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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO VELASQUEZ, Defendant and Appellant.	2d Crim. No. B228301 (Super. Ct. No. TA107302) (Los Angeles County)

Ernesto Velasquez appeals the judgment following his convictions for three counts of lewd or lascivious acts upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)[1] The jury also found to be true an allegation that there was more than one victim as stated in section 667.61, subdivision (e)(4). Velasquez was sentenced to a prison term of 45 years to life consisting of consecutive 15 years to life terms for each offense.

Velasquez contends the trial court erred by admitting evidence of a prior sexual offense, refusing to instruct the jury on the lesser offense of battery, and by imposing consecutive sentences for the three offenses. He also claims error in the reading of the verdicts and the determination of presentence credit, and seeks a correction

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

in the abstract of judgment. We will order corrections in the abstract of judgment. Otherwise, we affirm.

FACTS

Velasquez is the grandfather of A.E., J.H. and J.R. The girls were born in October 1998, July 1996 and November 2000, respectively. A.E. visited Velasquez regularly. J.H. and J.R. lived with Velasquez and his wife.

A.E. testified that, beginning when she was six years old, Velasquez would touch her on her vagina when she visited his house. Sometimes he would put his hand under her clothing, and sometimes he would touch her outside her clothing. The first touching occurred in her grandmother's room when Velasquez put his hand under her clothing and rubbed her vagina for a couple of seconds. The touchings occurred both when A.E. was alone with Velasquez and when she was with J.H. or J.R.. Sometimes when she was with J.H. and J.R., Velasquez would touch more than one of the girls. Once, Velasquez touched A.E. and J.H. when the girls were in bed. Velasquez gave A.E. money and asked her not to tell anyone about the touching.

J.H. testified that, when she was seven, Velasquez touched all three girls in the vagina area when they were on a bed. Velasquez touched her vagina over her clothes on one or two other occasions. When she was nine, Velasquez touched her on the chest. She saw Velasquez touch A.E. on another occasion.

J.R. testified that Velasquez touched her on her vagina over her clothes in the bathroom when she was eight years old. She also saw Velasquez put his hand down the front of A.E.'s shorts.

Initially, J.H. and J.R. denied any inappropriate touching by Velasquez, but in later police interviews they revealed he had touched them in the vagina multiple times. Velasquez admitted to the police that he touched all three girls on the vagina over their clothes, and put his hand down J.H. and J.R.'s pants and underwear.

Velasquez also told police that, approximately 30 years earlier, he had sexual intercourse with his daughter J. three or four times when she was 13 years old.

One incident occurred when he came into his daughter's room while she was sleeping. J. is the aunt of A.E., J.H., and J.R.

At trial, J. testified that her father never had sexual intercourse with her. She testified that, during the investigation of the charged offenses, a police detective asked her whether her father had raped her, and she answered affirmatively. But, she thought that the detective was referring to a man other than Velasquez. She testified that a man named "Father" raped her when she was 12 years old, but the man was not her biological father. J. also testified that she never saw Velasquez behave improperly with A.E., J.H., or J.R.

No Error in Admission of Prior Uncharged Offense

Velasquez contends that the court abused its discretion by admitting the statement by his daughter J. that he had sexual intercourse with her approximately 30 years before the charged offenses. He argues that the evidence was untrustworthy, and that the prior uncharged act was remote in time, dissimilar to the charged offenses, and likely to have confused the jury. We disagree.

In a prosecution for sex offenses, evidence that the defendant has committed an uncharged sexual offense is admissible to prove propensity. (Evid. Code, § 1108.) The trial court retains discretion to exclude such evidence if its probative value is substantially outweighed by the risk of undue prejudice, or if its presentation would consume undue time or mislead the jury. (Evid. Code, §§ 352, 1108; *People v. Falsetta* (1999) 21 Cal.4th 903, 916.)

In determining whether to admit the evidence, the trial court should consider factors such as the nature, relevance and remoteness in time of the incident, its similarity to the charged offense, the degree of certainty the prior offense was committed, and the likelihood of prejudicial impact on the jurors. (*People v. Abilez* (2007) 41 Cal.4th 472, 502; *People v. Falsetta, supra,* 21 Cal.4th at pp. 916-917.) We review the trial court's ruling under the abuse of discretion standard, and will uphold a ruling which is not arbitrary, capricious, or patently absurd. (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

We conclude that the trial court did not abuse its discretion in admitting the evidence. Although remote in time, the evidence was strong, credible, pertained to an act reasonably similar to the charged offenses, and had significant probative value which outweighed any risk of undue prejudice, consumption of time or confusion.

Velasquez argues that the evidence of the rape of his daughter was weak because the uncharged offense was not reported timely, did not result in a conviction, and occurred 30 years before the charged offenses. Even if these assertions are accurate, the evidence of the rape was strong. During the investigation of the charged offenses, Velasquez admitted raping his daughter and his daughter admitted being raped by her father. Although Velasquez did not testify at trial, and his daughter recanted her statement to the police, admissions by both the perpetrator and the victim of a crime constitutes strong and credible evidence that the crime occurred. In addition, J.'s attempt at trial to explain away her admission to the police lacked credibility. She testified that another man named "Father" raped her and she thought the police detective was referring to that man, not her real father.

Velasquez argues that the charged and uncharged offenses lacked similarity because rape of a 13 year old is much more serious than touching the genitals of younger girls. He also asserts that greater seriousness of the prior offense made the evidence highly inflammatory.

We agree that evidence of rape by its very nature arouses emotion as would the evidence of the offenses in the instant matter. But that is not dispositive. Rather, we look to the details of the prior and current offenses to determine admissibility. Here, each involved sexual conduct directed towards an underage female to whom Velasquez was closely related. He was the father of the rape victim and grandfather of the victim's of the charged offenses and two of those victims lived in his home. The prior and charged offenses also all occurred in his home. In all instances, Velasquez took advantage of a close relationship to the victims and a position of trust. Also, although the absence of a conviction for the uncharged offense may increase the danger of the jury punishing

defendant for the uncharged offense, the record provides no indication that the jury did so in this case.

In addition, Velasquez stresses that the uncharged act was remote in time, having occurred approximately 30 years before the charged offenses. We agree that 30 years is sufficient to constitute remoteness in time. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 739.) Nevertheless, remoteness in time is a relevant, but not dispositive, factor for the trial court to consider. The remoteness of a prior offense may lessen its probative value on the issue of predisposition, but the passage of a substantial time does not automatically result in prejudice from admission. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285; *People v. Soto* (1998) 64 Cal.App.4th 966, 991.) Courts have upheld the admission of uncharged offenses as old as 20 or 30 years. (See *Branch,* at pp. 284-285; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393.)

Also, as in the instant case, significant similarities between the charged and prior offenses balance out remoteness. *(People v. Branch, supra*, 91 Cal.App.4th at p. 285.) The charged and uncharged offenses need not be so similar that evidence of the latter would be admissible under Evidence Code section 1101. "It is enough the charged and uncharged offenses are sex offenses as defined in section 1108." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41, fn. omitted.)

No Error in Failure to Instruct on Battery

Velasquez contends that the trial court erred in failing to instruct the jury that battery is a lesser included offense of committing lewd or lascivious acts upon a child under 14 years of age. We disagree.

In a criminal case, the trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Booker* (2011) 51 Cal.4th 141, 181; *People v. Breverman* (1998) 19 Cal.4th 142, 149.) General principles of law include instructions on a lesser included offense when there is evidence substantial enough to merit consideration by the jury that all elements of a lesser offense but not the charged offense were present. (*Booker*, at p. 181.) In the absence of such evidence, the trial court

is not required to instruct on the lesser included offense. (*Ibid.*) On appeal, we independently review whether the trial court erred in failing to instruct on a lesser included offense. (*Ibid*.)

A lesser offense is included in the charged offense if it meets either the statutory elements test or the accusatory pleading test. Under the statutory elements test, a lesser offense is included in the greater offense when the statutory elements of the greater offense include all the statutory elements of the lesser offense so that the greater offense cannot be committed without also committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117.) Under the accusatory pleading test, a lesser offense is necessarily included in the greater offense if the allegations in the accusatory pleading establish that, if the greater offense was committed as pled, the lesser offense also must have been committed. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035.) If the trial court fails to instruct on a lesser included offense, reversal is required only if an examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.)

The commission of a lewd or lascivious act upon a child under the age of 14 years requires a touching and that the touching was "with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (§ 288, subd. (a); see *People v. Martinez* (1995) 11 Cal.4th 434, 444.) The touching need not appear objectively sexual as long as the perpetrator's subjective intent is to arouse his own, or the victim's, sexual desire. (*Ibid.*) Section 242 defines battery as "any willful and unlawful use of force or violence upon the person of another." The slightest touching can constitute a battery provided it is objectively and subjectively perceived as harmful or offensive. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889.)

Multiple cases have considered, and reached opposite conclusions, as to whether battery is a lesser included offense of a lewd or lascivious act upon on a child under 14. *People v. Santos* (1990) 222 Cal.App.3d 723, 739 held, without citation or analysis, that battery was not a lesser included offense. *People v. Thomas* (2007) 146

Cal.App.4th 1278, 1293, held that battery is a lesser included offense because both offenses require a harmful or offensive touching. Two more recent cases have also reached opposite conclusions. The Supreme Court has granted review in these more recent cases. (*People v. Shockley*, review granted Mar. 16, 2011, S189462; *People v. Gray*, review granted Dec. 14, 2011, S197749.)

There is no need for us to choose between the conflicting cases. We conclude that, whether or not battery is a lesser included offense of lewd or lascivious acts upon a child under 14, the trial court was not required to instruct the jury on battery under the circumstances of this case.

In holding that battery is a lesser included offense of lewd acts on a child under 14, *People v. Thomas*, *supra*, 146 Cal.App.4th at page 1293, concluded that both battery and lewd acts require a "touching" of the victim and that any touching of an underage child committed with the intent to sexually arouse is necessarily an offensive touching. On the other hand, there may be situations where a touching violates section 288 because it is sexually motivated but would not be a battery because it is not inherently harmful or offensive. Children are routinely cuddled, stroked, and groomed as part of a normal and healthy upbringing. (See *People v. Martinez*, *supra*, 11 Cal.4th at p. 450.) These are not offensive acts and, in the absence of a sexual motivation, would not support either a lewd act or a battery charge.

In any event, the trial court in the instant case did not err in failing to instruct the jury on battery because there is no substantial evidence from which the jury could conclude that Velasquez was guilty of battery but not of committing a lewd or lascivious act upon a child under the age of 14 years. (See *People v. Booker*, *supra*, 51 Cal.4th at p. 181; *People v. Manriquez* (2005) 37 Cal.4th 547, 584.) Here, if Velasquez is guilty at all, he is guilty of committing a lewd act, not merely battery. The undisputed evidence is that Velasquez touched vaginas of three young girls over and under their clothing. If the jury believed that these acts occurred, Velasquez necessarily committed them with the intent of arousing his sexual desires. There is no evidence that these acts could have occurred for a nonsexual purpose. And, if the jury disbelieved the victims,

there would have been no battery. In light of the evidence as a whole, no reasonable jury could have concluded that the incident was merely an offensive touching and not a lewd act upon a child under the age of 14.

No Error in Imposition of Consecutive Sentences

Velasquez received three 15 years to life sentences for his three offenses under the One Strike law alternate sentencing scheme. (§ 667.61.) The scheme required 15 years to life sentences because Velasquez committed offenses enumerated in section 667.61, subdivision (c) "against more than one victim" as set forth in section 667.61, subdivision (e)(4). Velasquez concedes that he was properly sentenced to 15 years to life for each offense, but contends that the trial court improperly relied on the same factor of multiple victims both to impose the sentences and order the sentences to be served consecutively. We disagree.

Velasquez has forfeited this claim. A party may not raise a claim on appeal that the trial court failed to properly make or articulate its discretionary sentencing choices when the party did not object to the sentence at trial. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *People v. Scott* (1994) 9 Cal.4th 331, 353.) The rule applies to cases where the stated reasons for a sentence allegedly do not apply, and where the court purportedly double-counted a particular sentencing factor or improperly weighed the various factors. (*Gonzalez,* at p. 751.) We consider the claim, however, because Velasquez contends in the alternative that he received ineffective assistance of counsel.

Generally, a trial court may not impose consecutive rather than concurrent sentences solely on the basis of an aggravating factor that has been used to enhance the prison term itself. (See *People v. Black* (2005) 35 Cal.4th 1238, 1262, citing Cal. Rules of Court, rule 4.425(b)(3).) Here, the multiple victim circumstance was used to trigger the section 667.61 alternate sentencing scheme, and cannot form the sole basis for ordering the sentences to be run consecutively. The trial court, however, did not make such "dual use" of the multiple victim circumstance in this case. The court properly imposed consecutive sentences after weighing various aggravating factors.

A trial court has broad discretion in weighing aggravating and mitigating factors to select an appropriate sentence. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.) A single aggravating factor will support an aggravated sentence. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

Here, the prosecution filed a sentencing memorandum listing numerous circumstances in aggravation (Cal. Rules of Court, rule 4.421), and criteria for imposing consecutive sentences. (*Id*. rule 4.425.) At sentencing, the trial court stated that the offenses involved "multiple victims," but the trial court also cited various other factors it considered in ordering consecutive sentences. The court found that the victims were particularly vulnerable, the offenses were carried out with planning and sophistication or by other means indicating premeditation, and the offenses involved great bodily harm, the threat of such harm or other acts showing a high degree of cruelty, viciousness or callousness. (See Cal. Rules of Court, rule 4.421(a)(1), (a)(3) & (a)(8).) Although rule 4.421 applies only to felonies punishable by determinate sentences (*id*. rule 4.403), these findings support the criteria for choosing between concurrent and consecutive sentences set forth in rule 4.425(a). In particular, the trial court impliedly found that the crimes and their objectives were predominantly independent of each other, and were committed at different times and not so closely in time and place as to indicate a single period of aberrant behavior. (*Id.* rule 4.425(a)(1) & (a)(3).)

Velasquez argues that the factors relied on by the trial court other than the existence of multiple victims had no factual support. We disagree. The record shows that the victims were particularly vulnerable. Velasquez occupied a position of trust created by his status as grandfather and caregiver for the victims. (See *People v. Esquibel* (2008) 166 Cal.App.4th 539, 542.) Also, Velasquez waited for opportune moments to commit the offenses. There was no abuse of discretion or any other error in the imposition of consecutive sentences in this case.

For the same reasons, the claim that Velasquez received ineffective assistance of counsel also fails. To show ineffective assistance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" "under

prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) In addition, the defendant must establish prejudice by showing "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.) Here, trial counsel's failure to object to consecutive sentences was reasonable. The aggravating factors were strong, and the chance of a successful objection were slight. We doubt there is even a remote possibility that an objection would have persuaded the trial court to impose concurrent sentences.

Correction in Reading Verdicts Not Required

Velasquez contends that an error in the clerk's reading of the verdicts "depriv[ed him] of a clear on-the-record statement" that the jury found him not guilty of count 8. He requests this court to correct the error.

The jury acquitted Velasquez of certain of the counts of committing a lewd or lascivious act upon a child under 14 years of age, including count 8. The verdict forms, minute order, and abstract of judgment all accurately reflect the verdicts on all counts. But, the clerk made a mistake in reading the verdicts in open court. The clerk correctly stated the verdicts on counts 1 through 7, skipped count 8 entirely, correctly stated the verdict on count 9, and repeated the correct verdict on count 9. In other words, the clerk failed to read the verdict on count 8 at all and read the verdict on count 9 twice. Although this was an error by the clerk, we see no prejudice to Velasquez. The record as a whole makes it clear that he was acquitted on count 8. Accordingly, we decline to take any action.

Corrections in Abstract of Judgment

Velasquez contends that he is entitled to seven more days of presentence custody credits than were awarded by the trial court. Respondent concedes, and we agree. Also, respondent points out that, although Velasquez was undisputedly sentenced under section 667.61, the abstract of judgment fails to check off the box indicating that fact. We agree that the abstract contains this omission.

DISPOSITION

The judgment is modified to award Velasquez 470 days of actual presentence custody credit. The trial court shall prepare a corrected abstract of judgment reflecting this modification and also reflecting in numbered paragraph 8 that Velasquez was sentenced pursuant to section 667.61. The court shall send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Rand S. Rubin, Judge

Superior Court County of Los Angeles

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

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