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CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON FLUGENCIO GONZALEZ,

Defendant and Appellant.

D059713

(Super. Ct. No. SCD228173)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed in part, reversed in part; judgment modified.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie Garland, Assistant Attorney General, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Ramon Flugencio Gonzalez appeals from a judgment of conviction after a jury convicted him of multiple sexual offenses against a single victim. On appeal, Gonzalez argues (1) that the trial court abused its discretion in allowing Juror No. 6 to remain on the jury after the juror indicated that, based on a photograph contained in one of the prosecution's exhibits, he believed that the victim was the grandmother of a friend of his, and that he would not be able to remain impartial; (2) that his convictions on counts 1 and 2 for unlawful oral copulation cannot both stand, because he committed only one act of unlawful copulation that constituted a single violation of Penal Code¹ section 288a; and (3) that his sentences for two counts of sexual battery must be stayed pursuant to section 654 because they were part of the same course of conduct for which Gonzalez was already punished as a result of his conviction for assault with the intent to penetrate.

With respect to Gonzalez's first contention, based on information provided by the prosecutor, the trial court informed the juror that the juror was likely mistaken about knowing the victim's granddaughter and told the juror that the court would revisit the issue if it turned out that the court and the prosecutor were wrong about that. The issue was never raised again. Under these circumstances, we conclude that there was no

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

demonstrable reality that the juror was unable to perform his proper function, and that the court therefore did not abuse its discretion in allowing the juror to remain on the jury.

We agree with Gonzalez's contention that he may be convicted of only one violation of section 288a (unlawful oral copulation) based on the single instance of oral copulation in which he engaged. We therefore consolidate his convictions on counts 1 and 2 into a single conviction, and vacate the conviction and sentence on count 2.

Finally, we conclude that Gonzalez's sentence on count 5 must be stayed because it is based on the same conduct for which he was convicted and sentenced on count 3, the assault count.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

On June 25, 2010, Gonzalez was sitting next to Carolyn H. on a street in downtown San Diego near the intersection of 16th Street and Island Avenue. A friend of Carolyn's, Keith Jennings, was nearby and saw Gonzalez and Carolyn sitting together. Jennings and Carolyn were both homeless and congregated in the same areas. Jennings initially saw Gonzalez and Carolyn talking and laughing. He also saw Carolyn give Gonzalez a peck on the cheek. Jennings's impression was that this was done in a joking manner. When Jennings next looked over, Carolyn was lying down, and her face was in Gonzalez's lap. Carolyn's body appeared limp and she was not responsive.

Carolyn's pants were unzipped and pulled down such that Jennings could see half of her buttocks. Gonzalez's left hand was down Carolyn's pants, and he was

"manipulating her genitalia." Jennings left for a few minutes to use the bathroom. When he returned, he saw Gonzalez moving Carolyn's head up and down on his lap. It appeared to Jennings that Gonzalez was attempting to make Carolyn perform oral sex on Gonzalez.

Two other men, Donald Goddard and Axcanyata "West" Laskey, who were friends of Carolyn, were also observing what was happening. They saw Gonzalez holding Carolyn's head and "bobbing it up and down" on his penis. Carolyn appeared to be passed out while this was happening. When Goddard and Laskey attempted to intervene and told Gonzalez to stop what he was doing, Gonzalez swung his cane at them and told them that it was "none of [their] fucking business."

Before the two men could stop what was going on, the police arrived. Two women had flagged down San Diego Police Officer Victor Calderson to report what was happening to Carolyn. Officer Calderson arrived at the scene and walked up behind Gonzalez. As Calderson looked over Gonzalez's shoulder, Calderson could see that Gonzalez's penis was in Carolyn's mouth. Calderson could also see that Gonzalez had his left hand inside of Carolyn's pants and that he was fondling her genitalia. When Calderson asked Gonzalez what he was doing, Gonzalez jumped and tried to put his penis back in his pants. When Gonzalez jumped up, Carolyn, who was unconscious, fell over and hit the concrete. Carolyn's eyes were rolled back in her head and she appeared pale. Officer Calderson handcuffed Gonzalez and placed him in the back of a police car.

Laskey shook Carolyn, but she did not respond. She appeared to be "totally passed out."

When Calderson returned to check on Carolyn, he noticed that she did not appear to be breathing. Calderson and some others who were nearby rolled Carolyn over, and she took a breath. Paramedics then arrived and took Carolyn to the hospital.

Carolyn testified that on the day of the incident, she was homeless. She had gotten into an argument with her boyfriend earlier that day and drank a pint of vodka. According to Carolyn, she lay down on Island Avenue to try to sleep. The next thing she remembered was being put in an ambulance. Carolyn testified that she had never seen Gonzalez before, and that she had not consented to any sexual activity with him.²

DNA tests confirmed that Gonzalez's semen was in Carolyn's mouth.

B. *Procedural background*

On January 6, 2011, a jury convicted Gonzalez of one count of oral copulation of an unconscious person (§ 288a, subd. (f); count 1); one count of oral copulation of an intoxicated person (§ 288a, subd. (i); count 2); one count of assault with intent to commit sexual penetration (§ 220, subd. (a); count 3), and two counts of sexual battery (§ 243.4, subd. (e)(1); counts 4 and 5).

The trial court sentenced Gonzalez to the low term of three years on count 1, and imposed but stayed the low term sentence of three years on count 2, pursuant to section 654. On count 3, the court imposed the low term of two years, to run concurrently with

² Although Carolyn denied knowing Gonzalez, three individuals, including Gonzalez's landlord and two neighbors, testified that they had seen Carolyn around Gonzalez's house on a few occasions, drunk and looking for Gonzalez.

the sentence on count 1. The court sentenced Gonzalez to 180 days, with credit for time served, on counts 4 and 5.

Gonzalez filed a timely notice of appeal on May 9, 2011.

III.

DISCUSSION

A. *The trial court did not abuse its discretion in allowing Juror No. 6 to remain on the jury*

Gonzalez contends that the trial court erred in failing to excuse Juror No. 6 on the ground that the juror was biased. According to Gonzalez, Juror No. 6 developed a bias against the defense based on one of the photographs of the victim, and the trial court's limited inquiry into the matter did not dispel the likelihood that the juror carried this bias into the jury's deliberations. Our review of the record discloses that Gonzalez's contention is without merit.

1. *Additional background*

At the close of the People's case, but before the defense called a witness, Juror No. 6 informed the court, "I don't think I can stay fair and unbiased. I recently came to the realization that People's exhibit B seemed vaguely familiar to me, and during the recess, I just placed where I had seen it." The court asked the juror to remain where he was and listen to the testimony of the defense's first witness. The court indicated that it would discuss the matter with the juror later.

After excusing the other jurors for the day, the court asked Juror No. 6 to stay behind to discuss the matter that the juror had raised earlier in the day. Juror No. 6

explained that he believed that he had recognized one of People's exhibits, which was a photograph of the victim. He thought that he had seen the photograph posted by a good friend on a Facebook page with a caption that read in part, "Nana." He assumed that the woman in the photograph was his friend's grandmother. The court asked Juror No. 6, "Is that an image and an association and information that you cannot set aside and rely just on the evidence that's presented here?" Juror No. 6 responded, "I was thinking about it all during the recess, even though I probably shouldn't have been, I don't think I could." The court conferred with the attorneys off the record at this point. After this discussion, the prosecutor asked to speak with the court outside the presence of the juror. Juror No. 6 left the courtroom and the attorneys and the court spoke about the matter. The prosecutor told the court that the victim had a son who lived in San Diego, but the son was in prison, and, more importantly, the photographs in question had never been released to the public.

The court called Juror No. 6 back into the courtroom and asked whether the juror recognized the actual photograph, or, rather, whether he believed he recognized the person in the photograph. The juror indicated that he believed he had seen one of the actual photographs that the prosecutor had used as an exhibit. When the trial court indicated to the juror that none of the photographs had been released, the juror said that the photograph he had seen seemed to show the same person in the same position, but with her granddaughter and grandson "like around her and on the bed." The court explained that the grandchildren of the person in the photograph "would not [have] be[en] able to do that," and said that it was unlikely that the person shown in the photograph in

the prosecution's exhibit was the same person as the person in the photograph that the juror had seen. The juror responded, "Okay. That makes everything different."

Defense counsel asked Juror No. 6 for the name of his friend, which Juror No. 6 provided. The court then said, "We'll make a check over this evening; and if we've miscalled this one, we'll recall it tomorrow and we'll address it again. But, right now, you can go home thinking that it's a different person." Juror No. 6 responded, "Okay." There was no further discussion of the matter.

2. *Analysis*

The constitutional right to a fair trial requires that the jury decide the case solely on the basis of evidence from witnesses. (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

" 'Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 807, quoting *People v. Holt* (1997) 15 Cal.4th 619, 659.) The decision whether to investigate the possibility of juror bias and the extent of any investigation rests within the sound discretion of the trial court. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.)

Contrary to Gonzalez's contention, the trial court's inquiry was sufficient. The trial court dispelled any potential bias that Juror No. 6 may have harbored based on his assumption that he recognized the victim. The trial court inquired as to Juror No. 6's

concern, and obtained sufficient information from that juror to be able to inform the juror that he was mistaken in his belief that the victim was the grandmother of one of his friends. Gonzalez makes much of the fact that Juror No. 6's friend could have been Carolyn's granddaughter after all, since there was nothing further on the record about this issue. However, as the matter was left, the court indicated that the court and the prosecutor would pursue the matter further and that if there had been some mistake about whether Juror No. 6's friend was related to the victim in this case, the court would revisit the issue. Given that this issue was not discussed again, we may reasonably infer both that Juror No. 6 was mistaken in his belief that he knew a relative of the victim, and also that Juror No. 6 understood that he had been mistaken in his belief that he knew a relative of the victim. We may further infer that any potential bias that Juror No. 6 may have harbored was dispelled once Juror No. 6 was disabused of the notion that his friend was related to the victim. Under these circumstances, the trial court did not abuse its discretion in the manner in which it handled the investigation into Juror No. 6's potential bias, or in allowing Juror No. 6 to remain on the panel.

B. *Appellant's two separate convictions under section 288a must be consolidated into a single conviction*

Gonzalez was convicted of both oral copulation of an unconscious person under section 288a, subdivision (f), and oral copulation of an intoxicated person under section 288a, subdivision (i). There is no dispute that both convictions under section 288a are

based on a single act of oral copulation.³ Gonzalez contends that this court should strike one of his two convictions under section 288a, or merge the two convictions into a single conviction under section 288a, under the authority and reasoning of *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*). We agree.

In *Craig, supra*, 17 Cal.2d at page 455, the defendant was convicted of both rape by force and violence, and statutory rape, and the trial court sentenced the defendant to concurrent terms on the two convictions. The issue before the Supreme Court was "the propriety of entering separate judgments and sentences for both forcible and statutory rape, charged under separate counts, when but a single act of sexual intercourse has been committed." (*Ibid.*) The *Craig* court observed: "There has been a violation of but one statute— section 261 of the Penal Code. And, while the proof necessarily varies with respect to the several subdivisions of that section under which the charge may be brought, the sole punishable offense under any and all of them is the unlawful intercourse with the victim." (*Id.* at p. 458.) On this basis, the *Craig* court concluded, "[O]nly one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of section 261 of the Penal Code." (*Craig, supra*, at p. 458.)⁴ The court

³ Pursuant to section 654, the trial court stayed imposition of Gonzalez's sentence on the conviction for oral copulation of an intoxicated person since it was based on the same conduct for which Gonzalez was convicted of oral copulation of an unconscious person.

⁴ Since the time *Craig* was decided, the subdivisions of section 261 have been reorganized, such that forcible rape is now set forth under subdivision (a)(2) of section 261, and statutory rape is now defined under section 261.5.

modified the judgment to state that the defendant had been "found guilty of the crime of Rape, a felony, as defined and proscribed in subdivisions 1 and 3 of section 261 of the Penal Code, and as charged in counts 1 and 2 of the amended information, being separate statements of the same offense" (*Craig, supra*, at p. 459, italics omitted.)⁵

Section 288a provides that "oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person." Like the rape statute at issue in *Craig*, section 288a goes on to specify various circumstances under which an act of oral copulation is unlawful, and delineates those circumstances under multiple subdivisions. This case is precisely analogous to *Craig* in that the defendant was convicted of oral copulation of an intoxicated person and oral copulation of an unconscious person *based on a single act of oral copulation*.

⁵ The dissent attempts to avoid the holding in *Craig* by suggesting that the *Craig* court was somehow applying the "long-prevailing rule that dismissal of multiple convictions is required *only* where one crime is included within another crime." (Conc. & dis. opn. at p. 6.) The basis for this assertion is unclear. Not only does the *Craig* court not rely on the lesser-included offense rule in its decision, but it could not have done so, since each subdivision of the rape statute under which the defendant in *Craig* was convicted contains an element that the other does not. The rape statute at the time defined rape "as 'an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances,' viz: (1) where she is under 18 years of age; (2) where she does not possess the mental capacity legally to consent thereto; (3) where her resistance is overcome by force; (4) where resistance is precluded by certain designated means; (5) where she is unconscious of the nature of the act and this is known to the accused; and (6) where she submits under artifice, fraud, etc." (*Craig, supra*, 17 Cal.2d at p. 455.) The defendant in *Craig* was convicted of sexual intercourse *with someone under 18 years of age* (i.e., subdivision (1) of the statute) and sexual intercourse *by force* (i.e., subdivision (3) of the statute) based on a single act of intercourse.

The People argue that "[a]lthough the *Craig* court ultimately modified the trial court's ruling so that only one judgment was entered convicting the defendant [citation], it appears, from the court's language (i.e., 'We conclude that only one *punishable* offense of rape results from a single act of intercourse') that the *Craig* court was predominantly focused on avoiding double punishment in that case where the trial court had imposed concurrent terms. [Citations.]" However, as the People acknowledge, the *Craig* court did not simply reject the idea that the defendant in that case could be *punished* twice for a single act of intercourse that was unlawful for two reasons, but instead, concluded that the defendant could be *convicted* of only one offense of rape for his single act of intercourse under the two sets of circumstances set forth in the rape statute.

The People suggest that *People v. Pearson* (1986) 42 Cal.3d 351, 359, undermines the continuing validity of *Craig*. In *Pearson*, the Supreme Court determined that a defendant could be convicted of two separate offenses—statutory sodomy (§ 286, subd. (c)) and lewd conduct (§ 288, subd. (a))—based on the same act of sodomy. Relying on section 954, which sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct,⁶ the *Pearson* court concluded that the trial court was "authorized to convict defendant of both offenses for each act" because "the statute clearly provides that the defendant may

⁶ Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged"

be convicted of 'any number of the offenses charged.' " (*Pearson, supra*, at p. 354, italics omitted.) However, " 'conduct giving rise to more than one offense within the meaning of the statute may result in initial conviction of both crimes, only one of which, the more serious offense, may be punished. [Citation.] The appropriate procedure, therefore, is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned.' " (*Id.* at pp. 359-360, citation omitted.)

Pearson does not address the issue that was decided in *Craig*, nor does it implicitly undermine *Craig's* reasoning. Unlike *Pearson*, which involved the defendant's convictions for *two separate offenses* based on the same conduct, *Craig* involved a defendant's two convictions for the same offense based on *two circumstances* that existed at the time of the single act of intercourse. The *Craig* court concluded that the defendant could stand convicted of only a single conviction of rape based on the two circumstances alleged in that case, stating:

"Under this section [(section 261)], but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions. These subdivisions merely define the circumstances under which an act of intercourse may be deemed an act of rape; *they are not to be construed as creating several offenses of rape based upon that single act.*" (*Craig, supra*, 17 Cal.2d at p. 455, italics added.)

The two convictions for unlawful oral copulation that Gonzalez suffered in this case are akin to the two convictions for rape suffered by the defendant in *Craig*, and are entirely distinguishable from the convictions for sodomy and lewd conduct suffered by the defendant in *Pearson*. As in *Craig*, Gonzalez was convicted of two counts of the

same offense based on a single act. Specifically, Gonzalez was convicted of two counts of unlawful oral copulation on the basis of one act of oral copulation committed under the circumstances that the victim was both intoxicated and unconscious. The fact that the victim in this case was unconscious *as a result of* her intoxication supports the conclusion that she was subjected to but a single crime of unlawful oral copulation under circumstances in which she was unable to give consent. Unlike the situation addressed in *Pearson*, which involved multiple convictions for *different offenses* based on a single act, in this case, Gonzalez was convicted of the *same offense* twice based on a single act. This is precisely what the Supreme Court determined to be improper in *Craig*.

Further, with respect to the People's suggestion that the holding in *Pearson* undermines the continuing validity of *Craig*, an appellate court very recently applied *Craig* in a situation quite similar to the one presented here. In *People v. Smith* (2010) 191 Cal.App.4th 199 (*Smith*), the defendant was convicted at trial of two counts of rape—rape of an intoxicated woman, and rape of an unconscious woman. The evidence demonstrated only one act of sexual intercourse. (*Id.* at p. 205.) Following *Craig*, the *Smith* court concluded that the defendant could stand convicted of only a single count of rape based on the single act of intercourse. (*Smith, supra*, at p. 205.)

We further conclude that, as in *Craig* and *Smith*, Gonzalez may be convicted of only a single count of unlawful oral copulation based on a single act of oral copulation.

We conclude that as in *Craig*, the appropriate remedy in this case is to consolidate Gonzalez's convictions on counts 1 and 2 into a single conviction for unlawful oral copulation.

C. *Imposition of punishment on count 5 must be stayed pursuant to section 654*

Gonzalez contends that his sentences on counts 4 and 5 should have been stayed pursuant to section 654 because his commission of both of these sexual batteries was incidental to his commission of the assault with intent to commit penetration alleged in count 3.

Section 654 provides in relevant part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Section 654 prohibits multiple punishments where a single criminal act or omission violates more than one penal statute. This statutory prohibition has been extended to cases in which the defendant engages in an indivisible course of conduct with a single objective, but violates several different penal statutes in the process. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

In reviewing a defendant's claim that the court erred in failing to stay a sentence pursuant to section 654, the "defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence." (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.)

The People assert that the evidence presented at trial indicated that "at certain points, appellant had his hand down Carolyn's pants 'manipulating' her genitalia, and, at other points, his hand was on her buttocks, which w[ere] exposed as a result of appellant pulling down her pants." According to the People, based on the testimony, "the trial court could reasonabl[y] conclude that appellant had his hand on her buttocks at certain points, and inside her pants at other points" and that the "sexual battery counts (counts 4 and 5) were based on appellant's conduct of touching Carolyn's exposed buttocks." The People assert that "this is precisely what the prosecutor argued in her closing statements" and contend that the "sexual battery was not necessary to accomplish the assault, and the assault was not necessary to accomplish the sexual battery."

It is clear from both the closing statements and the instructions to the jury that the conduct underlying the charge in count 5 is in fact the same conduct that forms the basis for the charge in count 3. Count 3 charges an assault with the intent to commit penetration, and the People do not dispute that this charge was based on Gonzalez's fondling of Carolyn's genitalia. Contrary to the People's contention that both of the sexual battery counts could have been based on Gonzalez's conduct in touching Carolyn's buttocks (and apart from the issue whether the evidence would support two separate charges based on the touching of her buttocks), the jury was clearly informed that the two

sexual battery counts were based on two different acts, specifically, that one was based on Gonzalez's fondling of Carolyn's genitalia, and other was based on Gonzalez's touching Carolyn's buttocks. The information alleged as to count 4 that Gonzalez committed the crime of sexual battery when he "touched Victim's buttocks," and alleged as to count 5 that he "touched Victim's genital area." In addition, the jury was instructed with respect to the specific intent element of count 4 that it must find that Gonzalez "touched Caroline [*sic*] H.'s *buttocks* area: [¶] For the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (Italics added.) With respect to the specific intent element of count 5, the jury was instructed that it must find that Gonzalez "touched Caroline [*sic*] H.'s *genital* area: [¶] For the specific purpose of sexual arousal, sexual gratification, or sexual abuse." (Italics added.) It is thus clear that the sexual battery alleged in count 5 and the offense alleged in count 3, assault with intent to commit penetration, were based on the same act—Gonzalez's fondling of Carolyn's genitalia.

Because the offenses in counts 3 and 5 are based on the same act, Gonzalez may not be punished twice for that act. The trial court should have stayed imposition of the sentence on count 5 pursuant to section 654.

IV.

DISPOSITION

The judgment of conviction is modified to reflect (1) that Gonzalez was convicted of a single violation of unlawful oral copulation, as defined and proscribed in subdivisions (f) and (i) of section 288a, as charged in counts 1 and 2, and that his sentence is three years in state prison for that conviction; (2) Gonzalez's conviction for

unlawful copulation in count 2, together with the sentence imposed but stayed on that count, is vacated; and (3) the sentence on count 5 is stayed pursuant to section 654. In all other respects, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment and minute order to reflect these modifications, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

AARON, J.

I CONCUR:

McINTYRE, J.

BENKE, J., concurring and dissenting.

I dissent to part III, section B of the majority opinion which holds that one of Ramon Flugencio Gonzalez's two convictions under Penal Code¹ section 288a must be stricken.² I conclude the majority's reliance on *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*)³ is misplaced. *Craig* does not apply in a situation where, as here, a defendant is charged and convicted under two provisions of section 288a which require proof of different elements and set forth separate punishments.

The only exception to the rule that a single act may give rise to multiple convictions occurs when, as the result of a single act, a defendant is convicted of multiple crimes and some crimes are necessarily lesser included offenses of the other crimes. (3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 252, pp. 402-403; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1227; *People v. Ortega* (1998) 19 Cal.4th 686, 692, overruled on another point in *People v. Reed, supra*, 38 Cal.4th at p. 1228; *People v. Pearson* (1986) 42 Cal.3d 351, 354-355.) Here, Gonzalez engaged in oral copulation with an unconscious person and oral copulation with an intoxicated person in

¹ All further statutory references are to the Penal Code.

² I note the majority in its opinion uses the terms "strike" and "merge and consolidate" in concluding that Gonzalez can only be guilty of a single conviction in counts 1 and 2 for oral copulation in violation of section 288a. For ease of reference, I will use the term "strike" when discussing this issue.

³ The majority also relies on *People v. Smith* (2010) 191 Cal.App.4th 199, which is factually similar to *Craig* (e.g., evidence indicated only one act of sexual intercourse with the victim in violation of section 261, although defendant was charged and convicted of rape of an intoxicated person and rape of an unconscious person). My discussion and analysis of *Craig* applies with equal force to the Court of Appeal's decision of *People v. Smith*.

violation of both section 288a, subdivision (f) and section 288a, subdivision (i). Because section 288a, subdivision (f) and section 288a, subdivision (i) are discrete substantive offenses with distinct elements and separate punishments, neither is the lesser included offense of the other and Gonzalez's conviction for each crime is therefore expressly authorized by section 954.⁴

The holding in *Craig* is entirely consistent with the well-established rule permitting multiple convictions for a single act except when one crime is the lesser included offense of the another. In *Craig*, the court treated the defendant's statutory rape conviction as an included offense of the defendant's conviction for forcible rape of a minor and properly dismissed the statutory rape conviction.⁵

⁴ Subdivision (f) of section 288a provides that an act of oral copulation on an unconscious victim, as therein defined, is punishable by imprisonment for a period of three, six or eight years. Subdivision (i) of section 288a provides that an act of oral copulation on a victim who is prevented from resisting as a result of any intoxicating, anesthetic or controlled substance is punishable by imprisonment for a period of three, six or eight years. Although appearing in a single statute, these provisions define separate substantive offenses, as each contains elements the other does not, neither references nor depends on the other and perhaps most importantly, each provides its own period of punishment. (See *e.g.*, *People v. Muhammad* (2007) 157 Cal.App.4th 484, 490-492 [discussing the definitions of and the differences between the terms "offense," "enhancement" and "penalty provision," and noting under section 15 that a "crime or public offense" is an "'act committed or omitted in violation of law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: . . . [¶] 2. [i]mprisonment' ".])

⁵ As the majority recognizes (*maj. opn.*, p. 10, fn. 4) since *Craig* was decided the Legislature has amended our rape statutes. Rape by force is now defined by section 261, subdivision (a)(2) and punished under section 264 with a term of imprisonment of three, six, or eight years. Section 261.5 defines the distinct crime of Unlawful Sexual Intercourse which, depending on the age of the offender and the age of the victim, may be punished either as a misdemeanor or as a felony.

The majority's use of *Craig* outside the particular circumstances the court confronted in that case has doctrinal and practical ramifications well beyond Gonzalez's conviction. By applying *Craig* outside the context of the crimes at issue in that case,⁶ the majority has rendered section 654 largely obsolete in sex offense cases and provided sex offenders with unwarranted protection from the state's "Three Strikes" law. The damage however does not end there. The majority has created a new sentencing rule and given the trial courts no guidance with respect to how they should unravel the inevitable conflicts they will face in applying it.

I would affirm Gonzalez's conviction on count 2 for violation of section 288a, subdivision (i) and, like the trial court below, would apply section 654 to stay that conviction. I would not take the drastic, unwarranted, and unlawful step of striking Gonzalez's conviction.

⁶ See footnote 5, ante.

Gonzalez's Conviction in Count 2 Should Be Stayed under Section 654

A. *Multiple Convictions*

As set forth in 3 Witkin, Cal. Criminal Law, *supra*, § 252, p. 402: "The rule is that multiple convictions are permitted when the evidence establishes that more than one penal law has been violated, even though the violations occur during a single course of conduct. *The single exception* is for offenses that are lesser included offenses of another offense of which the defendant is convicted; in that instance, multiple convictions are not permitted. [Citation.]" (Italics added.)

The rule permitting multiple convictions for a single act is based on section 954 which states that "[a]n accusatory pleading may charge . . . different statements of the same offense" and "the defendant may be convicted of any number of the offenses charged." (See *People v. Ortega, supra*, 19 Cal.4th at p. 692.) The rule has been applied repeatedly by our Supreme Court in a variety of contexts in which defendants have asserted that their convictions fall within the exception for lesser included offenses. (See e.g. *People v. Reed, supra*, 38 Cal.4th at p. 1227 [single act of possessing firearm supports multiple firearm convictions]; *People v. Sanchez* (2001) 24 Cal.4th 983, 989-991, overruled on another point in *People v. Reed, supra*, 38 Cal.4th at p. 1228; *People v. Ortega, supra*, 19 Cal.4th at p. 692 [single act supports grand theft and carjacking convictions]; *People v. Pearson, supra*, 42 Cal.3d at pp. 354-355 [single act supports rape and lewd conduct convictions]. In those cases the court upheld multiple convictions

because, as is the case here, each crime had a distinct element not required of the other and thus neither crime was the lesser included offense of the other.

The holding and reasoning of the court in *People v. Sanchez* is the most instructive here. There the defendant was convicted of both murder (§ 187) and gross vehicular manslaughter while intoxicated (§ 191.5) arising out of a single collision in which one person was killed. Although the trial court stayed the manslaughter sentence under section 654, on appeal the defendant argued the manslaughter conviction was a lesser included offense of the murder conviction and should have been dismissed. The Supreme Court disagreed. (*People v. Sanchez, supra*, 24 Cal.4th at p. 988.) Because murder may be committed without the intoxication required under section 191.5, the court held multiple convictions were permissible: "Although as a factual matter, a murder may be carried out by means of a vehicle and by an intoxicated driver, in the abstract it obviously is possible to commit a murder without committing gross vehicular manslaughter while intoxicated. Accordingly, dual conviction in the present case was appropriate—although the trial court properly avoided dual punishment pursuant to section 654 by staying execution of sentence for the vehicular manslaughter offense." (*Ibid.*)

Here, although oral copulation may be committed with a person who is both unconscious and intoxicated, in the abstract it obviously is possible to commit an act of oral copulation with an unconscious person who is *not* intoxicated; similarly it is possible to commit an act of oral copulation with an intoxicated person who is *not* unconscious. Given these possibilities, section 288a, subdivision (f) and section 288a, subdivision (i) are not lesser included offenses of each other and a single act of oral copulation can give

rise to convictions under both provisions. As in *People v. Sanchez*, while dual conviction is appropriate, the trial court here properly avoided dual punishment pursuant to section 654 by staying the sentence on Gonzalez's section 288a, subdivision (i) conviction.

B. *Craig*

Rather than following the rule which permits multiple convictions except where one offense is a lesser included offense of the other, relying on *Craig* the majority creates a new exception to section 954: under this exception, multiple convictions are not possible where the Legislature has set forth multiple distinct crimes in one statute instead of in separately enumerated statutes. (Maj. opn., p. 13.) *Craig* does not support creation of such a new exception to section 954, untethered, as is the majority's exception, to any analysis of the elements of the crimes which give rise to a defendant's multiple convictions.

The court in *Craig* took no step outside the long-prevailing rule that dismissal of multiple convictions is required *only* where one crime is included within another crime. It bears emphasis that in explaining its holding, the court in *Craig* restated and applied the general rule with respect to included offenses: "The authorities have set down certain rules or tests whereby it may generally be determined whether one or more offenses result from a single act or transaction. Frequently, the test is stated to be 'the *identity of the offenses* as distinguished from the identity of the transactions from which they arise. A defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included *within the other*.' [Citation.]

Where, as here, the charge and proof disclose a *single* act of intercourse resulting from *force* employed upon a *minor*, but one punishable rape is consummated, for the proof, though dual in character, *necessarily crystallizes into one 'included' or identical offense* [italics added]." (*Craig, supra*, 17 Cal.2d at p. 457.)

In finding that each means of committing rape was *included* within the other means set forth under former section 261, the court in *Craig* was bound by the then-prevailing view of rape as a single form of "outrage" to the person and feelings of the victim and that a victim would not be "doubly outraged, once by force and once because of her tender years, but suffered on a single offense." (*People v. Mummert* (1943) 57 Cal.App.2d 849, 856-857, overruled in *People v. Collins* (1960) 54 Cal.2d 57, 60.) Later enactment of section 261.5 as a separate crime demonstrates that we have now abandoned the notion that consensual sex with a minor is indistinguishable from forcible rape. (See *People v. Chapman* (1975) 47 Cal.App.3d 597, 604, fn. 3.) Our evolving view of rape should teach us that in enacting section 288a and providing separate punishments for each subdivision, the Legislature has recognized each subdivision as a distinct crime.⁷

Because of the differences between oral copulation with an unconscious person and oral copulation with an intoxicated person, unlike the statutory rape and forcible rape of a minor considered in *Craig*, here it cannot be said Gonzalez's conviction for oral copulation with an intoxicated person was included or identical with his conviction for oral copulation with an unconscious person. Thus, even under *Craig*, the majority errs in

⁷ See footnote 4, ante.

directing that Gonzalez's conviction for violation of section 288a, subdivision (i) be vacated.

II

The Ramifications of the Majority Opinion

A. *Section 654*

Justice Chin in his dissent in *People v. Benson* (1998) 18 Cal.4th 24, 38-40 (*Benson*) (cited with approval in *People v. Correa* (2012) 54 Cal.4th 331, 338, fn. 9) fully sets forth the development of our state's section 654 jurisprudence: "Section 654 was enacted in 1872. Although amended as recently as 1997, it has remained unchanged in relevant respects. It currently provides, as relevant: 'An act or omission that is punishable in different ways by different provisions of law shall be punished . . . , but in no case shall the act or omission be punished under more than one provision.' The statute is silent on the procedure to follow when there are multiple convictions that may be punished but once. The courts developed that procedure.

"The question the courts faced was how to guarantee a defendant would not receive multiple punishment in violation of section 654 without giving that defendant an *undeserved windfall*. [Italics added.] Generally, the Legislature has permitted multiple *conviction* even when multiple punishment is prohibited. 'An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged' (§ 954.) As we

explained in *People v. Pearson* (1986) 42 Cal.3d 351, 354 (*Pearson*), 'Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct.' The courts had to decide how to treat multiple convictions that could be punished but once. Setting aside all but one of the convictions would be unwise because, if that conviction were ever vacated for any reason, the others would not be available to replace it. The courts struggled with this question in the decade of the 1960's.

"Early cases were inconsistent in their treatment of cases covered by section 654. Some simply set aside the excess conviction. (See *People v. McFarland* (1962) 58 Cal.2d 748, 763 [(*McFarland*)].) However, as we noted in *McFarland*, 'section 654 proscribes double punishment, not double conviction' [Citation.] In *McFarland*, because '[t]he appropriate procedure . . . is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned,' we 'reversed [the judgment] insofar as it imposes a sentence for grand theft, and in all other respects' affirmed. [Citation.] The modern procedure of staying the impermissible punishment had not yet developed.

"That procedure was first used in *People v. Niles* (1964) 227 Cal.App.2d 749 (*Niles*). In *Niles*, the trial court did what has become the standard; it 'stay[ed]' sentence on the lesser offense. The appellate court considered whether that procedure satisfied section 654's prohibition against multiple punishment. In a thoughtful discussion that established the legal foundation for future section 654 jurisprudence, the court found the 'stay' did satisfy section 654. Citing *McFarland*, the court first noted that section 654

only proscribes multiple punishment, not multiple conviction. (*Niles, supra*, 227 Cal.App.2d at p. 756.) 'It is obvious,' the court stated, 'that this rule poses real problems for a trial court at the time of sentence. . . . [I]f it dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all. . . . It follows that the procedure adopted by the trial court in this case was a reasonable—and so far as we can see the only possible—reconciliation of the various policies involved. Any other method either incurs the risk of letting a defendant escape altogether, or else imposes an unnecessary burden on an appellate court and on the trial court on the inevitable remand for correction of sentence. The procedure here affords appellant the maximum protection to which section 654 entitles him and, *under no condition*, can operate to his prejudice.' (*Ibid.*, italics added.) [¶] . . . [¶])

"More recently, in *Pearson*, we considered whether we should 'prohibit the use of more than one conviction based on each of [defendant's] criminal acts for the purpose of enhancing any subsequent sentences he may receive.' (*Pearson, supra*, 42 Cal.3d at p. 358.) We noted that in *In re Wright* we 'balanced the potential windfall to the defendant of reversing multiple convictions against the prejudice to him of allowing sentencing for such convictions. We then determined that the procedure of staying execution of sentence for multiple convictions instead of reversing such convictions "reasonably reconciles the policies involved in applying section 654 to protect the rights of both the state and the defendant," and follows logically from the section 654 prohibition against

punishing the defendant under more than one provision based on a single criminal act. [Citation.] [Citation.]" (*Benson, supra*, 18 Cal.4th at pp. 38-40, dis. opn. of Chin, J.)

In *Benson*, the defendant sought to strike one of his prior convictions under the three strikes law (§§ 667, subds. (b)-(i), 1170.12) on the ground the sentence on that prior had been stayed pursuant to section 654. In affirming the trial court's refusal to strike the qualifying strike prior, the majority in *Benson* found the statutory definition of a prior felony conviction in section 1170.12, subdivision (b) and the Legislature's purpose and objectives underlying the three strikes law established that each prior conviction of defendant involving a serious or violent felony qualified as a separate strike notwithstanding the fact the sentence for that conviction was stayed under section 654. (*Benson, supra*, 18 Cal.4th at p. 31.) "[T]he language of section 1170.12, subdivision (b)(1), unequivocally establishes that the electorate intended to qualify as separate strikes *each* prior conviction that a defendant incurred relating to the commission of a serious or violent felony, notwithstanding the circumstances that the trial court, in the earlier proceeding, may have stayed sentence on one or more of the serious or violent felonies under compulsion of the provisions of section 654." (*Ibid.*)

Prior to the majority's decision, section 654 had obvious application to a number of the multiple distinct crimes set forth in section 288a.⁸ Admittedly, some of the crimes

⁸ Section 288a sets forth 17 crimes which share the common element of oral copulation: oral copulation of a person under the age of 18 (§ 288a (b)(1)); oral copulation of someone under the age of 16 by someone over the age of 21 (*id.* (b)(2)); oral copulation of someone under the age of 14 by someone more than 10 years older than the victim (*id.* (c)(1)); oral copulation by use of force or fear (*id.* (c)(2)(A)); oral

set forth in section 288a will not give rise to multiple convictions or application of section 654 because they are plainly lesser included offenses of other crimes defined and punished under the statute—e.g. section 288a, subdivision (c)(2)(A) forcible oral copulation, punishable with a term of three, six or eight years, is plainly a lesser included offense of forcible oral copulation of a person under the age of 14, punishable with a term of 8, 10 or 12 years. However, section 288a also sets forth other crimes which are not included in each other—e.g. oral copulation with a person under 14 when the perpetrator is 10 years older, proscribed by section 288a, subdivision (c)(1) is not included in oral copulation of an intoxicated person, proscribed by section 288a, subdivision (i). Plainly, it is possible to have oral copulation with an intoxicated person who is not under 14 and it is also possible to have oral copulation with person under 14 who is not intoxicated.

It is just as plain that with respect to this latter class of crimes set forth under section 288a—those not included within each other—a single act may give rise to multiple crimes and application of section 654. Clearly, a single act of oral copulation with an

copulation of someone under the age of 14 by use of force or fear (*id.* (c)(2)(B)); oral copulation of someone over the age of 14 by use of force or fear (*id.* (c)(2)(C)); oral copulation by use of threat of future retaliation (*id.* (c)(3)); oral copulation of someone acting concert with another and the act is committed against the person's will (*id.* (d)(1)); oral copulation of someone acting concert with another and the act is committed against the person's will and the person is under the age of 14 (*id.* (d)(2)); oral copulation of someone acting concert with another and the act is committed against the person's will and the person is over the age of 14 (*id.* (d)(3)); oral copulation while confined while in prison or jail (*id.* (e)); oral copulation of an unconscious person (*id.* (f)); oral copulation of a person incapable of consenting by virtue of disability (*id.* (g)); oral copulation of person incapable of consenting by virtue of disability when both the perpetrator and victim are confined in a mental institution (*id.* (h)); oral copulation with an intoxicated person (*id.* (i)); oral copulation with someone who has been tricked to believe he or she is married to the perpetrator (*id.* (j)); oral copulation by someone threatening arrest or deportation (*id.* (k)).

intoxicated person under 14 would give rise to culpability under both section 288a, subdivision (c)(1) and section 288a, subdivision (i). In such a case, section 654 requires that a trial court limit the perpetrator's punishment by staying the sentence on one or more of the crimes without providing the perpetrator with the windfall of escaping all potential culpability for a second or third offense if the first offense is vacated or overturned. In contrast, the majority opinion provides a sex offender the precise windfall our section 654 jurisprudence has, over the last 50 years, carefully avoided.

Unfortunately however, under the holding in *Benson*, the windfall the majority provides sex offenders convicted under multiple provisions of section 288a is not limited to the circumstance which arises when a conviction on one of multiple charges is later vacated. The majority, by requiring dismissal instead of a stay of a second or third conviction under section 288a, provides Gonzalez and other sex offenders with the additional and perhaps more significant benefit of avoiding application of the three strikes law to a second or third offense. I see no reason why sex offenders under section 288a should receive such deferential treatment for no other reason than that their crimes are set forth in subdivisions of a singly enumerated statute.

In considering the impact of the majority's decision on enforcement of the state's sex crimes statutes, it is also important to recognize that other sex offense statutes are written in the same manner as section 288a: like section 288a, those statutes define multiple crimes as subdivisions of a single statute. (See e.g., §§ 286 [sodomy] and 289 [sexual penetration by a foreign or unknown object].) Thus, the windfall the majority has created goes well beyond section 288a.

B. *Confusion*

The majority's application of *Craig* not only provides sex offenders with undeserved windfalls, it will unnecessarily confuse and burden trial courts, including in application of the state's determinate sentencing law.

Initially, I note the confusion in the majority's handling of counts 1 and 2. On the one hand, the majority states in the body of its opinion that Gonzalez's convictions on counts 1 and 2 must be *consolidated* into a single conviction for unlawful oral copulation. (Maj. opn., p. 14.) On the other hand, the majority states in the disposition of the case that Gonzalez's conviction on count 2 and his stayed sentence on that count are *vacated*. (Maj. opn., p. 17.) As I noted in footnote 2 of my dissent, the majority also confusingly refers to "striking" count 2. I do not believe that a conviction which has been consolidated with another conviction can at the same time be vacated, inasmuch as the consolidated conviction no longer independently exists.⁹

In any event, my colleagues conclude *Craig* requires that only one offense is possible for any enumerated statute. Here, the single statutory offense is "oral copulation." Sentencing here is not unduly problematic for the majority because the

⁹ I note that in *Craig* the court did not direct that the statutory rape conviction be vacated. Instead, in its disposition the court in *Craig* modified the two judgments entered in the trial court so that only one judgment convicting the defendant of one count of rape was entered. (*Craig, supra*, 17 Cal.2d at p. 458.) "Such modification will serve to preclude the dual judgments of the trial court from hereafter working any possible disadvantage or detriment to the defendant in the later fixing of his definite term by the State Board of Prison Terms and Paroles." (*Id.* at pp. 458-459.) Here, under the governing determinate sentencing scheme, where sentences are set by the trial court, there was no risk of such confusion.

sentence ranges applicable are coincidentally identical under subdivisions (f) and (i) of section 288a. However, under the logic of the majority, even when subdivisions of 288a prescribe different sentences, there is still only one crime.

Where sentences are different within the subdivisions of 288a, I assume the majority would require the "lesser" of the offenses be stricken. (See § 1170.1, subd. (a).) However, the majority opinion does little to guide trial courts in determining what is in fact a lesser sentence for purposes of applying the rule it has adopted. Take for example, a defendant to be sentenced for a conviction of subdivision (k) of section 288a (e.g., force accomplished by threatening deportation of the victim), which carries a prison sentence of three, six or eight years, and of subdivision (d)(2) of that same statute (force accomplished by threat of retaliation), which carries a prison sentence of five, seven or nine years. Which sentence is stricken in order to satisfy the majority's implicit requirement that the sentencing court strike the less serious offense?

Under section 288a, the threat of retaliation conviction carries a more serious sentence *range*. However, current sentencing law allows the sentencing court to select the upper sentence of eight years on the threat of deportation and the middle term of seven years on the retaliation offense. Thus, should the trial court select the sentence on each count and then strike the less serious of its selections? Or should the trial court select the defendant's sentence only from the most serious range of sentences? In determining what conviction is greater, should the court consider the application of any enhancements? If there is a choice with respect to how a trial court proceeds, what due process and equal protection questions arise in making such a choice? The answers to

these questions will have profound effects not only on the way sentencing courts calculate sentences, but on the benefits currently permitted by way of a discretion-based sentence.

The chaos created by the majority opinion's incorrect application of *Craig* is unwarranted and unnecessary.

I would affirm Gonzalez's conviction on count 2 for violation of subdivision (i) of section 288a because I conclude counts 1 and 2 are separate substantive offenses, despite the fact both provisions derive from the same statute and despite the fact the violation of each arises from a single act or an indivisible course of conduct. I would also affirm the stay of Gonzalez's conviction in count 2 because, as directed by section 654, subdivision (a), it was the lower sentence term in contrast to count 1. In all other respects, I agree with the majority decision.

BENKE, Acting P. J.