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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>KESH MAHARAJ,<br>Defendant and Appellant. | C066059<br>(Super. Ct. No. MF031926A) |

APPEAL from a judgment of the Superior Court of San Joaquin County, Bernard J. Garber, Judge. Affirmed.

Charles M. Bonneau, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Michael P. Farrell, Assistant Attorneys General, Daniel B. Bernstein and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I through VI.

A jury convicted defendant Kesh Maharaj of multiple counts of lewd and lascivious conduct involving the same victim, a young girl under the age of 14 years. In count one, defendant was convicted of forcible lewd and lascivious act on a child under the age of 14 years (Pen. Code, § 288, subd. (b)).[1] In counts two, three, and four, defendant was convicted of aggravated sexual assault on a child under the age of 14 years (§ 269). In counts five through thirteen, defendant was convicted of lewd and lascivious touching of a child under the age of 14 years (§ 288, subd. (a)). Count fourteen, alleging criminal threat (§ 422), was dismissed upon motion of the People after the jury was unable to agree on the charge. In counts fifteen and sixteen, defendant was convicted of exhibiting harmful material to a minor (§ 288.2, subd. (a)). The trial court sentenced defendant to a determinate term of 33 years and four months in state prison in addition to an indeterminate term of 45 years to life.

On appeal, defendant focuses on counts one through four. Defendant contends (1) the trial court erred in denying his motion to remove a juror who expressed animosity toward defense counsel and fell asleep during the first day of trial, (2) insufficient evidence supports defendant's conviction of aggravated sexual assault as alleged in count four, (3) his due process rights were violated for lack of notice of the conduct

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[1] Undesignated statutory references are to the Penal Code.

for which he was charged in count four, (4) the jury should have been instructed on the lesser included offense of non-forcible lewd act (§ 288, subd. (a)) in addition to the forcible lewd act on a child (§ 288, subd. (b)) charged in count one, (5) the trial court erred in denying his motion for new trial based on newly discovered evidence in the form of testimony by a friend of the victim's mother, (6) the court failed to properly state the reasons for imposing consecutive sentences for counts two through four, and (7) the court erroneously imposed consecutive sentences for his four forcible sex offenses in counts one through four in violation of section 667.6, subdivision (c).

For the following reasons, we affirm the judgment. First, with regard to the juror removal issue, the record supports the trial court's conclusion that the juror did not need to be removed for bias or inability to perform the functions of a juror. Second, there is sufficient evidence to support defendant's conviction of aggravated sexual assault alleged in count four. Third, defendant's claimed lack of notice of the sexual penetration charge in count four also fails because defendant was put on notice of the facts giving rise to count four's allegation through the victim's testimony at the preliminary hearing. Fourth, defendant's contention that the jury should have been instructed on the lesser included offense of non-forcible lewd act in addition to the forcible lewd act charged in count one must be rejected because there is no evidence to support a non-forcible lewd act instruction. Fifth,

the trial court did not err in denying the motion for new trial because defendant failed to demonstrate that the witness was unavailable. Sixth, defendant failed to object to the imposition of consecutive sentences for counts two, three, and four on the grounds that the trial court failed to state the requisite findings. Therefore, this issue has been forfeited. Seventh, the trial court properly imposed consecutive sentences for counts one through four based on the fact that the four counts are included in section 667.6, subdivision (e), requiring mandatory consecutive sentences for each of defendant's four forcible sex offenses.

## FACTUAL AND PROCEDURAL HISTORY

### *Prosecution Evidence*

When J.[2] was 12 years old, defendant regularly picked her up from school and took her to his house in Stockton. Defendant is a distant relative of J.'s mother. J. refers to defendant as "Uncle."

Defendant told J.'s father that she was going to babysit defendant's son. The first time she went to defendant's house, J. "felt weird" and did not want to go back. However, her father made her return.

One day when defendant's son was still at school, defendant lured J. upstairs with the promise of a gift. Once they were

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[2] We refer to the victim as "J." or "the victim" to protect her identity.

inside the bedroom, defendant locked the door, turned on the television, and told J. to lie down on the bed. Defendant pushed her down on the bed, then "laid beside [her] and started dry humping [her], like, on the side." J. recounted that defendant "started, like, humping me on my clothes. Like, I was wearing my clothes on. He had his clothes on, too, but he like . . . [¶] . . . [¶] . . . was going back and forth" with his "private part." When defendant was done, he went to the bathroom and then left to pick up his son.

Defendant molested J. again while she was still 12 years old. As before, defendant enticed J. to the upstairs bedroom with the false promise of a gift. Defendant again "dry humped" her. J. told him that she did not want to do that, and defendant responded: "Oh, come on." He told her "[t]o just do it."

On the next occasion, defendant again promised a gift for J. Once J. entered the bedroom, defendant took off her bra and panties, and held her "like a baby." She protested, but defendant told her: "Just do it." Defendant pushed her onto the bed, pulled her in, and licked her vaginal area. Defendant took off his clothes and laid himself beside her. J. was scared and felt weird. Defendant began "humping [her] with his penis." He then spread her legs while she attempted to keep them together. Defendant penetrated her vagina with his fingers. Defendant's fingers hurt her when he moved them in and out of

her vagina. He then put his penis "a little bit" into her vagina.

Defendant put lubricant onto his penis and on J.'s anus. He told her "that this is going to make [her] like slip and it's not going to hurt . . . ." J. began to cry and defendant said, "Don't cry, it's going to be okay. Don't cry." Defendant positioned J. on her hands and knees and penetrated her anus with his penis. She told him that it hurt, "[i]t hurt bad," and pushed him away. Defendant then got on top of her and ejaculated onto her stomach.

Once J. got home, she took a shower. She saw blood when she had a bowel movement and urinated. Although she told her mother about the bleeding, she did not tell her about being molested because defendant had threatened to kill her and her mother if she told anyone. J. believed defendant would carry out the threat.

When J. was 13 years old, defendant took her to a bedroom with a king-size bed. Defendant removed J.'s clothes and carried her to the bed. He told her to relax and licked her vaginal area.

J. babysat for defendant over the course of approximately six months. "Most of the times" that she babysat, defendant sexually molested her. J. estimated that defendant molested her more than 20 times while she was 12 and 13 years old. When she told him not to do it, he would force her. Every time defendant molested her, he would lock the door to the bedroom. On

occasions when J. did not want to take off her clothes, defendant would threaten her and she would get scared. During the 20 or more times that defendant molested her, he would fondle her breasts, insert his penis into her vagina and anus, ejaculate on her stomach or genitals, and then tell her to "go, like, wash it off." Whenever defendant put his penis into her vagina, J. would try to push him away. Twice, the defendant also inserted his fingers into her vagina. During the molestations, defendant often licked her vaginal area. She was safe from defendant only on the weekends.

Toward the end of the molestations, defendant showed J. a pornographic video in which women were performing oral sex. While watching the video, defendant lay on top of J. and rubbed her breasts and genitals. Defendant told J. "that whatever they are doing on the video, do it like to him." J. said she did not want to do that. Defendant forced her to touch his penis with her hand.

On another occasion, defendant showed J. pornographic magazines in which women were depicted performing oral sex on men. Defendant told her to "do the same thing." She refused.

After the last time J. returned from defendant's house, she returned from the bathroom and told her mother she was bleeding after a bowel movement. Her mother responded that she might simply be constipated.

When J. was almost 14 years old, she moved to another town with her mother and siblings. J.'s mother testified that

defendant called every night and asked to talk with J. After the telephone calls, J. was always mad.

On one occasion when defendant called J., he asked if she had told anyone about the molestations. J. became scared and told him that she had not. That night, J. was upset and unable to eat dinner. The next day, A.S. -- an acquaintance who J. referred to as her "Aunt" -- took J. aside and asked what was wrong. J. burst into tears and told A.S. about the molestations. J. then told her mother. J.'s mother called the police department in Manteca and reported the molestations.

Pursuant to a search warrant, Manteca Police Department detectives searched defendant's residence. In the headboard of a bed in the master bedroom, the officers found six pornographic magazines. Pornographic videos were found in a closet. One of the detectives found a tube of lubricant under the bed in the master bedroom.

David Love serves as director of a counseling service providing child abuse treatment programs. Love testified as an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS). Love explained that CSAAS is the product of clinical observations of sexually abused children and describes five behaviors typically manifested by such victims. These behaviors are (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, unconvincing disclosure, and (5) retraction. On cross-examination, Love acknowledged that

CSAAS is not a diagnostic tool that determines whether a child has been sexually molested.

*Defense Evidence*

The defense called witnesses who testified about his good character. These character witnesses included defendant's daughter, the husband of defendant's cousin, defendant's uncle, four long-time friends, three of defendant's nieces, one distant relative, a friend of defendant's daughter, and an acquaintance from religious ceremonies attended by defendant. Each of these witnesses testified that they did not believe defendant was capable of committing the charged offenses, and many emphasized defendant's role as a preacher.

Several of the defense witnesses also testified that J.'s mother had a vindictive nature and threatened to harm defendant for helping her husband. J.'s mother made threats at a time when she was seeking court protection based on her allegations of domestic violence by her husband. An uncle of J. testified that J. was not an honest person because she would do whatever her mother instructed.

The defense also introduced the testimony of Baljit Atwal, who has a doctorate in psychology and specializes in sex offender risk assessments. Dr. Atwal conducted an evaluation of defendant at the request of the defense. In doing so, Dr. Atwal reviewed documents in the case and met with defendant for a total of six hours. Dr. Atwal administered several psychological tests even though she was doubtful that the tests

would be applicable "[b]ecause [defendant's] cultural background doesn't fit the norms or the group that these tests were developed on." The result of the tests was inconclusive.

Dr. Atwal then consulted research literature on risk factors indicating propensity to commit sex offenses against children. As a result of her literature review, she concluded that defendant did not exhibit any of the factors associated with child molesters. Specifically, defendant did not have a deviant sexual history; a persistent sexual interest in children; a high psychopathy; emotional or psychological problems; accusations of molestation by multiple victims; or a history of substance abuse. Instead, defendant "appeared very genuine" and distressed about the charges. Defendant also exhibited concern for the impact of the charges on his family. He was successful in his business and had a stable family. Based on these factors, Dr. Atwal concluded that defendant did not have a propensity to commit sex offenses.

*Rebuttal Evidence*

The prosecution called Kalyani Kumar, a distant relative of defendant. Kumar had not seen defendant for 10 years before she visited him in jail in 2009. Kumar denied ever having a sexual relationship with defendant, but admitted that she had written him a letter asking: "Do you or did you ever regret loving me or making love to me?" In that letter, Kumar also told defendant that "he made [her] a woman from an innocent girl . . . ." In another letter Kumar referred to defendant as her

first husband. Kumar testified that she wrote "some sexual things to him" because she wanted to see if he could have committed the offenses with which he was charged. After Kumar's second visit to jail, defendant refused to see her again.

## DISCUSSION

## I

### *Denial of Motion to Dismiss a Juror on Grounds of Bias and Sleeping During Trial*

Defendant contends the trial court erred by failing to remove a juror who indicated obvious dislike of defendant's trial attorney and who slept through part of the testimony given by the victim's mother. We disagree.

### A.

### *Juror No. 12*

During the prosecution's case-in-chief, the defense moved to excuse Juror No. 12 on grounds that the juror displayed a "hostile attitude" toward defense counsel. Defense counsel believed that the juror had been "staring very angrily at [him]" during cross-examination of the victim. Counsel also noted that the juror stopped taking notes and appeared to be asleep during the testimony by the victim's mother.

The trial court responded that it had seen Juror No. 12 with his face in his hands during the prior afternoon's court session, but that he did not appear to be asleep. The court further noted, "As far as all these other things, I didn't see any of that" and denied the motion without prejudice. The court

stated that it would "keep an eye on [Juror No. 12] a little more closely" that day.

Later during trial and outside the presence of the rest of the jury, the court inquired of Juror No. 12 as follows:

"THE COURT: . . . [¶] [Juror No. 12], I asked you to remain because someone mentioned that last Thursday, the first day of testimony, when the first witness testified, they said that you were making mean looks towards [defense counsel]. Was -- is there anything to that?

"JUROR [No. 12]: I didn't care for two of the questions that he asked of the defendant [*sic*: victim]. You know, I thought they were for shock value. That was my personal opinion.

"I did make a face when he asked her if the white stuff was hot or cold. And the second -- when he brought up the pictures of the circumcised and uncircumcised diagrams, I have an 11-year-old daughter, I wouldn't want somebody doing that to my daughter.

"Is it going to affect my opinion in this case? No. It was just something I was uncomfortable with. As you said, this is a difficult case. Having an 11-year-old daughter, there are things of this that I would rather not hear, quite frankly. And, at this point, you know, it is what it is. And I'm remaining as objective as humanly possible.

“THE COURT: The most important issue is something you just mentioned and that is the question: Can you still be fair to both sides?

“JUROR [No. 12]: Absolutely. At this point, [defendant] is still innocent. The prosecution has not finished. They have not put a defense on. Until I go into the jury room and go through all the evidence with all the jurors, I cannot reach an opinion. It would be inappropriate for me to do so.

“THE COURT: Do you feel that you have any personal animosity toward [defense counsel]?

“JUROR [No. 12]: No. I personally -- I understand his job, unfortunately, is to question, you know, in this case a young girl. And his job is to, you know, put doubt in the juror’s mind as to whether she’s telling the truth or not. And the question whether it was hot or cold, if she would have said cold would have shown that she didn’t -- you know, something like that may not have happened to her. I understand the question.

“I don’t like it. As he said, he’s a father also. I’m sure he can understand why I wouldn’t like those questions. And I did make those faces and that was the reason why.

“And, again, that is not being held against [defendant].”

“THE COURT: [Defense counsel], do you have any questions you want to ask the juror?

“JUROR [No. 12]: Feel free [to] ask me anything. I’m an open book.

“[Defense Counsel]: Fair enough. You really -- do you still believe right now you still can be fair and impartial in this case?

“JUROR [No. 12]: Absolutely because it -- if I don’t remain fair and impartial, then one day, as you posed in the jury questioning, if I have a family member sitting there where he is and somebody doesn’t like what the defense attorney defending my family member is, how can I expect anybody else to do it if I don’t do it myself?

“[Defense Counsel]: Okay. After -- after questioning of the young girl in the case, did you feel like you had made up your mind in the case?

“JUROR [No. 12]: No. I felt incredibly horrible because when she speaks, she tells it the way things happened in her mind. The way my daughter tells a story, like if I ask her, you know, what happened in school today, she will rush right through it. Like, you and the defense attorney would have to stop her and say, hold on a second, back up. She reminds me of my daughter. And anybody with an 11-year-old daughter wouldn’t associate that type of speech. That’s just the way they talk at that age.

“So, it’s difficult, but I can remain fair and impartial because -- you know, as much as I don’t like this type of situation, I don’t want to be responsible for sending somebody that didn’t do it to jail because I -- you know, I don’t want that on my conscience, either.

“[Defense Counsel]: Obviously you understand this is difficult often for the attorneys to do.

“JUROR [No. 12]: I understand it’s very difficult and I believe I said that when you guys were interviewing me through the 12 -- you know, getting the 12 of us in here.

“And, you know, like I said, you know, could I -- I would much rather be on a triple homicide case. I mean, that’s just because of the nature of the charges. You know, nobody wants to listen to a child get up there and say the things she said, you know. Children shouldn’t know anything about it for one reason or another.

“[Defense Counsel]: I have nothing further.”

Following this colloquy, the court instructed Juror No. 12 not to discuss the questioning about his potential bias toward defense counsel. After the juror departed the courtroom, the trial court noted that it had watched him closely for two days and had not noticed anything inappropriate about the juror’s behavior. Defense counsel responded that Juror No. 12 had even given him a smile during questioning earlier that day.

The court also questioned Juror No. 12 regarding whether he had been asleep during the first day of trial when the victim had testified. The juror noted his eyes had been tired from working the night before, but he had not been asleep. Juror No. 12 added that he even had notes from the testimony given that day. The court admonished him not to discuss the further questioning with the other jurors.

The trial court questioned Juror No. 11 outside the presence of the rest of the jury about reports that Juror No. 12 was asleep during the first day of trial. Juror No. 11 reported that Juror No. 12 was not asleep during the trial. Juror No. 11 stated, "He's a little too fidgety for that." The juror denied ever seeing Juror No. 12 with his elbows on his knees and his face in his hands. The court admonished the juror not to discuss the questioning about Juror No. 12.

B.

*Disqualification of a Juror for Bias or Sleeping*

A criminal defendant has federal and state constitutional rights to a trial by an impartial jury on the charges alleged against him or her. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16; *People v. Martinez* (1991) 228 Cal.App.3d 1456, 1459-1460.) To safeguard these rights, section 1089 empowers a trial court to investigate whether to remove a juror because the juror "is found to be unable to perform his or her duty . . . ." As our Supreme Court has explained, "A trial court 'has broad discretion to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve.' (*People v. Millwee* (1998) 18 Cal.4th 96, 142, fn. 19.)" (*People v. Bennett* (2009) 45 Cal.4th 577, 621.)

The trial court must remove jurors who are biased against a party or who sleep through trial. (*People v. Lomax* (2010) 49 Cal.4th 530, 588-589; *People v. Cleveland* (2001) 25 Cal.4th 466,

475.) Bias or other grounds for discharge of a juror may be based on the statements or conduct of the juror at issue or on statements made by fellow jurors. (*People v. Lomax*, *supra*, at p. 588, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 532.)

"Although decisions to investigate juror misconduct and to discharge a juror are matters within the trial court's discretion (e.g., *People v. Maury* (2003) 30 Cal.4th 342, 434), we have concluded 'a somewhat stronger showing' than is typical for abuse of discretion review must be made to support such decisions on appeal. (*People v. Wilson* (2008) 44 Cal.4th 758, 821.) In *People v. Barnwell* [(2007)] 41 Cal.4th [1038,] 1052, [the Supreme Court] held that the basis for a juror's disqualification must appear on the record as a 'demonstrable reality.' This standard involves 'a more comprehensive and less deferential review' than simply determining whether any substantial evidence in the record supports the trial court's decision. (*Ibid.*) It must appear 'that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established.' (*Id.* at pp. 1052–1053.) However, in applying the demonstrable reality test, we do not reweigh the evidence. (*Id.* at p. 1053.) The inquiry is whether 'the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' (*Ibid.*)" (*People v. Lomax*, *supra*, 49 Cal.4th at pp. 589-590.)

In this case, the trial court properly denied defense counsel's motion to replace Juror No. 12 with an alternate

juror. Juror No. 12 disclaimed sleeping during any part of the trial, and his denial was confirmed by the juror who sat next to him. Moreover, the trial court noted that it also had not seen the juror asleep at any time. Although the record indicates that Juror No. 12 was tired on the first day of trial, it also shows that the juror took notes and was attentive to testimony he found distasteful.

Clearly, Juror No. 12 did find the questioning of the victim uncomfortable and expressed his difficulty with sitting on a case involving charges of child sexual abuse. This juror also expressed his dislike of two questions posed by defense counsel to the victim. However, Juror No. 12 also asserted that he harbored no bias against defendant and would not make up his mind until all the evidence had been presented by both sides. Juror No. 12 also explained that he understood the point of defense counsel's questioning and acknowledged the challenge that such legal representation entails. Rather than indicating bias or an inability to perform the duties required of a juror, Juror No. 12's answers appear candid and show an unwavering commitment to be fair and impartial.

Jury service during a criminal trial often includes listening to testimony and considering evidence that is unpleasant, distasteful, or disturbing. A juror is not required to be at ease with the evidence presented or the type of charges alleged. So long as the juror can serve impartially and follow the court's instructions, he or she remains fit to continue on

the jury. (See *People v. Lomax*, *supra*, 49 Cal.4th at pp. 572, 588-589.) Here, the record supports the trial court's conclusion that Juror No. 12 did not need to be removed for bias or inability to perform the functions of a juror.

II

*Sufficiency of the Evidence of Aggravated Sexual Assault*

Defendant contends insufficient evidence supports his conviction of the aggravated sexual assault alleged in count four of the information. We disagree.

A.

*Assessing Sufficiency of the Evidence*

In reviewing a claim of insufficient evidence in support of a criminal conviction, we review the whole record in the light most favorable to the judgment to assess whether substantial evidence supported the outcome. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[E]vidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt" constitutes substantial evidence. (*Ibid.*) "The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but instead, whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

(*Jackson v. Virginia* (1979) 443 U.S. 307, 317–320, 61 L.Ed.2d 560.)" (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1339.)

B.

*Count Four -- Aggravated Sexual Assault by Means of Digital Penetration*

In counts two, three, and four, the information charged defendant with three instances of sexual assault (§ 269) -- all committed during the same occasion. Count two related to defendant's penetration of the victim's vagina with his penis. Count three alleged defendant committed an act of sodomy against J. And, as the prosecutor explained during her closing argument, "count 4 is aggravated sexual assault, with the defendant putting -- sexual penetration, putting his fingers inside of her vagina with force."

Defendant acknowledges that he penetrated the victim's vagina and anus with his penis as alleged in counts two and three. However, he asserts that "the victim's testimony at trial did not establish two acts of sexual intercourse." Thus, defendant reasons that count four must be unsupported by any evidence. The record refutes this contention.

Although the forcible digital penetration was alleged in count four, it chronologically preceded the acts charged in counts two and three. The victim testified that defendant lured her to his bedroom with the repeated ploy of promising her a gift. Once inside the bedroom, defendant locked the door and forcibly removed J.'s clothes. The victim protested and was

scared, but defendant told her to "do it." Defendant pushed the victim onto the bed and began "humping [her] with his penis." Although this conduct was uncharged, the district attorney charged the digital penetration that followed as count four.

On the bed, defendant forced the victim's legs apart while she tried to keep them together. Defendant inserted his fingers into the victim's vagina. On direct examination, J. testified:

"Q. Okay. Where did he put his finger?

"A. Like, inside my vagina. And -- yeah.

"Q. Okay. When did he do that?

"A. He did that --

"Q. Before or after he put his penis in your vagina?

"A. He did that before.

"Q. Okay. How did that feel?

"A. That felt, like, really weird. Like it started hurting towards the bones in there.

"Q. Okay. Did he say anything to you when he did that?

"A. No.

"Q. And what did he do when he put his finger in your vagina? Did he just put it in --

"A. It was kind of like going like forward, take his fingers out. And then I started crying really bad and he was like, 'Oh, don't cry. It's going to be okay.'

"Q. Okay. But when he put his fingers in there, did he just put it in there or did he do anything with it?

"A. He was like going back and forth, like that (indicating)."

Defendant does not acknowledge this evidence that he digitally penetrated the victim before he inserted his penis into her vagina and anus. However, the victim's testimony sufficed to establish that defendant committed the offense charged in count four as a separate and distinct offense from those alleged in counts two and three. Accordingly, we reject his insufficiency of the evidence claim.

III

*Claimed Lack of Notice for Charge in Count Four*

Defendant argues that even if the evidence in support of count four was sufficient, he received constitutionally deficient notice of the conduct charged in that count. Specifically, defendant asserts that the conduct described only as "sexual intercourse" in count four "was understood to be an act of penetration of the vagina with a penis, as alleged in Count 2." Thus, he contends the prosecution's surprise claim in closing arguments that count four related to digital penetration deprived him of the notice required by due process. We disagree.

A.

*Count Four's Allegation of "Sexual Penetration"*

The information sets forth count four in pertinent part as follows: "COUNT: 004, for a further and separate cause of complaint, being a different offense from but connected in its

commission with the charge set forth in Count 003, complainant further complains and says: On or about MAY 2007 THROUGH MAY 2008 the crime of AGGRAVATED SEXUAL ASSAULT, in violation of Section 269 of the Penal Code, a FELONY, was committed by KESH MAHARAJ, who at the time and place last aforesaid did willfully, unlawfully, have, and accomplish an act of SEXUAL INTERCOURSE with a person, to wit: '[J.]'; SECOND INCIDENT FEW DAYS LATER, AGE 12, date of birth . . . a child under the age of 14 years, by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on said person."

During the preliminary hearing, J. testified that defendant digitally penetrated her with his fingers on the same occasion when he penetrated her vagina and anus with his penis.

After defendant was held to answer the charges, defense counsel filed a motion to dismiss the information. In the motion to dismiss, the defense summarized the testimony of the victim during the preliminary hearing. The summary acknowledged that the victim testified defendant "put his fingers inside of her vagina a couple of days ago; the day she had pain inside of her vagina."

Subsequently, the prosecution filed a pre-trial conference statement recounting that, on the same occasion on which defendant penetrated her vagina and anus with his penis, "the defendant also orally copulated the victim's vagina[l area] and digitally penetrated her." Consistent with this factual

summary, the prosecution listed the “charges and exposure,” in relevant part, as:

“Count 2  P.C. 269 (sexual intercourse) 15 years to life

“Count 3  P.C. 269 (sodomy)  15 years to life

“Count 4  P.C. 269 (sexual penetration) 15 years to life”

During trial, the prosecution moved to amend count four of the information to state that it charged “rape” for the digital penetration. The prosecutor explained that she had alleged “sexual penetration” in count four to distinguish it from the vaginal “sexual intercourse” alleged in count two. The following colloquy ensued:

“THE COURT: Why didn’t you say sexual penetration with a finger? I mean, you know what I’m saying, is be as specific as you can, which I’ve said several times during the trial. [¶] Anyway, here we are, the evidence is over. You are moving to amend that to sexual penetration?

“[Prosecutor]: Is the Court not -- I would prefer it to say rape if that’s what the Court is wanting me to -- that’s what I’m arguing.

“THE COURT: Do you have any objection to rape in Count 2, [defense counsel]?

“[Defense Counsel]: Yes.

“THE COURT: Okay. I think that’s too extreme.”

The court allowed the prosecution to amend count four of the information to allege “sexual penetration” under section 269.

B.

*Entitlement to Notice of Criminal Charges*

As the California Supreme Court has explained, "Both the Sixth Amendment of the federal Constitution and the due process guarantees of the state and federal Constitutions require that a criminal defendant receive notice of the charges adequate to give a meaningful opportunity to defend against them. (U.S. Const., 6th Amend. ['the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation']; *id.*, 14th Amend.; Cal. Const., art. I, § 15.) 'Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.' (*Lankford v. Idaho* (1991) 500 U.S. 110, 126 [114 L.Ed.2d 173].) 'The "preeminent" due process principle is that one accused of a crime must be "informed of the nature and cause of the accusation." [Citation.] Due process of law requires that an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' (*People v. Jones* (1990) 51 Cal.3d 294, 317.)" (*People v. Seaton* (2001) 26 Cal.4th 598, 640.)

Defendant contends the information failed to apprise him of the conduct with which he was charged in count four. He argues that he was unfairly surprised because the information "alleged two acts of forcible sexual intercourse (Counts 2 and 4)" that

did not apprise him that digital penetration constituted the basis for count four. We are not persuaded.

As defendant acknowledges, the information "alleged an act of aggravated sexual assault under . . . § 269" for count four. Moreover, even if the information's allegation of "sexual intercourse" as the basis for count four was ambiguous as to the conduct underlying the count, the victim's testimony at the preliminary hearing regarding the digital penetration gave sufficient notice of the nature of the charge. Our high court has held "that notice is provided not only by the accusatory pleading but also by the transcript of the preliminary hearing or the grand jury proceedings. (*People v. Jones* (1990) 51 Cal.3d 294, 317-318; accord, *People v. Diaz* (1992) 3 Cal.4th 495, 557; *People v. Marshall* (1957) 48 Cal.2d 394, 399, fn. 5.) In addition, a 'defendant may learn further critical details of the People's case through demurrer to the complaint or pretrial discovery procedures.' (*People v. Jones, supra*, 51 Cal.3d at p. 317.)" (*People v. Carrington* (2009) 47 Cal.4th 145, 183-184.) In this case, the preliminary hearing established that digital penetration -- along with the defendant's insertion of his penis into her vagina and anus -- constituted the bases for counts two, three, and four. Indeed, defendant's motion to dismiss, filed prior to trial, recounted the forcible digital penetration testimony given by the victim at the preliminary hearing.

The record indicates no confusion by defense counsel in preparing to defend against the charge in count four. Although the information was filed 11 months prior to commencement of trial, no demurrer or request for discovery was filed to clarify the allegation set forth in count four. Defendant does not refer us to anywhere in the record where his trial attorney expressed any confusion about the gravamen of count four.

With the information and preliminary hearing testimony, defendant was not surprised either as to the Penal Code violation with which he was charged or the conduct giving rise to count four of the information.

IV

*Failure to Instruct on Lesser Included Offense of Non-Forcible Lewd Act on a Child*

Defendant contends that weaknesses in the victim's testimony about the forcible lewd act (§ 288, subd. (b)) alleged in count one required the trial court to instruct sua sponte on the lesser included offense of non-forcible lewd act upon a child under age 14 (§ 288, subd. (a)). We disagree.

A.

*Duty to Instruct on Lesser Included Offenses*

In California, trial courts must instruct the jury on any offense "necessarily included" in the charged offenses when substantial evidence exists to show commission of the lesser crime. (*People v. Birks* (1998) 19 Cal.4th 108, 112.) As the *Birks* court elaborated, "[t]his venerable instructional rule

ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence." (*Ibid*.) An offense is a lesser included offense to another "if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*Id.* at pp. 117-118.)

Even if neither party requests an instruction on the lesser included offense, the trial court must nonetheless give the instruction if a reasonable jury might find the evidence of the lesser offense persuasive. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) However, "the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1215 (*Cole*), quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

In assessing a claim of failure to instruct on a lesser included offense, "we review independently the question whether the trial court failed to instruct on a lesser included offense." (*Cole, supra*, 33 Cal.4th at p. 1215.)

B.

*Whether Substantial Evidence Required Instruction on Non-Forcible Lewd Act on a Child*

Non-forcible lewd and lascivious act upon a child (§ 288, subd. (a)) is a lesser included offense of forcible lewd act on a child (§ 288, subd. (b)). (*People v. Ward* (1986) 188 Cal.App.3d 459, 472; see also *People v. Soto* (2011) 51 Cal.4th 229, 233 (*Soto*).) In *Soto*, our high court recently held that "the harsher penal consequences of a conviction under section 288(b), as compared to section 288(a), require that the force used for a subdivision (b) conviction be 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.'" (*Soto, supra,* at p. 242, quoting *People v. Cicero* (1984) 157 Cal.App.3d 465, 474.)

Defendant contends his "jury could reasonably question whether the act of pushing the victim onto the bed, even if it was in some sense a prelude to the sex act, was 'menacing behavior' sufficient to make the sex act itself forcible. In other words, there was room to doubt whether the act of pushing was directly related to the sex act." We reject the contention.

The victim's testimony regarding the offense alleged in count one established that defendant locked the door to the bedroom before he molested her. When the victim told him she did not want to lie down on the bed as defendant instructed, defendant pushed her down. He laid himself next to her and began "dry humping" her "on the side." The victim also

testified that when she told him not to do it, defendant would force her.

Defendant's locking the door and pushing the victim onto the bed where he molested her sufficed to establish that he employed substantially more force that necessary to accomplish the lewd act itself. (*Soto*, *supra*, 51 Cal.4th at p. 242.) It is well settled that "physically controlling the victim when the victim attempts to resist" constitutes force sufficient for a conviction of section 288, subdivision (b). (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14 (*Cochran*).)

In addition, "the victim's testimony must be considered in light of her age and her relationship to the defendant." (*Cochran, supra,* 103 Cal.App.4th at p. 14.) At the time of the offense, the victim was only 12 years old and defendant was 46. J. was isolated from any help because defendant picked her up from school and drove her to his house when no one else was home. She was also faced with the additional pressure of being "forced" by her father to go to defendant's house when she had said she did not wish to go there. Her father sent her to defendant's house to babysit at defendant's request, not knowing about the molestations. The victim's father testified that defendant "forced [J.] to go with him even though she didn't want to go." Defendant "said two or three times, 'Let's go. Let's go." The differential in age and the defendant's acts of forcing J. to accompany him to his otherwise empty house further proved that he employed means beyond what was necessary to

accomplish the lewd touching itself. (*Soto*, *supra*, 51 Cal.4th at p. 242.)

In sum, the trial court did not err by not instructing on the lesser included offense.

V

*Motion for New Trial Based on Newly Discovered Evidence*

Defendant contends the trial court erroneously denied his motion for new trial based on newly discovered evidence in the form of testimony by A.S. Defendant asserts that A.S., who did not testify at trial, would have provided exculpatory evidence because she "was the only neutral witness who was very familiar with the victim and felt that she was untruthful." Although A.S. was subpoenaed before trial began, she did not testify.

The record indicates that defense counsel abandoned efforts to compel her to testify after he "received a phone message back from both [A.S.] and her attorney saying that she would not testify in the case of People v. Kesh Maharaj, and she would plead the Fifth." After trial, defense counsel filed a motion for new trial that asserted: "Defense firmly believes we can obtain her testimony upon retrial." Defendant now argues that the trial court's denial of his motion must be reversed.

The testimony of a witness who took the stand and invoked the Fifth Amendment to the federal Constitution may constitute "newly discovered" evidence upon sudden willingness of the same witness to testify. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 487.) In this case, however, defense counsel did not call A.S.

as a witness during trial. Consequently, A.S. did not invoke her Fifth Amendment rights on the witness stand.

The California Supreme Court has admonished that "in order to assert the privilege against self-incrimination a witness must not only be called, but must also be sworn. [Citations.] Were we to accept the proposition that a witness is 'unavailable' because he might claim the privilege if called, that prerequisite to exercise of the privilege would be abandoned and the reasons for its existence ignored." (*People v. Ford* (1988) 45 Cal.3d 431, 440.) This rule is based on the high court's recognition that "a witness does not have an unqualified right to exercise the privilege against self-incrimination, and unless the question clearly calls for an incriminating answer the witness who has asserted the privilege bears the burden of satisfying the court that an answer would have a tendency to incriminate the witness." (*Ibid*.) Under *People v. Ford*, defense counsel's failure to call A.S. as a witness at defendant's trial precludes the argument that her testimony was unavailable.

VI

*Consecutive Sentences Imposed for Counts Two through Four*

Defendant contends the trial court failed to state the requisite findings on the record before imposing consecutive sentences for counts two through four. Specifically, he asserts the court failed to state that defendant had time for reflection between the forcible sexual assaults in counts two through four.

We conclude that the contention has not been preserved for review.

A.

*Consecutive Sentences Imposed for Violations of Section 269*

The prosecution filed a sentencing brief that stated: "The People concede that Counts Two through Four are the 'same occasion' under the definition set forth in . . . § 667.6 and therefore, the court is not mandated to sentence with full strength consecutive sentencing under [subdivision] (d). However, [*sic*: the court] has the discretion to do so under [subdivision (c)] and the People would argue that the defendant engaged in such egregious behavior that full strength consecutive sentencing is warranted in this case."

The trial court agreed and imposed consecutive sentences for counts two, three, and four as follows:

"[F]or Count 2, I'm going to impose -- and that was 269 of the Penal Code, this was the incident where he pushed her up -- took her to the bed, locked the door, forcibly removed her clothes, threw her on the bed and there was semen on the outside of her. She then cleaned herself up. So it is clearly a forcible offense. It is a separate offense. I'm going to impose a consecutive term of -- full consecutive term of 15 years to life for Count 2.

"For Count 3, 269 of the Penal Code, this was sodomy. He put her on her hands and knees. She made her legs stiff to try to stop him. He put cream on her to make it -- make himself

slip so it wouldn't hurt. She tried to push herself away. So I find this is also a forcible incident. It is a separate incident from the other counts. I'm going to impose a full consecutive term of 15 years to life.

"For Count 4, this was fingers in the vagina. It was penetration. It was finding [*sic*] that this was forcible and a separate occasion pursuant to 667.6(d) of the Penal Code. I'm going to impose a consecutive term of 15 years to life."

Defendant did not object on grounds that the trial court failed to state for the record the requisite findings for imposition of consecutive sentences for the convictions of counts two through four.

B.

*Cognizability of Sentencing Decisions on Appeal*

We find guidance regarding the cognizability of sentencing decisions on appeal absent timely objection in the trial court in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*) and *People v. Smith* (2001) 24 Cal.4th 849 (*Smith*). As the high court subsequently summarized, "In *Scott*, the court distinguished between unauthorized sentences -- those that 'could not lawfully be imposed under any circumstances in the particular case' (*Scott*, at p. 354) -- and discretionary sentencing choices -- those 'which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner.' (*Ibid*.) As to the former, lack of objection does not foreclose review: 'We deemed appellate intervention appropriate in these cases because the

errors presented "pure questions of law" [citation] and were "'clear and correctable' independent of any factual issues presented by the record at sentencing." [Citation.] In other words, obvious legal errors at sentencing that are correctable without referring to factual findings in the record or remanding for further findings are not waivable.' (*Smith*, at p. 852.) With respect to the latter, however, the general forfeiture doctrine applies and failure to timely object forfeits review. Such '[r]outine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.' (*Scott*, at p. 353; see also *People v. Welch* (1993) 5 Cal.4th 228, 232–237.)" (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113.)

C.

*Forfeiture of Challenges to Discretionary Sentencing Choices*

The Attorney General argues that the contention is forfeited for failure of the defense to make a timely objection to the consecutive sentences imposed for counts two through four. We agree.

Here, we are faced with discretionary sentencing choices by the trial court. The rule requiring a timely objection to the trial court's statement of reasons in support of the sentence is based on the recognition that "parties have ample opportunity to influence the court's sentencing choices under the determinate scheme. As a practical matter, both sides often know before the hearing what sentence is likely to be imposed and the reasons

therefor. Such information is contained in the probation report, which is required in every felony case and generally provided to the court and parties before sentencing. In anticipation of the hearing, the defense may file, among other things, a statement in mitigation urging specific sentencing choices and challenging the information and recommendations contained in the probation report. (§ 1170, subd. (b); [Cal. Rules of Court, former] rule 437.) Relevant argument and evidence also may be presented at sentencing. (§ 1204; [former] rule 433.)" (*Scott, supra,* 9 Cal.4th at pp. 350-351.)

Here, we conclude that defendant's argument the trial court did not articulate the necessary findings for the consecutive sentences in counts two through four is not cognizable on appeal for lack of objection at sentencing. (*People v. Scott*, *supra*, 9 Cal.4th at p. 353.) The claim has been forfeited.

VII

*Sentences Consecutive to Count One*

Defendant contends the trial court erred in imposing sentences for counts two, three, and four (§ 269) that are consecutive to count one (§ 288, subd. (b)) because count one was not committed "on the same occasion" as the other molestations. In so arguing, defendant acknowledges that he urges "an anomalous result" in asking us to construe section 667.6, subdivision (c), to disallow offenses committed against the same victim on separate occasions from being subject to consecutive sentences. We are not persuaded.

We begin by addressing the Attorney General's assertion that this issue was not preserved for review because defendant's trial attorney failed to object to the consecutive sentences at sentencing. We conclude that this issue is cognizable on appeal. Defendant does not base this claim on the contention that some procedural irregularity or failure to state a finding on the record requires correction. (See *Scott*, *supra*, 9 Cal.4th at p. 353.) Instead, he argues that section 667.6 disallows the sentences imposed for counts one through four. Thus, defendant's argument raises a claim of unauthorized sentence that is reviewable even in the absence of an objection in the trial court. (*People v. Stowell*, *supra*, 31 Cal.4th at p. 1113; *Smith*, *supra*, 24 Cal.4th at p. 852.) Accordingly, we consider the issue on the merits.

Defendant argues that subdivision (c) of section 667.6 prevents consecutive sentences for his conviction of counts one through four (§§ 288, subd. (b), & 269). In pertinent part, subdivision (c) of section 667.6 states: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) *if the crimes involve the same victim on the same occasion*. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall

commence from the time the person otherwise would have been released from imprisonment." (Italics added.)

Defendant contends the italicized portion of section 667.6 disallows consecutive sentences for offenses against the same victim on *separate* occasions. He reasons that "[t]here was no statutory authorization to run Count 1 full term consecutive. Count 5 was chosen as the base term, therefore absent a statutory exception all other determinate counts must run one-third consecutive, or concurrent." In support of his argument, defendant relies on this court's decision in *People v. Goodliffe* (2009) 177 Cal.App.4th 723 (*Goodliffe*).

In *Goodliffe*, this court examined the amendment of subdivision (c) of section 667.6 when the voters adopted Jessica's Law by initiative in 2006. (*Goodliffe, supra,* 177 Cal.App.4th at p. 726.) *Goodliffe* involved a defendant who committed only one offense specified in subdivision (e) of section 667.6 -- namely, a forcible lewd act on a child as defined by section 288, subdivision (b). (*Goodliffe, supra,* at p. 725.) The remaining convictions in *Goodliffe* were for non-forcible molestations of the same victim. (*Ibid.*) The People conceded that "the other crimes of which he was convicted did not involve the same victim on the same occasion." (*Id.* at pp. 725-726.)

This court concluded that the language of section 667.6, subdivision (c), disallowed consecutive sentences because the other, non-forcible convictions did not occur on the same

occasion as statutorily required. (*Goodliffe, supra,* 177 Cal.App.4th at p. 726.) As we explained, defendant was "not subject to subdivision (c) because the other crimes of which he was convicted did not involve *the same victim on the same occasion*." (*Id.* at p. 726, italics added.) In so holding, we noted that the result would be different for a defendant convicted of multiple forcible sex offenses set forth in subdivision (e) of section 667.6. Specifically, we stated that "subdivision (d) mandates a trial court to impose '[a] full, separate, and consecutive term . . . for each violation of an offense specified in subdivision (e) *if the crimes involve separate victims or involve the same victim on separate occasions*.' . . . Unlike subdivision (c), *this mandatory sentencing scheme applies only when a defendant stands convicted of more than one offense specified in subdivision* (*e*). (*People v. Jones* (1988) 46 Cal.3d 585, 594, fn. 5, 595-596 . . . .) Defendant was convicted of but one offense specified in subdivision (e), a forcible lewd and lascivious act upon a child under the age of 14. (§ 288, subd. (b)(1) . . . .) (§ 667.6, subd. (e)(5).) For that reason he is not subject to the mandatory consecutive sentencing scheme in subdivision (d)." (*Goodliffe, supra,* 177 Cal.App.4th at p. 727, fn. 10, second italics added.)

In contrast to *Goodliffe*, defendant in this case was convicted of three counts of violating section 269 and one count of violating section 288, subdivision (b) -- each committed

against the same victim. The Attorney General asserts, "Each of the violations listed in section 269 are [*sic*] also included in section 667.6, subdivision (e)." Our review of the relevant statutes supports this assertion.

Subdivision (a) of section 269, of which defendant was thrice convicted, provides: "(a) Any person who commits any of the following acts upon a child who is under 14 years of age and seven or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261. [¶] (2) Rape or sexual penetration, in concert, in violation of Section 264.1. [¶] (3) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286. [¶] (4) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a. [¶] (5) Sexual penetration, in violation of subdivision (a) of Section 289."

Each of these offenses enumerated in subdivision (a) of section 269 is also included in subdivision (e) of section 667.6, which states in pertinent part: "(e) This section shall apply to the following offenses: [¶] (1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261. [¶] (2) Spousal rape, in violation of paragraph (1), (4), or (5) of subdivision (a) of Section 262. [¶] (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1. [¶] (4) Sodomy, in violation of

paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286. [¶] (5) Lewd or lascivious act, in violation of subdivision (b) of Section 288. [¶] (6) Continuous sexual abuse of a child, in violation of Section 288.5. (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 288a. [¶] (8) Sexual penetration, in violation of subdivision (a) or (g) of Section 289."

Each of defendant's offenses in counts one through four is included in section 667.6, subdivision (e). Consequently, section 667.6 applies to defendant's conviction of section 288, subdivision (b), and three convictions of section 269, thus requiring mandatory consecutive sentences for each of defendant's four forcible sex offenses. (See § 667.6, subd. (d) [requiring "[a] full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions"]; see also *id.*, subd. (c) [providing that "[a] term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)"].) *Goodliffe*, having addressed an instance of only one forcible sex offense described by section 667.6, subdivision (e), does not prevent the mandatory consecutive sentencing requirement of subdivision (d) from applying to the multiple forcible sex offense convictions in this case. Accordingly, the trial court

did not err in imposing sentences for counts two through four (§ 269, subd. (a)) that were consecutive to the sentence imposed for count one (§ 288, subd. (b)).

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

RAYE, P. J.

NICHOLSON, J.