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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ALEXANDER MENDEZ, Defendant and Appellant.	B276696 (Los Angeles County Super. Ct. No. BA438935)

APPEAL from judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed as modified, and remanded with directions.

David M. Thompson, 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, Victoria B. Wilson and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After a jury convicted appellant William Alexander Mendez of multiple counts of kidnapping and sexually assaulting two victims in 2015, the trial court sentenced him to 120 years to life in prison pursuant to the "One Strike" law (Pen. Code, § 667.61).[1] Appellant now contends that under the One Strike law, the trial court could have imposed only 25-year-to-life sentences on all sex crimes counts, rather than the 40-year-to-life sentences. He further contends that the factual circumstances did not support the imposition of consecutive sentences on two sex crime counts, as the two crimes were part of one continuous course of conduct. The People concede the trial court erred in imposing the 40-year-to-life sentences, but contend the trial court properly imposed consecutive sentences because between the commission of the first and the second crime, appellant had an opportunity to reflect on his actions. We conclude that the trial court properly imposed consecutive sentences on the two counts, but that the maximum sentence the court could imposed on the sex crimes was 25 years to life. Accordingly, we reduce the sentences on those counts.

STATEMENT OF THE CASE

Appellant was charged by information with kidnapping to commit rape (§ 209, subd. (b)(1); counts 1 & 5), forcible rape (§ 261, subd. (a)(2); counts 2, 4 & 6), sodomy by use of force (§ 286, subd. (c)(2)(A); counts 3 & 8), and sexual penetration by foreign object of a minor victim over 14 years of age (§ 289, subd. (a)(1)(C); count 7). It was alleged that the crimes were committed

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

against more than one victim (Jane Doe 1 on counts 1-4; and Jane Doe 2 on counts 5-8). (§ 667.61, subd. (c).) It was further alleged as to counts 2, 3, 4, 6, 7 and 8 that appellant kidnapped the victim in violation of sections 207, 209 or 209.5, and that such kidnapping substantially increased the risk of harm to the victim (§ 667.61, subds. (d)(2), (e)(1), (4)).

A jury found appellant guilty on all counts and found true all the special allegations. The court sentenced appellant to a total term of 120 years to life, consisting of: 40 years to life on counts 2, 6 and 7; 40 years to life on counts 3 and 4, to be served concurrent with count 2; 40 years to life on count 8, to be served concurrent with count 7; and two life sentences on counts 1 and 5, stayed pursuant to section 654.

Appellant timely appealed.

STATEMENT OF THE FACTS

Jane Doe 1 testified that on July 11, 2015, she was riding her bike home from work when she encountered appellant, who was armed with a handgun. Appellant forced her to accompany him into an alley. There, he sexually assaulted her, repeatedly inserting his penis into her vagina and anus.

Jane Doe 2 testified that on May 3, 2015, appellant accosted her and forced her at gunpoint to accompany him to an alley. There, appellant stood face to face with her. He asked her how old she was, and she told him she was 16. He said he did not believe her, and that he had to check. He put his hand inside her boxer shorts and inserted his fingers into her vagina. He said to Jane Doe 2, "you're not 16" to which she responded, "Yes, I am." After removing his fingers, appellant then pulled down her shorts. She pulled them back up. He pulled them down again. She pulled them up again. The third time he pulled her shorts

down, she decided not to resist, out of fear that something worse would happen. Appellant pulled down his pants, took his penis out and unsuccessfully tried to insert it into her vagina. He then turned her around, bent her forward and inserted his penis into her vagina and anus.

Both victims were examined shortly after the assaults, and swabs were taken from their vaginal and anal regions. DNA from sperm found on those swabs matched appellant's DNA profile.

DISCUSSION

Appellant was sentenced under the One Strike law, which "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes perpetrated by force, including rape, foreign object penetration, sodomy, and oral copulation." (*People v. Mancebo* (2002) 27 Cal.4th 735, 741, fn. omitted.) The current version of the One Strike law, applicable when appellant committed the charged offenses in 2015, authorizes the imposition of 25-year-to-life sentences under subdivision (a) of the statute, provided either (1) that one or more circumstances described in subdivision (d) was established, or (2) that two or more circumstances described in subdivision (e) were established. (§ 667.61, subd. (a).) The One Strike law also authorizes the imposition of 15-year-to-life sentences under subdivision (b) of the statute, provided that one of the circumstances described in subdivision (e) was established. (§ 667.61, subd. (b).) In addition, the One Strike law provides that "the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." (§ 667.61, subd. (i).)

Here, in connection with the sex crimes counts, the jury found true one of the circumstances described in section 667.6, subdivision (d), viz., that appellant had kidnapped the victim and the movement of the victim substantially increased the risk of harm. It also found true two of the circumstances described in subdivision (e), viz., that appellant kidnapped the victim and that he committed sex crimes specified in subdivision (c) against more than one victim. At the prosecutor's urging, the trial court imposed both a 25-year-to-life sentence and a 15-year-to-life sentence on each of counts 2, 3, 4, 6, 7 and 8. The sentences on counts 2, 6 and 7 ran consecutively, and the sentences on counts 3, 4 and 8 ran concurrently.

Appellant challenges his sentence on two grounds. First, he contends the trial court erred in imposing consecutive sentences on counts 6 (forcible rape) and 7 (sexual penetration by foreign object), arguing that the crimes alleged in those counts occurred against the same victim (Jane Doe 2) at the same place during a short time frame. Appellant contends that he had no reasonable opportunity to reflect on his actions between the two sexual offenses. Second, he contends the trial court erred in imposing both a 25-year-to-life sentence and a 15-year-to-life sentence on each of the sex crimes counts. As explained below, we conclude that the imposition of consecutive sentences on counts 6 and 7 was proper, but that the 40-year-to-life sentences on the sex crimes counts was unauthorized.

A. *Consecutive Sentences*

As stated above, under section 667.61, subdivision (i), the trial court must impose consecutive sentences for each conviction of a sex crime described in subdivision (c) -- which includes forcible rape and foreign object penetration -- if the crimes

involve "the same victim on separate occasions as defined in subdivision (d) of Section 667.6." Subdivision (d) of section 667.6 provides: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, 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 or her 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).) A finding that the defendant committed the sex crimes on separate occasions "does not require a change in location or an obvious break in the perpetrator's behavior." (*People v. Jones* (2001) 25 Cal.4th 98, 104, superseded by statute on other grounds as stated in *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1307.) "Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 (*Garza*).)

In determining whether appellant had an adequate opportunity to reflect on his actions but nevertheless resumed his sexually assaultive behavior, we take guidance from those cases interpreting section 667.6, subdivision (d). In *Garza*, the appellate court affirmed the trial court's imposition of consecutive sentences under section 667.6, determining that the defendant had an adequate opportunity to reflect on his action between the

time he inserted his finger into the victim's vagina and the commission of rape, where the "defendant (1) began to play with the victim's chest; (2) put his gun on the back seat; (3) pulled the victim's legs around his shoulders and, finally, (4) forced his penis inside her vagina." (*Garza*, *supra*, 107 Cal.App.4th at p. 1092.) Similarly, in *People v. King* (2010) 183 Cal.App.4th 1281, 1325-1326, the appellate court affirmed the imposition of consecutive sentences for two sexual penetration counts where the defendant inserted the fingers of one hand into the victim's vagina, removed them after noticing some lights and a car driving by, looked around and then inserted a finger of his other hand into the victim's vagina. Finally, in *People v. Plaza* (1995) 41 Cal.App.4th 377, the appellate court affirmed the trial court's imposition of consecutive sentences for sexual penetration and forcible rape, determining that the defendant had a reasonable opportunity to reflect on his actions where, after inserting his fingers into the victim's vagina, he then removed his fingers, listened to the messages he had left earlier that day on her answering machine, punched the wall above the victim's head three times, threatened her and then placed his penis into her mouth. (*Id.* at pp. 382, 384.)

Here, after disputing Jane Doe 2's assertion that she was 16 and stating he needed to check, appellant put his fingers down her shorts and into her vagina. He then stated that she was not 16, to which she responded, "Yes, I am." Thereafter he removed his fingers and pulled her shorts down. She pulled them back up. He pulled them down again. She again pulled them back up. He pulled her shorts down a third time, pulled down his own pants, took out his penis, tried to insert it into her vagina, turned her around, bent her forward and then placed his penis into her

vagina. On these facts, a reasonable trier of fact could find that appellant had an adequate opportunity to reflect between the act of sexually penetrating the victim with his fingers and thereafter forcibly raping her, and that the acts therefore occurred on separate occasions for purposes of application of section 667.6, subdivision (d). The trial court made such a finding, and we discern no error.

Appellant's reliance on *People v. Pena* (1992) 7 Cal.App.4th 1294 (*Pena*) and *People v. Corona* (1988) 206 Cal.App.3d 13 (*Corona*) is misplaced. In *Pena*, the defendant accosted the victim in her home, raped her, got off the victim, forcibly twisted her legs and orally copulated her. (*Pena*, *supra*, at p. 1299.) The appellate court determined that the conduct constituted one continuous assault: "Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior." (*Id.* at p. 1316.) Here, in contrast, there was no continuous sexual assault. Appellant ceased his initial sexually assaultive behavior when he withdrew his fingers. Thereafter, he pulled down the victim's shorts twice, to which she responded by pulling them up. After pulling the victim's shorts down a third time, appellant pulled down his own pants. He then resumed his sexually assaultive behavior by attempting to -- and succeeding at -- raping the victim.

In *Corona*, *supra*, 206 Cal.App.3d at page 15, after the defendant forced the victim into his car, he digitally penetrated her vagina, orally copulated her, and then put his penis into her vagina. Subsequently, he exited the vehicle before returning and raping her a second time. (*Ibid.*) The appellate court noted the Attorney General's concession that the sex crimes that ended in the first rape constituted a single episode of sex offenses, and

found the trial court erred in imposing consecutive sentences for the sex crimes preceding the first rape because, "as the Attorney General tacitly concedes," there was "no evidence of any interval 'between' these sex crimes affording a reasonable opportunity for reflection." (*Id*. at p. 18.) Here, the Attorney General has made no concession that the crimes charged in Counts 6 and 7 constituted a single episode. More important, appellant had at least three opportunities to reflect on his actions and cease his sexually assaultive behavior. After appellant withdrew his fingers from the victim's vagina, he pulled down the victim's shorts and she resisted by pulling her pants back up. Appellant pulled down her shorts a second time, and she pulled them back up. He then pulled down her shorts a third time, pulled down his own pants, took out his penis and raped her. On this record, the trial court did not err in imposing consecutive sentences on counts 6 and 7.

B. *Sentences for Sex Crimes*

Appellant also contends the trial court erred in imposing both a 25-year-to-life sentence and a 15-year-to-life sentence on each of the sex crimes counts, arguing that only one sentence -- the 25-year-to-life sentence -- may be imposed on each count.[2] Although the People argued for the imposition of both sentences below, on appeal, the Attorney General concedes these are alternative sentences, only one of which may be imposed for a

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[2] Although appellant did not object to the sentences below, we may nevertheless consider his challenge to the legality of the sentences. (See *People v. Smith* (2001) 24 Cal.4th 849, 852 [""unauthorized sentences"" "reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court'"].)

single crime. We agree that under the One Strike law, only one of the two sentences may be imposed on each sex crime count. Accordingly, we reduce the sentences on counts 2, 3, 4, 6, 7 and 8 to 25 years to life in prison.

DISPOSITION

The abstract of judgment is modified to reflect a 25-year-to-life sentence on counts 2, 3, 4, 6, 7 and 8. As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.