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P. v. Delacruz

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	E043082
Plaintiff and Respondent,	(Super.Ct.No. RIF117099)

v. OPINION

JORGE DELACRUZ,

Defendant and Appellant.

APPEAL from the Superior Court of Riverside County. Richard Todd Fields, Judge. Affirmed with directions.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil Gonzalez, Supervising Deputy Attorney General, and Andrew Mestman, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant of two counts of child molestation (counts 1 & 2Pen. Code, 288, subd. (a)),[1] three counts of forcible rape (counts 3-5 261, subd. (a)(2)), forcible child molestation (count 6 288, subd. (b)), unlawful sexual intercourse (count 7 261.5, subd. (c)), and battery (count 8 242). In addition, the jury found that defendant committed the offenses charged in counts 1 through 6 against more than one victim within the meaning of section 667.61, subdivision (e)(5). The court sentenced defendant to an aggregate term of two years, plus a consecutive term of 75 years to life consisting of 15 years to life on count 1, 15 years to life concurrent on count 2, 15 years to life consecutive on counts 3 through 6 each, two years consecutive on count 7, and 180 days in county jail with credit for time served on count 8. On appeal, defendant argues that the court mistakenly believed it was required to impose consecutive sentences on counts 3 through 6 and the matter must, therefore, be remanded for resentencing in exercise of the courts discretion to impose either consecutive or concurrent sentences. We find that the court properly imposed the mandated consecutive sentences on counts 3 through 6. Defendant further contends the court erred in imposing a concurrent 15-year-to-life term on count 2. The People concede the issue. We agree and, therefore, remand the matter for resentencing on count 2.

I. FACTS

Defendants niece, D.D., testified that when she was 13 years old, defendant touched her vagina while the two were lying under a blanket watching a movie. She told defendant to stop, which he did. Defendant then pulled his penis out of his pants and began rubbing and grinding it against her vagina through the leg hole in her shorts. The offenses committed against D.D. formed the bases of counts 1 and 2.

Defendants cousin, Y.M., testified that when she was 14 years old, defendant compelled her to take a bath. After she got into the bath, defendant came into the bathroom, climbed naked into the tub with her, pushed her back down when she tried to leave, and then began rubbing his penis on her vagina. Defendant then stuck his penis partway into her vagina. Later that same month, Y.M. took another bath at defendants house and he again forcefully engaged in sexual intercourse with her against her will. The offenses defendant committed against Y.M. formed the bases of counts 3 and 4.

Another of defendants cousins, C.M., testified that when she was 15 years old, she was watching a movie on the floor in defendants living room when defendant removed her clothing and began having sex with her. On another occasion, defendant called her into his room, started kissing her, removed her clothing, and engaged in sexual intercourse with her. One of the offenses defendant committed against C.M. formed the basis of count 5.

Yet another cousin of defendant, S.M., testified that when she was 10 years old, defendant gave her a glass of water at his home. The water had a strange taste to it. After drinking it, she became dizzy and apparently lost consciousness. She awoke naked on the bed in defendants bedroom with defendant placing his penis inside her vagina. She struggled to get him off of her, but he grabbed her wrists and forced them onto the bed. She lost consciousness again and awoke in defendants car.

Defendants niece, A.D., testified that when she was 16 years old, defendant purchased some thong underwear for her. Defendant had her try them on in his bathroom. Thereafter, defendant began adjusting the underwear. Defendant started touching her thigh and told her he wanted to have sex with her. She told him no. Defendant left the room and returned with a tablet of spermicide which he put inside of her. He then told her to go to the bed. She told him no. He then walked her to the bed and engaged in intercourse with her. The offenses against A.D. formed the bases of counts 7 and 8.

III. DISCUSSION

A. *The Trial Court Properly Sentenced Defendant to Consecutive Terms on Counts 2 Through 6*

Section 667.61, provides that a defendant who is convicted of one of the enumerated sex offenses, including forcible rape (261, subd. (a)(2)) and child molestation by force (288, subd. (b)), shall be punished by indeterminate terms of 15 years to life if the jury also finds that the defendant has been convicted in the present case of such offenses against more than one victim (667.61, subds. (b), (c), & (e)(5)). Section 667.6, subdivision (d), provides that full and separate consecutive terms shall be imposed for forcible rape and forcible child molestation if the crimes involved separate victims or the same victim on separate occasions. (667.6, subds. (d) & (e).)

Defendant contends that by requiring the jury to find the elements of one of the enumerated sex offenses in addition to a separately listed circumstance, section 667.61 creates a separate offense. Since that offense is not listed in section 667.6, defendant contends the court maintains discretion to impose either consecutive or concurrent indeterminate terms. Therefore, since the court in this case believed it was required to impose consecutive terms for counts 2 through 4, defendant avers that the matter must be remanded for resentencing in exercise of the courts full discretion. Defendants argument fails for two reasons.

First, as defendant concedes, at least two cases have already held that the combined effect of sections 667.61 and 667.6 require imposition of consecutive life sentences in appropriate circumstances. In *People v. Jackson* (1998) 66 Cal.App.4th 182, the defendant was convicted of crimes listed in former section 667.6, subdivision (d), which mandated consecutive sentences for such crimes, but in sentencing the defendant, the trial court imposed concurrent sentences after concluding that the consecutive sentencing provision did not apply when the defendant is sentenced under section 667.61, the one strike law, to indeterminate terms in prison. (*People v. Jackson*, *supra*, at p. 190.) The Court of Appeal held that the trial court was mistaken. (*Id*. at p. 192.) It concluded that section 667.6s requirement of mandatory consecutive sentencing does apply to indeterminate terms imposed under section 667.61. (*People v. Jackson, supra,* at p. 192.) This was evident both from the specific language of section 667.61, subdivision (g), which specifically referred to section 667.6, and from the Legislatures awareness that the two statutes would combine to effect consecutive life sentences. (*People v. Jackson, supra,* at pp. 192-193 & fn. 6.) Thus, the court modified the judgment to impose consecutive indeterminate sentences on both counts for the defendants convictions of the statutorily enumerated sex crimes. (*Id*. at p. 194.) Likewise, in *People v. Chan* (2005) 128 Cal.App.4th 408, the court held that where section

667.61 requires that indeterminate sentences be imposed for multiple offenses which occurred on separate occasions, section 667.6, subdivision (d) mandates that they be imposed consecutively. (*People v. Chan, supra,* at pp. 423-424.)

Second, defendants contention that the provisions of section 667.61 create a separate offense that is not listed in section 667.6, subdivision (d) is unavailing. A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction . . . punishment[.] (15.) Here, section 667.61 does not define an act or omission, but merely refers to separately defined offenses. Thus, section 667.61 is like an enhancement, [it] does not define an offense but instead increases the punishment for the underlying substantive crime, here a sex offense. [Citations.] (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 197.) Section 667.61 provides for an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the [statutes] conditions . . . . [Citation.] (*People v. Acosta* (2002) 29 Cal.4th 105, 118.)

Here, defendant was convicted of four counts of offenses listed in both sections 667.61 and 667.6. Those offenses were forcible rape and forcible child molestation. (261, subd. (a)(2), 288, subd. (b).) The jury found that defendant committed the offenses charged in counts 1 through 6 against more than one victim within the meaning of section 667.61, subdivision (e)(5). The court below concluded that [c]ounts 3, 4, 5, and 6 are subject to Penal Code Section 667.6, subdivision (d) requiring . . . mandatory consecutive term[s] for a defendant who commits multiple sex offenses against different victims or the same victim on separate occasions. Defendants counsel below conceded that consecutive sentences for counts 3 through 6 were required: I think the Court is correct on the mandate, the sentencing, and consecutive sentences especially as they apply to Counts 3 through 6. Thus, the court properly imposed the mandated consecutive sentences on counts 3 through 6.

B. *The Matter Must Be Remanded for Resentencing on Count 2*

Defendant contends the court erred in imposing a concurrent 15-year-to-life term on count 2 because the offenses underlying both counts 1 and 2 were committed against the same victim on a single occasion. The People concede the issue. We agree.

At the time defendant committed the instant crimes, section 667.61, subdivision (g), provided that [t]he term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. . . . Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable. [F]or the purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a single occasion if they were committed in close temporal and spatial proximity. (*People v. Jones* (2001) 25 Cal.4th 98, 107.) If the crimes occurred during an uninterrupted time frame and in a single location, they occurred on a single occasion for purposes of section 667.61, subdivision (g), and only one life term may be imposed. (*People v. Jones, supra,* at p. 107.)

Here, counts 1 and 2 derived from defendants sexual contact with his niece, D.D. Defendant touched her vagina while the two were lying under a blanket watching a movie. After she told him to stop, defendant pulled out his penis and began rubbing it against her vagina through the leg hole in her shorts. The trial court stated that, it appears to me the objectives were the same with the same inappropriate sexual contact directed towards the same victim. The People conceded that the testimony as to Counts 1 and 2 during trial indicated that they were with the same victim on what could be argued as the same occasion. They took place on the bed [*sic*]. There was a brief break of I think maybe less than five minutes between the act that was the basis for Count 1 and the act that was the basis for Count 2. The court then responded, I felt that given all the circumstances and given the factin a broad sense it was on the same occasion. Maybe not in a technical legal sense. . . . [T]his really wasnt a different time or a separate place. It was really the same time and the same place, and in a technical legal sense, we might call it a separate occasion because he certainly could have had a chance to reflect. Thus, the circumstances of the offenses underlying the convictions in counts 1 and 2 were committed against a single victim within close temporal and spatial proximity; therefore, imposition of a concurrent, indeterminate sentence on count 2 was error.

III. DISPOSITION

The matter is remanded for resentencing on count 2. In all other respects, the judgment is affirmed.

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/s/ King

J.

We concur:

/s/ Ramirez

P.J.

/s/ Hollenhorst

J.

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

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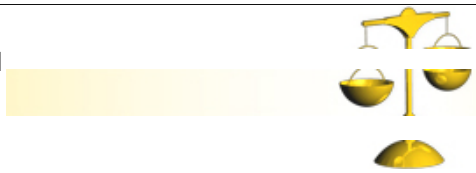

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