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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DAVID WAYNE HOYLE, Defendant and Appellant.	B279374 (Los Angeles County Super. Ct. No. MA065798)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed in part, reversed in part, and remanded with directions.

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, Senior Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

David Wayne Hoyle appeals from a judgment which sentences him to 115 years to life in state prison for the sexual and physical abuse of three children. We find the trial court erroneously believed it lacked discretion to impose concurrent sentences on counts 1-5 and 8. In addition, the trial court erred in that it failed to impose a mandated sentence of 25 years to life on counts 5 and 8 under Penal Code[1] section 667.61, subdivision (j)(2). We therefore remand for resentencing.

FACTS

Hoyle began a relationship with Mary Q. in 2010. At the time, Mary had a five-year-old daughter, A.Q., from a previous relationship. Mary and Hoyle adopted siblings L.J. and A.H., who were related to Mary, in 2011 or 2012. Mary and Hoyle had a baby girl, D.H., in 2012.

As the relationship progressed, Hoyle became violent towards Mary as well as the children. Mary began to notice a change in the behavior of seven-year-old L.J. and eight-year-old A.Q. in 2014. In June or July, she asked them if there was anything they wanted to tell her, but they were initially reluctant to disclose anything. Later that day, they confided that Hoyle was touching them and making them "do things." He threatened to hurt them or Mary if either revealed the abuse. They were frightened of him. Mary eventually called the police that night and confronted Hoyle. When he learned she had called the police, he left.

Mary moved to Colorado the next day with the children. She flew back to California to pack up their belongings while the children remained in Colorado with her sister. While she was in

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[1] All further section references are to the Penal Code unless otherwise specified.

town, she spoke to Hoyle, who admitted he sexually abused L.J. and A.Q. Hoyle subsequently travelled to Colorado to ask Mary and the children to take a trip to North Carolina with him to visit his family. Mary agreed, in the hope that he would be arrested. At trial, she admitted she was not in the right state of mind when she made that decision. Hoyle was arrested in North Carolina and tried in California.

Hoyle was charged with 13 counts as follows: sexual intercourse or sodomy with A.Q., a child 10 years old or younger, on or between September 10, 2011, and July 23, 2014, (count 1; § 288.7, subd. (a)); oral copulation with or sexual penetration of A.Q., a child 10 years old or younger, on or between September 10, 2011, and July 23, 2014, (counts 2–4; § 288.7, subd. (b)); committing a lewd act upon A.Q., a child under the age of 14, on or between September 10, 2011, and July 23, 2014, (count 5; § 288, subd. (a)); criminal threats against A.Q. on or between September 10, 2011, and July 23, 2014 (count 6; § 422); oral copulation with or sexual penetration of L.J., a child 10 years old or younger, on or between June 2, 2012, and July 23, 2014, (count 7; § 288.7, subd. (b)); committing a lewd act upon L.J., a child 10 years old or younger, on or between June 2, 2012, and July 23, 2014, (count 8; § 288, subd. (a)); corporal injury to L.J. on or between June 2, 2012, and July 23, 2014, (count 9; § 273d, subd. (a)); criminal threats against L.J. on or between June 2, 2012, and July 23, 2014, (count 10; § 422, subd. (a)); misdemeanor lewd practices in presence of minor L.J. (count 11; § 273g); corporal injury to A.H. (count 12; § 273d, subd. (a)); and misdemeanor lewd practices in the presence of minor A.H. (count 13; § 273g).

As to counts 1 through 5, 7, and 8, it was further alleged the offenses were committed against more than one victim as specified in section 667.61, subdivision (e)(4). Counts 11 and 13 were dismissed under section 1385.

At trial, the People presented evidence of Hoyle's abuse, including testimony from Mary, A.Q., L.J., and A.H. A.Q. testified Hoyle touched her in her "private places" 11 times, beginning when she was eight years old until she was nine. A.Q. also testified that he put his private part into hers nine times and sometimes hit her with his ring. This happened over the course of "a couple of months." He usually touched her in the garage when Mary was sleeping. A.Q. testified he would usually touch her with his hands first, then lick her private parts, and then touch her again. A.Q. would sit on a stool. He also made A.Q. touch his private parts with her hand and make her suck his private parts for five minutes until "white stuff" came out. He told her it was candy, but she knew that was not true.

A.Q. clarified her testimony on cross-examination, explaining Hoyle would remove all of her clothes while she sat on the stool. Further, she testified that half of Hoyle's private part would fit into her private part and that it hurt her. Hoyle told A.Q. not to tell anyone and that if she did he would kill her mother.

Hoyle touched L.J.'s genitalia more than 10 times, and forced her to orally copulate him. He likewise told L.J. not to tell anyone what happened. He threatened to hurt and kill her. On one occasion in Hoyle's bedroom, he removed A.H.'s and L.J.'s clothing and touched their genitalia with his hand. He had L.J. orally copulate him and told A.H. to have L.J. orally copulate him

as well. A.H. refused. Hoyle told A.H. not to tell anyone. Hoyle presented no witnesses.

During deliberations, the jury sent a note stating: "Clarification in counts 2, 3 and 4. Worded exactly the same. Unsure why repeated three times." The trial court allowed each party five minutes of additional argument to address the jury's question. The People explained that three separate counts of oral copulation with a minor were filed because A.Q. described three separate incidents without specific dates. Defense Counsel argued it demonstrated ambiguity and created reasonable doubt. After argument, the trial court reminded the jury that counts 1–5, 7, and 8 may be based on more than one act. However, all the jurors had to agree that he committed the same act or acts to return a guilty verdict as to any of those counts. (CALJIC No. 17.01.)

The jury found Hoyle guilty on all counts and found true the multiple victim allegation. Hoyle was sentenced to an aggregate determinate term of four years in state prison, comprised of the middle term of four years on count 12 and concurrent terms on counts 6 (middle term of two years), 9 (middle term of four years), and 10 (middle term of two years). He was sentenced to an additional indeterminate term of 25 years to life on count 1, and to six terms of 15 years to life on counts 2–5, 7, and 8. The terms were ordered to run consecutively, for an aggregate indeterminate term of 115 years to life. Hoyle timely appealed.

DISCUSSION

Hoyle's sole contention on appeal is that the trial court erred in ordering consecutive sentences on counts 3 and 5. We invited the parties to submit supplemental briefs addressing

whether consecutive sentences were mandatory on counts 1–5 and 8 and whether a sentence of 25 years to life was mandated for counts 5 and 8. (Gov. Code, § 68081.) We conclude consecutive sentences *were not* mandated for counts 1–5 and 8, but that sentences of 25 years to life *were* mandated for counts 5 and 8, and therefore remand for resentencing.

I. Sentences on Counts 1–5 and 8

Relying on section 667.61, subdivision (i), the trial court believed consecutive sentences were mandatory on counts 1–5 and 8 if the crimes were committed against separate victims or on separate occasions. However, those counts do not fall within the purview of the mandatory consecutive sentencing portion of that statute, and we find remand for resentencing is required.

While imposing the sentence, the trial court stated: "Pursuant to Penal Code section 667.61(i), I find that the sentences as to counts 1, 2, 3, 4, 5, and 8 should all run consecutively, as these counts were either against separate victims or on separate occasions." This statement makes it clear that the trial court believed its task was to determine whether there were separate victims or separate occasions, and if it did so, it lacked authority to impose concurrent sentences on any of these counts.

However, subdivision (i) of section 667.61 mandates consecutive sentences for crimes *specified in paragraphs (1) to (7) of subdivision (c) or in paragraphs (1) to (6) of subdivision (n)* of that section "if the crimes involve separate victims or involve the same victim on separate occasions as defined by subdivision (d) of Section 667.6." (§ 667.61, subd. (i).) Counts 1–5 and 8 are not offenses enumerated in the specified subdivisions. The People concede the trial court erroneously believed its sentencing

discretion was limited by section 667.61, subdivision (i) on those counts and we agree.[2]

The trial court, however, did have discretion to impose consecutive sentences on these counts. (Cal. Rules of Court, rule 4.425 (rule 4.425).) The People urge us to conclude the error was harmless and that remand is unnecessary because the trial court would have imposed the same sentence even if it exercised its discretion. (See, e.g., *People v. Coelho* (2001) 89 Cal.App.4th 861, 889–890.) While we acknowledge that this is a case where many factors weigh in favor of consecutive sentencing, especially considering the evidence and the compelling victim impact statement, we decline to make that determination for the trial court and instead find remand is necessary. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

"Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to 'sentencing decisions made in the exercise of the "informed discretion" of the sentencing court,' and a court that is unaware of its discretionary authority cannot exercise its informed discretion." (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

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[2] We also agree with the People that Hoyle's offenses do not come within the ambit of crimes with mandated consecutive sentences under section 667.6. (§ 667.6, subd. (e).)

We find the trial court must be allowed the opportunity to exercise its fully informed discretion, given the array of options available to it to order consecutive sentences on all, some, or none of the six counts.

II. Sentences on Counts 5 and 8

The trial court sentenced Hoyle to consecutive terms of 15 years to life on counts 5 and 8, both of which were convictions for lewd acts upon a child under the age of 14 in violation of section 288, subdivision (a). Hoyle concedes, and the People agree, the trial court should have imposed sentences of 25 years to life on those two counts pursuant to section 667.61, subdivision (j)(2).

Section 667.61, subdivision (j)(2), mandates a sentence of 25 years to life for any person convicted of an offense specified in subdivision (c) of that section, under one of the circumstances specified in subdivision (e), committed upon a child under 14 years of age.

Hoyle's convictions in counts 5 and 8 fulfill all of the criteria for a sentence of 25 years to life under that section. First, Hoyle was convicted of committing a lewd act upon a child in violation of section 288, subdivision (a), which is an offense enumerated in subdivision (c)(8) of section 667.61. Second, the People pled and proved a multiple victim circumstance under subdivision (e)(4) of section 667.61. Third, both A.Q. and L.J. were children under the age of 14 at the time of the crimes. Accordingly, the trial court is directed, upon resentencing, to impose the required sentence of 25 years to life on counts 5 and 8.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for resentencing consistent with this opinion.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.