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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. JOSUE MIGUEL SANCHEZ, Defendant and Appellant.	B280246 (Los Angeles County Super. Ct. No. VA138647)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Roger Ito, Judge. Affirmed.

Nancy J. King, 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, Paul M. Roadarmel, Supervising Deputy Attorney General, and Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant Josue Sanchez guilty of 11 felony counts of sexual and physical abuse of his daughter (A.S.), stepdaughter (A.H.), and son (M.S.). Ordering the sentences to run consecutively, the trial court imposed an aggregate prison term of 138 years, eight months to life.

On appeal, defendant contends the trial court abused its discretion when it permitted the prosecution to amend the information during trial to conform to proof or, in the alternative, his retained trial counsel provided ineffective assistance by failing to object to the amendment. Defendant further contends the trial court erred by imposing consecutive indeterminate life sentences on counts 1, 3, and 8—all involving the same victim—because consecutive sentences on subordinate counts 3 and 8 were not mandated under Penal Code sections 667.61, subdivision (i) and 667.6, subdivision (d).[1]

Defendant forfeited his challenge to the amendment to conform to proof; and, even assuming, arguendo, defendant received ineffective assistance of counsel in connection with the amendment issue, he failed to affirmatively demonstrate prejudice. The trial court did not err by imposing consecutive sentences on counts 1, 3, and 8. We affirm.

FACTUAL BACKGROUND

Defendant's criminal conduct spanned several years, when he and his wife lived with their four minor children, A.H., M.S., A.S., and J.S. In addition to the convictions based on the sexual abuse of his biological daughter, A.S., described below, defendant

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

was also convicted of sexually assaulting and committing lewd acts against stepdaughter A.H. and of physically abusing A.H., A.S., and M.S.

Defendant does not challenge the sufficiency of the evidence to support his convictions. Accordingly, a detailed review of the graphic trial evidence, which the trial judge described as "very dramatic . . . [and] extremely painful," is unnecessary. Instead, we discuss only those facts relevant to our review of defendant's challenge to his sentences on counts 1, 3, and 8.

A. Counts 1 and 8 (Intercourse and Oral Copulation; Victim Is a Child 10 Years of Age or Younger)

On one day in January 2011, when her mother was at work, A.S., then in the fifth grade and not yet 11 years of age, went to her parents' bedroom and told defendant her back hurt where her mother had hit her with a belt. Defendant used a gel pomade for her back pain. He then asked A.S. if she "wanted to see something . . . ." When A.S. said "okay," defendant turned on the television which "was paused at a scene of two people." Defendant rewound the video from "the beginning and showed" A.S. a scene depicting "two people having intercourse."

Defendant next directed A.S. to "pull down [her] pants and lie back." A.S. complied. She then described acts of digital penetration and oral copulation.

After a "couple of minutes," defendant "said something about it's going to hurt" and told A.S. "to relax." Defendant pulled down his pants, exposing his penis, and penetrated the victim. A.S. told defendant he was hurting her. Defendant

withdrew, ejaculated in his hands, and told AS not to "tell anyone, especially [her] mom, because if they [found] out a . . . 38-year-old [did] this to an 11-year-old, . . . [he would] go to jail for life."[2]

B. Count 3 (Lewd Act; Victim Is a Child 14 Years of Age or Younger)

On a subsequent occasion, when A.S. was in the sixth or seventh grade, she and defendant "were playing around . . . ." Defendant "lifted up [her] shirt, . . . pulled up [her] bra, and bit [her nipple]." A.S. started screaming, but defendant "was just laughing."

In another incident, while A.S. and defendant were "play fighting," he began to tickle her. But then defendant went "overboard" by restraining A.S.'s wrists over her head, lifting her shirt, and fondling her breasts.[3]

PROCEDURAL BACKGROUND

In the amended information, the Los Angeles County District Attorney charged defendant with six felony counts (1, 3,

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[2] Noting her birthday is in February, A.S. testified, "so he didn't even get my age right. I was 10 and he said 11."

[3] On a different occasion, when A.S. was 11 years old, defendant, unclothed, entered the shower while she showering, began scrubbing her back, and digitally penetrated her. Defendant acknowledges this incident provided the basis for count 9 (aggravated sexual assault of a child under the age of 14 with the defendant being 7 and more years older than the victim (§ 269, subd. (a)(5)) and mandated a consecutive 15-years-to-life sentence. (§ 269, subds. (b),(c).)

8, 9, 10, 16) involving sexual misconduct against A.S.; four felony counts (11, 12, 13, 15) of sexual misconduct against A.H.; three felony child abuse counts (4, 5, and 14) against A.S., A.H., and M.S.; and two misdemeanor counts (6 and 7) for invasion of privacy (photographing or recording) as to A.S. and A.H.[4]

The jury found defendant guilty of all the charges submitted to it. At sentencing, the trial court announced count 1, sexual intercourse against A.S., would be the base term; it was a mandated sentence of 25 years to life. (§ 288.7, subd. (a).) The trial court then imposed determinate sentences for the three convictions of section 273a, subdivision (a), one conviction for each child. The court sentenced defendant to the upper term of six years for the first conviction, with consecutive terms of one year and four months for the other two counts. The total determinate sentence was eight years, eight months. Two misdemeanor sentences of six months each were imposed under section 647, subdivision (j)(3) (one count each for A.S. and A.H.) and ordered to run concurrently to the determinate sentence.

Turning to the indeterminate terms, the trial court stated, "Because of the nature [of the] offenses, multiple victims, the court will then impose a consecutive 15 [years] to life [term] on count number 3 . . . ." The trial court added consecutive 15-years-to-life terms on counts 8, 9, 10, 11, 12, and 13, noting, "The court was the trial court in this matter and heard the testimony. The very dramatic I would say at some point extremely painful experiences of Mr. Sanchez's children. An individual who should

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[4] Before jury deliberations, the trial court dismissed counts 15 and 16, the two additional felony counts (§ 311.4, subd. (c)) charging defendant with forcing A.S. and A.H. to pose for lewd photographs.

have . . . as they indicated very articulately protected them, looked out for them. That is not what he did. He used them for his own deviant sexual proclivities. He abused them physically, emotionally, and the court because of those [bases] chose the high term and also will impose full term consecutives [on] all those additional counts."

Defendant timely appealed.

DISCUSSION

A. Amended Information—Count 1

1. Background

Based on the preliminary hearing testimony, the District Attorney charged defendant in count 1 with a violation of section 288.7, subdivision (a), sexual intercourse against a child 10 years of age or younger. The original information alleged this offense was committed "[o]n or between *February 24, 2011* and February 23, 2012" when the victim was 10 years of age or younger. (Italics added.) At trial, however, A.S. testified defendant had intercourse with her on one occasion *in January 2011*, not on February 24, 2011 as alleged in the information. On both dates, the victim was still 10 years of age.

Just before the close of the prosecution's case, the prosecutor requested leave to amend certain dates in count 1, but the trial court deferred a ruling at that time. Before argument, the trial court noted "the People filed an amended information to allege dates according to proof." There was no objection to the filing of the amended information. The amended information alleged the count 1 section 288.7, subdivision (a) offense occurred "[o]n or between *February 24, 2010* and February 23, 2012 . . . ." (Italics added.)

2. Forfeiture

Defendant contends the trial court abused its discretion when it allowed the prosecution to amend the information late in the trial. According to defendant, the amendment went beyond conforming the date range of the offense charged in count 1 to conform to proof by pushing that range back an entire year, instead of one month. In response, the Attorney General argues defendant forfeited this challenge by failing to raise it in the trial court. We agree.

"Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on appeal. . . . 'The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.'" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881.)

Because defendant failed to object to the amendment in the trial court, the judge and prosecutor had no opportunity to address the propriety of the amendment and potentially avoid any claim of error. It is fundamentally unfair to the trial court and the prosecution for us to consider the abuse of discretion claim for the first time on appeal. The claim is forfeited.

3. Ineffective Assistance

Defendant argues in the alternative he received ineffective assistance of counsel based on his trial counsel's failure to object to the amendment. According to defendant, there is no reasonable tactical explanation for his counsel's failure to object to the amendment, and the "surprise" addition of a year to the date range for count 1 "sandbagged" defendant and deprived him of the ability to fully defend against the charge in count 1.

The principles governing a claim of ineffective assistance of counsel are well established: "A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to *effective* legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an *appellate* claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

At the outset, it is not evident, as defendant contends, that there is no satisfactory explanation for trial counsel's failure to object to the amendment. Although the amendment expanded the date range within which defendant allegedly committed count 1, it did not change the charge, the victim, or her age. Moreover,

at trial, A.S. clarified defendant only forced intercourse once and the crime occurred in January 2011, the month before her birthday when she was 10 years old. Thus, regardless of the expansion of the date range of the crime, there was no uncertainty or conflicting evidence at trial about when the single act of intercourse occurred or A.S.'s age at the time.

In any event, defendant was not asserting an alibi defense that might have been affected by the change in the date range. He argued his daughter fabricated the crime. Had the jury accepted this defense, the date of the crime's occurrence would have been irrelevant. Given the apparent harmless nature of the date change to his defense, defendant's trial counsel may well have concluded an objection was unnecessary, a conclusion that would have been reasonable under the circumstances.

But even assuming, arguendo, the failure of defendant's trial counsel to object to the amendment fell below the objective standard of reasonableness, defendant does not satisfy his burden to show prejudice. He focuses on the absence of corroboration of A.S.'s testimony, but does articulate how his defense to count 1 was adversely impacted by the amended date range. This underscores the fact the amendment did not appear to have any impact upon defendant's ability to defend against the charge in count 1.

B. Consecutive Sentences on Counts 1, 3, and 8

Defendant contends the trial court erred when it imposed consecutive sentences on counts 1, 3, and 8, all committed against A.S. Citing sections 667.61, subdivision (i) and 667.6, subdivision (d), defendant asserts these crimes involved the *same victim* on the *same occasion* and were part of "an unbroken sexual assault."

He concludes consecutive sentences were not mandated and it was reversible error to impose them.

We disagree with defendant's assertions as to count 3, as they ignore defendant's multiple convictions for sexual offenses committed against A.H and the separate conviction for a lewd action against A.S. in violation of section 288, subdivision (a). Additionally, the consecutive sentence on count 8 was not prohibited by section 654,[5] and the trial court properly imposed it. (§ 669.)

A.S. was the victim of both oral copulation and intercourse (counts 1 and 8), and they were committed on the same date. As explained above, however, the conduct that supported defendant's conviction on count 3—lewd act on a child in violation of section 288, subdivision (b)(1)—occurred on a different date, when defendant restrained A.S.'s wrists over her head, lifted her shirt, and fondled her breasts. Defendant also was convicted in count 10 of a lewd act on another occasion against A.S. in violation of section 288, subdivision (a), and in counts 12 and 13 of separate lewd acts against A.H., again in violation of section 288, subdivision (a). As to all these counts (3, 10, 12, 13), the jury found the multiple victim circumstance of section 667.61, subdivision (e)(4) to be true.

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[5] Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

These findings triggered the sentencing provisions in section 667.61. If three statutory elements are met, section 667.61, subdivision (b) requires imposition of a consecutive, 15-years-to-life indeterminate sentence for certain offenses committed under certain circumstances. The criteria were satisfied here.

The offenses eligible for the lengthy indeterminate sentence are specified in section 667.61, subdivision (c)—and violations of section 288, subdivisions (a) and (b) are two of them.[6] (§ 667.61, subds. (c)(4), (c)(8)). A second element is that the defendant be convicted of the predicate crimes under certain circumstances. A prosecution involving more than one victim is one such circumstance—and defendant was convicted in this action of predicate offenses against separate victims, A.S. and A.H. (§ 667.61, subd. (e)(4).) Finally, if one of the predicate offenses is specified in subdivisions (c)(1) through (c)(7) of section 667.61, section 667.61, subdivision (i) requires the trial court to "impose a consecutive sentence for each offense that results in a conviction under [section 667.61] if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of section 667.6." Count 3, the violation of section 288, subdivision (b) against A.S., is identified as a predicate offense in subdivision (c)(4) of section 667.61. The trial court did not err; the consecutive 15-years-to-life sentence for count 3 was mandated by section 667.61, subdivision (i). (See also *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.)

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[6] The usual sentencing options for a violation of section 288, subdivision (b) are imprisonment for a determinate term of five, eight or ten years. A violation of section 288, subdivision (a) carries a range of three-, six- or eight-year determinate terms.

Unlike defendant's conviction in count 3 for committing a lewd act against A.S., violations of section 288.7, subdivision (a) (sexual intercourse; count 1) and subdivision (b) (oral copulation; count 8) are not listed in either section 667.6 or section 667.61. The sentencing provisions in those statutes are, accordingly, not applicable to counts 1 or 8. Defendant's reliance on them to argue the sentence on count 8 could not be consecutive to the sentence on count 1 is unavailing.

There are no determinate sentence ranges for violations of section 288.7, however. Section 288.7, subdivision (a) carries a mandatory sentence of 25 years to life, while subdivision (b) of section 288.7 requires a term of 15 years to life. When a defendant is convicted of both offenses against the same victim, the trial court's only sentencing option is to determine whether to impose concurrent or consecutive sentences.

The decision to impose a consecutive sentence for count 8 required the trial court to state reasons.[7] (Cal. Rules of Court, rule 4.406(b)(5); *People v. Powell* (1980) 101 Cal.App.3d 513, 518). Defendant did not object at the sentencing hearing to the trial court's statement of reasons and accordingly forfeited a claim as to any inadequacy of the reasons. (*People v. Scott* (1994) 9 Cal.4th 331, 352-353, 356.)

Notwithstanding the forfeiture, the trial court stated that defendant, who should have "protected [and] looked out for" his children instead victimized "them for his own deviant sexual proclivities." This was sufficient. (Cal. Rules of Court, rule

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[7] Nothing in the transcript from the sentencing hearing suggests the trial judge erroneously believed consecutive sentences were mandated.

4.421(a)(11) ["The defendant took advantage of a position of trust or confidence to commit the offense"].)

Moreover, as the Attorney General notes, there was no section 654 bar to consecutive sentences. Section 654 prohibits imposition of multiple punishments for the commission of the same act, but otherwise allows a trial court to impose multiple punishments in cases involving more than a single act. (*People v. Corpening* (2016) 2 Cal.5th 307, 309, 311-312.) Intercourse and oral copulation (counts 1, 8) are different offenses. "In cases involving sex offenses, courts have found that '[e]ven where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. [Citations.] [¶] . . . [S]ection 654 does not apply to sexual misconduct that is "preparatory" in the general sense that it is designed to sexually arouse the perpetrator or the victim.' [Citation.] [¶] Whether a defendant harbored a separate intent and objective for each offense is a factual determination for the trial court, and its conclusion will be sustained on appeal if supported by substantial evidence." (*People v. Hicks* (2017) 17 Cal.App.5th 496, 514-515 (*Hicks*).)

In *People v. Alvarez* (2009) 178 Cal.App.4th 999, the Court of Appeal observed that "section 654 [has] limited utility to defendants who commit multiple sex crimes against a single victim on a single occasion. As our Supreme Court has stated, '[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally "divisible" from one another under section 654, and separate punishment is usually allowed. [Citations.]' [Citation.] If the rule were otherwise, 'the clever molester could violate his victim

in numerous lewd ways, safe in the knowledge that he could not be convicted and punished for every act.' [Citation.] Particularly with regard to underage victims, it is inconceivable the Legislature would have intended this result." (*Id*. at p. 1006.)

Reviewing the evidence on this issue "in the light most favorable to the judgment" (*Hicks, supra,* 17 Cal.App.5th at p. 515), the trial court did not err in punishing defendant for both sexual intercourse and oral copulation against A.S. The evidence supported a finding the oral copulation was not merely incidental to sexual intercourse or the means by which that offense was committed. Defendant did not testify, and counsel's cross-examination of the victim focused on attacking her credibility as to whether the crimes even occurred. But the victim described an act of oral copulation by a clothed defendant who, "after a while," told her to relax because it was "going to hurt." Only then did he pull his pants down and penetrate the victim with his penis. As such, the trial court was authorized to impose separate punishments for each crime and, with an adequate statement in aggravation, impose consecutive prison terms.

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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