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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.

JOSE LUIS VAZQUEZ,

Defendant and Appellant.

B295462

(Los Angeles County
Super. Ct. No. KA116173)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Jr., Judge. Affirmed.

Vanessa Place, 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, Susan Sullivan Pithey and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jose Vazquez was convicted of oral copulation with a child and committing a lewd act on a child.¹ His only argument on appeal is that the trial court erred in imposing consecutive sentences on these counts. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was the victim's stepfather. When the victim was nine years old, he visited the family home. He was alone in the bedroom with the victim when the abuse occurred. Appellant first put his stepdaughter's hand on his penis for a few seconds. She told him to stop, but he did not. He then told her to put her mouth on his "private part," and she refused. He pushed her head down and put his penis in her mouth. A few seconds later, her sister entered the room and appellant let go of the victim.

A jury convicted appellant of oral copulation with a child 10 years or younger (Pen. Code, § 288.7, subd. (b))², and a lewd act on a child (§ 288, subd. (a)). At the sentencing hearing, defense counsel argued that the acts underlying these counts constituted one continuous act, and therefore, under section 654, he could not be sentenced on both. The court concluded section 654 did not apply, and appellant does not pursue a section 654 argument on appeal.

Defense counsel then argued that the court should exercise its discretion to impose concurrent terms, emphasizing the closeness in time of the underlying acts. The court recognized the "brevity of the acts in question and [] how close in time they

¹ His third conviction—misdemeanor disobeying a court order—is not at issue on appeal, and we do not address it further.

² All further statutory references are to the Penal Code unless otherwise stated.

were,” but concluded that “although the physical act may be brief, the psychological damage can be lifelong.” The court noted the probation and sentencing report stated that the victim still suffered from anxiety and anger issues, and her therapist opined she had “been damaged and [is] not the same as she used to be despite the fact the family is trying to forget about the incident. . . . [I]t has changed her as a result for the worst [This] is significant because it’s often overlooked when courts look at the conduct and ignore the consequences of the conduct when it comes to the lingering effects it may have upon a victim So for [these] reasons, the court finds that it is proper to run this term consecutive”

The court sentenced appellant to 15 years to life on the lewd act count and a consecutive midterm sentence of six years on the oral copulation count. Appellant timely appealed.

DISCUSSION

Appellant argues the court erred in imposing consecutive sentences under section 667.6 because the two crimes were not separate in time under the statute.³ Respondent agrees the

³ Section 667.6, subdivision (c) provides in part: “In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment.”

Section 667.6, subdivision (d) provides: “A full, separate, and consecutive term shall be imposed for each violation of an

statute does not apply here but contends the trial court did not sentence under section 667.6 so appellant's argument is beside the point. The record confirms respondent's position. Section 667.6 was not discussed at sentencing and the court stated clearly he was exercising discretion on whether to give concurrent or consecutive sentences. There is no indication the court was under the impression that a consecutive sentence was mandatory. The court's exact words were: "This is an issue as to whether or not the court should exercise its discretion and run the count concurrent rather than consecutive, which I'll certainly hear argument on."

Appellant, in his reply, argues that even if the trial court did not apply section 667.6 here, the court still erred in imposing consecutive sentences "because there was a [de minimis] change in activity between the charged acts, not reflective of a meaningful opportunity to reflect." Respondent argues the court's stated rationale for imposing consecutive sentences was sufficient to show a reasonable exercise of discretion. We agree with respondent.

A "trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court's discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the

offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions."

The commission of a lewd act on a child under 14 years old, the offense of which defendant was convicted, is not a qualifying offense under section 667.6, subdivision (e). If committed using force or violence (§ 288, subd. (b)), the crime qualifies under section 667.6, subdivision (e).

bounds of reason, all of the circumstances being considered.
[Citations.]” (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

California Rules of Court, rule 4.425 specifies several nonexclusive criteria to guide the trial court’s determination, including “[f]acts relating to the crimes.” (Cal. Rules of Court, rule 4.425(a).) Here, the trial court expressly considered such facts, specifically, the lasting damage the victim suffered as a result of the abuse. This was not unreasonable, and was sufficient to support the court’s decision to impose a consecutive sentence.⁴ (See *People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12 [“one relevant and sustainable fact” alone may justify imposition of consecutive sentences].)

DISPOSITION

The judgment is affirmed.

RUBIN, P. J.

WE CONCUR:

BAKER, J.

KIM, J.

⁴ In its brief on appeal, respondent argued, that the imposition of the full midterm on count 3 was unauthorized and a one-third midterm sentence should have been imposed. In a supplemental brief, the Attorney General withdrew its concession. Appellant did not respond to the supplemental brief. We find no error in imposing a full consecutive sentence in this matter as count 3 was the only felony with a determinate sentence. (*People v. Neely* (2009) 176 Cal.App.4th 787, 798–799 [consecutive sentencing in cases with both indeterminate and determinate sentences].)