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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LAPATRICK ALBERT JOHNSON, Defendant and Appellant.	A125154 (Alameda County Super. Ct. No. C158518)

Appellant LaPatrick Johnson was convicted by jury of two counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a)) and was sentenced to 55 years to life in state prison.[1] Johnson contends that the trial court abused its discretion by denying his motion to sever the counts alleging sexual assaults on different victims, and that the impact of alleged instructional errors requires reversal. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The operative information charged Johnson in separate counts with committing lewd acts on two children under the age of 14 (§ 288, subd. (a)) and with one count of aggravated sexual assault of a child (§ 269, subd. (a)(1)). In the first count, Johnson was charged with committing a lewd act on Jane Doe One[2] on or about January 11, 2007. In the second count, Johnson was charged with committing a lewd act on Jane Doe Two

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

[2] As in the trial court record, we refer to the victims as Jane Doe to protect their privacy.

between August 1, 2006 and October 31, 2006. In the third count, Johnson was charged with aggravated sexual assault of Jane Doe Two between August 1, 2006 and October 31, 2006.

With respect to the first two counts, it was further alleged pursuant to section 667.61 that multiple victims were involved and Johnson had committed prior sexual offenses; and it was alleged that he was a habitual sex offender (§ 667.71), having been convicted of forcible rape (§ 261, subd. (a)(2)) in 1996. As to all charges, it was alleged that Johnson had 10 prior convictions, one of which was a strike within the meaning of section 1170.12 and a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). It was further alleged that he had served eight prior prison terms within the meaning of section 667.5, subdivision (b).

Johnson was tried by jury and convicted on both counts one and two.[3] The multiple victim enhancement allegations were also found true. The court found true seven of the ten prior conviction allegations and six of the prior prison term allegations. Johnson was sentenced to state prison for a total term of 55 years to life. He filed a timely notice of appeal.

Prosecution's Case

Jane Doe One

Jane Doe One was 10 years old at the time of the charged offense. At the time of trial, she resided in a psychiatric facility. She did not testify. Jane Doe One's foster mother described Jane Doe One as "a special-needs child." She had been diagnosed with posttraumatic stress disorder and psychotic disorder not otherwise specified. In early 2007, Jane Doe One attended day treatment at the Lincoln Child Center (Lincoln), a school for emotionally disturbed children.

Johnson attended the church where Jane Doe One's foster mother was a minister. He also performed occasional handyman services at her home on Sunnyside Street in

[3] The third count was dismissed by the People prior to submission of the case to the jury.

Oakland. At some point, Johnson introduced Jane Doe One's foster mother to Jane Doe Two's mother. Johnson described Jane Doe Two's mother as his girlfriend.

On January 11, 2007, Jane Doe One's foster mother got her children ready for school and asked her 18-year-old son to walk Jane Doe One outside to be picked up by the school bus. Jane Doe One's foster mother then left the house at around 7:15 a.m. to attend a nursing class. The bus driver, who drove Jane Doe One to school that day, testified that Jane Doe One appeared worried when she was picked up. When asked what was wrong, Jane Doe One said that someone touched her. When asked who touched her, Jane Doe One said "Patrick" touched her at her house. Once the bus arrived at school, the driver reported Jane Doe One's comments to a teacher.

A Lincoln counselor testified that she was called to meet Jane Doe One at the bus. The counselor saw that Jane Doe One was crying and shaking. Jane Doe One told the counselor that "LaPatrick," who was a neighbor, had been in her house. Jane Doe One said "[h]e hurt me." Jane Doe One pointed to her vaginal area and said "[h]e put his penis down there." Jane Doe One also said that Johnson had put his penis "[i]nside down there" and that "blood and stuff came out." Jane Doe One told the counselor that this had happened right before she came to school. A Lincoln therapist also testified that Jane Doe One told her "LaPatrick" touched her in the crotch area.

Jane Doe One's foster mother was called and told of Jane Doe One's allegations. She took Jane Doe One to the hospital, where they met with a hospital social worker. The social worker testified that she met Jane Doe One and her foster mother in the emergency waiting room. Jane Doe One said that a man named LaPatrick entered her home that morning and showed her his private parts and "put his private parts in her private parts."

Jane Doe One was examined by a nurse practitioner, who collected Jane Doe One's clothing, pubic hair combings, as well as swabs from Jane Doe One's mouth, rectum, vulva, and vagina. At her home, the police collected Jane Doe One's clothing and a pair of panties from her room. After obtaining a search warrant, police also collected a buccal swab from Johnson's inner cheek.

The criminalist at the Oakland police crime laboratory, who performed the deoxyribonucleic acid (DNA) analysis in this case, testified that sperm cells were found on the swabs from Jane Doe One's vulva and rectum. Sperm cells were also found on a pair of Jane Doe One's underwear.

A DNA profile for Johnson was created from the buccal swabs. A genetic profile for the sperm found on the swab from Jane Doe One's vulva was generated and compared to Johnson's DNA profile. The profiles were consistent. The criminalist testified that a random correspondence would occur approximately once in four quintillion members of the population. Genetic profiles were also generated for the sperm found on the rectal swab and the underwear and compared to Johnson's DNA profile. The profiles were consistent.

Jane Doe Two

Jane Doe Two's mother testified that she and Johnson dated in 2006. She met him when he was living with Barbara, who was a friend and a neighbor. Johnson moved in with Jane Doe Two and her mother in approximately June or July and lived with them for approximately three or four months. The relationship ended in September or October 2006.

Jane Doe Two testified at trial. She was seven years old during the period between August 1, 2006 and October 31, 2006, and lived on Sunnyside Street in Oakland. Jane Doe Two testified that Johnson, who she identified as "Red," did something "bad" to her body when she was in kindergarten or first grade. Jane Doe Two described being in her bedroom, at night, when Johnson came in. According to Jane Doe Two, who was nine at the time of trial, "[Johnson] always act[ed] like he was going to the bathroom. He'll actually come to my room." Jane Doe Two testified that the "naked part" of Johnson's body, as well as his hand, touched her body.[4] Jane Doe Two could not

[4] Jane Doe Two circled the part of Johnson's body that touched her on a drawing of a male body. She also circled the part of her body that was touched on a drawing of a female body. However, the drawings are not part of the record before this court. In any

remember whether Johnson touched her over or under her clothes. However, she did see his "private parts." She testified that this happened more than twice.

Jane Doe Two recalled Johnson having touched her, before the incidents in her bedroom, when she spent the night at Barbara's house. Jane Doe Two did not remember precisely when the touching occurred, but testified that she was going to the fair the next day and that it was close to the end of the school year. Jane Doe Two testified that Johnson touched her while she was watching a movie in the living room and that she was wearing a blue and red dress.[5] Barbara and her grandchildren were asleep at the time. She could not recall whether Johnson touched her over, or under, her clothes. Jane Doe Two's mother testified that Jane Doe Two's sleepover at Barbara's house "would have to have been close to June" of 2006 "[b]ecause that's when the carnival is . . . ." This was before Jane Doe Two's mother and Johnson began their relationship.

Jane Doe Two told Johnson she was going to tell her mother what happened and Johnson said he would kill her mother and brother if she did. Jane Doe Two did tell another child, a friend she knew as "Nu-Nu."

Nu-Nu testified that Jane Doe Two used to live in his apartment building. Nu-Nu recalled that, one day after school in the spring of 2007, he and Jane Doe Two were swinging when he asked why she had wet herself at his sister's sleepover a week earlier. Nu-Nu recalled Jane Doe Two saying that "[her stepdad] put [his] thing in her butt and he be feeling on her and stuff."[6] Nu-Nu told Jane Doe Two to tell her mother. Jane Doe Two confided that Johnson threatened to kill her mother if she did. Nu-Nu waited "like two days" and then told his own mother.

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event, Johnson has not presented a substantial evidence challenge and concedes that Jane Doe Two said he "touched her in the crotch area with his hand."

[5] Jane Doe Two testified that Johnson touched her with the same part of his body that she had previously circled. She also said that the same, previously circled part of her body was touched.

[6] Nu-Nu considered Johnson to be Jane Doe Two's stepdad.

At some point, Nu-Nu's mother told Jane Doe Two's mother that something had happened between Jane Doe Two and Johnson. Jane Doe Two's mother and Johnson were no longer dating, but he still came by the house once or twice a week. When Jane Doe Two and her mother talked about it, her mother was angry and said that it "changed a lot of things" and that Johnson would probably get in a lot of trouble. Jane Doe Two then said " 'no, mommy, I was just lying.' " Jane Doe Two's mother did not confront Johnson or call the police. In June or July of 2007, Jane Doe Two went to stay with her godmother. Jane Doe Two again reported that Johnson had molested her. This time, Jane Doe Two's mother called the police.

Evidence of Prior Sexual Offense

Jane Doe Three testified that, on December 22, 1995, she was 17 years old and living in Sacramento with her 18-month-old son. Jane Doe Three's mother called and arranged to meet a friend at Jane Doe Three's house. Johnson arrived and Jane Doe Three called her mother to let her know. Her mother asked that Johnson wait there. Jane Doe Three and Johnson talked while waiting for her mother, who never arrived. Johnson was drinking gin. Eventually, Jane Doe Three went to bed with her son, leaving Johnson in her living room.

Jane Doe Three awoke when Johnson got in bed with her and began "rubbing on [her] leg." Jane Doe Three told him to get out of her bed, but Johnson got on top of her, spread her legs, and penetrated her vagina with his penis and his hands. Jane Doe Three was petrified and let Johnson rape her because she did not want anything to happen to her son, who was in bed with her. Johnson then returned to the living room. Jane Doe Three locked her bedroom door and called her boyfriend, who called the police.

Defense Case

Mechelle Johnson, Johnson's sister, testified that, in approximately March 2006, she lived with Johnson and his girlfriend, Ramona Gist, on 99th Avenue in Oakland. Johnson's sister further testified that, after she moved out, Johnson and Gist continued to live on 99th Avenue. She knew because she moved into the building next door. She testified that Johnson continued living on 99th Avenue until "[t]he summertime of I'm

going to say '07, maybe." Johnson's sister testified that she saw him every day except one between 2006 and 2007.[7] She was there when Johnson went to sleep every night in that time period. An investigator with the Alameda County Public Defender's Office testified that she made unsuccessful efforts to locate Gist.

II. DISCUSSION

In his opening brief, Johnson contends that: (1) the trial court abused its discretion by denying his motion to sever trial of the charges relating to Jane Doe One from those relating to Jane Doe Two; (2) the trial court erred in instructing the jury according to CALCRIM No. 207 with respect to count two; and (3) the court's failure to instruct on unanimity as to the acts on which the verdict as to Jane Doe Two was based requires reversal. We address each of these arguments in order.

A. Severance

Johnson moved to sever trial of the counts involving Jane Doe One from those involving Jane Doe Two.[8] After considering the motion, and the People's opposition, the trial court concluded: "[T]he evidence of each of these offenses would be admissible under [Evidence Code section] 1108 as against the other. [¶] . . . [¶] . . . And I don't see anything under Evidence Code [section] 352 that would defeat that, that would suggest that the evidence would be more prejudicial than probative. [¶] In light of that, I don't find any reason to sever the counts."[9] The motion to sever was denied. Johnson now

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[7] The parties stipulated that Johnson was in custody for approximately 79 days during this period.

[8] At the time the motion was filed, the operative information alleged multiple counts with respect to each victim.

[9] Evidence Code section 1108, subdivision (a), provides: "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."

Evidence Code section 1101 provides: "(a) 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

argues that the trial court abused its discretion, and deprived him of a fair trial, when it denied his motion.

Two or more offenses "of the same class," or "connected together in their commission," may be charged and tried together, but the trial court may sever counts in the interest of justice. (§ 954.) "The purpose underlying [section 954] is clear: joint trial 'ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.' [Citation.]" (*People v. Soper* (2009) 45 Cal.4th 759, 772 (*Soper*).)

Johnson concedes that the charges were properly subject to joinder under section 954, because the offenses are "of the same class . . . ." However, he argues that his severance motion should have been granted because of the danger of undue prejudice. Specifically, Johnson argues that "[t]he evidence presented on the Doe 2 count presented a close issue for the jury. The Doe 1 count did not. The presence of genetic material on the vulva of Doe 1, identified as a 'one-in-four-quintillion' match with [Johnson], quite probably motivated jurors not otherwise persuaded to convict [him] on the Doe 2 count."

"The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*Soper, supra,* 45 Cal.4th at p. 773.) Our Supreme Court has said, " 'because consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action

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her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

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."

preferred by the law. [Citations.]' (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).) When, as in this case, the statutory requirements for joinder have been met, a defendant 'can establish error in the trial court's ruling allowing joint trial . . . only by making a "*clear showing of prejudice* . . . ." ' (*Ibid*, original italics.) Denial of a motion for severance amounts to a prejudicial abuse of discretion if the trial court's ruling falls outside the bounds of reason. (*Ibid.*) ' "The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence." ' (*Id.* at p. 1221.)" (*People v. Hartsch* (2010) 49 Cal.4th 472, 493 (*Hartsch*).)

In assessing whether the trial court's ruling falls outside the bounds of reason, a reviewing court must consider " '(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.' [Citations.]" (*Alcala , supra,* 43 Cal.4th 1205 at pp. 1220–1221.) We consider the record before the trial court when it made its ruling.[10] (*Hartsch, supra,* 49 Cal.4th at p. 493.)

Cross-admissibility of evidence, standing alone, is sufficient to dispel any prejudice and justify denial of a severance motion. (*Hartsch, supra,* 49 Cal.4th at p. 493; *Soper, supra,* 45 Cal.4th at pp. 774–775; *Alcala, supra,* 43 Cal.4th at p. 1221.) However, " 'a trial court may not *grant* severance, where the statutory requirements for joinder are met, solely on the ground that evidence in the joined cases is *not* cross-admissible.' "

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[10] The record before the court, at the time Johnson's severance motion was denied, consisted of the evidence presented at the preliminary hearing. Neither Johnson, nor the People, point out any material differences between the evidence presented at the preliminary hearing and the evidence described above. The preliminary hearing transcript presents a set of facts substantially similar to those presented by the prosecution at trial. Accordingly, we only refer to the trial testimony.

(*Alcala, supra*, 43 Cal.4th at p. 1217, fn. 10; see also § 954.1.) "If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.' [Citations.]" (*Soper, supra,* 45 Cal.4th at p. 775.)

Here, the factors identified by the Supreme Court suggest that the trial court did not abuse its discretion when it denied Johnson's motion. First, Johnson argues that the evidence would not have been cross-admissible if separate trials had occurred. He bears the burden of showing the evidence would not have been cross-admissible. (*Hartsch, supra,* 49 Cal.4th at p. 494.) "[C]omplete (or so-called two-way) cross-admissibility is not required. In other words, it may be sufficient, for example, if evidence underlying charge 'B' is admissible in the trial of charge 'A'—even though evidence underlying charge 'A' may not be similarly admissible in the trial of charge 'B.' [Citations.]" (*Alcala, supra,* 43 Cal.4th at p. 1221.)

In denying Johnson's severance motion, the trial court concluded that the evidence of either charged offense would be cross-admissible pursuant to Evidence Code section 1108, as well as to prove a common plan or intent under Evidence Code section 1101, subdivision (b). Evidence Code section 1108 "allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.)

Johnson does not challenge Evidence Code section 1108's application here. Instead, he argues that a balancing of probative value against prejudicial effect, pursuant to Evidence Code section 352, must be taken into account. However, "[i]n the context of properly joined offenses, we assess potential prejudice not under Evidence Code section 352, but instead in the context of the traditional four factors outlined above: cross-admissibility of charges; tendency of the charges to inflame the jury; the bolstering of a weak case; and the conversion of noncapital charges into a capital case." (*Alcala,*

supra, 43 Cal.4th at p. 1222, fn. 11.) Because the trial court correctly concluded that, pursuant to Evidence Code section 1108, evidence of the sexual offense against Jane Doe One would be admissible in a trial charging only the offense against Jane Doe Two, we need not consider admissibility under Evidence Code section 1101.[11] Johnson's motion was properly denied.

Even if we assume that consideration of factors other than cross-admissibility is necessary, we conclude that Johnson has "failed to carry his burden of making the clear showing of prejudice required to establish that the trial court abused its discretion in declining to sever the . . . charges." (*Alcala, supra,* 43 Cal.4th at p. 1227.)

Johnson does not argue, in his opening brief, that the charges with respect to Jane Doe One were likely to unusually inflame the jury. In any event, any difference in the two offenses was relatively minor. With respect to both Jane Doe One and Jane Doe Two, Johnson abused a position of trust in order to commit sexual offenses against young girls in their own homes, or the home of a neighbor. It was unlikely that the jury was unusually inflamed by the crime committed against Jane Doe One in considering the evidence relating to Jane Doe Two.

Johnson argues that the evidence supporting count one was stronger than the evidence supporting count two. He relies on the fact that the former charge was supported by DNA evidence, but the latter charge was not. Johnson also points out that Jane Doe One reported his alleged acts immediately after they occurred. On the other hand, Jane Doe Two did not report the molestations until 2007 and originally recanted

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[11] Johnson also challenges the cross-admissibility under Evidence Code section 1101, subdivision (b), asserting that there was insufficient similarity between the offense to show any common plan or scheme. Similarity between sexual crimes increases the probative value of prior sexual offense evidence. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1287.) However, strict similarity is not required under Evidence Code section 1108, and is not essential to the relevance and probative value of the evidence. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 40–41 [contrasting similarity requirement for admission of evidence under Evid. Code, §§ 1101, subd. (b) & 1108]; *People v. Britt* (2002) 104 Cal.App.4th 500, 505–506 [same].)

her allegations. But, the charges relating to Jane Doe Two were supported by the testimony of the victim herself, whereas the charges relating to Jane Doe One were not.[12] Thus, the strength of the evidence was not so different that severance was required. "[I]t always is possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges. [Citation.]" (*Soper, supra,* 45 Cal.4th at p. 781.)

Finally, none of the charges involved a capital offense. The trial court did not abuse its discretion when it denied Johnson's motion to sever.

Johnson argues that, even if the trial court's ruling on his severance motion was not an abuse of discretion at the time it was made, he was nonetheless deprived of due process. Our Supreme Court has said that " 'even if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]' [Citations.]" (*Soper, supra,* 45 Cal.4th at p. 783.) Gross unfairness was not the result here. The evidence was cross-admissible. (Evid. Code, § 1108.)

Furthermore, the jury was instructed on the elements of the crimes, on the burden of proof, and to consider each charge separately. These instructions mitigated the risk of any prejudicial spillover. (See *Soper, supra,* 45 Cal.4th at p. 784.) Further, to the extent that Johnson contends that cross-consideration of evidence resulted in a federal due process violation, he must show that admission of the evidence rendered the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70, 75.) He does not.

Johnson's trial did not result in a denial of due process.

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[12] Johnson conceded, at the time the severance motion was made, that the fact that Jane Doe One would not testify undercut his severance argument.

B. CALCRIM No. 207

The operative information alleged, in count one, a lewd act on Jane Doe One committed "on or about January 11, 2007 . . . ." The information also alleged, in count two, a lewd act on Jane Doe Two committed "between August 1, 2006 and October 31, 2006 . . . ." Johnson correctly points out that Jane Doe Two testified to multiple acts that could form the basis for his conviction on count two. Jane Doe Two testified to more than two acts committed in the bedroom of her own home and to an act committed at Barbara's house. Jane Doe Two could not remember precisely when any of the acts occurred. However, the People's evidence suggested that the latter act occurred around June 2006. Thus, Johnson suggests that his conviction on count two must be reversed because he may have been convicted for an act that occurred outside of the August through October 2006 time period alleged in the information. He contends that the jury was erroneously instructed that the prosecution was not required to prove that the offense against Jane Doe Two was committed exactly during the three-month period alleged in the information.

"Errors in jury instructions are questions of law, which we review de novo. [Citation.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.) An appellate court cannot set aside a judgment on the basis of instructional error unless, after an examination of the entire record, the court concludes that the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)

1. *Background*

During argument over jury instructions, the following exchange occurred on the record:

"THE COURT: [¶] . . . [¶] [CALCRIM No.] 207,[13] which is a slightly modified version, . . . this was at the DA's request to show reference to both a certain date and a

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[13] CALCRIM No. 207 provides: "It is alleged that the crime occurred on [or about] _____ <*insert alleged date*>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day."

certain time period given that Count 1 charges a certain date, Count 2 charges a certain time period. And the instruction addresses the question of the 'on or about,' and as long as the proof is reasonably close to the date or time period alleged, that is sufficient. [¶] There was an objection to this in Count 1 in that it charged a specific date; however, my reading of the use notes suggests that I would not give this as to a specific date if evidence of an alibi were presented . . . for that specific date. And that did not occur, and, frankly, I don't think it's much of an issue here. And consistent with the evidence, all the evidence is January 11th. I'll give it. That found in the packet.

"[DEFENSE COUNSEL]: Your Honor, I just wanted to briefly say I felt that there was some evidence of lack of access based on cross-examination, and my concern is that that instruction will lessen the People's burden *as to Count 1*. [¶] Submitted." (Italics added.)

The court overruled Johnson's objection and instructed the jury as follows: "It is alleged that the crimes occurred on or about a certain date (Count One) or a certain time period (Count Two). The People are not required to prove that the crimes took place exactly on that day or during that time period but only that it happened reasonably close to that day or reasonably close to that time period."

During their deliberations, the jury submitted a question that read as follows: "Does the time frame for count 2—August 1 to October 31, 2006—preclude us from considering the incident at Barbara's house, when [Jane Doe Two] was allegedly assaulted by [Johnson]. Our time line indicates that event took place in June 2006. In other words, does this count (2) only include the incident in [Jane Doe Two's] bedroom?"

During discussion of the jury's question, Johnson's trial counsel and the court engaged in the following exchange:

"[DEFENSE COUNSEL]: My thoughts are about the evidence. (Jane Doe 2) testified to June at the end of school. Her mother did not testify to that. The fresh complaint was specifically made in the springtime. So I don't think it's completely clear what the evidence shows. [¶] But assuming that we go with what (Jane Doe 2) said at the end of her testimony, that still leaves two months, outside frame, and I don't know if

that's outside the realm of 'on or about.' It certainly seems like it should be outside the realm of 'on or about.' [¶] And I think if . . . [Johnson] is put in a situation where there's a conviction for an offense that happened outside the time that the jury was originally given, I think he is prejudiced by that. And I would ask the Court to simply say 'no'—or say 'Yes, you may not consider it.'

"THE COURT: And I guess I'm wondering what the prejudice is, again, given that I've discussed—apparently had notice that this was a potential basis: This was argued by you, the witness was cross-examined on this point, or certainly was available—all the witnesses were—on this issue. [¶] The alibi—that's maybe not the technically correct word for Mechelle Johnson's testimony, but it was in the nature of an alibi to indicate he didn't live at a certain location for a period of time. That was, as I recall, March of 2006 to the summer of 2007. So that would still include this period of time, this June 2006, as they have in their timeline, such that the defense presented to the charge still pertains."

The trial court's response to the jury read: "As to Count Two, the People are required to prove beyond a reasonable doubt that a violation of section 288(a) occurred between August 1, 2006 and October 31, 2006. However, per instruction 207, they need only prove a violation occurred 'reasonably close to that time period.' Whether that has been satisfactorily proven to the required standard is up to you."

2. *Analysis*

Johnson asserts that, with respect to count two, the court "allow[ed] conviction for an offense other than those charged and one which [he] was not put on notice that he would have to defend against . . . . [T]he error deprived [him] of his rights to have the jury decide the issues presented by his case (Sixth Amendment, United States Constitution) and his right to a fair trial. (Fifth Amendment and Fourteenth Amendment, United States Constitution.)"

Johnson does not argue that his due process rights were violated because the information lacked specificity.[14] Rather, he attacks the trial court's use of the " 'on or about' instruction" (CALCRIM No. 207) with respect to count two.[15] Johnson also argues that the error was compounded by the trial court's response to the jury's question. According to Johnson, the jury's question shows that "[t]he jury was *not* persuaded that the offense took place within the August 1 through October 31 dates alleged by the prosecution." He argues that the jury should have been limited to considering the time period stated in the information.

It is the People's evidence, rather than the dates stated in the information, that ordinarily limits the time period to be considered by the jury. "The precise date on which an offense was committed need not be stated in an accusatory pleading unless the date is material to the offense (§ 955), and the evidence is not insufficient merely because it shows the offense was committed on another date. [Citation.]" (*People v. Peyton* (2009) 176 Cal.App.4th 642, 660.) It is only "when the prosecution's proof establishes the offense occurred on a particular day to the exclusion of other dates, and when the defense is alibi (or lack of opportunity), [that] it is improper to give the jury an instruction using the 'on or about' language. [Citation.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 358–359; see also *People v. Wrigley* (1968) 69 Cal.2d 149, 154–160.) When these conditions are not met, the "on or about" instruction does not "deflect the jury's attention from a

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[14] In any event, such a claim would fail. (See *People v. Fortanel* (1990) 222 Cal.App.3d 1641, 1645 ["we conclude that it is unreasonable to require the pleading or proof of a specific day, even when defendant raises an alibi defense"].)

[15] As shown above, Johnson's trial counsel did not object to the "on or about" instruction on the ground that it was inappropriate with respect to count two. In fact, defense counsel only objected that it was improper to give the instruction with respect to count one. We nonetheless review his new claim on the merits because section 1259 permits us to "review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

crucial temporal element for which the defendant had an alibi." (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

Accordingly, the use notes for CALCRIM No. 207 specifically provide: "This instruction should not be given: (1) when *the evidence* demonstrates that the offense was committed at a specific time and place and the defendant has presented a defense of alibi or lack of opportunity; and (2) when two similar offenses are charged in separate counts." (Judicial Council of Cal., Crim. Jury Instns. (2010) Bench Notes to CALCRIM No. 207, p. 33, italics added.) Our Supreme Court has said that this limitation "accurately recognizes the rule as developed by the courts." (*People v. Jones* (1973) 9 Cal.3d 546, 557 (*Jones*) [approving a similar comment to the analogous CALJIC No. 4.71], overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Jones and *People v. Barney* (1983) 143 Cal.App.3d 490 (*Barney*) illustrate the above rule. In *Jones,* a police officer testified that he purchased marijuana from the defendant on March 24. The defendant presented evidence suggesting he was out of state on that date. (*Jones, supra,* 9 Cal.3d at pp. 556–557.) Accordingly, the Supreme Court held that it was error to instruct with CALJIC No. 4.71.[16] (*Id.* at pp. 557–558.)

In *Barney*, the defendant was charged with committing a lewd act " 'on or about' February 8." However, the victim's testimony made clear that the offense happened sometime during the weekend of February 7 and 8. (*Barney, supra,* 143 Cal.App.3d at pp. 497–498.) The defendant presented evidence that showed a lack of opportunity to commit the offense on those dates. Accordingly, the court concluded that it was error for the trial court to give CALJIC No. 4.71. (*Id.* at p. 498.) The court reasoned: "Ordinarily, the People need not plead the exact time of commission of an alleged offense. ([§ 955].) However, if the defense is alibi or, as here, lack of opportunity to

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[16] CALJIC No. 4.71 provided: " 'When, as in this case, it is alleged that the crime charged was committed "on or about" a certain date, if the jury finds that the crime was committed it is not necessary that the proof show that it was committed on that precise date; it is sufficient if the proof shows that the crime was committed on or about that date.' " (*Jones, supra,* 9 Cal.3d at p. 556, fn. 8.)

commit the offense, the exact time of commission becomes critically relevant to the maintenance of the defense. An instruction which deflects the jury's attention from temporal detail may unconstitutionally impede the defense. The defendant is entitled as a matter of due process to have the time of commission of the offense fixed in order to demonstrate he was elsewhere or otherwise disenabled from its commission." (*Id.* at p. 497.)

Here, unlike in *Barney* or *Jones,* the prosecution's evidence did not fix the commission of any offense against Jane Doe Two on any particular date or dates, to the exclusion of all other dates. Accordingly, the trial court did not err.

Even if the trial court had committed error in its instructions, Johnson has not shown any prejudice. He contends he was deprived of his opportunity to defend. But, Johnson's "alibi" evidence, to the extent it can be characterized as such, consisted of Mechelle Johnson's testimony that he lived somewhere other than Sunnyside Street *between March 2006 and the summer of 2007*. Johnson argues that he "presented evidence that he was *not* living with Doe 2's mother during the time-period of the alleged molestation," but that this "evidence would have little value defending against a charge that [he] molested Doe 2 on another date at a neighbor's house . . . ." (Bolding omitted.) However, Mechelle Johnson's testimony equally suggests that he was not living with Barbara in June 2006. We fail to see how the jury could have understood the challenged instructions to preclude consideration of Johnson's defense.

C. Unanimity Instruction

Next, Johnson argues, in his opening brief, that the trial court erred in failing to give a unanimity instruction, pursuant to CALCRIM No. 3500.[17] Specifically, Johnson

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[17] CALCRIM No. 3500 provides: "The defendant is charged with _____ <*insert description of alleged offense*> [in Count _____] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

argues: "Jane Doe 2 described two sets of acts, either of which may have influenced jurors to convict. The first set of facts described molests occurring at her own home during which [Johnson] came into her room. . . . A second set of facts described a molestation at her neighbor's house . . . . Because there were separate acts, either of which if found true could constitute the basis for the lewd conduct charge involving Doe 2, it was incumbent upon the court to instruct the jury that it must be unanimous as to the act that it found constituted the basis for its verdict." Johnson maintains, in his opening brief, that "the unanimity instruction was not given in the instant case."

"Defendants in criminal cases have a constitutional right to a unanimous jury verdict. [Citation.] From this constitutional principle, courts have derived the requirement that if one criminal act is charged, but the evidence tends to show the commission of more than one such 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.' [Citations.]" (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114.) The unanimity requirement " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

Here, a unanimity instruction was, in fact, given by the trial court. The jury was instructed, in accordance with CALCRIM No. 3501, as follows: "The defendant is charged with [a] lewd and lascivious act upon a child in Count Two sometime during the period of August 1, 2006 to October 31, 2006. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period."

Johnson concedes, in his reply brief, that the above unanimity instruction was given. Johnson then argues that "because the instruction was limited to the August

through October, 2006 time period, [he] must nonetheless insist that instruction pursuant to the generic-testimony unanimity instruction (CALCRIM No. 3501) did not protect [his] right to a unanimous jury verdict, whereas instruction pursuant to the specific-acts unanimity instruction (CALCRIM No. 3500) would have." We need not address this argument because it was raised for the first time in Johnson's reply brief. (*Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12.) The unanimity instruction given here ensured that Johnson was not convicted without unanimous agreement that Johnson committed at least one of the alleged acts and unanimous agreement about which act he committed.

III. DISPOSITION

The judgment is affirmed.

_____
Bruiniers, J.

We concur:

_____
Simons, Acting P. J.

_____
Needham, J.