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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. RAYMOND EDWARD PADILLA, Defendant and Appellant.	B280925 (Los Angeles County Super. Ct. No. BA433302)

APPEAL from the judgment of the Superior Court of Los Angeles County. Charlaine Olmedo, Judge. Affirmed.

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, Senior Assistant Attorney General, Kenneth C. Byrne and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Raymond Edward Padilla was found guilty by jury of six felonies. The offenses involved various lewd acts with four different minor girls, including his niece and three of his daughter's friends. Defendant was sentenced to six consecutive 15-years-to-life sentences pursuant to the One Strike law (Pen. Code, § 667.61).

On appeal, defendant contends the court erred in failing to instruct sua sponte with lesser included offenses as to counts 2, 5 and 6. Alternatively, defendant argues he received ineffective assistance of counsel because trial counsel did not request a lesser included instruction as to those counts. Defendant also raises two sentencing errors. Defendant contends the trial court erred in believing it lacked discretion to impose concurrent sentences as to four of the counts, and in denying him an award of presentence conduct credits.

Respondent contends the sentence imposed is unauthorized and requests remand for resentencing.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2015, defendant was charged by information with six felony counts: three counts of lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a); counts 2, 5 & 6), two counts of forcible lewd act upon a child under the age of 14 (§ 288, subd. (b)(1); counts 1 & 3), and one count of continuous sexual abuse on a child under the age of 14 (§ 288.5, subd. (a); count 4). It was alleged the offenses were committed against more than one victim within the meaning of section 667.61, subdivisions (b)

and (e).[1] It was further alleged defendant had suffered four prison priors within the meaning of section 667.5, subdivision (b), and had suffered a prior strike conviction in 1988 within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)).

The charges arose from the following facts and events as reflected in the testimony received at trial.

Counts 1 and 2 (B.G.)

B.G. went to school with defendant's daughter, R.P., and R.P.'s cousin, K.V. They had several other school friends in common, including M.P., L.S., and A.C.

When B.G. was in seventh grade, R.P. invited her over to her house several times after school. The first time, defendant picked them up from school in a car. Nothing unusual happened on that visit. The second time, defendant again picked them up after school. R.P. got into the front passenger seat of the car, and B.G. got into the seat behind her. During the drive to their house, defendant repeatedly reached back and touched B.G.'s thighs. The touching made her uncomfortable so B.G. crossed her legs and tried to move closer to the passenger side door.

After they got to the house, they had some snacks. They were talking and joking around. At some point, defendant said several times that he would "do" B.G.'s mom and "do" her as well. Eventually, defendant and R.P. decided they should watch a movie, but B.G. did not want to. B.G. went into R.P.'s bedroom and R.P. came after her, tugging at her, trying to get her to come back to watch the movie. They started playing around and

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[1] The information neglected to include the special allegation as to count 6. The error was amended by interlineation during trial without objection from defendant.

defendant came into the room. B.G. was pushed onto the bed. R.P. grabbed B.G.'s hands and defendant grabbed her legs, and they picked her up off the bed. Defendant wrapped B.G.'s legs around his waist and he shoved his hands up under her shorts. She tried to kick but she could not get her legs free. R.P. and defendant carried B.G. to the couch in the living room and put her down. B.G. got up quickly. At some point, R.P. went to the bathroom, and because B.G. did not want to be alone with defendant, she went back into R.P.'s bedroom.

Defendant eventually came into the bedroom and sat down on the bed next to B.G. B.G. was uncomfortable and told defendant her stomach hurt. Defendant asked if she wanted an aspirin and she said no. B.G.'s stomach did not hurt, but she was uncomfortable with defendant and did not know what else to say. Defendant told her that if she did not want an aspirin, she could have him. Defendant started touching her legs again, and pushed her back onto the bed. He rubbed her stomach and commented on how flat her stomach was. Defendant proceeded to touch B.G.'s vagina, over her clothes. B.G. got up from the bed and started to walk away. Defendant blocked her briefly and told her not to tell R.P. because she would "take it the wrong way." B.G. said she wanted to go home because she did not feel well, so defendant and R.P. drove her home.

The next day, B.G. told K.V. and L.S. at school. They spoke with the school counselor and reported the incident to the police.

Counts 3 and 4 (K.V.)

Defendant's niece, K.V., came over regularly to visit with R.P. The two girls were "like sisters." When K.V. was around eight or nine, defendant began touching her. He would approach her at times when she was alone. Defendant would run his

hands up and down her thighs. The touching sometimes progressed to defendant touching K.V.'s vagina, over her clothes. It made K.V. very uncomfortable and she would tell defendant to stop. Sometimes he did and sometimes he did not. Defendant would also sometimes try to touch her legs when they were driving in the car and she was seated in the back seat. Defendant would reach back with one hand and try to rub her thighs.

One time, defendant pulled open the shower curtain and stared at K.V. when she and R.P. were taking a shower. Several times defendant approached her while she was sitting on the bed in R.P.'s bedroom. On one occasion, defendant grabbed her wrists, held her down and touched her thighs. K.V. recalled she may have kicked defendant to get him to stop. Another time, defendant walked up to where she was seated, took his penis out of his pants and asked her if she wanted to touch it. She said no and defendant walked away. Defendant stopped touching her sometime when she was about 10 or 11 years old. K.V. pushed him away and defendant told her not to tell anyone about what he had done. K.V. did not tell anyone because she was afraid people would be mad at her. When K.V. was in the seventh grade, she learned another friend at school had a similar experience with defendant, so they told the school counselor. The police were called and she told the police what happened.

Count 5 (M.P.)

M.P. considered both R.P. and K.V. to be her good friends. One time when they were in the seventh grade, M.P. went over to R.P.'s house after school. When R.P. was not in the room, defendant came up behind her, put his arms around her waist, placed his hands on her stomach and kissed her neck. M.P. was

startled. She stepped away from defendant and told him he had scared her. Defendant just walked away and did not respond. M.P. felt uncomfortable telling her parents what happened, but she told her older sister and two friends at school, L.S. and A.C. Thereafter, she spoke with the school counselor and reported what happened to the police.

Count 6 (A.C.)

When A.C. was in the seventh grade, R.P. invited her and M.P. over to her house after school. On that first visit, the three of them just hung around together for a bit and nothing unusual happened. A couple of weeks later, R.P. invited her to come over again. This time M.P. did not go. Defendant picked them up from school in a car. When they got to their house, R.P. got out of the car and headed to the house. When A.C. started to get out of the car to follow R.P., defendant grabbed the strap of her backpack and pulled her backward. A.C. fell back onto the seat and defendant put his hands on her left thigh. He started to move them up her leg, but got no closer than about six or seven inches from her vagina. A.C. was able to get out of the car and run up to the house. A.C. was scared and said she wanted to go home. A woman who A.C. believed to be defendant's roommate drove A.C. home. She spoke with her school counselor about the incident a few days later and reported the incident to the police.

The jury found defendant guilty on all six counts, and found the multiple victim special allegation true as to each count. Defendant waived jury on the prior allegations and admitted his one strike prior from 1988 and the four prison priors.

At the sentencing hearing, the court struck defendant's strike prior pursuant to Penal Code section 1385 on the grounds it was remote in time. The prosecutor requested the imposition

of 15-to-life sentences on each count pursuant to section 667.61, subdivision (b) of the One Strike law. Defendant argued mitigating factors supported concurrent sentencing.

The court sentenced defendant pursuant to the One Strike law. The court imposed consecutive 15-to-life terms on each of the six counts for a total sentence of 90 years to life. The court stayed sentence on the four 1-year prison priors. The court imposed various fines and fees and awarded defendant 744 days of custody credits, representing actual days served prior to conviction. Defendant was not awarded any conduct credits.

This appeal followed.

DISCUSSION

1. The Court Did Not Err in Failing to Instruct Sua Sponte on Lesser Included Offenses as to Counts 2, 5 and 6

The court's obligation to instruct on all principles of law relevant to the issues raised by the evidence at trial includes the obligation to instruct " 'on any lesser offense "necessarily included" in the charged offense, *if there is substantial evidence that only the lesser crime was committed*.' [Citation.]" (*People v. Smith* (2013) 57 Cal.4th 232, 239, italics added; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345.) "An instruction on a lesser included offense *must be given only when the evidence warrants such an instruction*. [Citation.] To warrant such an instruction, there must be substantial evidence of the lesser included offense, that is, 'evidence from which a rational trier of fact could find beyond a reasonable doubt' that the defendant committed the lesser offense. [Citation.] Speculation is insufficient to require the giving of an instruction on a lesser

included offense." (*People v. Mendoza* (2000) 24 Cal.4th 130, 174, italics added.)

Defendant argues that counts 2, 5 and 6 involved conduct that was "innocuous," did not involve the touching of any intimate body part, and was only "horseplay" or "horsing around" with his daughter's friends. Defendant contends the jury would likely have found a lesser degree of liability, such as simple assault, if given the opportunity. The contention lacks merit.

The standard for determining whether a lesser included instruction is required is whether there was *substantial evidence* that *only the lesser crime was committed*, and not the greater. (*People v. Smith*, *supra*, 57 Cal.4th at p. 239.) The record demonstrates there was no substantial evidence that would support a lesser charge.

"[Penal Code] section 288 prohibits *all* forms of sexually motivated contact with an underage child. Indeed, the 'gist' of the offense has always been the defendant's intent to sexually exploit a child, not the nature of the offending act. [Citation.] '[T]he purpose of the perpetrator in touching the child is the controlling factor and each case is to be examined in the light of the intent with which the act was done. . . . If [the] intent of the act, *although it may have the outward appearance of innocence*, is to arouse . . . the lust, the passion or the sexual desire of the perpetrator [or the child,] it stands condemned by the statute . . . .' [Citation.]" (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) Accordingly, lewd acts with a child may involve the touching of " 'any part' " of the victim's body with the requisite intent, and need not involve "contact with the bare skin or 'private parts' " of the victim. (*Ibid.*) "By focusing on the defendant's intent to sexually exploit a child rather than on the nature of the

defendant's offending act, section 288 'assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire.' [Citation.]" (*People v. Shockley* (2013) 58 Cal.4th 400, 404.)

Count 2 as to B.G. involved defendant grabbing her by her legs, pushing his hands up under her shorts and carrying her into the living room, shortly after defendant groped B.G.'s thighs in the car, and said he wanted to "do" B.G. and her mother. Count 5 as to M.P. involved defendant sneaking up on her when she was alone, pressing his body against her back, grabbing her around the waist, and kissing her on the neck. Count 6 as to A.C. involved defendant grabbing the strap of her backpack as she was exiting the car and yanking her back into the car so he could grope her thigh.

These were sexually motivated acts undertaken as a pattern of groping young girls that unequivocally evidence a lewd intent on the part of defendant and constitute substantial evidence of violations of Penal Code section 288, subdivision (a).

The record does not contain substantial evidence upon which a jury could reasonably find that defendant committed only simple assaults or attempted lewd acts, but not violations of Penal Code section 288, subdivision (a). (*People v. Shockley*, *supra*, 58 Cal.4th at p. 403 [substantial evidence warranting a lesser included instruction "is evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense"].) Accordingly, the court was under no duty to instruct on lesser included offenses on counts 2, 5 and 6.

As no reasonable attorney would request instructions for which there was no supporting evidence, as is the case here, there is no basis for finding ineffective assistance of counsel.

2. The Court's Imposition of Consecutive Sentencing Is Supported by the Record

Defendant concedes consecutive sentencing was mandated by Penal Code section 667.61, subdivision (i) as to counts 1 and 3. But defendant argues the court did not understand it had the discretion to impose concurrent sentences on some or all of the remaining counts, and erroneously believed the minimum sentence it could impose was 60 years, as counsel had argued in briefs.

The record does not support defendant's contentions. The court never said consecutive sentences were mandatory as to all counts; instead, the court explained the aggravating factors that warranted consecutive sentencing, including that there were multiple victims, defendant's conduct violated a position of trust with a minor family member and with other minor girls that were friends of his daughter, and that defendant had shown an increasing pattern of criminal behavior. The court stated that the aggravating factors "outweigh any mitigating circumstances" and all sentences would be "served consecutively for the reasons I have stated."

Defendant has failed to show the court misunderstood the scope of its discretion or otherwise erred in imposing consecutive sentences on all six counts.

3. The Court Correctly Denied Defendant Presentence Conduct Credits

The court awarded defendant presentence custody credits for actual days served, but denied defendant any conduct credits pursuant to Penal Code section 4019. Defendant was sentenced to a One Strike sentence pursuant to section 667.61, subdivision (b). The 2006 amendment to the One Strike law

eliminated the authority for conduct credits previously authorized by former subdivision (j). (See Couzens & Bigelow, Sex Crimes: California Law and Procedure (The Rutter Group 2017) ch. 13, § 13:10, p. 13-51; Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005-2006 Reg. Sess.) as amended Mar. 7, 2006, p. N [among other things, the bill "eliminates conduct/work credits for inmates sentenced under the one-strike law"].) The court therefore correctly denied defendant an award of presentence conduct credits.

4. Remand for Resentencing Is Not Warranted

Respondent contends we should remand for resentencing, arguing that the 15-years-to-life sentences imposed under Penal Code section 667.61, subdivision (b) of the One Strike law are legally unauthorized. Respondent contends sentencing under subdivision (j)(2) (25 years to life) was mandatory.

Penal Code section 667.61, otherwise known as the One Strike law, sets forth "an alternative, harsher sentencing scheme" for certain enumerated sex crimes. (*People v. Mancebo* (2002) 27 Cal.4th 735, 738 (*Mancebo*).) The statute requires the qualifying circumstances must be pled and proven in order to be invoked at sentencing. (§ 667.61, subd. (o).)

The information alleged the multiple-victim circumstance of Penal Code section 667.61, subdivision (e)(4) of the One Strike Law applied to each count. The information alleged the mandatory sentence for each count was 15 years to life pursuant to subdivision (b). The information does *not* allege the alternative sentencing provision of subdivision (j)(2) providing for a 25-to-life sentence.

The prosecutor argued in the sentencing memorandum and at the sentencing hearing for imposition of a 15-to-life sentence

on each count pursuant to Penal Code section 667.61, subdivision (b), and requested a doubling of each sentence in light of defendant's prior strike. Even after the trial court struck defendant's prior strike, the prosecutor never argued, or in any way invoked, the 25-to-life sentencing under section 667.61, subdivision (j)(2). Nevertheless, respondent asserts for the first time on appeal that sentencing under subdivision (j)(2) is mandatory.

We conclude the record reflects the prosecutor made "a discretionary charging decision" in pursuing only the 15-to-life sentencing. (*Mancebo*, *supra*, 27 Cal.4th at p. 749 ["There can be little doubt that the prosecution understood the One Strike law's express pleading requirements and knew how to comply with them. We agree with the Court of Appeal's conclusion that the People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision."].)

At all stages of the proceedings, the prosecutor elected to proceed under Penal Code section 667.61, subdivision (b), and not under subdivision (j)(2). The prosecutor had discretion to make this charging decision. Therefore, the sentence was not unauthorized.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J. HALL, J.*

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