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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LLAMAS LLAMAS,

Defendant and Appellant.

2d Crim. No. B239150
(Super. Ct. No. 2010013320)
(Ventura County)

David Llamas Llamas appeals the judgment following his convictions for aggravated sexual assault (rape) of a child under the age of 14 (J. G.) (Pen. Code, § 269, subd. (a)(1)),[1] continuous sexual abuse of a child under the age of 14 (J. G.) (§ 288.5, subd. (a)), lewd act upon a child of 14 (J. G.) (§ 288, subd. (c)(1)), continuous sexual abuse of a child under the age of 14 (Y. G.) (§ 288.5, subd. (a)), and lewd acts upon a child of 14 and 15 (Y. G.) (§ 288, subd. (c)(1)). Llamas was sentenced to three consecutive terms of 15 years to life in prison for the aggravated sexual assault and the two counts of continuous sexual abuse. He was also sentenced to three years for the lewd act against a child of fourteen and eight months for lewd acts upon a child of fourteen and fifteen.

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

Llamas contends that the trial court erred in sentencing him to consecutive 15 years to life terms for the two counts of continuous sexual abuse (§ 288.4) by failing to understand it had discretion to impose concurrent sentences. Llamas also contends the trial court erred in awarding restitution to a victim of an uncharged crime, issuing a no-contact order (§ 1202.05), and miscalculating presentence custody credit. We will modify the judgment regarding the restitution, no-contact order and custody credits. The judgment, as modified, is affirmed.

FACTS AND PROCEDURAL HISTORY

J. G. was born in January 1996 and her half-sister Y. G. was born in April 1993. During the commission of the offenses, they lived with their mother and stepfather Llamas in various locations in Ventura County California.

Llamas began sexually abusing J. G. when she was four years. During the period when she was four to seven years old, Llamas repeatedly touched her vagina and buttocks, and placed his finger into her vagina. Llamas also touched J. G. with his penis and forced J. G. to put her mouth on his penis until he ejaculated.

Llamas began having sexual intercourse with J. G. when she was eight or nine years old. Llamas continued to have repeated sexual intercourse with J. G. into 2007. In March 2007, her mother observed an act of sexual abuse and called the police. In talking to the police, J. G. minimized the incident and denied any prior incidents. No charges were brought against Llamas. The sexual intercourse resumed shortly after the police investigation with somewhat less frequency and continued into 2010.

Llamas began sexually abusing Yahiara G. when she was approximately eight years old. He repeatedly touched her vagina with his erect penis while lying on top of her. The abuse continued at least weekly over the next several years. Repeated and frequent abuse was continuing to occur when she turned 14 in 2007.

DISCUSSION

Mandatory Consecutive Sentences for Violation of Section 288.5

Llamas contends the trial court imposed consecutive sentences for the two counts of continuous sexual abuse of a child under the age of 14 (§ 288.5, subd. (a)) in

the mistaken belief that consecutive sentences were mandatory under section 667.6, subdivision (d). Llamas argues that the court had discretion to order the sentences to be served concurrently because he was charged under the sentencing scheme of section 667.61 and, therefore, section 667.6, subdivision (d) did not apply. We disagree.

Section 667.61, the "one strike law," was enacted in 1994 to provide for enhanced 25 or 15 years to life indeterminate sentences for certain listed sex offenses accompanied by one or more specified aggravating circumstances. At the time section 667.61 was enacted, section 667.6, subdivision (d) provided that a "full, separate, and consecutive term" of imprisonment shall be imposed for certain listed sex offenses "if the crimes involve separate victims or involve the same victim on separate occasions."

Prior to 2006, the offense of continuous sexual abuse of a child under the age of 14 (§ 288.5) was not listed either section 667.61 or 667.6 and, therefore, was not subject to the 25 or 15 years to life sentences imposed by section 667.61 or the mandatory consecutive sentencing required by section 667.6, subdivision (d). In 2006, section 667.61 was amended to include section 288.5 as an offense subject to 25 or 15 years to life indeterminate sentences,[2] and section 667.6 was amended to add section 288.5 as an offense subject to mandatory consecutive sentences when multiple offenses were committed against separate victims or on separate occasions.[3] The amended section 667.61 became effective on November 8, 2006, and the amended section 667.6 became effective on September 20, 2006.

Under ex post facto principles, a statutory amendment cannot be applied retrospectively if it increases the punishment for a crime after its commission. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1164.) In this case, the pleadings and jury verdicts establish that both section 288.5 offenses began prior to 2006 but were not completed until 2007 and 2008. The jury verdicts state that the continuous sexual abuse

[2] Stats. 2006, ch. 337 (S.B.1128), § 33, eff. Sept. 20, 2006; Initiative Measure (Prop. 83, § 12, approved Nov. 7, 2006, eff. Nov. 8, 2006).

[3] Stats. 2006, ch. 337 (S.B.1128), § 32, eff. Sept. 20, 2006.

of J. G. occurred between January 24, 2000, and January 23, 2008, and that the continuous sexual abuse of Y. G. occurred between April 29, 2000, and April 28, 2007. The evidence shows that multiple acts of sexual abuse were committed against both J. G. and Y. G. after the effective date of the 2006 amendments. Therefore, Llamas was subject to sentencing under the 2006 versions of sections 667.6 and 667.61.

Llamas tacitly concedes that the current version of section 667.61 applies in this case, and that the current version of section 667.6 would be the operative version of that statute. Llamas argues, however, that section 667.6, subdivision (d) does not apply in this case because he was "charged under the sentencing scheme of section 667.61," not under section 667.6. In essence, he asserts that, because he was "charged" under section 667.61, his sentence must be determined solely by that statute and that the trial court was precluded from considering section 667.6. We disagree.

Llamas was not "charged" under section 667.61, or any sentencing statute. Llamas was charged under section 288.5 which creates the offense of continuous sexual abuse of a child under 14 years of age. In all criminal cases involving multiple convictions, a trial court is required to impose a term of imprisonment for each offense and determine whether the terms will be served consecutively or concurrently under applicable statutes. (See §§ 669, 1170.1, subd. (a).) Section 667.61 is a sentencing statute which sets forth the term of imprisonment for a violation of section 288.5, and section 667.6 is a sentencing statute that removes the court's discretion to order terms of imprisonment to be served concurrently under certain circumstances. (See *People v. Jones* (1988) 46 Cal.3d 585, 592.) In this case, the trial court correctly imposed the required 15 years to life sentences required by section 667.61 and then ordered the sentences to be served consecutively as required by section 667.6 subdivision (d).

When section 667.61 was first enacted, there was a question of whether the mandatory consecutive sentence provisions in section 667.6, applied to the indeterminate life sentences imposed under section 667.61. This question has been resolved in two cases which held that the combined effect of sections 667.61 and 667.6 may require imposition of consecutive life sentences. In *People v. Jackson* (1998) 66 Cal.App.4th

182, 192, the court held that the section 667.6 mandatory consecutive sentencing provisions apply to indeterminate terms imposed under section 667.61. The court concluded that this was evident from the Legislature's awareness that the two statutes would combine to effect consecutive life sentences. (*Jackson*, *supra*, at pp. 192-193 & fn. 6.) Likewise, in *People v. Chan* (2005) 128 Cal.App.4th 408, 423-424, 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.

Llamas cites *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262 for a contrary position but *Rodriguez* is distinguishable. In *Rodriguez*, the offenses committed by the defendant subjected him to sentencing under section 667.61, but did not trigger application of the mandatory consecutive sentence requirement of section 667.6 because they did not involve offenses against separate victims or the same victim on separate occasions.

Restitution Order Unauthorized

Llamas contends the trial court erred in awarding restitution to a victim of an offense for which he was not convicted. Respondent concedes that the award was not authorized by statute, and we agree.

A victim who suffers loss caused by a person convicted of the crime causing the loss may obtain restitution from the convicted person. (§ 1202.4, subd. (a)(1).) Restitution is limited to losses "caused by the criminal conduct for which the defendant was convicted." (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1249.)

Here, the trial court awarded restitution to Diana M. Diana M. was not a victim of any of the offenses for which Llamas was charged or convicted. Accordingly, the restitution award as to Diana M. was unauthorized. Although the claim was not raised in the trial court, a challenge to an unauthorized sentence may be raised for the first time on appeal when it presents a legal question which can be corrected without a review of the factual circumstances. (*People v. Slattery* (2008) 167 Cal.App.4th 1091, 1094.)

No-Contact Order Unauthorized

Llamas contends the trial court erred in issuing a no-contact order pursuant to section 1202.05 as to J. G. Y. G., and Diana M. Respondent concedes that the order was not authorized by statute, and we agree.

At sentencing, the trial court ordered that Llamas was to have "no contact, either direct or indirect" with J. G., Y. G. or Diana M. "in person, by mail [or] by phone." Section 1202.05 provides that when a defendant is sentenced to state prison for violation of certain sex offenses including section 288.5, "and the victim of one or more of those offenses is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim."

Section 1202.05 authorizes orders precluding visitation, not other forms of contact. The order that Llamas have no contact "in person or by mail or by phone" exceeded that trial court's statutory authority. A sentencing court has no discretion to deviate from the penalties prescribed by statute. (*People v. Lara* (1984) 155 Cal.App.3d 570, 574.)

Moreover, even if the order were limited to "visitation," it would exceed the trial court's authority as to Y. G. and Diana M. By referring to "visitation between the defendant and the *child victim*," section 1202.05 applies only to "victims" of the charged offenses who were under the age of 18 at the time of sentencing. (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1307.) At the time of trial and sentencing, Y. G. was 18 years old and, as previously stated, Diana M. was not a victim of any offense for which Llamas was convicted and imprisoned.

Error in Computing Presentence Credit

Llamas contends the trial court erred by awarding him 647 days of presentence credit instead of the 648 days to which he was entitled. Respondent concedes and we agree.

DISPOSITION

The abstract of judgment is modified to strike the trial court's order requiring appellant to pay restitution to Diana M., and to strike the no-contact orders

under section 1202.05. The judgment is further modified to add one additional day of presentence credit for a total of 648 days. The trial court shall prepare an amended abstract of judgment showing the modifications and transmit a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Patricia M. Murphy, Judge

Superior Court County of Ventura

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