Filed 12/14/17 P. v. Bolden CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL BOLDEN,

Defendant and Appellant.

2d Crim. No. B279782
(Super. Ct. No. NA102551)
(Los Angeles County)

Samuel Bolden appeals from the judgment entered after his conviction by a jury of three counts of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a))[1] and one count of possession of child pornography. (§ 311.11, subd. (a).) The trial court found true two prior prison terms (§ 667.5, subd. (b)), one prior serious felony conviction (§ 667, subd. (a)(1)), and one prior serious or violent felony conviction ("strike") within the meaning of California's "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court struck

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

the prior prison terms and sentenced appellant to prison for 26 years, 4 months.

Appellant contends that (1) he was convicted of an uncharged crime not shown by the evidence presented at the preliminary hearing, (2) the trial court's imposition of consecutive sentences violated section 654's prohibition of multiple punishment, (3) he was denied effective assistance of counsel, and (4) the court erroneously calculated his presentence custody credits. Only the last contention has merit. We recalculate appellant's presentence custody credits and affirm in all other respects.

Facts

K.S. was born in November 2002. She lived in an apartment with A.O., her second cousin. Appellant was A.O.'s "best friend, like a family friend."

After midnight on September 6, 2015, appellant telephoned K.S. and asked her to open the front door of her apartment. K.S., who was 12 years old, complied with the request. She and appellant walked into her bedroom. Appellant locked the door. He told her "to get undressed." With his cell phone, appellant took photos of K.S. while she was naked. Four of the photos show his hand touching her body.[2]

Appellant kissed K.S., took off his clothes, and told her to lie on the bed. He put his fingers and then his penis inside her vagina. Next, he put his penis inside her "butt" and moved it back and forth. At trial K.S. testified that he did not put his

[2] Neither party requested that the photographs, received in evidence as People's Exhibit No. 9, be transmitted to this court. (See Cal. Rules of Court, rule 8.224.)

penis inside her mouth. But immediately after the incident, she told a nurse that appellant had put his penis there.

In the early morning hours on September 6, 2015, A.O. saw appellant standing naked inside a closet in K.S.'s bedroom. His penis was "hard." Appellant left and A.O. telephoned the police.

Officer Ryan Gow responded to the call. He apprehended appellant approximately one mile away from A.O.'s apartment. Gow seized appellant's cell phone. It contained the nude photos that appellant had taken of K.S.

A nurse performed a sexual assault examination of K.S. She "had swelling and bruising on her hymen." She also had "a tear . . . through the hymen that's gone to the base." There was a tear about four inches inside her anus. Screening tests for semen were positive on samples taken from K.S.'s hymen and internal rectal area. Samples taken from her hymen were consistent with appellant's DNA profile. Saliva was found in samples taken from appellant's penis. These samples were consistent with K.S.'s DNA profile. A saliva sample taken from appellant's mouth was also consistent with her DNA profile.

Prosecutor's Closing Argument

The prosecutor was not asked to elect, and did not elect, the particular act underlying each of the three lewd act counts. During closing argument, the prosecutor told the jury: "You heard that they were kissing. That's a touching with lewd intent, sexual intent. You heard that he committed anal sex. You heard that he committed vaginal sex. You heard that there was oral sex going on. You heard she testified that he put his fingers in her vagina. You've heard well over three individual single touching acts that would constitute the three charges." In addition, the prosecutor said that appellant's touching of K.S. as

depicted in the cell phone photographs could constitute three separate violations of section 288.

Jury Instruction on Unanimity

Pursuant to CALCRIM No. 3501, the trial court gave the following instruction on unanimity: "The People have presented evidence of more than one act to prove that the defendant committed [the charged] offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

Conviction of Allegedly Uncharged Crime Not Shown by Evidence at Preliminary Hearing

A defendant cannot "constitutionally be prosecuted for or convicted of an offense not shown by the evidence at the preliminary hearing . . . ." (*People v. Burnett* (1999) 71 Cal.App.4th 151, 181; see also § 1009 [an information "cannot be amended . . . so as to charge an offense not shown by the evidence taken at the preliminary examination"].) Appellant argues that, based on the prosecutor's closing argument, the jury could have convicted him of committing a lewd act by digitally penetrating K.S.'s vagina. The People concede, "At the preliminary hearing, there was no evidence of digital presentation presented." Appellant contends that "one of [his] lewd act convictions [that could have been] based on . . . digital penetration [must be reversed] because there was no preliminary hearing evidence of any such penetration of [K.S.'s] vagina."

The contention is forfeited because appellant did not raise the issue in the trial court. When the prosecutor told the jury that it could convict appellant of a lewd act based on K.S.'s testimony "that he put his fingers in her vagina," defense counsel did not object. Where, as here, a defendant is charged by way of an information, "[t]he case law is consistent in reiterating that a superior court lacks authority to try [the] defendant for a felony . . . offense not previously subjected to a preliminary hearing. Violation of this limitation on the superior court's power, however, would constitute action in excess of jurisdiction—waivable error—and not nonwaivable subject matter jurisdiction. [Citations.]" (*People v. Burnett*, *supra*, 71 Cal.App.4th at p. 179; see also *People v. Gil* (1992) 3 Cal.App.4th 653, 659; *People v. Newlun* (1991) 227 Cal.App.3d 1590, 1603-1604 [by failing to object, defendant forfeited argument that he had been denied due process because he was convicted of lewd acts based on sodomy when no evidence of sodomy was presented at preliminary hearing].)

In his reply brief appellant asserts: "[I]f there is forfeiture, then there is ineffective assistance of trial counsel. It is total incompetence for defense counsel to allow his or her client to be convicted of an offense not shown at the preliminary hearing, in violation of Penal Code section 1009."

The standard for evaluating a claim of ineffective counsel is set forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the requisite degree of prejudice, the defendant "must show that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id*. at p. 694.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Id*. at p. 697.)

Appellant has not carried his burden of showing prejudice. His reply brief contains no discussion of whether it is reasonably probable that, but for counsel's failure to object, the result of the proceeding would have been different. If counsel had objected and the jury had been instructed not to convict based on the act of digital penetration, it still could have convicted appellant of three lewd act counts based on sodomy, vaginal intercourse, and oral copulation.

Claim that Consecutive Sentences Violated Section 654

The trial court sentenced appellant to prison for twelve years on one count of committing a lewd act and imposed consecutive sentences on the three remaining counts. Appellant claims that the consecutive sentences must be stayed pursuant to section 654, subdivision (a), which provides that "an act or omission" shall not "be punished under more than one provision." "Even though section 654 refers to an 'act or omission,' . . . the relevant question is typically whether a defendant's '"course of conduct . . . comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654."' [Citation.] . . . 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one

objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Correa* (2012) 54 Cal.4th 331, 335-336.)

"[S]ection 654 does *not* bar multiple punishment simply because numerous sex offenses are rapidly committed against a victim with the 'sole' aim of achieving sexual gratification." (*People v. Harrison* (1989) 48 Cal.3d 321, 325.) "To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. [Citation.]" (*People v. Perez* (1979) 23 Cal.3d 545, 552; see also *People v. Scott* (1995) 9 Cal.4th 331, 347 [if multiple punishment were barred for separate lewd acts committed on the same occasion, "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"].) "In other words, section 654 does not preclude separate punishment for multiple sex offenses which, although closely connected in time and part of the same criminal venture, are separate and distinct, and which are not committed as a means of committing any other sex offense, do not facilitate commission of another sex offense, and are not incidental to the commission of another sex offense. [Citations.]" (*People v. Castro* (1994) 27 Cal.App.4th 578, 584-585.)

Thus, "[w]here a defendant fondles a portion of the victim's body with the requisite intent, a violation of section 288 has occurred. The offense ends when the defendant ceases to fondle that area. Where a defendant fondles one area of the victim's body and then moves on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the

two be separated by a hiatus, or period of reflection. [¶] . . . It cannot reasonably be doubted that, when fondling of an underage victim moves from one area of the body to another, a separate outrage has occurred." (*People v. Jimenez* (2002) 99 Cal.App.4th 450, 456.)

"Whether [section 654] 'applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Vang* (2010) 184 Cal.App.4th 912, 915-916.)

Appellant argues that "all three lewd act convictions are most likely based on the photos depicting [appellant's] touching of [K.S.]." Therefore, "only one punishment for the lewd act convictions is proper because all three counts were incident to one objective and intent. The same reasoning applies to [appellant's] possession of child pornography conviction." But we have no way of knowing which lewd act the jury selected as the basis for each of the three lewd act convictions. Appellant's argument is contrary to the rule that the trial court's section 654 findings "'will not be reversed on appeal if there is *any* substantial evidence to support them. . . .'" (*People v. Vang*, *supra*, 184 Cal.App.4th at p. 916, italics added.) Substantial evidence supports appellant's commission of more than three separate lewd acts within the meaning of section 654: sodomy, vaginal intercourse, oral copulation, digital penetration, and kissing. None of these acts facilitated or was incidental to any of

the other lewd acts. (See *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1007 [trial court could have reasonably concluded that kissing child was separately punishable under section 654 and not "merely designed to facilitate the subsequent acts of penetration and fondling"].)

Accordingly, the trial court properly imposed consecutive sentences on the lewd act counts. (See *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1340 ["in the absence of some circumstance 'foreclosing' its sentencing discretion (as [where the specific factual basis for the jury's conviction can be identified]), a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial, without regard to the verdicts"].) Appellant concedes that, "if the jury based its [lewd act] convictions on oral copulation, anal sex, vaginal intercourse and/or digital penetration, the imposed multiple consecutive punishment is proper."

As to the conviction for possession of child pornography, the trial court was not barred from imposing a consecutive sentence because the crime was separate and distinct from appellant's commission of the lewd acts. Appellant possessed the pornography at the time of his arrest about one mile away from the location where he had committed the lewd acts. The pornography and lewd act offenses were not incidental to the same intent and objective. In committing the lewd acts, appellant's objective was to obtain sexual gratification by touching K.S.'s body or penetrating her bodily openings. In possessing child pornography, his objective was to obtain sexual gratification by viewing nude photos of K.S. (See *People v. Harrison*, *supra*, 48 Cal.3d at p. 335 ["It is defendant's intent and

objective . . . which determine whether the transaction is indivisible"].)

Claim that Counsel Was Ineffective for Failing to Request Special Verdicts or General Verdict with Special Findings

Appellant claims that his counsel was ineffective because he failed "to request special verdicts or general verdicts supplemented by special findings as to [the three lewd act] counts." "A special verdict is that by which the jury finds the facts only, leaving the judgment to the court." (§ 1152.) "The jury must render a general verdict, except that in a felony case, when they are in doubt as to the legal effect of the facts proved, they may . . . find a special verdict." (§ 1150.) "[S]pecial 'findings' may accompany a general criminal verdict, even if not expressly authorized by statute, so long as they do not interfere with the jury's deliberative process. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 447; see also *People v. Gurule* (2002) 28 Cal.4th 557, 632 ["we have approved the use of such hybrid general verdict forms, finding they do not violate the statutory prohibition against special verdicts"].)

Appellant argues, "[S]pecial verdicts or general verdicts supplemented by special finding were required because without them, it is very hard, if not impossible, to determine beyond a reasonable doubt which of the multiple claimed unlawful acts the jury believed constituted each charged section 288(a) crime." Appellant maintains that, if the jury had made special findings as to the acts underlying the lewd act convictions, the court may have stayed the sentence on one or more of the convictions pursuant to section 654, may have imposed concurrent instead of consecutive sentences, or may have granted his motion to dismiss the prior felony "strike" conviction.

When a defendant claims that he was denied effective assistance of counsel, he "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 883, 937.) Here, appellant has engaged in speculation as to the effect of counsel's allegedly deficient performance. He has therefore not carried his burden of proving prejudice.

Credit for Presentence Custody

The trial court found that appellant is entitled to credit for 535 days of presentence custody, consisting of 465 days of actual custody and 70 days of conduct credit. Appellant contends, and the People concede, that he is entitled to credit for 466, not 465, days of actual custody. We accept the concession.

Disposition

The judgment is modified to grant appellant credit for 536 days of presentence custody, consisting of 466 days of actual custody and 70 days of conduct credit. The trial court shall amend the abstract of judgment to show this modification and shall send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

James D. Otto, Judge

Superior Court County of Los Angeles

Waldemar D. Halka, under appointment by the Court of Appeal for Defendant and Appellant.

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