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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR RICARDO RAMIREZ,

Defendant and Appellant.

2d Crim. No. B266653
(Super. Ct. No. 2014028519)
(Ventura County)

Penal Code section 269, subdivision (c) mandates that full, separate and consecutive sentences be imposed for specified sexual assaults committed against a child “on separate occasions as defined in subdivision (d) of [s]ection 667.6.”¹ “What the trial court must decide is whether ‘the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.’” (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1070-1071, citing § 667.6, subd. (d).) “If a court

¹ All statutory references are to the Penal Code.

concludes such a finding is appropriate, it must *clearly explain* its reasoning based upon a dispassionate review of the facts.” (*Irvin*, at p. 1071, italics added.)

In the instant matter, appellant Victor Ricardo Ramirez was convicted by jury of nine counts involving lewd acts and sexual assault on his former wife’s daughter, Nicole S., from the time she was five until she was in middle school. (§§ 269, subd. (a)(4)-(5), 288, subd. (a).)² Four of the nine counts of which appellant was convicted each charged a violation of section 269. Two of the counts occurred on one date; two of the counts on another. Each count carried a sentence of 15 years to life.

Ramirez contends that the trial court’s findings were inadequate to impose consecutive sentences (1) for the offenses committed on the same date which resulted in an additional sentence of 30 years to life on the sexual assault counts (§ 269), and (2) for the five lewd conduct offenses (§ 288). We agree.

The trial court found: “I presided over the trial. I heard the witnesses testify. I heard the evidence. I believe the defendant . . . does represent a great danger to the community. He does need a lengthy commitment to decrease likelihood (*sic*) of victimization of persons in the future as well as a deterrent.”

² Section 269, subdivision (a)(4) is an aggravated sexual assault of a child with oral copulation; subdivision (a)(5) is an aggravated assault with sexual penetration. Section 288, subdivision (a) is a lewd act upon a child.

We conclude that the trial court did not make adequate findings at the sentencing hearing to support its determination that each of the four assault convictions (§ 269) was committed on a separate occasion, as required for the imposition of multiple terms. (§ 667.6, subd. (d).) Nor do the findings explain why the court imposed consecutive sentences for Ramirez's five lewd conduct convictions. (§ 288.) We remand the case for resentencing, at which time the trial court shall state, in detail, the reasons for the sentence it imposes for all nine convictions.

FACTS AND PROCEDURAL HISTORY

Ramirez is the stepfather of Nicole S., and the father of Nicole's four older half-siblings. Ramirez treated Nicole like one of his own children, taking her to school daily, feeding her, and playing a parental role. Though divorced and living apart from Nicole's mother, Ramirez spent time every day at Nicole's home.

Counts 1 and 2 (§ 269, subd. (a)(4)-(5))

In 2000, when Nicole was five years old and in kindergarten, Ramirez molested her as she watched television while on a bed at her mother's home. She testified that he closed the bedroom door, removed her leggings, spread her legs, and "put his face between my legs and began doing . . . oral copulation, and he removed -- inserted his fingers inside of my vagina," for 10 to 15 minutes. Ramirez did not say anything to her while he was doing this. Nicole was crying, scared and in pain during the assault.

Counts 3 and 4 (§ 288, subd. (a))

When Nicole was six years old, Ramirez drove her to his mother's home and committed the same acts as before, placing his mouth on her vagina, then inserting his fingers into her. She

cried and tried to push away his head and hand, but he did not stop. This went on for 15 minutes. No one else was in the house.

Counts 5 and 6 (§ 288, subd. (a))

Ramirez took Nicole to his mother's house when she was seven years old, sometime in 2002-2003. No one else was there. Nicole testified that he removed her pants, "put his mouth on my vagina and put his fingers in and out of my private area" for 10 to 15 minutes. As before, Nicole cried and tried to push his face and hand away from her vagina.³

Counts 7 and 8 (§ 269, subd. (a)(4)-(5))

Ramirez drove Nicole to the beach in his recreational vehicle when she was seven or eight years old. She fell asleep on the way home, and testified that "I woke up to Victor's face between my legs and his mouth was on my vagina, and he ended up putting his fingers inside of me again." She continued, "I was trying to push his hand so he wouldn't hurt me or continue doing what he was doing and trying to push his face away, but nothing would stop him." This conduct continued for more than 10 minutes. Afterward, Ramirez was somewhat apologetic, said "I'm sorry baby" and looked like he was going to cry. When Nicole showered, she saw blood in the crotch of her bathing suit.

Count 9 (§ 288, subd. (a))

When Nicole was in the seventh grade, Ramirez grabbed her arm and tried to have her stroke his erect penis over his clothing as they drove down the freeway. He put his hand on

³ Nicole testified that during one of the assaults in the home of Ramirez's mother, defendant forced her to touch his penis and she observed that he is circumcised. In defense, an expert testified that Ramirez is not circumcised.

her upper thigh. Nicole was upset and crying. She shouted “Stop” and Ramirez stopped touching her. He never again molested her.

The Recorded Pretext Call

Nicole reported the molestations to the police in 2014. The police arranged for Nicole to make a recorded pretext call to Ramirez. He asked Nicole for forgiveness, adding, “I was sick.” He admitted that what he did was “wrong.” At the same time, he denied putting his face and fingers in Nicole’s private parts, or did not remember doing this, and said he was apologizing “for behaving bad.”

The Sentence Imposed

The district attorney filed a nine count felony information against Ramirez in April 2015. A jury found Ramirez guilty on all counts. The trial court sentenced Ramirez to the upper term of eight years on his lewd conduct conviction in count 3, and one-third of the middle term (two years) on each of the remaining lewd conduct counts, for an aggregate determinate term of 16 years. Ramirez was sentenced to a term of 15 years to life for each aggravated sexual assault in counts 1, 2, 7 and 8, all consecutive, for an indeterminate term of 60 years to life.

DISCUSSION

The Aggravated Sexual Assault Counts

The trial court must impose consecutive sentences for each conviction of aggravated sexual assault on a child if the crimes “involve the same victim on separate occasions as defined in subdivision (d) of [s]ection 667.6.” (§ 269, subd. (c).)

“In determining whether crimes against a single victim were committed on separate occasions . . . the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect

upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.” (§ 667.6, subd. (d).) Under subdivision (d) of the section, “the court is without discretion in the matter, but *must* impose full separate, and consecutive terms” if the crimes involve the same victim on separate occasions. (*People v. Craft* (1986) 41 Cal.3d 554, 559; see Cal. Rules of Court, rule 4.426(a).)

Subdivision (d) of section 667.6 establishes “an objective test for determining whether sex crimes against a single victim occurred on separate occasions.” (*People v. Jones* (2001) 25 Cal.4th 98, 104, fn. 2.) Using this “broad standard,” the courts “have not required a break of any specific duration or any change in physical location” to find “separate occasions.” (*Id.* at p. 104; *People v. King* (2010) 183 Cal.App.4th 1281, 1325.) “[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.” (*People v. Irvin, supra*, 43 Cal.App.4th at p. 1071.) By the same token, an attack may not be “divisible on the basis of another offense, time, climax, or opportunity to reflect.” (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1317.)

The statute requires that between crimes, “the defendant had a reasonable opportunity to reflect . . . and nevertheless resumed sexually assaultive behavior.” (§ 667.6, subd. (d); *People v. Solis* (2012) 206 Cal.App.4th 1210, 1215-1220 [the meaning of § 667.6, subd. (d) is not unconstitutionally vague].) For example, if a defendant sexually assaults a victim in his car, first digitally penetrating the victim’s vagina, then orally

copulating her, and finally raping her, consecutive terms cannot be imposed for the sexual acts occurring before the rape, absent evidence of any interval between these crimes affording a reasonable opportunity for reflection or any evidence of a cessation of the assaultive behavior that allowed the defendant to resume that behavior. (*People v. Corona* (1988) 206 Cal.App.3d 13, 15-18. Compare *People v. Plaza* (1995) 41 Cal.App.4th 377, 384 [consecutive sentences can be imposed where the defendant committed forced oral copulation in the victim's bathroom, then forced her into the bedroom where he digitally penetrated her, but stopped to listen to an answering machine and punch three holes in the wall, and finally committed another act of oral copulation].)

The trial court found, in sentencing Ramirez to consecutive terms, that counts 1, 2, 7 and 8 “are all separate instances [of] independent acts.” The court offered no further explanation for imposing consecutive sentences.

Counts 1 and 2 occurred when Nicole was five years old. Over a period of 10 to 15 minutes Ramirez both orally copulated Nicole (count 1) and contemporaneously digitally penetrated her (count 2) while she lay on a bed at her home. We cannot, however, glean from the record whether Ramirez had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. (§ 667.6, subd. (d); *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.)

Counts 7 and 8 occurred when Nicole was eight or nine years old and went to the beach with Ramirez in his recreational vehicle. In this incident, Ramirez both orally copulated Nicole (count 7) and digitally penetrated her (count 8). Once again, we cannot glean from the record whether Ramirez had a reasonable

opportunity for reflection between the assaults. (§ 667.6, subd. (d).)

The case is remanded for the trial court to set forth its findings how Ramirez “had a reasonable opportunity to reflect upon his . . . actions,” especially with respect to the timing of the oral copulation and the digital penetration, i.e., why the four charges under section 269 occurred on separate occasions. (*People v. Irvin, supra*, 43 Cal.App.4th at pp. 1065-1066, 1070; see, e.g., *People v. King, supra*, 183 Cal.App.4th at p. 1325 [multiple digital penetrations qualified as separate occasions because the defendant removed his fingers and looked around uneasily when a car passed by, showing awareness that he was engaged in wrongdoing, then resuming when the coast was clear].)

The Lewd and Lascivious Conduct Counts

The trial court has discretion to impose concurrent or consecutive sentences for each of Ramirez’s five convictions for lewd and lascivious conduct upon a child. (§ 288, subd. (a); *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.) If the court imposes consecutive sentences, it must state, on the record during the sentencing hearing, its reasons for imposing consecutive sentences. (§ 1170, subd. (c); Cal. Rules of Court, rule 4.406(b).)

Here, the court stated, “I presided over the trial. I heard the witnesses testify. I heard the evidence. I believe the defendant . . . does represent a great danger to the community. He does need a lengthy commitment to decrease likelihood (*sic*) of victimization of persons in the future as well as a deterrent.” Also, it “heard evidence regarding uncharged acts which the Court can consider. Whether I consider them or not, it gives me a better framework of this defendant.”

The court's statement fails to articulate its reasons for imposing consecutive sentences, preventing meaningful appellate review. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450; *People v. Fernandez* (1990) 226 Cal.App.3d 669, 684.) The appropriate course is a remand for resentencing. (*People v. Irvin, supra*, 43 Cal.App.4th at p. 1070.)

At resentencing, the trial court must give a statement of reasons for choosing concurrent or consecutive sentences. The reasons may include aggravating factors, including the young age of the victim and Ramirez's position of trust with the victim. (*People v. Valdez, supra*, 193 Cal.App.4th at p. 1524; Cal. Rules of Court, rule 4.425(b).) The court should consider whether the crimes (1) were predominantly independent of each other; (2) involved separate acts of violence or threats of violence; and (3) were committed at different times or separate places, and were not so close in time and place as to indicate a single period of aberrant behavior. (Cal. Rules of Court, rule 4.425(a).) This list is not exclusive, but if the court considers additional criteria reasonably related to the sentence, "[a]ny such additional criteria must be stated on the record by the sentencing judge." (Cal. Rules of Court, rule 4.408(a).)⁴

DISPOSITION

The judgment is reversed for resentencing. In all other respects, the judgment is affirmed. On remand, the court's sentencing choices must be supported by a detailed statement of reasons. Following resentencing, the trial court shall, if

⁴ We do not reach the constitutional argument raised in Ramirez's brief because he may receive an entirely different sentence following remand.

appropriate, amend the abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

F. Dino Innumerable, Judge
Superior Court County of Ventura

Richard C. Gilman, under appointment by the Court of
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A.
Engler, Chief Assistant Attorney General, Lance E. Winters,
Senior Assistant Attorney General, Susan Sullivan Pithey,
Supervising Deputy Attorney General, Heather B. Arambarri,
Deputy Attorney General, for Plaintiff and Respondent.