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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO LOPEZ, Defendant and Appellant.	B285881 (Los Angeles County Super. Ct. No. KA109039)

APPEAL from a judgment of the Superior Court of Los Angeles County. Juan C. Dominguez, Judge. Affirmed and remanded.

Mark R. Feeser, 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, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Alejandro Lopez of six counts of child molestation. On appeal, defendant contends, respondent concedes, and we agree that his sentence on counts 2 and 5 violates the ex post facto clause.[1] We vacate the sentences and remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant lived with his wife and children. Several other family members lived in the home from time to time, and many large family gatherings were held there. At defendant's trial, multiple female relatives testified that defendant molested them when they were children. This appeal only concerns the evidence in support of defendant's convictions for sexually abusing Maria and Carla.[2]

In approximately 1993, when Carla was six years old, she was at defendant's house watching television, when defendant put his hand in her underwear and touched her vagina.

In approximately 1997, when Maria was two years old, her parents divorced and her father moved into defendant's home. Maria stayed at defendant's home with her father on the weekends. Defendant began to sexually abuse her when she was at his house. Defendant molested her multiple times, and had vaginal intercourse with her at least 12 times.

Maria's father moved out of defendant's house in 2004, when Maria was nine years old. Maria was "not sure" if

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[1] The court renumbered the counts during the trial after one count was dismissed. We refer to the charges by their original count numbering, as have the parties.

[2] We use pseudonyms for these victims in order to protect their privacy.

defendant molested her after her father moved out of defendant's home. However, she was certain the abuse stopped at least by the time she turned 13 years old.

A jury convicted defendant of one count of continuous sexual abuse with respect to Maria (count 2; Pen. Code, § 288.5, subd. (a)),[3] and five counts of committing a lewd act upon a child with respect to Carla and the other victims (counts 3–6; § 288, subd. (a)). The trial court imposed an indeterminate term of 15 years to life for each of the convictions with a total of sixty years to life; two of the five counts for violating section 288, subdivision (a) were imposed concurrently. Defendant timely appealed.

DISCUSSION

Defendant's sole contentions on appeal is that a part of his sentence violates the ex post facto clause.

1. *The Ex Post Facto Clause*

"The United States Constitution and the California Constitution proscribe ex post facto laws. [Citations.] Under both Constitutions, '[l]egislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts.' [Citation.] We interpret the California Constitution's ex post facto clause coextensively with its federal counterpart. [Citation.] [¶] We may correct an unauthorized sentence on appeal despite failure to object below. [Citation.] A sentence is unauthorized if 'it could not lawfully be imposed under any circumstance in the particular case.' [Citation.]" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1173 (*Valenti*).)

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[3] All further statutory references are to the Penal Code.

2. *Defendant's Sentence on Count 5 Violates the Ex Post Facto Clause*

The parties agree that the sentence imposed on defendant for count 5 (one of the lewd act convictions) violates the ex post facto clauses of the United States and California Constitutions. Defendant was charged in count 5 with committing a lewd act on Carla when she was under the age of fourteen years old (§ 288, subd. (a)). The information alleged the lewd act occurred on or between March 25, 1993 and March 24, 1994, and the evidence at trial supported that allegation. Yet defendant was sentenced under section 667.61, which only became effective on November 30, 1994. (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178.)

Section 667.61, California's One Strike law, requires an indeterminate life term for certain sex offenses. (§ 667.61, subd. (b).) "The sentences prescribed by section 667.61 greatly exceed the determinate sentences previously available for violations of section 288. Therefore, the ex post facto clauses of the United States and California Constitutions preclude sentencing under section 667.61 for offenses committed before November 30, 1994. [Citation.]" (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 257 (*Hiscox*).)

Here, because count 5 concerned conduct that occurred before the effective date of section 667.61, defendant's sentence on count 5 under that statute was unauthorized. The proper remedy for this sentencing error is to vacate the sentence on this count and remand the matter for resentencing under the law in effect at the time of the offense. (*Hiscox*, *supra*, 136 Cal.App.4th at p. 262.)

3. *Defendant's Sentence on Count 2 Violates the Ex Post Facto Clause*

The parties agree that the "one strike" sentence imposed on defendant for count 2 is unauthorized. Defendant was charged in count 2 with the continuous sexual abuse of Maria between 1997 and 2009 (§ 288.5, subd. (a)). He was sentenced on count 2 to an indeterminate life sentence under section 667.61. Section 667.61 was amended on September 20, 2006 to include violations of section 288.5, yet the trial court failed to instruct the jury to make a finding as to whether defendant's molestation of Maria continued after that date. Because the evidence fails to prove beyond a reasonable doubt that the molestation continued past the amendment of section 667.61, the error is not harmless.

Effective September 20, 2006, section 667.61 "was amended to apply to defendants convicted of continuous sexual abuse of a child (§ 288.5). [Citation.] However, before 2006, section 288.5 was not a One Strike offense. [Citations.] The indeterminate life sentences now prescribed by section 667.61 greatly exceed the determinate sentences of 6, 12, or 16 years previously available for violations of section 288.5. Thus, the ex post facto clause prohibits sentencing defendants under the One Strike law for section 288.5 violations committed before September 20, 2006." (*Valenti*, *supra*, 243 Cal.App.4th at p. 1174.)

Because the information alleged sexual abuse that occurred before and after the effective date of section 667.61, count 2 falls under "the straddle-offense exception to the ex post facto clause." (*Valenti*, *supra*, 243 Cal.App.4th at p. 1175.) Under this exception, if " 'an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute

may be applied without violating the ex post facto prohibition.' [Citation.]" (*People v. Grant* (1999) 20 Cal.4th 150, 159.)

"[A]ny fact that increases a defendant's minimum or maximum sentence is an element of the offense that must be submitted to the jury. [Citation.]" (*Valenti*, *supra*, 243 Cal.App.4th at p. 1176.) Here, defendant is eligible for One Strike sentencing only if the continuous sexual abuse of Maria continued beyond September 20, 2006, the effective date of the 2006 amendment of section 667.61. "Because the date of the last act of sexual abuse increased defendant's mandatory minimum and maximum sentences, the date was an element of each charged crime." (*Ibid.*)

The court's failure to instruct that at least one instance of sexual abuse had to occur on or after September 20, 2006 is harmless "if the People prove beyond a reasonable doubt that no substantial evidence supports a contrary finding on the omitted element." (*Valenti*, *supra*, 243 Cal.App.4th at p. 1176.) The relevant inquiry is "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." (*Neder v. United States* (1999) 527 U.S. 1, 19.)

There was conflicting evidence as to whether defendant molested Maria after September 20, 2006. Maria testified that defendant sexually abused her while she was staying with her father at defendant's home. She testified that her father moved out of defendant's home when she was nine—she turned nine in early 2004. This evidence indicated that the abuse ended in 2004, nearly two years before section 288.5 became a "one-strike" offense.

However, Maria also testified that she was "not sure" if defendant molested her after her father moved out of defendant's

home. She further testified that she was certain the abuse stopped after she turned 13 years old.

Maria's testimony permitted contrary inferences about when the molestation stopped. The jury could have reasonably concluded that the molestation continued until she was 13—after the effective date of the section 667.61 amendment—and could have also reasonably concluded the molestation stopped in 2004, when she was nine. This did not constitute proof beyond a reasonable doubt that defendant sexually abused Maria after September 20, 2006.

DISPOSITION

The convictions are affirmed. The sentences imposed for counts 2 and 5 are vacated, and the matter is remanded for resentencing without application of the One Strike law (§ 667.61).

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.