Filed 10/25/13 P. v. Gonzalez CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANGEL GONZALEZ,<br><br>Defendant and Appellant. | B242842<br><br>(Los Angeles County<br>Super. Ct. No. BA388768) |

APPEAL from an order of the Superior Court of the County of Los Angeles, Rand Rubin, Judge. Affirmed in part, reversed in part, and remanded.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Stephanie C. Santoro, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant and appellant Angel Gonzalez (defendant) was convicted of three counts of lewd acts upon a child (Pen. Code, § 288, subd. (a)[1]), one count of sexual penetration by a foreign object (§ 289, subd. (a)(1)(a)), one count of forcible oral copulation (§ 288, subd. (c)(2)(a)), and one count of sodomy by use of force (§ 286, subd. (c)(2)(a)). On appeal, defendant contends that his constitutional due process and fair trial rights were violated when the trial court failed to follow the requirements for the presence of a support person as set forth in section 868.5, the trial court erroneously imposed a consecutive sentence on one of the counts, and he is entitled to additional presentence custody credits.

We hold that defendant's state and federal constitutional due process and fair trial rights were not violated by the trial court's appointing a support person pursuant to section 868.5, and procedures used in connection therewith, and the trial court did not erroneously impose a consecutive sentence on one of the counts. We also hold that the trial court erred in calculating the defendant's award of presentence custody credits, and remand the matter to correct the abstract of judgment. The sexual offender program fund fee pursuant to section 290.3 is reversed, and upon remittutur issuance, the trial court is to determine defendant's ability to pay a sexual offender program fund fee together with the penalties and surcharges.

## BACKGROUND

### A. Factual Background

Defendant sexually abused C.G. and M.G. C.G. was 13 years old when defendant, C.G.'s godfather, first molested her, and was 14 years old at the time of trial. C.G.'s younger sister, M.G., was seven years old when defendant first molested her, and was eight years old at the time of trial. R.G. (mother) is the mother of C.G. and M.G.

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[1] All statutory citations are to the Penal Code unless otherwise noted.

### B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with four counts of lewd acts upon a child in violation of section 288, subdivision (a) (counts 1, 2, 6 and 7, respectively), one count of sexual penetration by a foreign object in violation of section 289, subdivision (a)(1)(a) (count 3), forcible oral copulation in violation of section 288, subdivision (c)(2)(a) (count 4), and one count of sodomy by use of force in violation of section 286, subdivision (c)(2)(a) (count 5). The District Attorney further alleged as to each count that defendant committed a crime against more than one victim in violation of section 667.61, subdivision (b)(and (e).

Following a trial, the jury found defendant guilty on counts 1 through 6, and found that the special allegations were true. C.G. was the victim in counts 1 through 5, and M.G. was the victim in count 6.[2] Defendant was found not guilty on count 7.

The trial court sentenced defendant to state prison for a term of 55 years to life, consisting of a term of 15 years on each of counts 1, 2 and 6, and 25 years to life on each of counts 3, 4 and 5. The sentences for counts 1, 3, and 6 were ordered to run consecutively; the sentences for all other counts were ordered to run concurrently. Defendant was awarded a total of 272 presentence custody credits, consisting of 237 days actual custody credit and 35 days conduct credit.

The trial court ordered defendant to pay a $10,000 restitution fine (§ 1202.4, subd. (b)), a $240 court operations assessment (§ 1465.8, subd. (a)(1)), a $180 criminal conviction assessment (Gov. Code, § 70373), a $300 sexual offender program fund fee (§ 290.3); a $10,000 parole revocation restitution fine was imposed and stayed (§ 1202.45).

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[2] Defendant states that "the only counts . . . challenged [at trial] were those relat[ing] to [M.G.]"

## DISCUSSION

### A. Section 868.5

Defendant contends that his state and federal constitutional due process and fair trial rights were violated when during trial the trial court failed to follow the requirements for the presence of a support person as set forth in section 868.5. Defendant contends that the trial court erred because the prosecution failed to show that mother's attendance as a support person was desired by, and helpful to M.G., the trial court failed to admonish mother not to sway or influence M.G.'s testimony, and trial court allowed M.G. to testify prior to mother, thereby allowing mother to tailor her testimony to her daughter's testimony.

#### *1. Applicable Law*

Section 868.5 provides in relevant part, "(a) Notwithstanding any other law, a prosecuting witness in a case involving a violation of Section . . . 286, 288, 288a, . . . [and] 289, . . . shall be entitled, for support, to the attendance of up to two persons of his or her own choosing, one of whom may be a witness, at the preliminary hearing and at the trial . . . during the testimony of the prosecuting witness. Only one of those support persons may accompany the witness to the witness stand, although the other may remain in the courtroom during the witness' testimony. The person or persons so chosen shall not be a person described in Section 1070 of the Evidence Code unless the person or persons are related to the prosecuting witness as a parent, guardian, or sibling and do not make notes during the hearing or proceeding. [¶] (b) If the person or persons so chosen are also witnesses, the prosecution shall present evidence that the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness. Upon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony. . . . In all cases, the judge shall admonish the support person or persons to not prompt, sway, or influence

the witness in any way. Nothing in this section shall preclude a court from exercising its discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the witness. [¶] (c) The testimony of the person or persons so chosen who are also witnesses shall be presented before the testimony of the prosecuting witness. The prosecuting witness shall be excluded from the courtroom during that testimony."

"'The common reasons advanced for the procedure are to allow the witness to more easily come forward and to reduce the psychological harm and trauma the witness might experience. [Citation.] The state's interest in safeguarding the physical and psychological well-being of a minor or victim of sexual abuse can be a compelling one.' [Citation.]" (*People v. Lord* (1994) 30 Cal.App.4th 1718, 1721.)

*2. Relevant Proceedings*

Prior to opening statements, the prosecutor stated that she intended to call mother as a witness. The following exchange occurred, "[Prosecutor:] With regard to [M.G.], she's eight [years old]. At the preliminary hearing her mother, who's got limited English skills, was present as a support person pursuant to Penal Code section 868.5. [¶] I do anticipate calling the mother as a witness on some selected factual issues that I've discussed with [defendant's counsel]. I would prefer for flow purposes to call [M.G.] before I call her mother, although the Penal Code sort of asks that you use the support person's testimony first. [¶] So that's how I would like to proceed, but I wanted to give [defendant's counsel] a chance to object. [¶] [Defendant's counsel:] And I would object. I would ask that the mother be called in advance of [M.G.]. And I'll submit. [¶] [Trial court:] Okay. You can proceed in the manner that you want. I don't have a problem with that.

a) M.G.'s Testimony

When M.G. took the stand, the trial court permitted mother to accompany her. M.G. testified that she was eight years old. M.G. demonstrated that was able to tell the

difference between telling the truth and telling a lie, and testified that she knows that telling the truth is good and telling a lie gets her in trouble. She said sometimes she lies; sometimes she tells "big lies," and sometimes she tells "little lies." M.G. promised to tell the truth while testifying.

M.G. testified that when she was seven years old, defendant, whom she described as her "second father," molested her. M.G. was sleeping and defendant pulled her next to him. Defendant touched her genitals under her clothes. Defendant molested M.G. a second time. M.G. was playing with her uncle's cell phone when defendant touched her again on her genitals. M.G. felt unhappy that defendant touched her.

M.G. testified that after defendant was "gone from the house," M.G. asked C.G. where defendant was, and C.G. told M.G. that the police took defendant away. M.G. was happy that defendant was removed from the house. C.G. told M.G. that defendant touched C.G. on her private parts. M.G. recalled C.G. telling her that defendant "kind of" did something similar to C.G. M.G. started crying and told C.G. that defendant also touched her. M.G. told C.G. and mother that defendant molested her, but M.G. did not know if she first told her mother or C.G. M.G. told mother about defendant sexually abusing her during a walk to the dentist office.

b) Mother's Testimony

Mother testified at trial that she is the mother of C.G. and M.G. Defendant was a childhood friend of mother's husband. After mother's husband was deported, the family had financial trouble, and defendant assisted them financially.

Mother testified that early one morning, C.G. awakened her and C.G. was crying. C.G. told her that she was afraid to tell her, but defendant had put "his penis in my --." Mother called the police, and defendant was arrested.

Mother testified that one or two weeks after defendant was arrested, C.G. told mother that defendant had touched M.G. Mother asked M.G. about defendant molesting her when mother got home from the dentist, and M.G. said that defendant had touched her private parts more than once.

*3. Analysis*

Defendant objected to M.G. being called to testify prior to mother testifying. This is one of his contentions on appeal. Defendant, however, did not object regarding his contentions that the prosecution failed at trial to show that mother's attendance as a support person was desired by, and helpful to M.G.[3], and that the trial court failed to admonish mother not to sway or influence M.G.'s testimony.[4] Defendant therefore forfeited the latter two contentions.

"Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court. [Citation.] The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' [Citation.]" (*People v. French* (2008) 43 Cal.4th 36, 46; *People v. Lord*, *supra*, 30 Cal.App.4th at p. 1722 [defendant's failure to request a hearing on the necessity of a support person's presence, waived any objection to the failure to hold a hearing].) Even if defendant did not forfeit his contentions that the prosecution failed at trial to show that mother's attendance as a support person was desired by and helpful to M.G. and that the trial court failed to admonish mother not to sway or influence M.G.'s testimony, as discussed *infra*, any such errors were harmless.

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[3] At the preliminary hearing, mother acted as a support person for M.G. Prior to mother acting in that role, the prosecutor asked M.G. if she would like her mother to sit behind her while she testified, and M.G. nodded her head yes. The prosecutor also stated that during a court recess, M.G. had said that she wanted her mother present because she was scared.

[4] At the preliminary hearing, the trial court stated in acting as a support person, "I must admonish you [mother] that you're not to communicate with [M.G.] through words or any form of nonverbal communication either during the course of her testimony. If you were to be communicating with her during her testimony, I would have to have you step down and leave the courtroom."

The trial court erred in allowing M.G. to be called to testify before mother testified. Section 868.5, subdivision (c) provides that the testimony of a support person who is also witnesses "*shall* be presented before the testimony of the prosecuting witness." (Emphasis added.) It is true that "this rule is not absolute," (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1729; *People v. Redondo* (1988) 203 Cal.App.3d 647, 654 ["the marginal benefit gained by preventing a support person from testifying on recall after the victim has testified is vastly outweighed by the cost of keeping admissible evidence from the jury"]. Here, however, the prosecutor's justification for calling M.G. as a witness before calling mother as a witness is that the prosecutor "prefer[ed it] for flow purposes." The prosecutor's preference "for flow purposes" is an insufficient justification to override the legislation's requirement that a witness who is also a support person should testify before he or she acts as a support person for the victim-witness.

Any error regarding the trial court's appointing of mother as a support person and the procedures used in connection therewith, however, was harmless under either *Chapman v. California* (1967) 386 U.S. 12, 24 [harmless beyond a reasonable doubt], or *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of more favorable result]. Defendant contends that "[w]hen [mother] heard [M.G.'s] testimony prior to testifying herself, that encounter undermined the reliability of [mother's] subsequent trial testimony." The record, however, does not show that mother's presence in the courtroom during M.G.'s testimony influenced or affected mother's testimony. The testimony each gave differed. M.G. testified, inter alia, about the circumstances of her being sexually abused by defendant, her conversations with C.G. regarding defendant's molestation, and her telling mother about defendant's sexual abuse during a walk to the dentist. By contrast, mother testified, inter alia, about defendant assisting the family financially, C.G. telling her that defendant sexually abused her, calling the police, defendant being arrested, hearing about M.G. being sexually abused by defendant from C.G., and that she did not ask M.G. about the molestation until after they arrived home from the dentist's office. There is no evidence or indication in the record that mother swayed or influenced M.G.'s testimony. These facts support the conclusion that any error by the trial court in

permitting mother to act as a support person without a showing that it was desired by, and helpful to M.G., and failing to admonish mother not to sway or influence M.G.'s testimony, and allowing M.G. to testify prior to mother, is harmless under any applicable standard.

### B. Consecutive Sentence on Count 3

Defendant contends that the trial court erroneously imposed a consecutive sentence for count 3 because it was in conflict with its earlier statement to impose a concurrent sentence for that count. We disagree.

#### *1. Background Facts*

The prosecutor's sentencing memorandum stated that the trial had the discretion to impose consecutive sentences as to counts 3, 4 and 5 under section 667.6, subdivision (c). It was further stated in that memorandum that because counts 3, 4, and 5, were committed on a single occasion against one victim, "the People submit that the three 25 to life sentences for Counts Three, Four and Five may be imposed *concurrent with each other*. [¶] [T]he sentences imposed for Counts Three, Four and Five must be collectively consecutive to the sentences imposed for Counts One, Two and Six. [¶] Thus, the total sentence sought by the People is 55 years to life as follows: 15 years to life on Count One, a concurrent sentence of 15 years to life on Count Two, a consecutive sentence of 25 years to life on Count Three, a concurrent sentence of 25 [years] to life on Count Four, a concurrent sentence of 25 [years] to life on Count Five, and a consecutive sentence of 15 [years] to life on Count Six."

At the sentencing hearing, the trial court sentenced defendant consistent with the prosecutor's sentencing memorandum: "[Trial court:] Count 1 is 15 years to life consecutive to any other sentence. [¶] Count 2 is 15 years to life, to run concurrent to any other sentence, and count 6 is 15 to life, to run consecutive to any other sentence. [¶] As to counts 3, 4, and 5, it's the same date, single victim, and I'm going to use my discretion and not impose consecutive sentence. [¶] . . . [¶] Count 3, 25 to life

consecutive to any other sentence. Count 4, 20 to life concurrent with any other sentence. Count 5, 25 to life concurrent with any other sentence. [¶] Total sentence in this case is 55 years to life."

*2. Analysis*

Defendant's counsel failed to object that the trial court erroneously imposed a consecutive sentence for count 3 and therefore forfeited the contention. "A party may not raise an argument on appeal that he or she did not raise before the trial court." (*People v. Mayham* (2013) 212 Cal.App.4th 847, 856; *People v. French, supra*, 43 Cal.4th at p. 46 ["Ordinarily, an appellate court will not consider a claim of error if an objection could have been, but was not, made in the lower court"]; *In re Michael L.* (1985) 39 Cal.3d 81, 88 ["Objections not presented to the trial court cannot be raised for the first time on appeal"].)

Even if defendant did not forfeit his contention that the trial court erroneously imposed a consecutive sentence for count 3, the contention is without merit. The trial court imposed a 25 years to life sentence for count 3 to run consecutive to the other sentences. Defendant contends that the trial court's statement, "As to counts 3, 4, and 5, it's the same date, single victim, and I'm going to use my discretion and not impose consecutive sentence," showed that the trial court intended to impose a concurrent, rather than a consecutive, sentence as to count 3, and its statement conflicted with the sentence imposed. The trial court's statement, however, concerned its exercise of judicial discretion in not imposing consecutive sentences for counts 3, 4, and 5 as to each other (i.e., "[a]s to counts 3, 4, and 5.") The statement did not concern how the trial court intended the sentences on counts 3, 4, and 5 to run in relation to the other remaining counts—counts 1, 2 and 6. The trial court did not err.

### C. Presentence Credits

Defendant contends that he is entitled to 96 more days of presentence custody credits, and the abstract of judgment should be amended accordingly. The Attorney General agrees.

Section 1237.1 prohibits a defendant from appealing a judgment of conviction on the ground of an error in the calculation of presentence custody credits, "unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." The record does not reflect that defendant made a motion for correction of the record in the trial court.

"[S]ection 1237.1, [however,] when properly construed, does not require defense counsel to file motion to correct a presentence award of credits in order to raise that question on appeal when other issues are litigated on appeal." (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427.) Defendant here appealed issues in addition to his claim regarding the computation of his presentence custody credits. Defendant, therefore, was not required to first file a motion for correction with the trial court before he could raise his claim on appeal. In addition, although defendant did not object at the sentencing hearing, his claim is not forfeited because the calculation of defendant's presentence custody credits is purely mathematical and involves no discretion. (*People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139.)

Defendant was credited with 272 days of presentence custody, consisting of 237 days for actual time spent in custody, plus 15 percent of the actual time in custody for conduct credits (the limitation imposed by § 2933.1)—i.e., 35 days of conduct credit. Defendant, however, spent 320 days in actual custody, not 237 days—the period from the date of his arrest on September 9, 2011 to the date of sentencing on July 24, 2012 (2012 was a "leap year" and therefore February 2012 consisted of 29 days). Because the trial court concluded that defendant was entitled to conduct credit in the amount of 15 percent of the actual time defendant was in custody, he was entitled to 48 days of conduct credit. Defendant therefore is entitled to 368 days presentence credits, consisting of 320 days

actual custody credit and 48 days conduct credit. The abstract of judgment, accordingly, must be corrected to reflect the correct credits.

### D. Mandatory Surcharges and Penalties

The trial court ordered defendant to pay a $300 sexual offender program fund fee pursuant to section 290.3, but did not impose on defendant a $300 state penalty pursuant to section 1464, subdivision (a)(1); a $60 state surcharge pursuant to section 1465.7, subdivision (a); a $150 state court construction penalty pursuant to Government Code section 70372, subdivision (a); a $210 county penalty pursuant to Government Code section 76000, subdivision (a)(1); a $30 deoxyribonucleic acid penalty pursuant to Government Code section 76104.6, subdivision (a)(1); a $120 state-only deoxyribonucleic acid penalty pursuant to Government Code sections 76104.7, subdivision (a); and a $60 emergency medical services penalty pursuant to Government Code section 76000.5, subd. (a)(1). We therefore asked the parties to brief the issue of whether the trial court erred in failing to impose these surcharges and penalties on defendant.

The provisions referenced above are mandatory, "requir[ing] the imposition of additional penalties and surcharges upon every fine, penalty or forfeiture imposed for a criminal offense. [Citations.]" (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1371-1372; see *People v. Corrales* (2013) 213 Cal.App.4th 696, 702; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530.) The trial court therefore erred in failing to impose them despite ordering defendant to pay a $300 sexual offender program fund fee pursuant to section 290.3.

Section 290.3 provides that if the accused cannot afford to pay the fine, the trial court is prohibited from imposing it. The total amount payable for the sexual offender program fund fee with the additional penalties and surcharges is $1,230. Upon remittutur issuance, therefore, the trial court is to conduct a hearing concerning defendant's ability to pay the sexual offender program fund fee in light of his total financial obligations. (See *People v. Corrales, supra,* 213 Cal.App.4th at p. 702.)

## DISPOSITION

The sexual offender program fund fee pursuant to section 290.3 is reversed and remanded to the trial court. Upon remittutur issuance, the trial court is to determine defendant's ability to pay a sexual offender program fund fee, together with the penalties and surcharges in light of defendant's financial circumstances. If defendant does have the ability to pay, the sexual offender program fund fee is to be reinstated with the additional penalties and surcharges, which are the following: the state penalty pursuant to section 1464, subdivision (a)(1); the state surcharge pursuant to section 1465.7, subdivision (a); the state court construction penalty pursuant to Government Code section 70372, subdivision (a); the county penalty pursuant to Government Code section 76000, subdivision (a)(1); the deoxyribonucleic acid penalty pursuant to Government Code section 76104.6, subdivision (a)(1); the state-only deoxyribonucleic acid penalty pursuant to Government Code sections 76104.7, subdivision (a); and the emergency medical services penalty pursuant to Government Code section 76000.5, subd. (a)(1).

The matter is remanded to the trial court also to amend the abstract of judgment to reflect that defendant is entitled to 368 days presentence credits, consisting of 320 days actual custody credit and 48 days conduct credit. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J. KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.