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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROGELIO REYES,

Defendant and Appellant.

B234552

(Los Angeles County
Super. Ct. No. BA372655)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed in part, reversed in part, and remanded.

Doris M. LeRoy, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Rogelio Reyes (defendant) was convicted of four counts of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a)¹). On appeal, defendant contends that the trial court erred in sentencing him pursuant to section 667.61. We hold that the trial court erred in this respect.

BACKGROUND

The District Attorney of Los Angeles County filed an amended information charging defendant with four counts of continuous sexual abuse of a child in violation of section 288.5, subdivision (a)². Defendant's conduct specified in counts 1 and 2 was alleged to have occurred on or between May 1, 2003, and July 31, 2003. The conduct specified in count 3 was alleged to have occurred on or between January 17, 1990, and December 31, 1995, and the conduct specified in count 4 was alleged to have occurred on or between June 9, 1992, and June 9, 1999. Counts 1 through 4 each involved separate victims. The District Attorney alleged as to counts 3 and 4 that defendant committed an offense specified in section 667.61, subdivision (c) against more than one victim.

On June 20, 2011, following a trial, the jury found defendant guilty on all counts, and found the allegations that he committed the offenses against more than one victim were true. The trial court sentenced defendant to state prison for a term of 60 years to life, consisting of consecutive terms of 15 years to life on each count pursuant to section

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

² Section 288.5, subdivision (a), provides, "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense, as defined in subdivision (b) of Section 1203.066, or three or more acts of lewd or lascivious conduct, as defined in Section 288, with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years."

667.61.³ The trial court ordered defendant to pay a \$300 sex offender fine, a \$5,000 child abuse prevention restitution fine, a \$160 court security assessment, and a \$120 criminal conviction assessment. The trial court awarded defendant 434 days of custody credit consisting of 378 days of actual custody credit and 56 days of conduct credit.

DISCUSSION

Defendant contends that his sentence of 15 years to life under the One Strike law (§ 667.61) violated the constitutional prohibitions against ex post facto laws because he committed the offenses of continuous sexual abuse of a child (§ 288.5) before a violation of section 288.5 became a qualifying offense for purposes of the One Strike law. The Attorney General concedes that the trial court erred. We agree.

“Approximately six months after the Legislature enacted the ‘Three Strikes’ law as urgency legislation, it adopted section 667.61, the One Strike law. [Citations.] This section 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. The section applies if the defendant has previously been convicted of one of seven specified offenses, or if the current offense was committed under one or more specified circumstances.” (*People v. Mancebo* (2002) 27 Cal.4th 735, 741-742, fns. omitted.)

“California’s ‘One Strike’ law requires a sentence of 15 years to life for a person convicted of certain enumerated sexual offenses under particular aggravating

³ Section 667.61 presently provides in pertinent part, “(b) [A]ny person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life. [¶] (c) This section shall apply to any of the following offenses: . . . (9) Continuous sexual abuse of a child, in violation of Section 288.5. [¶] . . . [¶] (e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (4) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.”

circumstances. (§ 667.61, subd. (b).)” (*People v. Palmer* (2001) 86 Cal.App.4th 440, 443.) However, when the One Strike law went into effect on November 30, 1994 (Sen. Bill No. 26X, Stats. 1993-1994 (1993-1994 1st Ex. Sess.) ch. 14, § 1), the continuous sexual abuse of a child in violation of section 288.5 was not one of the enumerated qualifying offenses. (See *ibid.*) A violation of section 288.5 did not become a qualifying offense for purposes of the One Strike law until September 20, 2006. (Sen. Bill 1128, Stats. 2006, ch. 337, § 33.)

“Both the California and United States Constitutions proscribe ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) The federal and state prohibitions against ex post facto laws apply to any statute that punishes as a crime an act previously committed which was not a crime when done or that inflicts greater punishment than the applicable law when the crime was committed. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42-43 [110 S.Ct. 2715, 2719-2720, 111 L.Ed.2d 30].)” (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178, fns. omitted.)

The amended information alleged that defendant committed his section 288.5 offenses from 1990 through 2003, and as the Attorney General concedes, the evidence introduced at trial supported those allegations. The jury found defendant guilty on all four counts of continuous sexual abuse in violation of section 288.5, and under section 667.61, the trial court sentenced defendant to consecutive terms of 15 years to life as to each count.

Because section 288.5 was not a qualifying offense under section 667.61 when defendant committed his section 288.5 offenses, the trial court erred in sentencing defendant to 15 years to life on counts 1 through 4 pursuant to section 667.61. We therefore remand the matter for resentencing.

DISPOSITION

The judgment is reversed as to defendant's sentence under section 667.61. The matter is remanded to the trial court with instructions to resentence defendant consistent with this opinion. In all other respects, the judgment is affirmed.

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MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.