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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DENNIS NIECE, Defendant and Appellant.	E037328 (Super.Ct.No. SWF007270) O P I N I O N

APPEAL from the Superior Court of Riverside County. Rodney L. Walker, Judge. Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez and Lilia E. Garcia, Supervising Deputy Attorneys General, and Deana Bohenek, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant of two counts of aggravated sexual assault of a child (counts 1 & 2; Pen. Code, §§ 269, subd. (a)(4) & (5))[1] and four counts of lewd and lascivious acts upon a child by force or fear (counts 3-6; § 288, subd. (b)(1)). The jury also found true an allegation that defendant committed lewd and lascivious acts in the present case against more than one victim. (§ 667.61, subd. (e)(5).) The court sentenced defendant to 15 years to life for each of the six counts, and stayed the punishment on counts 5 and 6 pursuant to section 654. The punishment for the convictions on counts 2, 3, and 4 are to run consecutive to the conviction on count 1, thus providing for a total indeterminate term of 60 years to life.

Defendant contends: (1) the court erred in failing to instruct the jury on the element of force with respect to one of the counts of aggravated sexual assault; (2) the court prejudicially erred in admitting defendant's offer to an investigating officer to plead guilty; (3) the court prejudicially erred in failing to instruct sua sponte on the necessity of jury unanimity; and (4) the court abused its discretion when it allowed defendant's former wife to testify that defendant raped her and limited cross-examination of that witness. We reject these contentions and affirm.

SUMMARY OF FACTS

Victims J.T. and S.T. are brothers. J.T. turned 14 years old in February 2004. At all relevant times S.T. was 12 years old. They lived with their grandmother. Defendant

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

lived in a room in the garage of the grandmother's home. Defendant was 59 years old at the time of trial.

On March 18, 2004, J.T. told a friend at school that he had been sexually molested by defendant. The friend told the school's assistant principal, Gregory White.[2] White then called J.T. into his office. J.T. told White about sexual activity between him and defendant. J.T. said that it began when he and defendant watched pornographic movies together and defendant told J.T., "'I have a big dick, too. You want to suck on it?'" J.T. also told White that defendant "attempted on numerous occasions to enter his penis into [J.T.'s] butt." J.T. also described an instance when he tried to resist defendant's effort to orally copulate him, but then "just kind of gave up."

White reported the matter to the Riverside County Sheriff's Department. Deputy David Kurylowicz responded. At the school, J.T. told Kurylowicz that he was being raped by defendant. When Kurylowicz asked J.T. what he meant by that, J.T. told him that defendant "was making him suck his dick." J.T. then asked to speak with S.T.

S.T. was called into the school office; the two children were then placed in a room by themselves. J.T. told S.T. that he "told the cops about [defendant]." S.T. became upset, began crying and yelling, and pounded on the wall. S.T. feared that he would be taken from the grandmother and placed in foster care. White heard him tell J.T., "'How could you?'" and, "'it happened to me, too.'" Kurylowicz heard him tell J.T., "'No. No.

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[2] Although J.T. made the friend swear that he would not tell anyone, he believed that the friend would tell someone at the school.

Why did you tell? Why did you tell?'" Kurylowicz went into the room with the boys. S.T. then told J.T., "'He was raping me, too, but I didn't want to tell anybody.'"

J.T. and S.T. then met with White and Kurylowicz in White's office. It appeared to White that J.T. was fearful of "something happening to him or his family." Either J.T. or S.T. told White that if they told someone what had happened, there would be serious harm to them.

Kurylowicz then took J.T. and S.T. to the sheriff's department. There, S.T. told Kurylowicz that defendant showed him movies, would talk dirty to him, and grabbed his penis and his buttocks. This happened about 20 times. When asked if other things occurred, S.T. told him there was, but that "they were too upsetting or too dirty for him to describe" to Kurylowicz. S.T. told Kurylowicz that he had been afraid to tell anyone because defendant had told him that if he told anyone, he would "blow up his grandmother and kill his brother" and bury the bodies in the desert.

J.T. told Kurylowicz about attempts by defendant to have anal intercourse upon J.T., and that J.T. had performed anal intercourse upon defendant on more than one occasion. J.T. said that defendant had forced him, by using threats, to perform oral copulation on defendant's penis at least 30 times. J.T. initially tried to resist, but defendant would punch him in the head, shoulders, and ribs. After awhile, J.T. "quit resisting and just let [defendant] get it over with." J.T. also told Kurylowicz that defendant had tried to use a dildo on him using lubricants. J.T. said that these events took place over a six-month period, from October 2003 to the present.

Riverside County Sheriff's Deputy Kevin Duffy contacted defendant, who agreed to be interviewed at the police station.[3] Defendant told Duffy that the boys would come into his room and watch pornographic videos, and that J.T. would go into the bathroom and masturbate. Duffy testified that the following then occurred: "We took a break in the interview room. He wanted to have a cigarette so I escorted him out of the interview room down the hallway. And at that point, in the hallway, he asked me if we could make a deal. And I asked him what he meant. And he said, what if he plead to a low-term deal and did a year in custody, and when he got out, he would leave the state. And I told him -- my response was, we're not in any position to make any kind of deals. And he said he understood." At the end of the interview, defendant wrote a note to J.T., stating, "'I'm sorry it came to this. I only hope it's the best for grandma and you kids?'"

On March 30, 2004, J.T. and S.T. were interviewed by Vera Diaz, a child interview specialist with the Riverside County Assessment Team. J.T. described instances in which defendant attempted to have anal intercourse with him. The first attempt occurred in defendant's car during a trip to Idyllwild to collect firewood. He told Diaz: "[H]e says, 'Get out.' I got out. And he says, 'Bend over.' I said, 'Why?' And [he] said 'Bend over.' And he threw me down over the seat and said, 'Pull down your pants.' If I didn't, he was gonna hit me and -- and he hits hard. So I just did what he said and then he tried to screw me up the butt and I just screamed as loud as I could. And,

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[3] Defendant was told that he was not under arrest and was free to leave at any time.

you know, and he stopped . . . ." Including the Idyllwild incident, defendant "tried to do something to [his] butt" on three to five occasions, the most recent occurring about one month before the interview.

J.T. also told Diaz that on several occasions defendant would forcibly orally copulate J.T., and one instance when defendant forced J.T. to orally copulate him. In addition, there were numerous times when defendant attempted to make J.T. orally copulate him, but J.T. would "always end up getting away or screaming or something."

On another occasion, defendant used a "small little dildo thing." J.T. said: "He'd tell me to pull down my pants, bend over, spread [my] butt cheeks. And I thought he was gonna try and do that to me again. But then he pulled out that dildo and he put this lubricant stuff on it . . . . [¶] . . . [¶] . . . And he stook [*sic*] it up my butt." This occurred toward the end of 2003. Defendant also made J.T. look at pornographic videos and magazines. Defendant had threatened to kill him and his "whole family" if J.T. ever told anyone about these acts.

J.T. told Diaz that the conduct happened while he was in the seventh grade (which began in September 2003) "and a little bit in 6th [grade]."

After Diaz concluded her interview, Duffy sought to clarify when the conduct began and how often it occurred:

"DUFFY: . . . I didn't understand how it first began. That's up in Idyllwild.

"[J.T.]: Uh, pretty much, yeah.

"DUFFY: In the – in the Bronco. Was [*sic*] there some things that happened before that that lead [*sic*] up to that?

"[J.T.]: Like, no. He just – like it all started when he just started grabbing my nuts and talked and, but one day we just went up there and that's when he told me to – to do that. [¶] . . . [¶]

"DUFFY: And then um – after that, other things started happening?

"[J.T.]: It just continued.

"DUFFY: Okay. . . . And when we – when we spoke last ah week, um – I think you told me a number. I said – I think I – I said, 'Well, how many times do you think something's happened within about – I think you said a six-month period, right?'

"[J.T.]: Yeah.

"DUFFY: And do you remember what you told me then?

"[J.T.]: I don't remember the exact number.

"DUFFY: Okay. Let's think real hard about the number of times different things happened cause it's – it's pretty important – [¶] . . . [¶]

"[J.T.]: . . . I'd say – on the, like on an average kind of?[4]

"DUFFY: Or an average is okay. Yeah.

"[J.T.]: Out of everything put together, let's say (inaudible) probably like 20.

"DUFFY: Okay. So when we talk about 20, we're talking about – [¶] . . . [¶] -- him putting his – [¶] . . . [¶] -- penis in your butt.

"[J.T.]: [I]t would be like [an] average of five times.

"DUFFY: Okay.

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[4] Although J.T. used the word "average," it appears that he meant an estimate.

"[J.T.]: And then there'd be like the ah – then there'd be the time of him sucking mine – [¶] . . . [¶] -- which would be an average of five.

"DUFFY: Okay. [¶] . . . [¶]

"[J.T.]: And then a [*sic*] average of him trying to make me suck his would be like a 10 because, you know, he just – he said the reason was because ah – he couldn't get anything out of my grandma so he's going for the second best which is me.

"DUFFY: That's what he told you?

"[J.T.]: Yeah.

"DUFFY: Okay. And then ah – the dildo. How many times –

"[J.T.]: He -- once.

"DUFFY: Okay.

"[J.T.]: Like one.

"DUFFY: Okay.

"[J.T.]: ([I]naudible) more like 21 average.

"DUFFY: Okay. And that's an average. And then in a week's time – I think we talked about this –

"[J.T.]: In a week, ah --

"DUFFY: Just an average.

"[J.T.]: Ah – it's jumpy. Sometimes within a week nothing would happen and other times, one thing would happen, sometimes it would be like almost every day."

Diaz also interviewed S.T. S.T. told Diaz that defendant grabbed his privates approximately 10 to 20 times. The grabbing began when defendant made S.T. watch

pornographic videos. S.T. told defendant, "'Leave me alone,'" but defendant "would just keep doing it." S.T. was afraid to tell anyone because defendant made threats to kill him and bury him in the desert. Defendant showed S.T. a dildo and told him that defendant "could stick that one up . . . a hole up his butt," and that "he would try to use it on [S.T.]." On one occasion, defendant told S.T. to "suck his . . . penis," but S.T. refused. He also told Diaz that on one occasion in January 2003, he saw defendant pull J.T.'s pants down. J.T. told S.T. that defendant had told him to give him a "head job" and that he was scared of defendant. S.T. was in the fifth grade (the 2002-2003 school year) when J.T. first talked to S.T. about defendant's conduct. When defendant found out that S.T. and J.T. had talked about "stuff," defendant showed S.T. a gun and told him that if he ever told anyone "about this," he would kill him and bury him in the desert.

Duffy met with J.T. and S.T. again in late June 2004 "to clarify some things." J.T. told Duffy that the sexual acts with defendant began with the attempt by defendant to have anal intercourse with J.T. while on a firewood gathering trip to Idyllwild in October 2003.

S.T. told Duffy that defendant rubbed either S.T.'s penis or his buttocks between 10 and 20 times. During some of these incidents, J.T. noticed that defendant had an erection. In addition, defendant tried to use a lubricated dildo "on him" and that "it hurt." S.T. also told Duffy that on numerous occasions defendant "asked [S.T.] if he could commit oral copulation on him." S.T. said that this conduct began during a camping trip in the summer of 2003.

Physical examinations of the two children conducted on March 30, 2004, were "normal" and did not reveal any injuries or scarring of the anus.

During a search of defendant's room, police found three pornographic magazines, a bag containing two dildos and lubricant, several pornographic videotapes, and one DVD containing pornography.

Defendant was charged with two counts of aggravated sexual assault against J.T. Count 1 is based upon the defendant's use of a dildo to commit an act of sexual penetration upon J.T. (§ 269, subd. (a)(5).) Count 2 is based upon the forced oral copulation by defendant on J.T. (§ 269, subd. (a)(4).) Defendant was further charged with two counts of lewd and lascivious acts upon S.T. by use of force, violence, duress, menace, or fear (counts 3 and 4), and two counts of lewd and lascivious acts upon J.T. by use of force, violence, duress, menace, or fear (counts 5 and 6). (§ 288, subd. (b)(1).)

At trial, White, Kurylowicz, and Duffy testified about their interviews with the children. A videotape of Diaz's interviews of the children was played for the jury and transcripts of the interviews provided to the jurors.

J.T. and S.T. recanted their prior statements. J.T. testified that defendant had been feeling J.T.'s privates and that he "willingly looked at magazines and watched videos with [defendant]." He previously "believed that other things were happening," but he now believed that "most of those didn't happen"; they "were dreams." He said that these dreams began about a month after he first told his friend that defendant was molesting him.

S.T. testified that he had previously told Kurylowicz, Duffy, Diaz, and others that defendant had grabbed his privates, but said that "it never really happened." He also denied that defendant ever grabbed his buttocks or asked him to put his mouth on defendant's penis.

The prosecution presented a forensic psychologist, who provided expert testimony about Child Abuse Accommodation Syndrome. According to the psychologist, children will often recant prior statements of abuse because of fear of negative consequences, such as the break-up of a family.

Over defense objection, the court permitted the prosecution to introduce testimony from defendant's former wife that in 1971 defendant had tied her up in a bedroom and raped her.

Defendant presented no evidence.

ANALYSIS

A. *Instructional Error on Count 2*

Defendant contends that the court prejudicially erred in instructing the jury on count 2. This count alleges that defendant committed aggravated sexual assault upon J.T. under subdivision (a)(4) of section 269. Section 269 begins: "Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child[.]" (§ 269, subd. (a).) The statute then sets forth five such "acts" in separate subdivisions. Subdivision (a)(4), upon which count 2 is based, provides: "Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and

unlawful bodily injury on the victim or another person."[5] (For ease of reference, we will refer to the requirement that the act occur by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" as the "force element" or the "use of force.") The elements of aggravated sexual assault of a child as alleged in count 2, therefore, are: (1) the defendant committed oral copulation in violation of section 288a by the use of force; (2) the victim was under 14 years of age; and (3) the alleged victim was 10 or more years younger than the perpetrator. (§ 269, subd. (a)(4); CALJIC No. 10.55.)

Defendant contends that the court's instructions failed to instruct the jury that the oral copulation occurred by the use of force, and that such error is prejudicial. The Attorney General asserts that the jury was properly instructed on the force element, and that any error was harmless. For the reasons that follow, we hold that while the instructions were ambiguous, they were not reasonably likely to be applied in a way that deprived defendant of his rights under the federal Constitution. Moreover, any error was harmless beyond a reasonable doubt.

1. The Court's Instructions

The court combined, to some extent, the instructions on both counts 1 and 2 as follows: "Defendant is accused in Count One of a felony violation of section 269[,

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[5] Section 288a provides, in relevant part: "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] . . . [¶] (c)(1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years."

subdivision] (a)(5) of the Penal Code, and in Count Two of a felony violation [of] section 269[, subdivision] (a)(4) of the Penal Code. [¶] Every person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of the crime of aggravated sexual assault of a child in violation of Penal Code section 269, subdivision (a): [¶] *Count Two: Section 269[, subdivision] (a)(4): Oral copulation in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.* [¶] Count One: Section 269[, subdivision] (a)(5): A violation of subdivision (a) of section 289 of the Penal Code."[6] (Italics added.)

The instructions to this point correctly set forth the statutory basis under section 269 for the crimes alleged in counts 1 and 2. In particular, with respect to count 2, the force element is expressly stated.

The court's instructions continued: "In order to commit this crime, each of the following elements have to be proved: [¶] 1. *A person committed a violation of [section] 288a Count Two* and/or [section] 289[, subdivision] (a) Count One; [¶] 2. The

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[6] There are some differences between the written instructions given to the jury and the transcript of the oral instructions read to the jury. In particular, the oral instructions reflect some confusion as to which count alleges a violation of which subdivision of section 269. For example, the oral instructions recite the text of section 269, subdivision (a)(4) (on which count 2 is based), in connection with the instruction on count 1, and erroneously state that count 2 is based upon section 269, subdivision (a)(5). Our review of the instructions (as well as our quotations thereof) are of the written instructions, which we presume guided the jury and control over any conflict with the oral instructions. (See *People v. Davis* (1995) 10 Cal.4th 463, 542; *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1112-1113.)

alleged victim was under 14 years of age; and [¶] 3. The alleged perpetrator was 10 or more years older than the victim of the acts." (Italics added.) With respect to section 288a and count 2, the court then instructed: "Every person who engages in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he is guilty of the crime of unlawful oral copulation in violation of Penal Code section 288a[, subdivision] (c)(1)." The court proceeded to define "oral copulation," then stated, with respect to section 288a: "In order to prove this crime, each of the following elements must be proved: [¶] 1. A person engaged in an act of oral copulation with an alleged victim; and [¶] 2. The alleged victim was under the age of 14 and more than 10 years younger than the other participant."

In addressing the "elements [that] have to be proved" for count 2, the court failed to mention that the violation of section 288a must occur by the use of force.

With respect to count 1 (sexual assault by sexual penetration against J.T.), the court instructed the jury that a violation of section 289, subdivision (a)(1), requires an act of sexual penetration accomplished by the use of force.

With respect to counts 3 through 6, the court instructed the jury that the charged crimes of committing a lewd act with a child (§ 288, subd. (b)(1)) requires, among other elements, the touching of a child by the use of force.

2. Analysis

Defendant focuses his argument on the portion of the instructions in which the court expressly set forth the elements to be proved, which does not mention the requirement that the alleged oral copulation be committed by the use of force. However,

we do not consider jury instructions in isolation. Whether instructions are erroneous is determined by considering the entire charge to the jury. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385]; *People v. Williams* (1997) 16 Cal.4th 635, 675; *People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149.) The absence of an essential element in one instruction may be cured by other instructions. (*People v. Burgener* (1986) 41 Cal.3d 505, 539, overruled on another point in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *People v. Crandell* (1988) 46 Cal.3d 833, 873-874, overruled on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

When the instructions are viewed as a whole, the instructions on count 2 are ambiguous. As discussed above, in order to commit aggravated sexual assault of a child under section 269, subdivision (a)(4), it is not enough to commit a violation of section 288a (which can occur without the use of force); the violation must be committed with the use of force. (§ 269, subd. (a)(4).) The court initially read the text of the statute, including the language of the force element, to the jury. However, when the court proceeded to instruct the jury on the specific "elements [that] must be proved," the court failed to mention the force element. The recitation of the statutory language (which includes the force element), followed by a description of the elements of the crime that omit any reference to the use of force, created an ambiguity that potentially misdirected the jury.[7]

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[7] "'The word "misdirection" logically includes every kind of instructional error. It seems manifest that incorrect, ambiguous, conflicting, or wrongly omitted instructions may equally "misdirect" the jury's deliberations.'" (*People v. Wims* (1995) 10 Cal.4th

[footnote continued on next page]

"[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is '"whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process."' [Citation.] '"[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citation.] If the charge as a whole is ambiguous, the question is whether there is a '"reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.]" (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701]; accord, *People v. Huggins* (2006) 38 Cal.4th 175, 192.) In evaluating whether such a likelihood exists, we consider the arguments counsel made to the jury. (*Ibid*.) This is particularly appropriate when the prosecutor's arguments resolve an ambiguity in favor of the defendant. (*Middleton v. McNeil*, *supra*, at p. 438.)

Here, the jury was given one instruction that correctly stated that the crime alleged in count 2 required the use of force, and another instruction that incorrectly fails to mention the requirement of the use of force. The two instructions are not mutually exclusive or necessarily inconsistent; the absence of any mention in the second instruction of the use of force cannot reasonably be read as negating the requirement of the use of force set forth in the first instruction. The jurors were also instructed that they must "not single out any particular sentence or any individual point or instruction and

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[footnote continued from previous page]
293, 314-315, overruled on another point in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 579.)

ignore the others," and that they must "[c]onsider the instructions as a whole and each in light of all the others." We presume that the jurors followed these instructions and did not ignore the first instruction that the crime alleged in count 2 requires the use of force. When the instructions are read as a whole and in light of all the others, the first instruction fills the gap left in the second instruction.

Moreover, the closing arguments by the prosecution make clear that the use of force was required for both counts 1 and 2. In discussing the two counts together, the prosecutor addressed the various means by which the use of force can be accomplished, then stated: "By force, that means holding the boy. Keeping him from resisting, from moving, from getting away. That is an act of force. Slapping the young man in the head so he stops moving, that is an act of force. [¶] For either of these acts, really the only force necessary to accomplish the act is just doing the act. The boy lays down, and he can be orally copulated. Same with the dildo. [¶] Anything done to make the boy stay in place by physical force is substantially different or greater than that which is necessary. [¶] It applies really to the degree of cooperation that did or did not exist. [J.T.] did not cooperate or acquiesce, if you will, until he was made to do so, either by threat or by force. [¶] The oral copulation, the same situation we are talking about, being made to put his mouth on [defendant's] penis." Such argument resolved any ambiguity in the instructions as to the requirement of the use of force. (*Middleton v. McNeil, supra,* 541 U.S. at p. 438.) There is nothing in the arguments by either counsel that suggest that the use of force was not an element of the crime.

For the foregoing reasons, we do not believe there is a reasonable likelihood that the jury applied the instructions in a way that deprived defendant of his constitutional rights. Even if the instructions did violate the Constitution, we would find beyond a reasonable doubt that the error did not contribute to the verdict. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *Yates v. Evatt* (1991) 500 U.S. 391, 404 [111 S.Ct. 1184, 114 L.Ed.2d 432], disapproved on another point in *Estelle v. McGuire, supra,* 502 U.S. at p. 73, fn. 4.) The jury was unambiguously instructed that the sexual penetration alleged in count 1 and the lewd and lascivious acts alleged in counts 3 through 6 were committed by the use of force. As the prosecutor argued to the jury, the evidence of the use of force by the defendant was not specific to any particular incident but, rather, consisted of a background of physical force and threats that permeated all of the sexual conduct between the defendant and the boys. The use of force found by the jury to convict defendant of counts 1 and 3 through 6 cannot reasonably be separated from the force necessary to convict defendant of count 2. The jury verdicts show that the jury found the use of such force as to counts 1 and 3 through 6. Having found the use of force inherent in the sexual relationship between J.T. and defendant in these counts, there is no basis upon which the jury could have concluded that such force did not exist as to count 2. In finding the requisite force as to counts 1 and 3 through 6, the jury necessarily found the use of force as to count 2. Thus, even if the ambiguous instructions on count 2 constituted a violation of due process, the error could not have affected the verdict on count 2, and is therefore harmless. (See *People v. Lewis* (2006) 139 Cal.App.4th 874, 884-888.)

B. *Admission of Defendant's Statement Offering to Plead Guilty*

At trial, the court admitted into evidence, over defendant's objection, defendant's statements to Duffy about making a "low-term deal" to spend one year in custody, then leave the state. Defendant contends that this constitutes prejudicial error. We hold that the court did not abuse its discretion in allowing the statements into evidence.

The admissibility of defendant's statement was addressed at a conference among the court and counsel. Following argument, the court ruled that the statement was admissible. The court framed the analysis as a question of "whether the offer to plead guilty was part of the bona fide plea negotiations," and concluded that the facts (as presented in counsels' argument) did not "demonstrate that this is a legitimate plea negotiation." The court further informed counsel that defense counsel would have "broad latitude in cross[-]examining the officer about what led up to the statement, what was said before, and to a lesser extent after the comments."

We review a trial court's evidentiary rulings for an abuse of discretion. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 805; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1113.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Ibid*.)

Evidence Code section 1153 provides: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of

any nature, including proceedings before agencies, commissions, boards, and tribunals." This statute implements the policy of encouraging settlement of criminal cases and candor among the participants in plea negotiations. (*People v. Sirhan* (1972) 7 Cal.3d 710, 745, overruled on other grounds in *Hawkins v. Superior Court* (1978) 22 Cal.3d 584, 593, fn. 7; *People v. Tanner* (1975) 45 Cal.App.3d 345, 351.) It applies, however, "only to statements made in the context of bona fide plea negotiations." (*People v. Magana* (1993) 17 Cal.App.4th 1371, 1376.) "Bona fide plea negotiations include statements made to the trial court and to the prosecuting attorney . . . ." (*Id*. at p. 1377; see, e.g., *People v. Tanner, supra,* at p. 351 [defendant's letters to deputy district attorney were inadmissible]; *People v. Hamilton* (1963) 60 Cal.2d 105, 112-114 [defendant's offer to plead guilty made to a member of the district attorney's staff was inadmissible], disapproved on other grounds in *People v. Daniels* (1991) 52 Cal.3d 815, 866.) The statute does not apply to statements made to persons uninvolved and unnecessary to plea negotiations. (*People v. Magana, supra,* at p. 1376; see also *People v. Posten* (1980) 108 Cal.App.3d 633, 648 [defendant's offers to plead guilty to lesser crime made to police officers were admissible].) Statements made to such third parties "are not part of the bona fide plea negotiations as they cannot be seen as an attempt to influence the court or the prosecutor to accept a particular offer." (*People v. Magana, supra,* at p. 1377.)

Here, defendant made his statement to a police officer, not to someone within the district attorney's office or the court. Although Duffy was involved in the investigation of the facts, the court could reasonably conclude that he was neither involved in nor necessary to any plea negotiations. Indeed, defendant was not in custody and no charges

had been filed against him at the time he inquired about making a "low-term deal." The inquiry appears to have been unsolicited. The record reveals extensive argument by counsel on the issue and the trial court's careful analysis of the matter. Its conclusion that defendant's statement was not made in the course of bona fide plea negotiations was neither arbitrary, capricious, nor patently absurd. The ruling was not, therefore, an abuse of discretion.

C. *Juror Unanimity*

Defendant contends that the court erred by failing to instruct the jury sua sponte on unanimity. We agree. We find, however, that the error was harmless beyond a reasonable doubt.

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act. [Citations.] The unanimity requirement is constitutionally rooted in the principle that a criminal defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged. [Citations.]" (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499-1500; see also *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "When the trial court erroneously fails to give a unanimity instruction, it allows a conviction even if all 12 jurors . . . are not convinced that the defendant is guilty of any one criminal event . . . . This lowers the prosecution's burden of proof and therefore

violates federal constitutional law. [Citations.]" (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 187-188)[8]

Count 2 (as discussed above) alleged that defendant committed oral copulation on J.T., a child under the age of 14, by the use of force. The evidence supports at least two, and as many as five, different acts of oral copulation by defendant on J.T., and at least one act of oral copulation by J.T. on defendant. In his closing argument, the prosecutor told the jury: "[T]he oral copulation [alleged in count 2] means either [J.T.] on the defendant, defendant on [J.T.]." Here the defendant was charged with a single count. The evidence disclosed numerous acts upon which the jury could rest its decision. And,

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[8] Unanimity instructions are set forth in CALJIC Nos. 4.71.5 and 17.01. CALJIC No. 4.71.5 provides: "Defendant is accused [in Count[s] ____] of having committed the crime of _____, a violation of section _____ of the Penal Code, on or about a period of time between _____ and _____. [¶] In order to find the defendant guilty, it is necessary for the prosecution to prove beyond a reasonable doubt the commission of [a specific act [or acts] constituting that crime] [all of the acts described by the alleged victim] within the period alleged. [¶] And, in order to find the defendant guilty, you must unanimously agree upon the commission of [the same specific act [or acts] constituting the crime] [all of the acts described by the alleged victim] within the period alleged. [¶] It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict."

CALJIC No. 17.01 provides: "The defendant is accused of having committed the crime of _____ [in Count ____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

the prosecutor's closing comments did not aid the jury in the selection process. A unanimity instruction was called for.

Counts 3 and 4 each allege that defendant violated section 288, subdivision (b)(1), by committing a lewd and lascivious act upon S.T. (a child under 14 years of age) by the use of force sometime between August 1, 2003, and January 31, 2004. Counts 5 and 6 each allege a violation of the same statute by committing a lewd and lascivious act upon J.T. between October 1, 2003, and January 31, 2004.

In his closing argument, the prosecutor explained that these counts were based upon the touching of the boys while watching pornographic videos, "grabbing their balls, rubbing their buttocks," "[t]he attempts to force oral copulation," "[t]he attempted intercourse, the try whatever you want to call it. That is what this is." The evidence supports numerous such instances against the children. The prosecutor then told the jury: "I am asking you to focus on the testicle. The rubbing of the testicle. Make it simple for your determination. That is what the boys have told us. That is what they have talked about during the course of watching these porn videos. [¶] Ask yourself, why did we charge two counts for each boy on the [section] 288's? Because within that time period, pick the first time, pick the last time. You don't have to worry about what is in between or know the date."

As with J.T., the evidence disclosed many different acts upon which the jury could rest it decision. While the prosecutor's argument somewhat focused on specific acts to support the underlying convictions, it did not constitute an election of the crime for purposes of the unanimity requirement. Telling the jurors to "pick the first time, pick the

last time," did not, in light of the evidence presented in this case, inform the jurors of the particular act the prosecution was relying upon to prove the charges in counts 3 through 6. With respect to J.T. in particular, the "first time" is arguably the attempt at anal intercourse during the trip to Idyllwild. Indeed, the prosecutor referred to this event as the initial event: "Remember [J.T.] talked about the end of October, the 15th, Halloween time for the Idyllwild. There is [*sic*] your markers." However, J.T. also told Duffy that the defendant's sexual conduct started prior to the Idyllwild incident "when he just started grabbing my nuts." This grabbing apparently began while J.T. was in the sixth grade -- prior to the six-month time period alleged in the charging pleading. The circumstances surrounding the "last time" is also uncertain. J.T. told Kurylowicz that the conduct lasted up until the day J.T. reported it to his friend at school. He told Diaz that the most recent act of attempted anal intercourse occurred about one month before the March 30, 2004, interview. Both of these dates -- the date it was first reported and the date that is one month prior to the interview -- occurred after J.T. was 14 years old. Defendant cannot be convicted of violating section 228, subdivision (b)(1) for acts committed against a 14 year old. The prosecutor failed, therefore, to adequately identify the particular acts he was relying on to support counts 5 and 6.

Nevertheless, the failure to sua sponte give a unanimity instruction was not prejudicial. We review the court's failure to give the unanimity instruction under the *Chapman* standard. In determining whether the instructional error is prejudicial, "[t]he important question is whether there was anything in the record by way of evidence or argument to support discriminating between the . . . incidents such that the jury could find

that [defendant] committed one . . . but not the other." (*People v. Brown, supra,* 42 Cal.App.4th at p. 1502; see, e.g., *People v. Davis* (2005) 36 Cal.4th 510, 561.)

Relative to count 2, the only evidence at trial that the acts concerning J.T. did not occur was J.T.'s recanting of his earlier statements. The defense was based entirely upon the argument that the jurors should believe J.T.'s trial testimony and not his earlier statements. If the jury agreed with the defendant, it would acquit defendant of the charge; if, however, the jury rejected J.T.'s trial testimony, believing his earlier statements, there would be no basis on which reasonable jurors could find that one act occurred and not another.[9] The same is true of the counts dealing with S.T. Once the jurors rejected his trial testimony that the conduct did not happen at all, there was no evidentiary basis for distinguishing between the incidents which comprised counts 3 through 6. Accordingly, the error was therefore harmless.

Defendant also argues that the failure to identify a particular act for the charges in counts 5 and 6 made it possible for the jury to rely upon one act of sexual penetration to convict defendant of the charge in count 1, or one act of oral copulation to convict defendant of the charge in count 2, as well as the crimes charged in counts 5 and 6. The contention is without merit. Even assuming defendant is correct that the jury might have based its conviction on counts 5 and 6 upon the same acts it based the convictions on

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[9] Although there was evidence that the defendant's conduct may have begun prior to the dates set forth in the charging pleading and may have continued beyond J.T.'s 14th birthday, there was evidence of numerous incidents that occurred during the time period alleged in the charging pleading.

counts 1 and 2, there is, generally, no bar to multiple convictions for a single act. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034; § 954.)[10]

D. *Admission of Evidence of Rape of Defendant's Former Wife*

Prior to trial, the prosecution sought an order permitting it to introduce the testimony of Theresa W., defendant's former wife, that defendant tied her up and forcibly raped her in 1971. The court allowed the evidence pursuant to Evidence Code section 1108 over defendant's objection. Defendant contends that the uncharged act bears no similarity to the charged offenses and should not have been admitted under Evidence Code section 352. We hold that the admission of the evidence was not an abuse of discretion.

Evidence Code section 1101, subdivision (a), provides: "Except as provided in this section and in 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." Evidence Code section 1108 provides, in relevant 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 [Evidence Code s]ection 1101, if the evidence is not inadmissible pursuant to [Evidence Code s]ection 352." (Evid. Code, § 1108, subd. (a).)

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[10] Although there is no bar to multiple *convictions* for a single act, there is a bar to imposing *punishment* for more than one conviction of a single act. (See § 654.) Here, the trial court did in fact stay the sentences on counts 5 and 6 pursuant to section 654.

(There is no dispute that the prior rape of Theresa W. constituted a "sexual offense" within the meaning of this statute.) "[Evidence Code] section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. In this regard, [Evidence Code] section 1108 implicitly abrogates prior decisions . . . indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.) When evidence of prior sex crimes is admitted pursuant to this section, the jury may use the evidence "'to find that defendant had a propensity to commit such crimes, which in turn may show that he committed the charged offenses.' [Citation.]" (*People v. Reliford* (2003) 29 Cal.4th 1007, 1013.)

While trial courts may not deem such evidence unduly prejudicial per se, they must still engage in a careful weighing process under Evidence Code section 352. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 916-917.) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Id.* at p. 917.)

We review evidentiary rulings made pursuant to Evidence Code section 1108 for an abuse of discretion. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) Such discretion "'"is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice."' [Citation.]" (*People v. Ortiz* (2003) 109 Cal.App.4th 104, 117.)

Here, the factors identified by the *Falsetta* court appear to weigh in favor of excluding evidence of the prior offense. The prior rape was against an adult woman and committed by tying the victim up with a rope. The nature of the offense bears minimal similarity to the sexual conduct alleged against the minor boys, J.T. and S.T. It was remote in time, taking place about 33 years before the charged conduct. Moreover, the commission of the prior rape must be considered somewhat uncertain because Theresa W. never reported the crime to authorities and there was no corroborating evidence. There was also the possibility that the evidence would at least distract the jurors from their main inquiry -- determining the truth of the allegations concerning defendant's acts against J.T. and S.T. -- and that the jurors would want to punish defendant for the 1971 rape even if he was innocent of the charged offenses.

We cannot, however, conclude that the trial court abused its discretion in allowing the evidence. The evidence was relevant to show that defendant was willing to and did use force to commit a sexual offense. The facts that the prior victim was an adult woman and the victims in the charged crimes are minor boys, and that the absence of evidence of

bondage in the present case, are arguably of little significance; what matters is that defendant has been willing to use force (by whatever means) to commit sexual offenses against victims (of whatever gender and age) with whom he has an existing relationship. Although the *Falsetta* court included similarity of the events as a factor to consider in determining admissibility under Evidence Code sections 1108 and 352, the statute does not require the kind of "specific similarity" required to admit evidence of prior bad acts under Evidence Code section 1101, subdivision (b). (Historical and Statutory Notes, 29B pt. 3, West's Ann. Evid. Code (2006 supp.) foll. § 1108, p. 181; see, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 [discussing varying degrees of similarity with respect to analysis of admissibility under Evidence Code section 1101, subdivision (b)].)

Although the prior crime was remote in time, "the passage of a substantial length of time does not automatically render the prior incidents prejudicial." (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.) Other courts have found no abuse of discretion in allowing evidence of prior sexual offenses that occurred 20 or 30 years before the charged events. (See, e.g., *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [30 years between acts]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [20 years]; *People v. Soto, supra*, at pp. 977-978, 991-992 [approximately 20 and 30 years].) The rape of Theresa W. was not necessarily any more inflammatory than the forcible attempts of anal intercourse, oral copulation, and sexual penetration with a dildo upon minors that are the subject of the present case.

To limit the possibility that the jury would be confused or misled by the evidence, immediately following Theresa W.'s testimony, the court informed the jury that Theresa

W.'s testimony was introduced for the purpose of showing that defendant engaged in a sexual offense other than the ones charged in this case, then gave the jurors the following admonishment: "If you find that [defendant] committed a prior sexual offense, and whether you do or not is up to you, you may but are . . . not required to infer that [defendant] has a disposition to commit sexual offenses. [¶] If you find that [defendant] has this disposition, you may but you are not required to infer that he was likely to commit and did commit the crimes for which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant . . . committed a prior sexual offense, 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 the testimony of Ms. Theresa [W.], 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 any or all of the charged crimes, unless I otherwise instruct you. You must not consider this evidence for any other purpose."

Even if we would have made a different ruling, for the foregoing reasons, we conclude that the court acted within its discretion in allowing evidence of the prior rape.

Defendant also argues that the court erred in refusing to allow defense counsel to question Theresa W. during cross-examination concerning Theresa W.'s hospitalization for seizures that resulted from her discontinuation of prescription pain medication. The hospitalization occurred over a two-week period within the six months prior to the trial. The court held a hearing pursuant to Evidence Code section 402. During the hearing, Theresa W. testified that the seizures caused her to have hallucinations. In response to

questions from the court, Theresa W. testified that the seizures and the medication did not interfere with her ability to remember past events, and that the events she described in court were not the product of a hallucination. She further testified that the medication she is now taking does not interfere with her ability to remember. Both counsel declined to ask Theresa W. any questions. The court ruled that evidence of her hospitalization was irrelevant. The ruling was not an abuse of the court's discretion. There was no showing that Theresa W.'s recent hospitalization or her medication had any effect upon her testimony or was otherwise relevant.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.