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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAIME WILFREDO TORRES, Defendant and Appellant.	A091096 (San Francisco County Super. Ct. No. 175896)

Jaime Wilfredo Torres was convicted of 11 counts of rape (Pen. Code, § 261, former subd. (2), now subd. (a)(2)[1] [Stats. 1986, ch. 1299, § 1, p. 4592; Stats. 1990, ch. 630, § 1, p. 3096]; six counts of lewd or lascivious conduct with a child under the age of 14 (§ 288, subd. (a)); one count of oral copulation (§ 288a, subd. (c)); one count of continuous sexual abuse of a child (§ 288.5); and one count of forcible penetration (§ 289, subd. (a)). It was further alleged, and the jury found true, that the charges were filed after the limitations period specified in sections 800 and 801 had expired but within one year after the victims reported the crimes to a California law enforcement agency, and that the crimes involved substantial sexual conduct and were corroborated by independent evidence. (§§ 803, subd. (g) [803(g)], 1203.066, subd. (b).) The court

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Analysis, parts I through VII.

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

sentenced appellant to state prison for a term of 45 years, and he filed a timely notice of appeal.[2]

We granted rehearing, as to the issue raised in section VIII, because, before our decision became final, our Supreme Court filed its decision in *People v. Johnson* (2002) 28 Cal.4th 240, disapproving of *People v. Valdez* (1994) 23 Cal.App.4th 46, upon which we had relied. We shall hold, in accordance with *People v. Johnson, supra*, 28 Cal. 4th 240, that appellant cannot stand convicted of both a violation of section 288.5, and of multiple counts of other specific felony sex offenses committed against the same victim and in the same time period as the section 288.5 count. We shall further hold that, in this case, the appropriate remedy for the failure to plead these offenses in the alternative, as required by subdivision (c) of section 288.5, is to reverse appellant's conviction on the section 288.5 count.

ANALYSIS

I.

Ex Post Facto Clause

Appellant was charged and convicted of committing numerous sexual offenses against Nancy R. and Adela M. between June 1, 1988, and July 2, 1992. Under the law in effect at the time these offenses were committed, the applicable limitations period was six years (§§ 800, 805). After these offenses were committed, but before the applicable limitations period had expired, the Legislature, effective January 1, 1994, enacted section 803(g) (Stats. 1993, ch. 390, § 1, pp. 2224, 2226), which provided that a criminal complaint alleging specified sex offenses committed against a person under the age of 18 is timely if filed within one year of the date the victim reports the offense to a law enforcement agency, if the period specified in section 800 or 801 has expired, the crime involved substantial sexual conduct, and there is independent evidence that clearly and convincingly corroborates the victim's allegations. (Stats. 1993, ch. 390, § 1, p. 3096.)

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2. We will summarize the facts only as relevant to our analysis of the issues on appeal.

Appellant first contends that application of section 803(g) to extend the limitations period for offenses committed before its effective date, but for which the then applicable limitations period had not yet expired, violates the ex post facto clause. Our Supreme Court, in *People v. Frazer* (1999) 21 Cal.4th 737 (*Frazer*), held that section 803(g) did not violate ex post facto principles even though it extended *and* revived the statute of limitations. (*Id*. at p. 763.) In that case, "[t]he fixed limitations period in existence when the crime occurred had run before the complaint was filed, and before section 803(g) became effective." (*Id.* at p. 742.)

The defendant in *Frazer* argued that "section 803(g) impermissibly deprives him of a ' "defense available according to law at the time when the act was committed" ' [because] when the crime allegedly occurred, section 800 provided immunity from prosecution in the event prosecution did not commence within six years of the charged crime," and therefore the amendment deprived him of a "complete defense to criminal liability and punishment." (*Frazer, supra*, 21 Cal.4th at pp. 759-760.) The court applied the test articulated in *Collins v. Youngblood* (1990) 497 U.S. 37, 42-43. It rejected the defendant's argument, explaining "the ex post facto clause is concerned exclusively with 'the criminal quality *attributable to an act*' as evidenced 'either by the legal definition of the offense or by the nature or amount of the punishment' at the time it occurs. (*Beazell, supra*, 269 U.S. 167, 170 [46 S.Ct. 68, 68-69], italics added.) The primary purpose of the constitutional guarantee is to ensure that the consequences of a particular *course of conduct* can be meaningfully assessed in advance, without fear that the rules of criminality and punishment will later change. (*Weaver v. Graham, supra*, 450 U.S. 24, 28-29 [101 S.Ct. 960, 963-964]; *Marks v. United States, supra*, 430 U.S. 188, 191 [97 S.Ct. 990, 992-993].) For this reason, *Collins* made clear that ex post facto protection extends only to 'defense[s]' bearing on the 'definition' and 'elements' of proscribed *conduct*, or involving 'excuse or justification' for its commission. (497 U.S. 37, 50 [110 S.Ct. 2715, 2723].)

"Application of section 803(g) to defendant's case in no way violates these principles. The section makes no change in the act or intent elements which the

prosecution must prove beyond a reasonable doubt to obtain a conviction under section 288(a), the circumstances which can be used by the defendant to show no lewd touching of an underage child occurred under section 288(a), or the range of state prison sentences available as punishment under section 288(a). Section 803(g) simply provides that where the victim has waited to report a violation of section 288(a) or other enumerated sex crime to a law enforcement agency, and where the limitations period has otherwise expired, there is an additional one-year period in which a criminal complaint may be filed after a qualifying report is made. Section 803(g) regulates the time at which child sexual abuse *defined and punished elsewhere in the Penal Code* may be charged, but it does not impermissibly withdraw a 'defense' as that term of art is used for ex post facto purposes in *Collins, supra*, 497 U.S. 37, 50 [110 S.Ct. 2715, 2723]." (*Frazer, supra,* 21 Cal.4th at p. 760, fn. omitted.)

Appellant nevertheless contends that, after the decision in *Carmell v. Texas* (2000) 529 U.S. 513 (*Carmell*), the decision in *Frazer* is no longer a correct and binding interpretation of the applicable federal constitutional law. In *Carmell*, *supra*, the Supreme Court held that a state statute changing the quantum of evidence necessary *to sustain a conviction* violated the ex post facto clause. (*Id*. at p. 530.) The Texas statute at issue in *Carmell* was enacted after the offense was committed and permitted convictions for child sexual assaults based on the victim's testimony alone. The earlier statute, also known as an "outcry statute" provided that the victim's testimony would not support a conviction unless (1) the victim's testimony was corroborated by other evidence, or (2) the victim informed another person of the offense within six months of its occurrence. (*Id. at* p. 517.) The court clarified it did not intend in *Collins*, by focusing its analysis on three categories of laws which violate the ex post facto clause, to eliminate a *fourth* category of laws which alter " 'legal rules of evidence, and receive[] less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*.' " (*Id*. at p. 551.) "A law reducing the quantum of evidence required *to convict an offender* is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense,

or lowering the burden of proof [citation]. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption." (*Id*. at p. 532.)

To the extent that appellant argues that the California Supreme Court in *Frazer,* "misread" *Collins v. Youngblood*, *supra*, 497 U.S. 37 as excluding this fourth category of laws,[3] the argument is misdirected because as a court of intermediate appellate jurisdiction we are nevertheless bound to follow the decisions of our Supreme Court. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) In any event, the question whether section 803(g) fell into this fourth category was simply not addressed in *Frazer*, because the defendant argued instead that section 803(g) deprived him of a defense that was available at the time he committed the offense. Nothing in *Carmell* undermines the analysis in *Collins*, and relied upon in *Frazer*, holding that a law violates ex post facto protection only if the defense relates to "the elements of the crime . . . or . . . excuse or justification for the conduct underlying the charge," and that section 803(g) did not fall into that category. (*Collins v. Youngblood*, *supra*, 497 U.S. at p. 50; *Frazer, supra,* 21 Cal.4th at p. 757.)

Nor are we persuaded by appellant's contention that section 803(g) falls into the fourth category of laws. Appellant argues that section 803(g) falls into this category because it allows him to be convicted based upon evidence of offenses committed between June 1, 1988, and July 2, 1992, whereas before the enactment of section 803(g) the prosecution, based upon this same evidence, would have been barred. The court in

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3. In *Collins*, the court reiterated the formulation in *Calder v. Bull* (1798) 3 U.S. 386 and *Beazell v. Ohio* (1925) 269 U.S. 167 listing the categories of laws that implicate ex post facto protection: " '1st. Every law that makes an action done before the passing of the law and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender*.' " (*Collins v. Youngblood, supra,* 397 U.S. at p. 42, quoting *Calder*, italics in *Calder*, *supra*, 3 U.S. at p. 390.)

Carmell emphasized that "[t]he relevant question is whether the law affects the quantum of evidence required *to convict.*" (*Carmell, supra*, 529 U.S. at pp. 522, 551.) The statute in *Carmell* fell into that category because it eliminated the requirement that, in order *to prove that the defendant committed the offense*: (a) the victim's testimony be corroborated, and (b) that the prosecution prove that the victim, within six months, reported the offense to another person. The new law thereby lessened the prosecution's burden in proving the elements of the offense and changed the quantum of evidence required "*to convict*."

By contrast, section 803(g) does not change the definition of an offense, nor does it change or eliminate an excuse or justification for its commission, or reduce the burden of proof with respect to establishing the elements of the offense. (*Frazer, supra,* 21 Cal.4th 737, 759-769, 760, fn. 22.) It merely "regulates the time at which child sexual abuse *defined and punished elsewhere in the Penal Code* may be charged." (*Id*. at p. 760.) "Statutes governing the time at which a future criminal action may be filed are not enactments on which defendants may reasonably rely in deciding whether to commit an act otherwise defined as criminal and subject to punishment under the law in existence at the time." (*Id.* at p. 771.) The change in the statute of limitations therefore has no impact upon the quantum of evidence necessary to establish appellant's guilt of the offenses with which he is charged. Its only effect, in appellant's case, is to extend the limitations period, subject to various conditions including that the prosecution submit corroborating evidence. We conclude that section 803(g) does not fall into the fourth category of laws, which the *Carmell* court reaffirmed may also violate the ex post facto clause.[4]

4. We also note that our Supreme Court in *Frazer* was aware of the issue that was pending in *Carmell* and distinguished it on the ground that "[t]he 'outcry statute' at issue in *Carmell*—unlike section 803(g)—does not appear to operate as a statute of limitations governing the time at which criminal charges may be filed." (*Frazer, supra*, 21 Cal.4th at p. 755, fn. 16.)

II.

Instructions on the Statute of Limitations

Appellant next challenges several aspects of the instructions given concerning the statute of limitations.[5]

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5. The full text of the challenged instruction was as follows: "As to Counts 1 through 23, it is alleged that the criminal complaint in this case was filed pursuant to Penal Code section 803 (g) which permits the filing of a criminal complaint within one year of the date a report to a California law enforcement agency by a person of any age alleging that she, while under the age of 18 years, was the victim of crimes described in the Information. If you find the defendant guilty of any count, as to that count, you must determine whether or not the truth of this allegation has been proved.

"In order to find the filing of a complaint pursuant to Penal Code section 803 (g) each of the following must be proved by the People;

"(1) A criminal complaint was filed within one year of reporting of the allegations of molest to a California law enforcement agency.

"(2) The limitation period specified in Penal Code section 800 or 801 had expired.

"(3) The crimes alleged involve substantial sexual conduct. 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or offender by the penis of the other or by any foreign object, oral copulation, or mutual masturbation.

"(4) There is independent evidence that clearly and convincingly corroborates the victim's allegation, to wit: another individual has alleged that she too was a victim of sexual molestation by the defendant. Clear and convincing evidence of the corroboration means evidence that is clear, explicit, and unequivocal and of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence. You should consider all of the evidence bearing upon every issue regardless of who produced it.

"The limitation period contained in Penal Code section 800 is defined as a prosecution commencing within six years after the commission of the offense. As to Penal Code section 288 (c) (1), a lesser to Count XVIII, the limitation period contained in Penal Code section 801 is three years. A prosecution is commenced when a complaint is filed or an arrest warrant is issued.

"The People have the burden of proving the truth each of the elements of the allegation pursuant to Penal Code section 803 (g) by a preponderance of the evidence except as to the corroboration element found in item number 4 which requires clear and convincing evidence.

"Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find

First, he argues that by instructing the jury that the burdens of proof applicable to the statute of limitations allegations were preponderance of the evidence, and, as to the corroboration requirement, clear and convincing evidence, he was deprived of his federal due process and Sixth Amendment right to have the jury determine his guilt beyond a reasonable doubt. It is well established that the federal Constitution guarantees a criminal defendant the right to a jury determination that he is guilty of every element of a charged offense beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477; *United States v. Gaudin* (1995) 515 U.S. 506, 510; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *In re Winship* (1970) 397 U.S. 358, 364.) In *Apprendi* the court also held that the federal Constitution guarantees a criminal defendant the right to have the jury determine, beyond a reasonable doubt, any fact, other than a prior conviction, that increases the maximum penalty. (*Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 476, 490.)[6] Neither federal constitutional right is violated by instructing the jury to apply the lesser preponderance of the evidence standard with respect to facts necessary to establish that the prosecution was commenced within the statute of limitations because "the statute of limitations is not an 'element' of the offense," nor is it a defense involving excuse or justification for its commission. (*Frazer, supra,* 21 Cal.4th at pp. 760-761 & fn. 22.) Nor is it a fact that increases the maximum penalty for the offense. Appellant cites no

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that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

"You should consider all of the evidence bearing upon every issue regardless of who produced it.

"If you find the People have not proved the truth of this allegation by a preponderance of the evidence, you must find the allegation not true."

6. The United States Supreme Court recently reaffirmed in *Ring v. Arizona* (2002) __U.S.___; 122 S.Ct 2428, the principle that any *fact that is necessary to increase the authorized penalty,* whether characterized as an element, or sentencing factor, must be found by a jury beyond a reasonable doubt. It applied this principle to find unconstitutional an Arizona state sentencing scheme which provided that a death sentence could not be imposed unless at least one aggravating factor is found to exist, yet permitted a judge to make the necessary factual finding.

federal cases holding that the Constitution requires that facts necessary to establish the prosecution commenced within the applicable limitations period be proven beyond a reasonable doubt. The California courts, including our Supreme Court, have consistently held that the preponderance of evidence standard of proof applies, and we conclude this established precedent is consistent with the federal constitutional protections in *Apprendi v. New Jersey, supra,* 530 U.S. 466 and *In re Winship*, *supra,* 397 U.S. 358, 364. (See, *e.g., People v. Zamora* (1976) 18 Cal.3d 538, 565, fn. 27; *People v. Le* (2000) 82 Cal.App.4th 1352, 1360; *People v. Angel* (1999) 70 Cal.App.4th. 1141, 1146-1147.)

Second, appellant argues that BAJI No 2.62, defining "clear and convincing evidence" as it applied to the corroboration element, diluted this standard of proof because the court failed to modify it, sua sponte, to state that "clear and convincing evidence" means evidence "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." This court considered and rejected a nearly identical claim of error in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128 (*Weeks*). In that case, we concluded that the court did not err in denying a request to modify BAJI No. 2.62 to include language that " 'the evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind.' " We acknowledged that BAJI No. 2.62 had "been criticized as an overabbreviation of" language in *In re Angelia P*. (1981) 28 Cal.3d 908, 919. (*Weeks, supra,* at p. 1165.) We, however, also noted that the same court that had criticized BAJI No. 2.62, "recently revisited the point as part of a thoughtful discussion in *Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820 [60 Cal.Rptr.2d 780]. It concluded that cases such as *In re Angelia P.* do not require the proposed modification, and that absent some additional mandate from the Supreme Court or the Legislature, BAJI No. 2.62 remains a correct instruction. (*Mattco Forge, Inc. v. Arthur Young & Co., supra*, 52 Cal.App.4th at pp. 847-850; and see also *Roberts v. Ford Aerospace & Communications Corp., supra*, 224 Cal.App.3d at p. 804.) We agree." (*Weeks, supra,* 63 Cal.App.4th 1128, 1165.) Nor should the

standard of clear and convincing evidence be defined any differently in criminal cases. (*People v. Mabini* (2001) 92 Cal.App.4th 654, 660.)

Third, appellant contends that by instructing the jury that the prosecution was required to prove that "[t]here is independent evidence that clearly and convincingly corroborates the victim or victim's allegation, to wit: another witness or individual has alleged that she too was the victim of sexual molestation by the defendant," the court directed the jury to find the corroboration allegation to be true. (See, *e.g., People v. Figueroa* (1986) 41 Cal.3d 714, 724; *People v. Nava* (1989) 207 Cal.App.3d 1490, 1498.) To the contrary, the instruction merely identified the evidence of corroboration upon which the prosecution relied, and clearly informed the jury that the prosecution was required to *prove* the corroboration. The specification of the evidence relied upon as corroboration is a common practice, and operates only to pinpoint the evidence relevant to corroboration. (See *People v. Mabini*, *supra*, 92 Cal.App.4th 654, 658 [jury instructed that the prosecution must prove that " '[t]here is independent evidence in this case *by Kayla C.* that clearly and convincingly corroborates the victim's allegation . . .' "].)

III.

Expert Testimony on Child Sexual Abuse Accommodation

Dr. Michael Grogan, testified for the prosecution regarding Child Sexual Abuse Accommodation Syndrome (CSAAS) for the limited and proper purpose of dispelling common misconceptions regarding how victims of sexual abuse react, and explaining conduct that may appear inconsistent with the victim's allegation of abuse such as delay in reporting and continuing contact with the abuser. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300-1301; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1745; *People v. Housley* (1992) 6 Cal.App.4th 947, 955.) Appellant objected, however, when Grogan testified: "A child is more likely to be molested by a family member than by a stranger," on the ground that it was "outside the scope." Appellant argues that the court abused its discretion in overruling the objection because this testimony was the equivalent of offering a profile of the typical child molester, showing appellant fit the profile, and

inviting the jury to infer he was statistically more likely to be guilty because he was related to the victims.

The only California case appellant relies upon, *People v. Robbie* (2001) 92 Cal.App.4th 1075, is distinguishable. In *Robbie*, the court reversed a defendant's conviction for sex-related offenses because the trial court admitted expert testimony regarding a profile of typical behavior of a rapist towards the victim. The prosecutor then incorporated the victim's description of the defendant's conduct into hypothetical questions and asked whether it fit the pattern. The expert responded that the defendant's conduct was "the 'most prevalent type of behavior that I've seen with sex offenders.' " (*Id.* at p. 1084.) The court held it was an abuse of discretion to admit this evidence because it was clearly offered, and used, to prove the defendant's guilt by the following syllogistic reasoning: "[C]riminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion." (*Id.* at p. 1085.)

By contrast, here, the expert did not offer such a "profile" of the typical child molester, or express any opinion on whether appellant's behavior was consistent with such a profile. In fact, when the prosecutor asked, "have you found there is such a thing as a typical child molester?" the court sustained appellant's objection, as it did when the prosecutor began to pose a hypothetical involving a "perpetrator [who] is a trusted adult member of the family." The single reference by the expert to the fact that child molesters are commonly related to their victims was offered instead for the proper purpose of dispelling a common misconception that child molesters are strangers. Appellant himself relied upon this misconception in his defense by offering testimony by other relatives that he was a "loving uncle," and behaved as such with his child relatives, and presenting other character witnesses in support of his defense that he did not have character "traits ordinarily involved in the commission" of the charged offenses. In reliance upon these character witnesses, appellant's counsel argued that appellant could not be a child molester because he was "an honest simple man . . . good with kids," that his relatives trusted him with their children, and there were no complaints from other victims.

Under similar circumstances, the court in *People v. McAlpin, supra,* 53 Cal.3d 1289, 1302-1303, held it was not an abuse of discretion to allow an expert to testify that there is no typical profile of a child molester: " 'The layperson imagines the child offender to be a *stranger*, an old man, insane or retarded, alcohol or drug addicted, sexually frustrated and impotent or sexually jaded, and looking for "kicks." He is "gay" and recruiting little boys into homosexuality . . . . These are popular notions appealing in their simplicity . . . and they offer the advantage of making the child offender as different and unlike the ordinary person—ourselves, our parents, our children, our relatives, friends, and teachers—as possible.' (Groth, *Patterns of Sexual Assault Against Children and Adolescents*, in Sexual Assault of Children and Adolescents (Burgess et al. edits. 1978) pp. 3-4 [hereafter Groth]; accord, Cerkovnik, *The Sexual Abuse of Children: Myths, Research, and Policy Implications* (1985) 89 Dick. L. Rev. 691, 692-694.) [¶] This stereotype, however, is false. The same studies report that *in most cases the child molester is not in fact a stranger to his victim*, is not an old man, is not an alcoholic, is not mentally retarded, and is not homosexual." (Italics added, fns. omitted.) Similarly, here the court did not abuse its discretion by allowing the expert to testify that child molesters are commonly related to the victims, to dispel the common misconception that only a stranger could commit such acts.

In any event, there is no possibility that the jury would have considered this testimony for the improper purpose of concluding that appellant must have committed the offense simply because he was related to the victims, because the trial court repeatedly instructed the jury regarding the limited purpose for which it was admitted, and that it could not be considered as evidence that victim's allegations were true. The expert himself agreed that he had "no idea" whether the victims were telling the truth.

Appellant also contends that even if the CSAAS testimony were otherwise admissible, section 803(g)(2)(B) requires that "there is independent evidence that clearly and convincingly corroborates the victim's allegation," and that "[i]ndependent evidence does not include the opinions of mental health professionals." He suggests CSAAS evidence should not have been admitted because of the risk that the jury might rely upon

the opinion of the mental health professional as independent evidence of the alleged corroboration. The possibility the jury would consider CSAAS evidence for a purpose other than that for which it is properly admitted is not a basis for excluding it although the court could, in its discretion, address the concern with yet another limiting instruction. (Cf. *People v. Yovanov* (1999) 69 Cal.App.4th 392, 407.) We find, however, that the limiting instructions given, after the expert testified, and again after closing argument, were sufficient to avoid the possibility that the jury would rely upon the CSAAS testimony as "independent evidence" of the alleged corroboration. The instructions identified the corroboration the prosecution relied upon with respect to each victim to be the allegations of the other that appellant had committed similar acts against her. Dr. Grogan offered no opinion on the question whether any of the acts the victims alleged had actually occurred, and specifically testified that he had "no idea" whether the victims were telling the truth. The jury was also instructed that they could not rely upon the CSAAS testimony as "proof that the alleged victim's molestations and/or rape claims are true." Since the "corroboration" of each victim consisted of the other's allegations of similar acts, and the jury was clearly and repeatedly instructed that it could not rely upon the CSAAS testimony as proof that their allegations were true, there was no possibility, under the instructions given, that the jury would consider the CSAAS testimony as independent evidence clearly and convincingly establishing the alleged corroboration.

In sum, the court properly admitted all of the CSAAS testimony and carefully circumscribed the purposes for which the jury could consider it.

IV.

Instructions on Use of Evidence of Uncharged Offenses

At trial the prosecutor introduced evidence of some uncharged offenses that appellant had committed against the victims, in addition to the charged conduct. The court gave the 1999 revision of CALJIC No. 2.50.01, which, among other things, informed the jury that it need only find by a preponderance of the evidence that the *uncharged* conduct occurred, before drawing the permissive inference that he has the disposition to commit the same or similar offenses, or drawing the additional permissive

inference that he was likely to and did commit the charged offense. The instruction also cautioned the jury "if you find by a preponderance of the evidence that the defendant committed a prior sexual offense or offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes."

This court has upheld this version of CALJIC No. 2.50.01 against arguments that it is likely to mislead the jury regarding the applicable burden of proof on the ultimate issue of guilt, or be understood as permitting the jury to convict based solely upon a finding that the defendant committed the uncharged misconduct. (*People v. Hill* (2001) 86 Cal.App.4th 273, 276-279.)[7] Appellant nevertheless contends, here, the 1999 revision of CALJIC No. 2.50.01 was misleading because the jury might construe it as permitting it to find the *corroboration* required by section 803(g)(2)(B) by a preponderance of the evidence " . . rather than *independent* evidence that *clearly* and *convincingly*" corroborated the victim's allegation.

We find no reasonable likelihood that the jury could be so misled under the instructions as a whole. The instructions explained that the burden of preponderance of evidence applies to a "sexual offense *other than those for which he is now on trial,*" (italics added) and that *guilt* of the *charged* offenses must be proved beyond a reasonable doubt. The instructions on the statute of limitations allegations informed the jury that *if* it found appellant *"guilty of any count,"* it must also determine the truth of the allegation pursuant to section 803(g). The instructions identified the corroboration the prosecution was relying on in this case as the allegation of the other that "she too was the victim of sexual molestation by the defendant,"[8] most of which was *charged* conduct. The jury

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7. Our Supreme Court has granted review in *People v. Reliford* on February 13, 2002, S103084, formerly published at 93 Cal.App.4th 973, to decide whether the 1999 revision of CALJIC No. 2.50.01 correctly describes the inferences that may be drawn from prior uncharged sexual acts, and the burden of proof applicable to uncharged sexual acts, or may mislead the jury concerning the burden to prove guilt beyond a reasonable doubt.

8. In closing argument appellant's counsel underscored that, "in this particular case the District Attorney has chosen to allege . . . that the corroboration is that one

was further explicitly instructed that "[t]he People have the burden of proving the truth of each of the elements of *this allegation* by a preponderance of the evidence, *except as to the corroboration element . . . which requires clear and convincing evidence*." (Italics added.) Thus, a reasonable jury would, under these instructions, have concluded that the preponderance of evidence standard set forth in CALJIC No. 2.50.01 applied only to the question whether the uncharged conduct occurred and, with respect to the statute of limitations, would have followed the specific instruction that all the elements of the statute of limitations allegations must be proved by a preponderance of the evidence, *except* the alleged corroboration, which it was informed must be proved by clear and convincing evidence.

V.

Ineffective Assistance of Counsel

Appellant next contends that he received ineffective assistance of counsel with respect to his decision to reject a plea bargain that would have required him to plead guilty to two counts of rape and be sentenced to three years in prison. He asserts that his counsel incorrectly calculated his maximum exposure to be in the "mid 20s," yet his actual exposure was to over a hundred years, and the sentence he ultimately received was an aggregate term of 45 years. He further asserts that, when the plea was offered, his counsel advised him that his maximum exposure was in the mid-20 range, that he based his decision to reject the plea upon her incorrect advice, and that if he had been correctly advised, he would have accepted the plea. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 928, 933-938.)

Although appellant cites various points in the record where his counsel or the court stated that his exposure was in the mid-20 range, the specific advice counsel gave regarding the plea is not part of the record on appeal, nor does the record contain any statement by appellant that he would have accepted the plea bargain had he been

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women's testimony corroborates the other woman. So you can't use anything else for corroboration."

correctly advised regarding the maximum prison sentence. The only record we do have concerning the plea bargain is the transcript of a hearing on appellant's *Marsden* motion, which suggests that he was adamantly opposed to accepting the plea bargain and rejected it *against his counsel's advice* that it was a good offer, and her advice that he risked imprisonment "*for a substantial period of his life, if not all of the rest of his life.*" (*In re Alvernaz, supra,* 2 Cal.4th 924, 938 [factors relevant to determination whether appellant would have accepted a plea bargain include the advice actually given by counsel, and objective corroborating evidence of appellant's assertion that had he been correctly advised he would have accepted the offer including evidence that the defendant was amenable to a plea bargain].) We conclude that the record on appeal is simply inadequate to support the claim of ineffective assistance of counsel. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.)

VI.

Substantial Evidence

Appellant next contends that all of his convictions for violating section 261, subdivision (2) and his conviction for violating section 289, subdivision (a) must be reversed because there was insufficient evidence of the element of force, violence or fear, or, as to the post 1991 forcible rape convictions[9] and the section 289, subdivision (a) conviction, there was insufficient evidence of force, violence, fear, duress or menace.[10]

Resolving all conflicts and drawing all inferences in favor of the judgment, we conclude that, at a minimum, the record contains substantial evidence as to the element of fear with respect to all of the challenged convictions. "[T]he element of fear of immediate and unlawful bodily injury has two components, one subjective and one

9. Effective January 1, 1991, the "force or fear" element was expanded to include duress, and menace. (Stats. 1990, ch. 630, § 1, p. 3096.) The jury was correctly instructed on the different definitions and the dates of offenses to which they applied.

10. Appellant's contention, that his conviction for violating section 288.5 between July 2, 1989 and July 1, 1992 must also be reversed for the same reason, is meritless because the use of force, violence, or fear was not then, and is not now, a required element of that offense. (Stats. 1989, ch. 1402, § 4, p. 6140; *People v. Vasquez* (1996) 51 Cal.App.4th 1277, 1287.)

objective. The subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will. In order to satisfy this component, the extent or seriousness of the injury feared is immaterial. (See *People v. Harris* (1951) 108 Cal.App.2d 84, 89, cited with approval in *Barnes, supra*, 42 Cal.3d at p. 304 ["[t]he kind of physical force that may induce fear in the mind of a woman is immaterial . . . *it may consist in the taking of indecent liberties or of embracing and kissing her against her will*"].) [¶] In addition, the prosecution must satisfy the objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it. (See *Barnes, supra*, 42 Cal.3d at p. 304, & fn. 20.) The particular means by which fear is imparted is not an element of rape. (Cf. *In re Michael L*. (1985) 39 Cal.3d 81, 88 [robbery].)" (*People v. Iniguez* (1994) 7 Cal.4th 847, 856-857.)

Nancy testified that although appellant never struck her, or explicitly threatened to hurt her, she was frightened of him. She believed she had to do what he told her. She also testified that he told her, when she was nine, that he killed someone, and she believed him, and she also believed he would be willing to kill her. He was very strict with her, and would always tell her parents if she did not do what he wanted her to do. He also told her, when she threatened to tell her parents about an incident of sexual molestation, that her parents liked him, that no one would believe her, and that everyone would think she was the worst thing in the world. She was nine years old when he told her about killing someone, and eleven when he first raped her, but most of the charged acts occurred when she was fifteen, and staying with her grandmother while her parents went on a trip to El Salvador. In nearly every sexual assault she described, appellant took advantage of a moment when they were alone, to fondle her, disrobe her against her will, and pick her up or hold her to position her for sexual intercourse. He placed her on his lap in a chair in the kitchen, and inserted his penis into her vagina three times while she kept squirming off, saying, "I want to get off," and warning him that her grandmother

might come in. On two other occasions, he did the same thing while sitting on a chair and once on the kitchen table.

Adela testified that her uncle started molesting her at age nine. She had to do what he told her to do because he was her uncle. She would "freeze" when he touched her. She was nine when the molestation began and eleven when he first had sexual intercourse with her. When he had intercourse with her, she would try to push him off saying it hurt. He would continue, but eventually stopped. While he was having intercourse she was scared to protest, and thought if she "said something he would slap me or something." Although he had never hit her before, she knew he had a quick temper and was "always scared of him."

This evidence is more than sufficient to establish not only that Nancy and Adela subjectively feared appellant, but that their fear was objectively reasonable in light of the disparity in size and age, and his occupation of a position of authority over them. It also supports the inference that even if their fear was unreasonable, appellant knew they were afraid and took advantage of it. He had the power to indirectly discipline Nancy by reporting to her parents when she misbehaved, and Adela had seen appellant lose his temper, and was afraid that he might slap her if she protested his actions. Appellant's reliance upon other more equivocal testimony, such as Nancy's statement that she did not know what she felt for him, love, hatred, or fear, is unavailing because as the court explained in *Iniguez, supra*, fear may be inferred from the circumstances "despite even superficially contrary testimony of the victim." (*People v. Iniguez, supra,* 7 Cal.4th at p. 857.) Nor is it necessary to show that the defendant did anything to suggest that he intended to injure the victim if a basis for the victim's fear may be inferred from the circumstances. (*Id.* at p. 858.) The court in *Iniguez*, *supra*, observed that, "[s]udden, unconsented-to groping, disrobing, and ensuing sexual intercourse while one appears to lie sleeping is an appalling and intolerable invasion of one's personal autonomy that, in and of itself, would reasonably cause one to react with fear." (*Id.* at p. 858.) Similarly, here, although Adela and Nancy were not asleep when these attacks occurred, and appellant was not a stranger, he occupied a position of authority and was an adult,

whereas they were children. He would seize moments when they were alone to suddenly sexually grope, disrobe, and have intercourse with them, even while their grandmother was near, and they would otherwise expect to be secure. Merely touching her sexually caused Adela to "freeze" in fear. It is also inferable that he knew both girls believed they had to obey him, and he actively reinforced their belief that they would be shamed, if discovered, to deprive them of the protection and security they might otherwise have gained by crying out. All of these circumstances support the conclusion that he overcame their will by means of fear.

In view of our determination that there is substantial evidence of fear, it is unnecessary to address whether there was also substantial evidence of force or, as to the post 1991 offenses, duress or menace.

VII.

Failure to Instruct on Unlawful Intercourse as Lesser Included Offense of Rape

Appellant also asserts that the court had a sua sponte duty to instruct on unlawful sexual intercourse (former § 261.5 [Stats. 1970, ch. 1301, § 2, p. 2406]) and incest (§ 285) as lesser included offense of rape (§ 261, former subd. (2), now subd. (a)(2) [Stats. 1986, ch. 1299, § 1, Stats. 1990, ch. 630, § 1].) Appellant acknowledges that, under the statutory elements test, unlawful intercourse was not a lesser included offense of rape. (See, e.g., *People v. Montero* (1986) 185 Cal.App.3d 415, 433; *People v. Gutierrez* (1982) 137 Cal.App.3d 542, 548.) Nor, under the statutory elements test, is incest a lesser included offense of rape, because the crime of rape can be committed against a related or unrelated victim whereas incest may only be committed against a related victim. (See *People v. Jarrett* (1970) 6 Cal.App.3d 737, 739-740 & fn. 1.) His contention that the facts at trial established the necessary relationship between him and Adela M. is irrelevant because even under the accusatory pleading test, it is the facts *alleged*, not the evidence adduced at trial, that determine whether an offense is necessarily included. (See *People v. Ortega* (1998) 19 Cal.4th 686, 698.)

In any event, the trial court has no sua sponte duty to instruct the jury on a time-barred lesser included offense unless the defendant waives the statute of limitations.

(*Cowan v. Superior Court* (1996) 14 Cal.4th 367, 376; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 374.) Appellant was charged with multiple counts of rape committed between March 1, 1989, and July 1, 1992. The applicable statute of limitations for incest and unlawful sexual intercourse was three years (§§ 803, 805) and for the purpose of these asserted lesser included offenses, the prosecution commenced, at the earliest, upon issuance of the arrest warrant on November 20, 1998. (§ 804; see *People v. Yovanov, supra*, 69 Cal.App.4th 401-402.) Appellant did not waive the statute of limitations, and therefore, the court had no duty to instruct on these time-barred offenses.

VIII.

Multiple Convictions for Violating Section 288.5 and Other Offenses Committed in the Same Period

With respect to Adela, appellant was charged with, and convicted of, one count of continuous sexual abuse of a child between July 2, 1989, and July 1, 1992, in violation of section 288.5. Appellant was also convicted of 10 counts of other felony sex offenses committed against Adela occurring within the same time period. The court sentenced him to 21 years on the four counts of rape, to be served consecutively to the 24 years it had already imposed for the offenses against Nancy, and imposed concurrent sentences with respect to the other six felony offenses committed against Adela during the same period as the section 288.5 count. The court also sentenced appellant to the lower term of six years on the section 288.5 count, but stayed execution of the sentence.

Section 288.5, subdivision (c) provides that: "No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." The Legislature's stated intention when it enacted section 288.5 was, "to provide *additional* protection for children subjected to continuing sexual abuse and *certain* punishment . . . ." (Stats. 1989, ch. 1402, § 1, p. 6138, italics added.)

In *People v. Johnson* (2002) 28 Cal.4th 240 the defendant was convicted of one count of continuous sexual abuse pursuant to section 288.5, and five counts of other

specific sexual offenses involving the same victim, and occurring in the same period. The trial court sentenced the defendant to the maximum penalty of 16 years for the continuous sexual abuse count, and stayed sentences on the five counts of other specific sexual offenses. Our Supreme Court disapproved the decision in *People v. Valdez* (1994) 23 Cal.App.4th 46, which had interpreted section 288.5 to allow conviction for both continuous sexual abuse, and the specific sex offenses alleged to have occurred in the same period, so long as the court, pursuant to section 654, stays the sentences on the lesser of the alternative offenses. (*Id.* at p. 49.) Instead, the court held that section 288.5, subdivision (c), precludes multiple *convictions*, for the alternative offenses of continuous sexual abuse, and of specific felony sex offenses against the same victim, alleged to have occurred in the same time period. (*Id.* at pp. 245-248.) Accordingly, it affirmed the decision of the Court of Appeal vacating the convictions on the individual counts. (*Id.* at p. 248.)

The pleading in this case failed to allege the continuous sexual abuse count, and the 10 specific counts alleged to have occurred in the same period in the alternative. Therefore, appellant cannot stand convicted of both. (*People v. Johnson*, *supra*, 28 Cal.4th 240, 245, 248.) The question remains, however, *which* convictions should be vacated?

Appellant contends that the decision in *People v. Johnson, supra*, 28 Cal.4th 240 requires that whenever multiple convictions are obtained in violation of section 288.5, subdivision (c), only the conviction for continuous sexual abuse may stand, and the convictions on the specific counts must be vacated. He concludes that we must vacate the 10 specific counts, and lift the stay of the 6-year sentence the court imposed on the section 288.5 count.

The *Johnson* court held only that when multiple convictions are obtained in violation of section 288.5, subdivision (c) "*either* the continuous abuse conviction *or* the convictions on the specific offenses must be vacated." (*Id.* at p. 245, italics added.) Although the court affirmed the decision of the Court of Appeal vacating the specific counts, the parties in Johnson had *agreed* during oral argument before the Court of

Appeal that, if multiple convictions were improper, the appropriate disposition was to vacate the convictions on the specific counts. (See *People v. Johnson*, formerly published at 88 Cal.App.4th 539, 548, fn. 3.) Neither court therefore was ever called upon to decide *which* of the alternative convictions should be reversed. Hence, the above-quoted language from the Supreme Court's opinion requires nothing more than vacation of *either* the continuous sexual abuse conviction *or* the convictions on the specific sexual offenses. (*Id.* at p. 245.)

Relying on the rule that when multiple convictions are precluded because one offense is necessarily included in the other, the remedy is to reverse the conviction on the lesser included offense, appellant asserts that only the section 288.5 conviction should stand. (See *People v. Pearson* (1986) 42 Cal.3d 351, 355.) This rule is inapplicable here because, although some of the same acts may underlie the continuous sexual abuse conviction and the specific sex offenses, the specific counts are not lesser included offenses of a violation of section 288.5. (See *People v. Valdez*, *supra*, 23 Cal.App.4th 46, 47-48, disapproved on other grounds in *People v. Johnson* 28 Cal.4th 240, 248, fn. 6; see also *People v. Avina* (1993) 14 Cal.App.4th. 1303.) Appellant also suggests that we must vacate the convictions for specific sex offenses because section 288.5 is a special statute, whereas his convictions of other specific felony sex offenses are pursuant to more general statutes. In *People v. Hord* (1993) 15 Cal.App.4th 711, 720-721, the court specifically rejected the contention that section 288.5 is a special statute that precludes prosecution for other generally applicable sexual offenses. Moreover, in *People v. Johnson*, *supra*, the court was careful to note that nothing in its opinion was inconsistent with the analysis in *People v. Hord*, *supra*, 15 Cal.App.4th 711, because it held only that "the alternative pleading requirement of section 288.5, subdivision (c) is a specific statute *as against section 954's general authorization for pleading multiple offenses*." (*Id.* at pp. 246-247, fn. 5, italics added.) Nor, by analogy to the 654 context, is it necessarily the case that the section 288.5 offense must stand on the ground that it will always subject the defendant to a greater maximum penalty than the alternative specific offenses. When enacting section 288.5, the Legislature declared its intent that "the penalty for this crime

shall be greater than the maximum penalty under existing law for any *single* felony sex offense." (Stats. 1989, ch. 1402, § 1, italics added.) However, because section 288.5, subdivision (c) defines the alternative offenses to be either *one* count of violating 288.5, or *any number* of specific sex offenses alleged to have occurred in the same period, the relevant comparison is between the penalty for violating section 288.5, and the *aggregate* maximum penalty for the specific counts.[11] Thus, the determination of which of the alternative offenses is the more serious would depend on the number, and type, of specific offenses.

Since section 288.5, subdivision (c) is the source of this statutory proscription against multiple convictions, it is appropriate to examine the legislative intent underlying section 288.5, in determining what the appropriate remedy is in this case. The intent of the Legislature in enacting section 288.5, was "to provide *additional* protection for children subjected to continuing sexual abuse and certain punishment." (Stats 1989, ch. 1402, § 1, p. 6318, italics added.) The primary purpose of the Legislature in enacting section 288.5 was to evade the then-existing unanimity requirement established in *People v. Van Hoek* (1988) 200 Cal.App.3d 811, disapproved in *People v. Jones* (1990) 51 Cal.3d 294, 322, which often had the effect of defeating the prosecution of offenders who committed repeated acts of sexual abuse against children over an extended period of time, by defining the section 288.5 offense in terms of a "course of conduct." However, consistent with its intent that this newly defined offense provide "*additional* protection" the Legislature also clearly provided in section 288.5, subdivision (c) that the prosecutor was not precluded from *also* charging a defendant with other felony sex offenses. Thus, the prosecutor may allege offenses that occur outside the period alleged in the section 288.5 count (*People v. Hord, supra,* 15 Cal.App.4th 711, 720) and the prosecutor need not allege more than the minimum three-month period in connection with a section

11. We also note that, in cases where the One Strike Law applies to one of the specific counts, the maximum sentence on even one specific count may exceed the maximum penalty for the section 288.5 violation because continuous sexual abuse is not one of the enumerated offenses under the "One Strike Law." (§ 667.61, subd. (c); *People v. Palmer* (2001) 86 Cal.App.4th 440, 443.)

288.5 charge even if the abuse continued for a longer period. (*People v. Cortes* (1999) 71 Cal.App.4th 62, 77.) In *People v. Cortes* the court explained that one of the reasons why it would not construe section 288.5, subdivision (c) as requiring the prosecution to allege the entire period during which the defendant engaged in repeated acts of sexual abuse, was that " '[a] defendant who . . . continues to perpetrate sexual abuse for a longer period of time than [the minimum] . . . required by section 288.5 is *more* culpable than a defendant who perpetrates the continued abuse for a limited time. [Citation.] It follows that those who prolong periods of continuous abuse should be more, not less, vulnerable to additional convictions in order to ensure that their punishment can be commensurate with their culpability. Indeed, by permitting prosecutors to seek additional convictions for offenses committed outside the alleged period, the Legislature . . . *clearly intended that liability reflect culpability."* (*Id.* at p. 78, italics added.) Finally, the prosecutor even has the discretion to charge the defendant with specific felony offenses occurring *in the same period* as the section 288.5 count, as long as the offenses are alleged in the alternative. (*People v. Johnson, supra,* 28 Cal.App.4th 240, 248.)

Thus, section 288.5, subdivision (c) gives the prosecutor maximum flexibility to allege and prove *not only* a continuous sexual abuse count, but also specific felony offenses commensurate with the defendant's culpability, subject only to the limitation that the defendant may not be *convicted* of both continuous sexual abuse and specific felony sex offenses committed in the same period. It therefore is also appropriate, in deciding which convictions to vacate as the remedy for a violation of the proscription against multiple convictions set forth in section 288.5, subdivision (c) that we leave appellant standing convicted of the alternative offenses that are most commensurate with his culpability. Here, appellant was alleged to have committed, and the prosecution proved, not only the three acts necessary to establish a continuous sexual abuse violation, but also 10 separate felony sex offenses against Adela including four counts of rape.[12]

12. Consistent with section 288.5, subdivision (c) the prosecution could have alleged a much shorter time period in relation to the section 288.5 offense, and thereby obtained convictions not only for the 288.5 offense, but also many of the other felony sex offenses committed against her.

Because of the number and severity of these specific offenses, appellant faced a greater maximum aggregate penalty with respect to these than he did on the continuous sexual abuse offense. The court also imposed a greater aggregate sentence with respect to the specific offenses than on the section 288.5 offense, and stayed execution of sentence on the latter. In these circumstances we conclude the appropriate remedy is to reverse the conviction for violating section 288.5.

Our conclusion that, in the appropriate case we may vacate the section 288.5 conviction when the proscription against multiple convictions in section 288.5, subdivision (c) is violated, is reinforced by the very recent decision in *People v. Alvarez* (2002) 100 Cal.App.4th 1170 (review filed September 9, 2002). In that case, the defendant was charged with a section 288.5 violation and three counts of either lewd acts, or forcible lewd acts, against the same victim in the same time period as the section 288.5 violation. The pleading, however, failed to allege these counts in the alternative. He was also charged with sexual offenses involving another victim. The matter was tried to the court and after the trial concluded, but before the court announced its decision, the court raised the question whether, if it convicted the defendant of the section 288.5 offense, it could also convict him of the specific counts of lewd acts. In response, the prosecutor moved to dismiss the section 288.5 count, and the court convicted and sentenced the defendant on the individual counts of committing lewd acts, which is also one of the enumerated offenses in section 667.61, subdivision (c). On appeal the defendant relied upon *People v. Johnson, supra*, 28 Cal.App.4th 240, in arguing that a violation of its proscription against multiple convictions may be remedied only by vacating, or dismissing the individual specific sex offense counts. The *Alvarez* court explained, as we have, that *People v. Johnson, supra*, did not decide under what circumstances its proscription against multiple convictions "can be achieved by dismissing the continuous sexual abuse account, rather than the specific sexual offenses." (*People v. Alvarez, supra,* 100 Cal.App.4th at p. 1176.) Then, applying an analysis of the legislative purpose of section 288.5 similar to the one we have stated, the court explained that to conclude that the failure to plead these offenses in the alternative compelled the court to convict

only on the section 288.5 offense would be "anomalous" because "section 288.5, adopted to prevent child molesters from evading conviction, could be used by those molesters to circumvent . . . convictions with more severe penalties and prior strike consequences than available . . . under section 288.5." (*Id.* at pp. 1177-1178.) It therefore upheld the decision of the trial court to dismiss the section 288.5 count.

For all of the foregoing reasons, we shall reverse appellant's conviction for violating section 288.5.

CONCLUSION

Appellant's conviction for violating section 288.5 is vacated. In all other respects, the judgment is affirmed.

_____
Stein, J.

We concur:

_____
Marchiano, P. J.

_____
Swager, J.

Trial Court:	Superior Court City and County of San Francisco
Trial Judge:	Honorable Kevin V. Ryan
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