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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ERICK CATALAN, Defendant and Appellant.	B290568 (Los Angeles County Super. Ct. No. PA081168)

APPEAL from an order of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed in part, reversed in part, and remanded with directions.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Erick Catalan appeals his convictions for three counts of child molestation. He argues the court violated ex post facto principles when it sentenced him to consecutive sentences of 15 years to life, 6 years, and 12 years, respectively. We conclude that the sentence on count 2 (six years) violated the ex post facto clause. We find no sentencing errors as to counts 1 and 3. Nevertheless, considering the sentencing error as to count 2, we remand the case to permit the trial court to resentence on both counts 2 and 3. In all other respects, we affirm.

FACTS AND PROCEDURAL BACKGROUND

The victim was born in May 2000. She was 17 years old at the time the information was filed on August 10, 2017. From 2005 to 2010, when she was between five and ten years old, defendant dated the victim's mother and acted like a father figure to the victim. During that period, defendant lived with the victim and her mother, brother, aunt, uncle, and grandmother.[1]

1. The Molestations

The victim and her brother were often left at home in defendant's care during the day, while the other family members worked. On one occasion in 2005 when the victim was alone with defendant, defendant undressed and instructed the victim, then five years old, to undress. Defendant touched the victim's butt and rubbed his penis on her stomach and vagina. Defendant then made the victim shower, and threatened to kill the victim's family if she spoke to anyone about the assault. Although these acts were first in time, they formed the basis of count 2 in the information.

About a month later, while the victim's brother was outside, defendant interrupted the victim while she was on the

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[1] The brother is one year older than the victim.

couch playing a video game.[2] Defendant undressed her and orally copulated her. The victim was also five years old at the time. Defendant then threatened to kill the victim's mother. This molestation is alleged in count 1 of the information although it is later in time to count 2.

During the time the victim was between five and ten years old, defendant repeatedly molested her by conduct that appeared to fit a single pattern: when they were home alone, defendant would touch his penis to her vagina but would not penetrate her. Defendant touched her in this manner on more than 10 different occasions. These repeated molestations formed the basis of count 3 – continuous sexual abuse of a child.[3]

2. The Victim's Report of the Abuse

Several years later, when the victim was in seventh grade, one of her teachers referred her to the school therapist because the teacher was concerned that the victim became withdrawn when she was reprimanded in class. During her meeting with the therapist, the victim reported defendant's molestations.

Police began an investigation, and the victim described the abuse to officers. Police learned that before he left the family

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[2] Although the victim stated at trial that the date of the second incident might have been later, when her memory was refreshed by reading the police report, she testified that the incident took place a month after the first act, and she was "still five" when the second molestation had taken place.

[3] There was also evidence that defendant touched the victim's butt over her clothes when she was sitting on defendant's lap while celebrating a birthday at a restaurant, and also licked her breasts on another occasion. Based on the prosecutor's closing argument, these acts do not appear to be the basis of any particular count.

home, defendant had created a Facebook account for the victim so that she could communicate with him. With the victim's permission, police utilized the victim's Facebook and email accounts to start a conversation with defendant about the abuse. In a series of emails defendant sent in June 2014, when the victim was 14, defendant described sexual acts he performed on the victim and told her that she must delete all the emails because if they were found, he could go to jail. In the emails, defendant admitted to exposing his penis to her, kissing her breasts and body, orally copulating her vagina, and rubbing his penis on her butt and vagina.

3. Charges and Trial

In August 2017, the People filed an information charging defendant with the following counts—

- count 1: aggravated sexual assault of a minor under the age of 14 in violation of Penal Code section 269, occurring between January 1, 2005 and January 1, 2009;[4]
- count 2: lewd and lascivious act upon a minor under the age of 14 in violation of section 288, subdivision (a), occurring between January 1, 2005 and May 13, 2006;[5]
- count 3: continuous sexual abuse of a minor under the age of 14 in violation of section 288.5, subdivision (a), occurring between May 14, 2006 and December 31, 2010.[6]

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[4] All subsequent statutory references are to the Penal Code.

[5] As we have earlier observed the second count was chronologically first in time.

[6] The People amended the information at trial to change the dates of the offenses in counts two and three. The amended dates are reflected in the text in our outline of the charges.

On April 25, 2018, jury trial commenced. The People argued that count 1 related to defendant's oral copulation of the victim, count 2 corresponded to the first-in-time incident where defendant touched the victim's unclothed vagina and stomach with his penis, and count 3 was defendant's continuous sexual abuse of the victim until she was 10 years old. On May 4, 2018, the jury returned verdicts finding defendant guilty on all three counts.

In both a sentencing memorandum and orally at sentencing, the People argued defendant should receive the maximum sentence for his crimes and that punishment for the continuous sexual abuse must be served consecutively to the other sentences. Defendant argued that each count related to the same course of conduct and he should thus be punished for a single crime. He requested a six-year sentence based on the midterm for count 2.

The court found the charged offenses were separate acts. The court stated that it was mandated by the Legislature to sentence defendant to an indefinite term of 15 years to life for count 1 (aggravated sexual assault of a minor by oral copulation). The court indicated it was required to sentence the indeterminate term for count 1 consecutively to the determinate terms for the other counts. The court chose the respective midterms of 6 years and 12 years for count 2 (lewd and lascivious act on a minor) and 3 (continuous sexual abuse of a minor). The court concluded that it was required to impose a consecutive sentence on count 3 under section 667.6, subdivision (e)(6). The court ordered the terms for counts 2 and 3 to be served as mandatory, full, consecutive terms. Defendant's total sentence was 33 years to life.

Defendant timely appealed.

DISCUSSION

Defendant argues the trial court violated the prohibition on ex post facto legislation by imposing a consecutive 15 years to life sentence for count 1. He also asserts the trial court committed ex post facto error by imposing consecutive sentences on all three counts without exercising its discretion to impose concurrent sentences. Defendant claims consecutive sentences were not authorized under sentencing statues in effect when the molestations occurred.

Before we consider each count, we first address whether these claims have been forfeited and then summarize the relevant ex post facto principles.

1. Defendant's Ex Post Facto Claims Are Not Forfeited

Respondent asserts that defendant forfeited his ex post facto claims because he failed to object at sentencing. Defendant counters that the sentences imposed were legally unauthorized, and cannot be forfeited. In general, sentencing errors must be raised at trial or they are forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 351 (*Scott*).) Nonetheless, "an ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object below." (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 258 (*Hiscox*).) A sentence is unauthorized if "it could not lawfully be imposed under any circumstance in the particular case." (*Scott,* at p. 354.) As defendant raises the issue of unauthorized sentences, which cannot be forfeited, we address his claims on appeal.

2. Prohibition Against Ex Post Facto Laws

The ex post facto clause of our state and federal Constitutions prohibits the Legislature from retroactively imposing a greater punishment for a criminal act than the law provided when the act was committed. (*People v. Rojas* (2015) 237 Cal.App.4th 1298, 1306.) "The language of the state and

federal clauses is identical in relevant part: each declares that no 'ex post facto law' shall be passed." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295.) "The standard for determining whether a law violates the ex post facto clause has two components, 'a law must be retrospective—that is, "it must apply to events occurring before its enactment"—and it "must disadvantage the offender affected by it" . . . by altering the definition of criminal conduct or increasing the punishment for the crime. . . .' " (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1164.) The prosecution bears the responsibility of proving that the charged offenses occurred on or after the effective date of the statute under which the defendant is sentenced. (*Hiscox, supra,* 136 Cal.App.4th at p. 256.)

Our review of this constitutional issue is de novo. (*In re Sampson* (2011) 197 Cal.App.4th 1234, 1241.)

3. The Sentence on Count 1 Did Not Violate the Ex Post Facto Clause

For count 1, defendant was sentenced to 15 years to life under section 269. Defendant argues the court committed ex post facto error by sentencing defendant under the law that went into effect on September 20, 2006, much after the 2005 molestation that formed the basis of count 1. Defendant is correct that the law changed in 2006, but he is incorrect that count 1 was tried under the new law.

Prior to 2006, an aggravated assault by oral copulation of a child under 14 years by someone 10 years older was committed if the defendant used "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (Former § 269.) On September 20, 2006, the statute was amended to add an additional aggravating factor -- oral

copulation accomplished "by threatening to retaliate in the future against the victim or any other person."[7] (§ 287, subd. (c)(3).)

Although this legislative history might be relevant in other settings, this change in law had no impact on the trial here. The information alleged that the oral copulation in count 1 took place between January 1, 2005 and January 1, 2009.

But the only testimony on the subject – the victim's – was precise. She testified that count 1 (the second incident in time) followed the first incident (count 2) by about a month and both took place when she was five years old. She remembered her age at the time because the assaults took place "near my birthday." That birthday would have been in May 2005.

We agree with defendant that the 2005 version of section 269 applied to the aggravated oral copulation charge. The record suggests that court and counsel were in agreement on the point. The minute order of May 3, 2018 states: "Court and counsel confer in chambers re: jury instructions. [¶] On the record, the court has read the agreed upon jury instructions numbers." The trial court then read to the jury the agreed instructions, including CALCRIM 1015 which for aggravated sexual assault required the jury to find that the "defendant accomplished the act by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to someone." By concluding that defendant was guilty of the charge the jury made the CALCRIM 1015 finding.

Defendant made no claim on appeal that there was insufficient evidence that defendant acted with "force, violence,

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[7] The amendment to section 269 deleted the "force, violence, duress, menace or fear" language and added a reference to the primary oral copulation statute, then section 288a. By that amendment, section 269 incorporated from section 288a both the "future retaliation" enhancement as well as the "force, violence, duress, menace, or fear" enhancement.

duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" when he orally copulated the victim. The victim testified about the series of threats defendant made against her family in connection with each sexual assault and the fear she felt. We need not repeat the details of those threats here.

We find no error in the instructions given to the jury on this question or in the evidence admitted to convict defendant of the section 269 charge. The trial court lawfully imposed the 15-years-to-life sentence.

4. No Ex Post Facto Error in Imposing a Fully Consecutive Sentence for Count 3

Count 3 was continuous sexual assault of a child pursuant to section 288.5. According to the victim, the continuous sexual assault was by defendant touching the victim's vagina with his penis. The victim testified that the continuous assault took place at least 10 times while she was between 5 and 10 years old. The trial court stated it was required to sentence count 3 consecutively to count 1 because "determinate sentences must be consecutive to an indeterminate sentence."

Defendant argues that the court committed ex post facto error in imposing a fully consecutive sentence for count 3.

Under California law, "two different sentencing schemes coexist today: one determinate, the other indeterminate." (*People v. Felix* (2000) 22 Cal.4th 651, 654 (*Felix*).) Pursuant to the Determinate Sentencing Act, " 'most felonies specify three possible terms of imprisonment (the lower, middle, and upper terms); . . . the trial court selects one of these terms. ([Pen. Code,] § 1170, subd. (b).)' [Citation.] These terms are generally referred to as 'determinate sentences.' (Pen. Code, § 1170, subd. (a)(1). . . .) Some crimes, however, remain punishable by imprisonment for either some number of years to life, or simply 'life.' " (*Ibid.*) When

a defendant is sentenced to a determinate and an indeterminate sentence, neither term is principal nor subordinate. The determinate sentence must be served fully and first. (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.) Count 1 carried an indeterminate sentence; count 3 a determinate sentence.

To determine whether defendant's conviction for violating section 288.5 subjected him to a full mandatory consecutive sentence again requires us to consider legislative changes to the relevant sentencing statute.

From September 20, 2006 to December 31, 2018, section 667.6, subdivision (d) provided that a "full, separate and consecutive sentence 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."[8] One of the enumerated offenses in subdivision (e) was section 288.5, continuous sexual assault of a child. (§ 667.5, subd. (e)(6).) If this version of the statute applies to count 3, then the trial court correctly imposed a fully consecutive sentence.

Defendant argues because the jury was not asked to determine the dates of the individual acts that constituted the continuous sexual assault, it is possible that some of the acts took place before September 20, 2006. Defendant is correct that the version of section 667.6 in effect prior to September 20, 2006 did not include continuous sexual assault as one of the enumerated offenses carrying with it a fully consecutive sentence. Defendant is incorrect that the prior version of the statute applied to this case.

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[8] Defendant does not contest that the crimes of which defendant was convicted involved "the same victim on separate occasions" within section 667.6.

The victim testified that she was molested at least 10 times from the time she was five until she turned 10. This testimony can only be reasonably interpreted as meaning that at least one of the acts of continuous sexual abuse occurred when she was approximately 10 years old. The victim turned 10 in May 2010, long after section 288.5 was added to the list of sections that required a full consecutive sentence under section 667.6. In *People v. Palacios* (1997) 56 Cal.App.4th 252, the Court of Appeal was confronted with the scenario that defendant suggests could have happened – some of the acts may have taken place before the change in the law. *Palacios* says that it is irrelevant: "Section 288.5 punishes a continuous course of conduct, not each of its three or more constituent acts. (*People v. Avina* (1993) 14 Cal.App.4th 1303, 1308-1313 [no unanimity instruction required]; *People v. Higgins*[(1992)] 9 Cal.App.4th [294,] 304-305 [same].) A continuous course of conduct offense cannot logically be 'completed' until the last requisite act is performed. Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition. (1 LaFave & Scott, Substantive Criminal Law (1986) § 2.4(b), p. 142; see also *People v. Toplitzky* (1996) 43 Cal.App.4th 491, 493-494 [conspiracy], and cases cited therein; *U.S. v. Kohl* (9th Cir. 1992) 972 F.2d 294, 297-298 [application of sentencing guidelines to 'straddle' offense], and cases cited therein.)." (*Id.* at p. 257.)

We agree with *Palacios*. As at least one of the several acts of continuous abuse took place after September 20, 2006, the trial court correctly used the version of section 667.6 then in effect to impose a fully consecutive sentence on count 3.

5. The Court Erred in Sentencing Count 2

The trial court sentenced defendant to a full, consecutive midterm sentence of six years on count 2. Defendant argues that

the sentence was unauthorized. Count 2 alleged that defendant committed a lewd and lascivious act upon a minor under the age of 14 in violation of section 288, subdivision (a). According to the information, the act took place between January 1, 2005 and May 13, 2006. Referencing the changes brought by the September 2006 amendments to section 667.6, defendant argues that "at the time of commission of the offense, consecutive sentencing was not mandatory" for a lewd and lascivious act on minor charged under section 288, subdivision (a). We agree.

The sexual abuse in count 2 took place near the victim's fifth birthday, or somewhere around May 2005. As we have already observed, section 667.6 requires full mandatory sentences for certain crimes. The version of section 667.6, subdivision (d) in effect in May 2005 required fully consecutive sentences for certain convictions listed in the statute. Although the enumerated statutes included sections 288a and 288, subdivision (b), defendant was convicted of neither of these offenses. He was convicted for violating section 288, subdivision (a).[9]

Respondent argues that another provision of section 667.6 supports full consecutive sentence for count 2. Respondent points to this language in section 667.6, subdivision (c): "A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)."

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[9] Historically, section 288, subdivision (a) was often confused with section 288a, although they are separate statutes. The former, charged in count 2 here, prohibits lewd and lascivious conduct. The latter prohibits certain acts of oral copulation. In an apparent effort to avoid the confusion, the Legislature in 2013 renumbered section 288a as section 287. Defendant was not separately charged with violating section 288a, as it existed at the time of these events.

Respondent reasons that even if count 2 was not an enumerated offense under (e), defendant was also convicted in count 3 of continuous sexual abuse (§ 288.5) which is a subdivision (e) enumerated offense. In a sense, so the argument goes, the presence of one qualifying conviction (§ 288.5) pulls the other conviction (§ 288, subd. (b)) into the full consecutive realm. Without passing on whether respondent's statutory interpretation argument is correct in other situations, a more fundamental defect in respondent's argument exists here.

Count 2 took place on or about the victim's fifth birthday in May 2005. The quoted language on which respondent relies was not in the version of section 667.6 in effect in May 2005. Thus it does not apply to defendant.

Given the state of the law, sentencing on count 2 was governed primarily by section 1170.1, subdivision (a) in effect in May 2005. As the court selected count 3 as the principal term, count 2 became the subordinate term. The trial court could have imposed a concurrent sentence on count 2 or a consecutive sentence comprised of one-third the midterm for the subordinate offense (§§ 669, 1170.1). The trial court was neither required nor permitted to impose a full consecutive sentence. If the court chose to sentence consecutively, it was limited to the one-third mid-term sentence. The middle term for a lewd and lascivious act under section 288, subdivision (a) committed in May 2005 was six years. Thus, one-third the middle term was two years.

6. Remand for Sentencing

The trial court's sentence for count 2 was unauthorized and is reversed. The reversal of a sentence on one of several counts authorizes the trial court on remand to consider its discretionary sentencing choices on all counts. " '[U]pon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify

every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term.' " (*People v. Navarro* (2007) 40 Cal.4th 668, 681; see also *People v. Buycks* (2018) 5 Cal.5th 857, 893 ["[w]hen part of a sentence is stricken on review, on remand for resentencing 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.' "].)

We express no opinion on whether or how the trial court is to sentence on remand.

DISPOSITION

The judgment is reversed as to count 2 and the case is remanded for resentencing on counts 2 and 3. In all other respects, the judgment is affirmed.

RUBIN, P.J.

WE CONCUR:

BAKER, J.

KIM, J.