Filed 2/8/07 P. v. Barreto CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAPHAEL BARRETO, Defendant and Appellant.	H029455 (Santa Cruz County Super. Ct. No. F09489)

Following a jury trial, appellant was convicted of committing 11 sex offenses against his stepdaughter and sentenced to a state prison term of 44 years with a consecutive 15-years-to-life term. He contends that the trial court erred in admitting evidence of prior lewd conduct, that his statements to the police should not have been admitted at trial, and that he was denied notice of the conduct underlying two of the counts. He further contends that the trial court erred in its instructions to the jury by giving conflicting instructions on the burden of proof, by failing to give a unanimity instruction as to certain counts, and by instructing the jury on a probability standard for evaluating prosecution testimony. Appellant also contends that the trial court committed sentencing error. We affirm.

Evidence at Trial

Appellant was accused of molesting his stepdaughter M. from 1995, when she was six years old, to June 2000. When M. was five years old, appellant, at age 50, married

M.'s mother, who was then 25. Shortly thereafter, they moved from Mexico to Santa Cruz and, as M. testified at trial, appellant became "pretty much my only friend at the time." They moved from Santa Cruz to Watsonville and then back to Santa Cruz.

At the time of trial, M. was 15 years old and had just completed her freshman year of high school with a 4.0 grade point average. She testified that when she was six, she was watching television on the couch when appellant came and sat down next to her. He gave her a hug and put his hand down her pants, moving it around on her vagina. M. testified that she "felt kind of strange" about this but did not say anything to appellant or anyone else because she "didn't know it was wrong."

M. testified that appellant touched her vagina with his hand "many other times." She said, "Sometimes it would be twice a week or sometimes it would be like once or twice a month." She testified that she did not remember "anything specific" about these incidents. She said, "nothing about them stands out." She could not describe them "one-by-one" because "there [were] so many of them."

M. testified that when she was nine years old she was on the couch and appellant approached her "like he wanted to touch me." She said that she pushed him away and "just let him know that I didn't want to." He grabbed her feet and pulled her toward him. He pulled down her pants and touched her vagina with his hand. His fingers penetrated her vagina. He grabbed her hand and placed it on his penis over his pants. She testified, "He wanted me to touch it, and I pulled my hand back, and he just grabbed it and put it back." He then pulled her pants lower and put his mouth on her vagina. M. testified that she "kept pushing him away . . . after a while I told him that I had to go to the bathroom, and he let me go and he left."

At some point, M. told appellant that she was going to tell her mother about these molests. She testified that "he said, you know, not to, because she already [knew] about it and didn't care. And she wasn't going to do anything." M.'s mother had two children with appellant during this time period.

M. testified that a "couple [of] times, two or three times" appellant came into her bedroom in the early morning to wake her up. Her mother would be drinking coffee or having breakfast. Appellant would "cuddle up" next to M. in bed. She said, "my back would be to him, and he would put his hands underneath my shirt and start touching me." She testified that "he was like putting pressure on me, because usually I'd try to, you know, move away from him, go to the other side of the bed. And he'd just, you know, push – like put pressure on me to stay there."

M. testified that the last time appellant molested her she was nine years old. She and appellant were alone in their apartment and she had just taken a shower. Appellant was wearing pants and a t-shirt. M. was walking to her room from the bathroom wearing a towel. Appellant tried to grab her and lift her up. She ran to her room and tried to close the door but appellant opened it. She testified that appellant "pushed me on to the bed and he was trying to touch me and, like, he took my towel off and we were struggling." She continued to squirm, jumped off her bed, and ran to her parents' bedroom which had a door that locked. Appellant ran after her. She jumped on the bed to get away from him. Appellant, now wearing only his boxer shorts, pushed M. down on the bed and "tried [to] put his hand in my vagina." He put his mouth on her vagina. She felt his penis touch her vagina for "a split second." M. thought "that he was actually going to rape me or something." This incident was different from the previous lewd acts because, as M. testified, appellant "was like kind of fighting with me instead of like pretending to be nice about it."

A few weeks later, M. told her friend Theresa about appellant's behavior. Theresa told M.'s mother. After that, M.'s mother did not leave her alone with appellant and "things kind of settled down" in the household. When M. was in eighth grade she was having problems with her mother and went to counseling. There she disclosed that she had been molested.

Detective Henry Montes testified that he interviewed appellant in Spanish shortly after appellant was arrested, on May 10, 2004, and again on May 12. The jury was provided with tapes, transcripts, and translations of these interviews. Before Detective Montes asked appellant any questions about the charged offenses, appellant said that he had had bad thoughts of little girls since he was very young. He said that he had touched little girls in Mexico but that he had never digitally penetrated them and he had never touched his own children. He admitted touching M. four or five times by brushing his hand on her. When asked if he could have made M. touch his penis, appellant told Montes "If she remembers, well, I don't know, I could have done it without being aware of it." Montes told appellant about M.'s description of the incident in which appellant pulled down M.'s pants and orally copulated her and asked appellant "Could that have happened?" Appellant answered, "Yes, something could have happened. . . . But . . . putting my mouth on her, that, that seems to be, more, difficult. . . . But, maybe because one gets so crazed, don't you think?"

Montes asked appellant about the incident in which M. came out of the bathroom in a towel. Appellant said that that time he "was feeling that she wanted me to be there" so he caressed her and "gave her a kiss on her navel" and said "Sweetie, sweetie, I don't want to hurt you." Appellant said that "that time was when she felt the rejection most." Appellant denied trying to put his penis in M.'s vagina. Appellant told Montes that M. was "extremely suggestive" with him and "entices [him] a lot." Throughout the interviews, appellant stated that M. was a truthful person but that he "couldn't have done all that." He said "I don't accept myself as I am."

Appellant's daughter L. was 29 at the time of trial. She testified that she was a second grade teacher and had broken off all relationship with appellant when she was 17. She said that appellant molested her from the time she was six until she was 11. Appellant would fondle her chest when she was in bed. Once, he touched her with his penis while they were in bed. L. testified that when she was a child she found a Spanish

paperback book on a high shelf in the bathroom that showed pictures of children touching other children and adults in a sexual manner.

Nancy G., appellant's great-niece, testified that when she was eight, she spent the night on a couch at appellant's house after a trip to Disneyland with her extended family. When she woke up, appellant was rubbing her vagina with his hand and grinning. She told him to stop and he put his hand over her mouth. Nancy testified that years later, at a funeral attended by many members of the family, appellant "said that he had recuperated and that he was not doing that anymore and that he was sorry."

Appellant's brother testified that appellant was an honest person. Jail medical personnel testified concerning the medications appellant was taking at the time of his interview with the police.

EVIDENCE OF PRIOR LEWD CONDUCT

Appellant contends, "The court erred prejudicially in admitting unnecessary evidence of prior misconduct, denying appellant his state and federal constitutional rights to due process of law, equal protection of the laws, and a fair trial."

Background

Before trial, the parties litigated the admissibility of the uncharged prior lewd conduct evidence. The prosecution's motion proposed calling three witnesses to testify to that, when they were young girls, appellant committed lewd acts against them. Appellant filed a motion in opposition arguing that an analysis of the appropriate factors "weigh[ed] heavily in favor of exclusion of all such evidence." The trial court granted the prosecution's motion but observed that it would be "cautious" during trial to see "if we get to that point where the jury is losing sight of the present evidence and focusing only on these other outside allegations."

Appellant asked the court to reconsider this ruling after defense counsel, during opening statement, acknowledged that appellant had committed some of the offenses with which he was charged. Defense counsel argued that because of appellant's concession of

guilt of some of the charges and his admission in his statement to the police that he had a sexual interest in touching young girls, evidence of the uncharged lewd conduct to show propensity would be irrelevant and prejudicial. The trial court said that it found the evidence "highly probative" and L. and Nancy G. testified as described above.

Discussion

Evidence Code section 1108 provides, in pertinent part: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."[1] Thus, under section 1108, evidence of prior sex acts is relevant to show a defendant's propensity to commit sex crimes.

Appellant contends, "Evidence Code section 1108 is violative of due process of law, both on its face and as applied in this case." Raising the issue to preserve it for future review, appellant acknowledges that this argument has been rejected by the Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903, 916-918. We are bound by *Falsetta*. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant contends, "Evidence Code section 1108 is violative of equal protection of the laws, both on its face and as applied in this case." Removing the protection against character evidence through Evidence Code section 1108 permits "disparate treatment of those accused of a sexual offense from all others accused of criminal offenses."

---

[1] Evidence Code section 1101 provides, in pertinent part: "Except as provided in this section and Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid.Code, § 1101, subd. (a).) Evidence Code section 352 provides: "The 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."

Although the *Falsetta* court did not squarely address the equal protection issue appellant raises in this case, the court did acknowledge that "[*People v. Fitch* (1997) 55 Cal.App.4th 172] likewise rejected the defendant's equal protection challenge, concluding that the Legislature reasonably could create an exception to the propensity rule for sex offenses, because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests. [Citation.]" (*Falsetta, supra,* 21 Cal.4th at p. 918.)

Recognizing that the *Fitch* court rejected his equal protection claim on the basis of the seriousness and the secretive nature of sexual offenses provides a rational basis for the admission of such evidence, appellant argues that the court in *Fitch* cited "no evidence for this distinction from other types of crimes – many of which one can easily presume to be equally serious and secretive." Appellant has not identified any of these other types of crimes. A similar provision of the Federal Rules of Evidence, Rule 413, has been held to be constitutional since it implicates neither a fundamental right nor a suspect class, and the rule has a rational basis in that sexual assault cases often raise unique questions regarding credibility of victims which render a defendant's prior conduct especially probative. (*United States v. Julian* (7th Cir. 2005) 427 F.3d 471, 487.)

In any event, the *Fitch* court noted that "[i]n order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others." (*Fitch, supra,* 55 Cal.App.4th at pp. 184-185.) Evidence Code section 1108 does not violate equal protection.

Appellant contends, "Even if threshold relevance were shown on the issue of propensity, Evidence Code section 352 and due process demanded exclusion of this emotionally wrought testimony, especially after the defense conceded the propensity issues."

" 'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citations.]" (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) "A trial court has broad discretion in determining whether to admit or exclude evidence objected to on the basis of section 352 [citation], and rulings under that section will not be overturned absent an abuse of that discretion [citation]. . . . '[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.]" (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.)

Appellant paints with too broad a brush in stating that he conceded the propensity issue. In opening, defense counsel said, "Mr. Barreto will tell you he is not an innocent man. He did shameful things, but he did not do most of what he is charged with." In appellant's statement to the police, he repeatedly made remarks such as "I couldn't have done all that" and "I'm not like that." In closing, defense counsel said that during the police questioning, appellant "admitted the crime he committed, the things that he did, and he denied other things." Counsel argued, "[M.] is a victim. Mr. Barreto admitted that. . . . The only issue that you have before you is what to convict Mr. Barreto of." Thus, although admitting through counsel's argument and the statement to the police that appellant had committed some non-forcible lewd acts with M., appellant denied using any force on her, having any substantial sexual contact with her, or orally copulating her. Appellant told the police that M. behaved toward him in a seductive manner which provoked him into committing certain non-forcible lewd acts that he had always had the propensity to commit, but that he did not have a propensity to commit the other sexual acts that she had described and that those acts, represented by the more serious charges charged in the information, would be repugnant to him. Defense counsel asked the jury to acquit him of those charges.

Appellant argues that in making the Evidence Code section 352 determination, the court had a "duty . . . [to] at least *ask*: what was really disputed here; and whether the prior acts really proved force or substantial sexual conduct." Both of the prior lewd conduct witnesses testified to conduct by appellant that was similar to that charged and above and beyond the type of acts that he elected to concede. Certainly, there is no basis for concluding, as appellant has argued here, that the trial court admitted "all qualifying sexual conduct as a matter of course." The trial court did not abuse its discretion under Evidence Code section 352 in admitting this evidence and appellant was not denied due process.

APPELLANT'S STATEMENTS TO THE POLICE

Appellant contends, "Appellant's police statements were not shown to be voluntary; at a minimum, the prosecution failed to show that appellant's *Miranda* waivers were voluntary."

Background

Appellant filed a motion before trial to exclude evidence of the statements that he made to the police. He argued that the statements were not made voluntarily. The trial court heard testimony from Detective Montes and reviewed the videos of the police questioning. Appellant talked to Detective Montes on May 10 and 12, 2004. Detective Montes testified at the pre-trial hearing that when he met appellant at the jail appellant was sobbing and taking deep breaths to the point of having trouble breathing. Montes calmed appellant down and encouraged him to give his side of the story. He gave appellant the standard rights advisement and appellant said that he understood his rights. Appellant made many incriminating statements. Two days later, appellant said that he needed to talk to someone and Detective Montes interviewed him again. Appellant made more incriminating statements, admitting that he had committed some sexual acts against M. and denying that he had committed other, more serious ones.

After reviewing the evidence, the trial court said that appellant's statements indicated "that he does have his own free will. He's not sitting there like a bowl of Cream of Wheat. He's talking, not allowing the officer to lead him along." The trial court said that there was no "inappropriate law enforcement conduct" and that appellant was competent to, and did, waive his rights and voluntarily spoke to the detective.

Discussion

In reviewing the trial court's ruling concerning whether a statement or confession was obtained in violation of a defendant's *Miranda* rights, "we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we ' "give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 235-236; accord, *People v. Haley* (2004) 34 Cal.4th 283, 299.)

It is settled that a defendant's waiver may be either express or implied, but it must be knowing and voluntary, i.e., the product of a free and deliberate choice and made with a full awareness of the nature of the right waived and the consequences of such a waiver. (*Moran v. Burbine* (1986) 475 U.S. 412, 421; *North Carolina v. Butler* (1979) 441 U.S. 369, 373-376.) In assessing the voluntariness of a waiver, we must consider the totality of the circumstances while bearing in mind the particular background, experience and conduct of the suspect. (*Moran v. Burbine, supra*, 475 U.S. at p. 421; *North Carolina v. Butler, supra*, 441 U.S. at p. 374.) Where a suspect has been advised of his rights, says he understands them, and does not request an attorney, his subsequent willingness to answer questions and speak to police may support a finding of implied waiver. (*Moran v. Burbine, supra*, 475 U.S. at pp. 422-423; *People v. Whitson* (1998) 17 Cal.4th 229, 248-249.)

"In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) "In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider 'the totality of circumstances.' [Citations.] Relevant are 'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 660.) "A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. [Citations.]" (*Id.* at p. 659.)

Appellant argues that the detective's "exploitation of appellant's distraught mental state required him to secure express waivers; this was necessary in order to ensure appellant's waivers here were voluntary as a matter of fact under the circumstances." He states, "This case called for more than a lurch into camouflaged booking questions with this distraught, elderly, Spanish-speaking, first-time offender."

Although appellant, at age 60, may have been older than the typical arrestee, to describe him as "elderly" is to ignore the astonishingly youthful-looking man that he appears to be on the tape of his interview. Although appellant was Spanish-speaking, Detective Montes, whose first language is Spanish, spoke to appellant in Spanish throughout the questioning, which presumably would have made their communication less stressful for appellant. Although appellant was sobbing when Detective Montes first encountered him, appellant looks nervous but composed at the time of the implied waivers. Later in the interview appellant seems distraught, apparently ashamed of his conduct and distressed that it had been brought to light, but these emotions appear to have been a product of his conscience, rather than any police tactic. Detective Montes used a gentle and conversational tone throughout the interview. Our careful review of this

record convinces us that both appellant's waivers and his statements were entirely voluntary and were the product of a strong desire to speak to the detective about his situation.

NOTICE OF COUNTS 8 AND 9

Appellant contends, "The defense was denied fair notice of the conduct underlying counts 8 and 9 before trial, denying appellant due process of law." He argues that the trial court erred "in permitting argument and instruction on: (1) Count 9, since there was no evidence of a vaginal touching during the final incident until mid-trial; and (3) Count 8, since there was no evidence of generic touchings to fill in gaps in the testimony until mid-trial. Requiring the defense to respond to these last-minute attempts to fill in gaps in the case without notice at the preliminary hearing or otherwise before trial violated Penal Code section 1009 (as to Count 9, the subject of an amendment), and basic due process notice principles (as to both counts)."

Background

M. did not testify at the preliminary hearing. Deputy Shea Johnson of the Santa Cruz County Sheriff's Office testified that she interviewed M. about the molestations. M. described to her the incident when she was watching television and appellant put his hands down her pants, the incident when he pulled down her pants on the couch and orally copulated her, and the incident in which she had on a towel, appellant followed her into her bedroom, pushed her down on the bed where she lay naked with appellant on top of her, and then wound up in her mother's bedroom with appellant. In that bedroom, appellant orally copulated her and she felt "his erect penis in her vagina slightly." Detective Johnson was asked if M. had told her about any incidents besides the ones about which Detective Johnson had testified. She said that M. had described "at least three to four other incidents" that took "the same general form." Detective Johnson described those incident as ones in which appellant would come into M.'s room in the early morning and crawl into bed with her and molest her. Detective Johnson said that

M. would turn her back to appellant and would "try to sort of move away from him so he wouldn't bother her." Appellant would reach his arm around her and continue to molest her.

After some amendments to the information to change some of the dates of the various counts, appellant filed a Penal Code section 995 motion to set aside count 6, 7, 8, and 9 of the information, all charged as forcible lewd acts under Penal Code section 288, subdivision (b), on the ground that there was no evidence that appellant used force in the commission of the early morning lewd acts. In response, the prosecutor said that only three of the counts challenged related to the early morning molestations and that the evidence that appellant reached his arm around M.'s body was sufficient evidence of force to support those counts. The court said that "the record is just too thin" as to the use of force during the early morning molestations.

The prosecutor filed a second amended information, to which defense counsel objected, with the early morning molestations now represented by counts 10, 11, and 12 and charged as non-forcible lewd acts under Penal Code section 288, subdivision (a). This information added a new count 5 of a forcible lewd act for the time during the shower incident when appellant lay down on M. in the first bedroom before she ran to her mother's bedroom. This information charged the acts in the second bedroom as count 6, the aggravated sexual assault of a child by rape for the "penis to vagina contact," and count 8, the aggravated sexual assault of a child by oral copulation in the second bedroom. Count 7 was a charge of forcible lewd conduct during the same time frame.

At trial, M. testified that the early morning touchings occurred a "couple [of] times, two or three times." She also testified that during the incident in her mother's bedroom, appellant digitally penetrated her vagina but that there was no penile penetration. Defense counsel did not cross-examine M.

At the conclusion of the evidentiary portion of the trial, defense counsel said that he wanted to bring a motion under Penal Code section 1118.1 for an acquittal as to certain

counts. The prosecutor said that he wanted to file a third amended information "after the Court rules upon the 1118."

Defense counsel argued that as to count 6, which charged the aggravated sexual assault by rape for the incident in the second bedroom, there was not sufficient evidence of penetration. Counsel also argued that as to other counts alleging forcible sexual conduct, counts 3, 4, 5, 7, and 9, there was not sufficient evidence of force. Defense counsel summarized, "I think there's sufficient evidence for five separate incidents. On one of those there may be sufficient evidence for the alternative of 288(b) and the 269, resulting in six total counts. [¶] Three counts, I believe, were 288(a), not sufficient force. So, I'm asking the Court to pare down the Information from its current status to three counts of 288(a), one 288(b), one 269(a), and any additional 288(b), I think would be charged in the alternative of 269."

The prosecutor argued that some of the counts charging a violation of Penal Code section 288(b) were represented by appellant's conduct when he molested M. on the couch, she pushed him away with her feet, he pulled down her pants and orally copulated her and made her touch his penis twice. He argued, "That right there gives you four different counts of 288(b)." The prosecutor said that "at a minimum" the early morning molestations were two non-forcible lewd acts and that "the testimony that vaginal touching had occurred on other occasions, even though . . . there wasn't a specific time or place identified" was sufficient for a third count. Defense counsel argued that no such generic touchings had been charged or proven at the preliminary hearing.

The trial court agreed that because M. had testified at trial that there was no penetration there was insufficient evidence of count 6, aggravated sexual assault by rape. The court accepted a new third amended information which reflected the trial court's ruling on the Penal Code section 1118.1 motion by eliminating the charge of aggravated sexual assault by rape and renumbering the counts so that counts 10, 11, and 12 became counts 9, 10 and 11. Defense counsel objected on due process and other grounds to "any

charges that were not brought – pled and proven at the preliminary hearing, any charges based on facts brought out at trial specifically charges related to events that were not specified in testimony as to dates, places, et cetera." The trial court said that it would reserve ruling on this objection "because I don't recall what was proven up at the preliminary hearing at this point." The trial court reserved ruling on this issue and, apparently, did not return to it. In closing argument, the prosecutor argued that count 6 through 8 related to the early morning molestations and also to "any occasion w[h]ere he would reach and touch her. She said they are countless, and how can she be expected to remember them all?"

Discussion

Penal Code Section 1009

Appellant argues, "The court violated Penal Code section 1009 in permitting amendment of the information to add a new count (count 9) not shown by the evidence at the preliminary hearing." He argues that the court erred in permitting argument and instruction on count 9 because "there was no evidence of a vaginal touching during the final incident until mid-trial . . . . Requiring the defense to respond to these last-minute attempts to fill in gaps in the case without notice at the preliminary hearing or otherwise before trial violated Penal Code section 1009."

Under Penal Code section 1009, the trial court may permit an amendment to an information at any stage of the proceedings provided: (1) the amendment does not prejudice the defendant's substantial rights; and (2) the amendment does not charge an offense not shown by the evidence taken at the preliminary examination. (*People v. Valles* (1961) 197 Cal.App.2d 362, 371.) "Section 1009 preserves a defendant's substantial right to trial on a charge of which he had due notice. [Citation.] In other words, section 1009 protects a defendant's right to due process." (*People v. Pitts* (1990) 223 Cal.App.3d 606, 903-904.)

Appellant notes that "the 'critical inquiry' is whether the amendment is designed to correct a defect or insufficiency in the original information or is it an amendment to charge an offense not attempted to be charged by the original information." As ultimately numbered, count 9 charged a forcible lewd act. Appellant argues that the evidence at the preliminary examination did not support an amendment to include this charge of a third lewd act during the final incident. We disagree. Detective Johnson testified at the preliminary examination that M. told her that after M.'s shower, wrapped in only a towel, M. met her stepfather, who was wearing clothes, in the hallway. He was "just standing there." She walked to her bedroom and, as she tried to close the door, he pushed it open. When he got into the room, he was wearing a t-shirt and boxer shorts. Appellant then "took [M.] and pushed her down onto her bed to where she was laying on her back and he was laying on top of her." At this point M. was no longer wearing the towel. M. struggled with appellant, told him to stop, and finally managed to get away, fleeing to the second bedroom. We disagree with appellant's assertion that "This terse description simply did not support a completed lewd act, or even really an attempted one." When considered with the other evidence presented at the preliminary examination, appellant's forceful and sexually charged conduct laying on top of this naked girl on her bed in his boxer shorts until she struggled free supported a violation of Penal Code section 288, subdivision (b), and the trial court did not err in permitting this amendment.

Due Process

Appellant argues that "the prosecutor's last-minute shuffling of theories to fit and shore up trial testimony, as needed, violated due process" as regards to both count 8 and count 9.

"Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them.

[Citations.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 640.) " 'Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.' [Citation.] 'The "preeminent" due process principle is that one accused of a crime must be "informed of the nature and cause of the accusation." [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' [Citation.]" (*Id.* at pp. 640-641.)

Count 8 charged a violation of Penal Code section 288, subdivision (a), a non-forcible lewd act, between November 1, 1995 and June 1, 2000. As to this count, appellant argues that the trial court erred "in permitting argument and instruction . . . since there was no evidence of generic touchings to fill in gaps in the testimony until mid-trial. Requiring the defense to respond to these last-minute attempts to fill in gaps in the case without notice at the preliminary hearing or otherwise before trial violated . . . basic due process notice principles."

The evidence at the preliminary examination was that M. had said that on three or four occasions appellant would crawl into bed with her in the early morning and molest her. At trial, M. said that appellant had crawled into bed with her two or three times in the early morning. She also testified that there were many touchings involving skin to skin contact. When defense counsel moved for acquittal on one of the counts of section 288, subdivision (a), because M.'s trial testimony had reduced by one the number of these early morning incidents, the prosecutor argued that the evidence at the preliminary examination was that M. had said that there were "at least" three or four other incidents of improper touchings between 1996 and 2000. Defense counsel also objected on due process grounds to any charges "based on facts brought out at trial" that had not been proven at the preliminary examination. The trial court, having not read the examination transcript, reserved ruling but does not appear to have ruled on this issue. In closing, the prosecutor invited the jury to convict appellant of non-forcible lewd conduct based on the

two or three early morning molestations or any of the "countless" other times that she testified at trial that appellant had touched her.

Appellant challenges count 8 arguing that "there was no evidence of generic touchings to fill in gaps in the testimony until mid-trial." Respondent acknowledges that "Detective Johnson did not testify to these other touchings at the preliminary hearing." When M.'s trial testimony reduced the number of early morning touchings in bed, charged as non-forcible lewd acts, from three or four to two or three, the prosecutor was permitted to argue a third count based on M.'s generic testimony at trial. However, the difference between the evidence at the preliminary examination and the trial did not deprive appellant of due process as to count 8.

Appellant argues that his defense at trial "was to rais[e] doubts as to the victim's ability to recall specific acts and to limit the number and nature of charges to three or four 288(a) offenses; there was also real room to doubt the victim's true ability to recall specific acts, since charges like penetration were pared away based on changing testimony at trial." This is not accurate. Defense counsel questioned whether what M. described fit the definition of "force" and read that definition to the jury. Counsel pointed out that although appellant did not defend himself against the charge of rape during his interview with Detective Montes, telling Montes, "I accept the charges. Whatever she says, I accept them," M.'s trial testimony was that there was no penile penetration. However, defense counsel said that appellant had admitted to what he had done and asked the jury to "Convict [appellant] of four counts of a lewd and lascivious act, but don't convict him of the things that he's not guilty of." These four counts would have included the first molest, charged as count 1, as well as counts 6, 7, and 8. Thus, appellant's defense in no way depended on whether count 8 was tied to a specific incident or was generic in nature. Appellant had sufficient notice of the nature of the charge to prepare his defense and appellant was not denied due process.

In his due process argument as to count 9, appellant complains of "the prosecutor's last-minute shuffling of theories to fit and shore up trial testimony, as needed." He argues, "there was simply no testimony at the preliminary hearing [as] to a vaginal touching in the second bedroom; either the prosecutor was permitted to add this theory before trial based on an unsupportable sparse description of a struggle in the first bedroom, then argue the count based on new trial testimony adding the vaginal touching."

Although there may have been some variance between when appellant forcibly touched M.'s vagina during the towel incident, whether he did so in the first or the second bedroom, this difference hardly deprived appellant of notice of the nature of the charges against him or cause him to be unprepared to defend against count 9. As discussed above, appellant's trial strategy was to concede the non-forcible counts and ask the jury to decline to convict him of the more serious charges on the theory that he had admitted to what he had done. Arguing one forcible count to conform to trial testimony on the theory that it occurred in the second bedroom rather than the first during essentially the same event did not deprive appellant of due process.

In *Gray v. Raines* (9th Cir. 1981) 662 F.2d 569, one of the federal cases appellant relies on, Gray was charged with forcible rape. Gray's entire defense was that the sexual relations were consensual. During an instruction conference near the close of evidence, the prosecution requested an instruction on statutory rape, and Gray was ultimately convicted of statutory rape. (*Id*. at pp. 570-572.) On appeal, the court held that Gray had not been sufficiently informed of the nature of the accusation against him, in violation of the Sixth Amendment. Gray's own defense virtually convicted him under the statutory rape theory. The court stated: "The state was permitted to wait until Gray had put on evidence of consent as a defense to the charged offense, and then use that evidence to convict Gray of the second offense. Such a procedure is repugnant to the concept of due process and fundamental fairness." (*Id*. at p. 573, fn. omitted.) Here, appellant's defense

applied with full force to all of the charges against him whether there was a generic non-forcible count included or a forcible count tied to one bedroom rather than another.

In *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, the state conceded on appeal that the prosecution's last-minute request for felony-murder instructions, after both sides had rested, misled Sheppard and denied him an effective opportunity to prepare a defense. (*Id.* at pp. 1236-1237.) The court concluded the error could not be considered harmless because it denied Sheppard the opportunity to present evidence to defend against the new theory. The court stated: "Here, the prosecutor 'ambushed' the defense with a new theory of culpability after the evidence was already in, after both sides had rested, and after the jury instructions were settled. This new theory then appeared in the form of unexpected jury instructions permitting the jury to convict on a theory that was neither subject to adversarial testing, nor defined in advance of the proceeding." *(Id*. at p. 1237.) Here, appellant cannot make a credible claim to having been denied an effective opportunity to prepare a defense. Appellant could have easily anticipated that M. might testify somewhat inconsistently with what Detective Johnson testified that M. had told her, and appellant chose not to cross examine M.. There was no compromise in the presentation of defense evidence and the defense theory remained the same, as did the jury instructions. Appellant was not denied due process. [2]

[2] Respondent argues that appellant has waived the notice issues by not pressing the trial court for a ruling after it arose during his Penal Code section 1118.1 motion and not objecting when the prosecutor argued that this generic testimony could be used as a basis for conviction of one of the counts of non-forcible lewd act. We have addressed the issues because appellant argues that the failure to perfect his objections or secure a ruling on the issue of using generic testimony that was not presented at the preliminary examination to support count 8 would have constituted ineffective assistance of counsel.

JURY INSTRUCTIONS

CALJIC No. 2.50.01

Appellant contends, "Even if Evidence Code section 1108 is constitutional, the 2002 revision of CALJIC 2.50.01, given here in combination with a conflicting burden of proof instruction (CALJIC No. 2.02), was erroneous, denying appellant due process of law and fair trial."

The court instructed the jury pursuant to CALJIC No. 2.02, "The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the crimes charged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9 or 11 – that's all the counts except 10, or the crimes of a lewd act with a child, which is a lesser crime. . . . unless the proved circumstances are not only, one, consistent with the theory that the defendant had the required specific intent or mental state; but two, cannot be reconciled with any other rational conclusion. Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

The trial court also instructed the jury pursuant to CALJIC No. 2.50.01 (2002 rev.) as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than [that] charged in this case. . . . [¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to infer that he was likely to commit *and did commit* the crime or crimes of

which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense or offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. [¶] If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. [¶] Within the meaning of [the] preceding instruction, the prosecution has the burden of proving by a preponderance of the evidence that the defendant committed sexual offenses other than those for which he is on trial. [¶] You must not consider [this] evidence for any [other] purpose unless you find by a preponderance of the evidence that the defendant committed the other sexual offenses. [¶] If you find other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before the defendant can be found guilty of any crime charged or included or any included crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime." (Italics added.)

Appellant acknowledges that in *People v. Reliford* (2003) 29 Cal.4th 1007, our Supreme Court "expressed approval of the CALJIC [No. 2.50.01] language and approved similar language as against constitutional challenges." This court is bound by stare decisis to follow that decision. (See *Auto Equity Sales, Inc. v. Superior Court*, *supra*, 57 Cal.2d 450, 455.) Appellant offers as a reason to reach a result at variance with the result in *Reliford* the argument that, "The 'and did commit' language allows a conviction based on conduct proven by a preponderance without distinguishing for lay-jurors the different burdens applicable to foundational findings of uncharged conduct versus inferences of guilt based on that conduct; this conflicts with the requirement that each circumstantial fact essential for guilt to be proven beyond a reasonable doubt, and that guilt be proven to the exclusion of all rational innocent inferences."

We consider this argument to be a variation without meaningful difference from one that was resolved by *Reliford* in its rejection of the possibility of the jury being confused by a conflict between CALJIC No. 2.50.02 and CALJIC No. 2.01, the sister instruction to CALJIC No. 2.02, because CALJIC No. 2.50.01 is "too complicated" for jurors to apply. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016) The court explained, "This is not the first time jurors have been asked to apply a different standard of proof to a predicate fact or finding in a criminal trial. . . . As we do in each of those circumstances, we will presume here that jurors can grasp their duty -- as stated in the instructions -- to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations." (*Id.* at p. 1016.)

Unanimity Instruction

Appellant contends, "The court's failure to deliver any unanimity instruction deprived appellant of his state constitutional right to a unanimous jury verdict and his federal constitutional right to due process, requiring reversal of the lewd act convictions in counts 6-8, or at a minimum of count 8."

The prosecutor elected to argue that count 1 was the non-forcible touching when M. was six and watching television. As for the other non-forcible touchings, the prosecutor argued, "Counts 6 through 8. And let me just say there was testimony which supports these charges and more than these charges, but those charges relate to simple child molest, when he gets in bed with her, reached around and fondles her vaginal area, didn't remember whether there was penetration or not. [¶] It relates to any occasion where he would reach and touch her. . . . It occurred to her when her mom was eating breakfast and her stepfather is waking her up. [¶] It occurred for her when her mom's taking a shower and he reaches into her pants."

Criminal defendants have a constitutional right to a unanimous jury verdict. (Cal. Const., art. I, § 16; *People v. Jones* (1990) 51 Cal.3d 294, 321.) For a conviction to be

valid, jurors must "unanimously agree defendant is criminally responsible for '*one discrete criminal event*.' " (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850, quoting *People v. Davis* (1992) 8 Cal.App.4th 28, 41.) To ensure that jurors do so, courts impose the "either/or" rule: "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; see *People v. Jones, supra,* 51 Cal.3d at p. 307 [citing either/or rule with approval].) Thus, if the evidence indicates jurors might disagree as to the particular act a defendant committed, and the prosecution makes no election, the trial court has a sua sponte duty to give CALJIC No. 17.01 or its equivalent. (See *People v. Melhado,* at p. 1534.) This unanimity instruction is necessary to prevent the jury from "amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count." (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.)

Here, the evidence supported two or three specific non-forcible lewd acts based on the early morning touchings as well as the generic count 8 discussed above. "[I]n order for the unanimity instruction to make a difference, there must be evidence from which jurors could *both accept and reject* the occurrence of at least the same number of acts as there are charged crimes. [Citation.]" (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1502.) In contrast, in cases where the jury is presented with an all-or-nothing choice, a unanimity instruction is unnecessary or, if error, harmless. (*People v. Schultz* (1987) 192 Cal.App.3d 535, 539.) In *People v. Vargas* (2001) 91 Cal.App.4th 506, 561, this court acknowledged that "[t]here is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction." Some cases apply

the "harmless beyond a reasonable doubt" standard under *Chapman v. California* (1967) 386 U.S. 18, 24; other cases apply the standard from *People v. Watson* (1956) 46 Cal.2d 818, 836, which is whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (See e.g., *People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299 [applying *Watson*]; *People v. Melhado, supra,* 60 Cal.App.4th at p. 1536, [applying *Chapman*].) In *Vargas*, this court held, "*Watson* provides the correct standard on the issue." (*Vargas, supra,* 91 Cal.App.4th at p. 562.) In light of appellant's invitation to the jury to find him guilty of all four counts of non-forcible lewd conduct, it is not reasonably probable that there was any disagreement by the jury regarding the factual basis for the convictions in those counts. For the same reason, any error was harmless even under the *Chapman* standard of harmless error beyond a reasonable doubt.

CALJIC No. 2.21.2

Appellant contends, "The court erred in instructing the jury with CALJIC No. 2.21.2, because the instruction permitted evaluation of the pivotal prosecution testimony by a probability standard, denying appellant due process of law."

CALJIC No. 2.21.2 authorizes the jury to "reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the *probability* of truth favors his or her testimony in other particulars." (Italics added.) Appellant recognizes that the California Supreme Court has expressly rejected a similar attack upon this instruction. (*People v. Nakahara* (2003) 30 Cal.4th 705, 714, *People v. Hillhouse* (2002) 27 Cal.4th 469, 493.)

Here, the court additionally instructed the jury on the reasonable doubt standard (CALJIC No. 2.90) and to consider the instructions as a whole (CALJIC No. 1.01). The Supreme Court has concluded that, when considered with CALJIC Nos. 2.90 and 1.01, CALJIC No. 2.21.2 does not have the effect of reducing the prosecution's burden of proof. (*People v. Riel* (2000) 22 Cal.4th 1153, 1200-1201.) "Although [CALJIC No.

2.21.2] did not itself explain the reasonable doubt standard of proof, it did not undermine other instructions that did do so." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 493.) The court did not err in giving the jury CALJIC No. 2.21.2.

SENTENCING ISSUES

At sentencing, the trial court expressed the thought that the risk of recidivism was so great that "There is nothing else for this Court to do but to keep you away from society as long as I possibly can." The court imposed full consecutive terms for the forcible lewd conduct counts because appellant had time to reflect on each act. The court said it would impose full consecutive terms "on the 288(b) counts, as well as the 269(A)(4) and the 666.6(B), as well as 667.6 (C)." The court said it found as aggravating factors that each conviction represented a separate and distinct act of violence, that the acts did not indicate a single period of aberrant behavior, that the victim was particularly vulnerable, and that there was planning involved. The court sentenced appellant to a prison term of 44 years plus 15 years to life. This was a principal term of six years under count 2; full consecutive six-year mid-terms on the other forcible lewd act counts (counts 3, 4, 5, 9, and 11) pursuant to Penal Code section 667.6, consecutive two-year terms on the non-forcible lewd act counts (counts 1, 6, 7, and 8) and a consecutive indeterminate term of 15 years to life under count 10.

Appellant contends, "The full determinate consecutive terms imposed under counts 3-5, 9, and 11 violated *Blakely v. Washington* [(2004) 542 U.S. 296]." Appellant argues that the court's imposition of full consecutive terms on these counts based on a court finding of opportunity to reflect violated *Blakely* because the jury did not find that appellant had an opportunity to reflect, and the court lacks the power to issue such a finding on its own. Appellant acknowledges that his claim was rejected in *People v. Black* (2005) 35 Cal.4th 1238, which held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial."

(*Id*. at p. 1244.) At the present time, we are bound by *People v. Black, supra*, 35 Cal.4th 1238. (See *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450, 455-456.) Therefore, we reject appellant's claim.[3]

Appellant contends, "The trial court erred in imposing sentence for counts 2-5 and 9-11 under Penal Code section 667.6, subdivision (d), requiring remand for resentencing." Counts 2 through 5 were the counts charged for appellant's conduct with M. when she was sitting on the couch when he began to molest her, she pushed him away, he pulled her feet toward him and pulled down her pants, touching her vagina, orally copulating her, and placing her hand on his penis. M. estimated that this incident took over 10 to 20 minutes. Counts 9 through 11 charged appellant with the offenses in the last incident when he found M. in her towel, forced his way into her bedroom and followed her into her mother's bedroom when she escaped from him. The court specifically said that appellant "had time to reflect on each act." Appellant argues that the court's finding that appellant had the opportunity to reflect on each act is not supported because "The fairly brief testimony describing the second incident . . . and the

---

[3] In *People v. Groves* (2003) 107 Cal.App.4th 1227, decided after *Apprendi v. New Jersey* (2000) 530 U.S. 466 but before *Blakely*, the appellate court held that the trial court did not violate the defendant's right to trial by jury by finding by preponderance of the evidence and without submitting the matter to the jury the factual matters necessary for the operation of section 667.6, subdivision (d), and therefore did not err in imposing full-term consecutive sentences in accordance with that statute. (*Groves, supra,* 107 Cal.App.4th at pp. 1230-1231.) As noted, in *Black*, our Supreme Court observed that several cases had held that the right to jury trial was not implicated by the imposition of consecutive sentences and cited *Groves* with approval. (*Black, supra,* 35 Cal.4th at pp. 1263-1264, fn. 19.) In *Cunningham v. California* (Jan. 22, 2007, No 05-6551) 549 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ [2007 WL 135687], the high court held that California's Determinate Sentencing Law violates a defendant's Sixth and Fourteenth Amendment right to a jury trial to the extent it permits a trial court to impose an upper term based on facts found by the court rather than by a jury beyond a reasonable doubt. *Cunningham* did not address the distinct issue of imposition of consecutive sentencing and we remain bound by *Black*.

final incident . . . does not fairly reflect any significant breaks in conduct between [the] offenses affording appellant an opportunity to reflect on either occasion."

"In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (Pen. Code, § 667.6, subd. (d).) "[W]here . . . the trial court finds the time and the circumstances were sufficient to afford the defendant with the required opportunity to reflect upon his actions and he thereafter resumed his *sexually* abusive conduct, that finding will be upheld unless no reasonable trier of fact could have so concluded. [Citations.]" (*People v. Plaza* (1995) 41 Cal.App.4th 377, 385.)

The court could reasonably conclude that appellant had the opportunity to pause and reflect between acts during both incidents. The record shows that appellant was reflecting on his actions even as he was committing them. He told Detective Montes that during the towel incident "I was feeling I was going to lose control" and that after he touched M. she wanted him to do more and he told her "Sweetie, I don't want to hurt you, I've told you many times." Discussing the incident on the couch, he said that he stopped short of oral copulation and digital penetration because "I would always stop on my own." Appellant's narrative description of his thoughts during each of these series of acts, despite his refusal to acknowledge the full extent of them and comment that he would have had to have been crazed to commit them, when combined with M.'s testimony about these acts, serve to support a view that that appellant was excruciatingly aware of what he was doing, and reflecting upon each step of his conduct, during the commission of and between each act. Given the deferential standard of review, the

evidence supports the trial court's imposition of fully consecutive terms under Penal Code section 667.6, subdivision (d).

Appellant contends, "The court erroneously failed to exercise discretion to impose a concurrent term on the indeterminate count, denying appellant due process of law." In support of this argument, appellant states "the prosecution's sentencing memorandum and the probation report both erroneously state the ISL term had to be imposed consecutively by law; the latter appears to suggest a consecutive ISL term was mandatory under section 667.6. These errors were never corrected[.]" This argument ignores the fact that defense counsel specifically argued to the court that it should impose a concurrent sentence for that count. When this is considered with the court's expression of an intention to remove appellant from society as long as possible, the record does not affirmatively demonstrate that the court misunderstood the scope of its sentencing discretion when it chose to order the indeterminate term to be served consecutively.

DISPOSITION

The judgment is affirmed.

_____

ELIA, J.

WE CONCUR:

_____

RUSHING, P. J.

_____

PREMO, J.