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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. JUAN MANUEL MURILLO, Defendant and Appellant.	B253874 (Los Angeles County Super. Ct. No. NA091309)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan J. Kline and Garett A. Gorlitsky, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury found appellant Juan Manuel Murillo guilty of eight sex offenses involving two children, the trial court sentenced him to a total term of 125 years to life. On appeal, appellant challenges only his sentence, contending that the trial court erred in sentencing him under the "One Strike" law (Pen. Code, § 667.61).[1] We reject his contentions and affirm the judgment.

RELEVANT PROCEDURAL BACKGROUND

In July 2012, an information was filed, charging appellant with nine offenses against two young girls, G.V. and S.S. The information alleged that on June 3, 2011, appellant engaged in forcible lewd acts upon G.V. (§ 288, subd. (b)(1); counts 1 through 3, 5, and 7), and in sexual intercourse or sodomy with her when she was 10 ten years old or younger (§ 288.7, subd. (a); counts 4 and 6). The information further alleged that on the same date, appellant engaged in a forcible lewd act upon S.S. (§ 288, subd. (b)(1); count 9), and in sexual intercourse or sodomy with her while she was 10 ten years old or younger (§ 288.7, subd. (a); count 8). Accompanying the counts charging forcible lewd acts were allegations that there were multiple victims and that the victim was less than 14 years old (§ 667.61, subd. (j)(2)). Appellant pleaded not guilty to all the counts and denied the special allegations.

During appellant's trial, the court dismissed count 2. Regarding the remaining eight offenses, the jury found appellant guilty as charged, and found the special allegations to be true. On November 12, 2013, the trial court sentenced appellant to a total term of 125 years to life, comprising consecutive terms of 25 years to life on two counts of forcible lewd acts (counts 1 and 3) and three counts of sexual intercourse or sodomy with a child of ten years or younger (counts 4, 6,

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

and 8). Terms of 25 years to life were also imposed on the remaining counts (counts 5, 7, and 9) and stayed (§ 654). This appeal followed.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

In 2011, T.G. lived on the first floor of an apartment building in Long Beach with her six-year old daughter, S.S. M.A.C. (A.) also lived on the building's first floor and had a six-year old daughter, G.V. Appellant was the building manager and G.V.'s uncle.

On June 3, 2011, T.G. visited As apartment. During the visit, S.S. and G.V. played in the building's first floor hallway, where T.G. and A. could hear them. Later, the children were permitted to go to the building's second floor hallway to play with a friend.

G.V. testified that when she and S.S. arrived at the second floor, appellant opened the door to an apartment, which they entered. After closing the door, appellant kissed G.V. on the mouth and placed her on the floor. G.V. became fearful and tried to struggle free. Despite G.V.'s resistance, he touched her chest and licked her stomach. After removing her pants and underwear, he placed his penis into or near her vagina, turned her over, and inserted his penis into her "butt." Appellant then turned his attention to S.S. When there was a knock on the door of the apartment, appellant allowed the children to leave it.

S.S. testified that appellant pulled the children into a second floor apartment and closed its door. Overcoming resistance from the children, appellant lay upon each of them, removed some of their clothing, and inserted his penis into their vaginas. He also placed his penis in or on S.S's "butt." Upon hearing T.G. calling for the children, appellant opened the apartment door, and the children left.

When T.G. and A. noticed that S.S and G.V. were making no noise from the hallway, T.G. went to the building's second floor, where she saw S.S. and G.V. leaving a vacant apartment. S.S. told T.G. that appellant had touched her "part," and had also touched G.V. T.G. looked at S.S's vagina, which appeared to be red. G.V. told A. that appellant had put his penis "in between her private parts." When A. examined G.V., she saw that G.V.'s vagina was red and found a hair.

T. G. and A. called the police. The children were taken to a hospital, where they received a forensic examination. Samples taken from the children's vaginal and anal areas tested positive for semen matching appellant's DNA. In addition, samples from S.S.'s stomach and buttocks and from G.V.'s vaginal area tested positive for saliva.

B. *Defense Evidence*

Appellant presented no evidence.

DISCUSSION

Appellant contends there was sentencing error regarding his convictions for forcible lewd acts involving G.V., as charged in counts 1 and 3. He argues that the trial court improperly imposed consecutive terms of 25 years to life on those counts under section 667.61, the One Strike law (*People v. Mancebo* (2002) 27 Cal.4th 735, 741 (*Mancebo*)). He argues that the One Strike law required the court to impose only a single term of 25 years of life on the two offenses. As explained below, we disagree.

A. *One Strike Sentencing*

Under counts 1 and 3, appellant was convicted of forcible lewd conduct (§ 288, subd. (b)(1)), an offense potentially subject to a 25-years-to-life term under

the One Strike law, which "sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes . . . ." (*Mancebo, supra*, 27 Cal.4th at p. 741.) The version of the One Strike law applicable in 2011, when appellant committed the offenses, is materially similar to the current law. The sex crimes subject to the One Strike law are set forth in section 667.61, subdivision (c), and include forcible lewd conduct (§ 288, subd. (b)(1)). Subdivision (a) of the statute states that a 25-years-to-life sentence "shall" be imposed for the crimes so enumerated, provided that two or more circumstances described in subdivision (e) of section 667.61 are established. (§ 667.61, subds. (a), (c)(4).) When the victim is a child under 14 years of age, however, section 667.61, subdivision (j)(2), provides that a 25-years-to-life-term "shall" be imposed on "[a]ny person who is convicted of an offense specified in subdivision (c), . . . under *one* of the circumstances specified in subdivision (e)." (Italics added.) Subdivision (e) of the One Strike law includes among the specified circumstances the following: "(4) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." (§ 667.61, subd. (e)(4).)

Regarding consecutive sentencing, the One Strike law provides in subdivision (i) that with respect to certain specified sex crimes -- including forcible lewd conduct (§ 288, subd. (b)(1)) -- "the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." Under that definition, crimes against a single victim are committed on separate occasions if between the crimes "the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).)[2]

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[2] Subdivision (d) of section 667.6 further states: "Neither the duration of time

The One Strike law contains no provision expressly addressing whether consecutive terms may be imposed on multiple offenses of forcible lewd conduct (§ 288, subd. (b)(1)) against a single victim on a single occasion. In *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524 (*Valdez*), the court held that consecutive or concurrent terms may be imposed for crimes subject to the One Strike law, but not listed in subdivision (i) of that statute. There, the defendant was convicted on seven counts of lewd conduct against three victims under section 288, subdivision (a), a sex crime subject to the One Strike law (§ 667.61, subd. (c)(8)), but not enumerated in subdivision (i). In sentencing the defendant, the trial court imposed consecutive terms on the offenses. (*Valdez, supra*, 193 Cal.App.4th at p. 1521.) On appeal, the defendant argued that subdivision (i) bars consecutive sentencing for offenses not specified within it. The appellate court disagreed, stating: "[N]othing in subdivision (i) purports to proscribe the imposition of consecutive one strike sentences for those whose predicate offense was under section 288, subdivision (a). To the contrary, it merely provides a limitation on the mandatory imposition of such terms, which by implication leaves the decision to impose consecutive or concurrent terms to the sentencing court's discretion under section 669."[3] (*Valdez, supra,* at p. 1524, italics deleted; see also *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 214 (*Rodriguez*) [applying *Valdez*].)

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between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."

[3] Section 669 provides that "[w]hen [the defendant] is convicted of two or more crimes," the trial court is to "direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

B. *Underlying Proceedings*

The information charged appellant with four counts of forcible lewd conduct regarding G.V. (counts 1, 3, 5, 7) and one count of forcible lewd conduct regarding S.S. (count 9.) The four counts of forcible lewd conduct involving G.V. were predicated on distinct acts: count 1 alleged that appellant licked G.V.'s stomach, count 3 alleged that appellant kissed her, count 5 alleged that he had sexual intercourse with her, and count 7 alleged that he engaged in sodomy. In the remaining counts (counts 4, 6, and 8), the information charged appellant with sexual intercourse or sodomy with a child of ten years or younger (§ 288.7, subd. (a)), a crime not enumerated in subdivision (c) of the One Strike Law. Two of those counts (counts 4 and 6) were predicated on the acts involving G.V. underlying counts 5 and 7; the remaining count (count 8) was predicated on misconduct involving S.S. Accompanying the counts charging forcible lewd conduct (counts 1, 3, 5, 7, and 9) were allegations that there were multiple victims, and that the victim was under 14 years of age. The jury convicted appellant on all counts and found the special allegations to be true.

The prosecution's sentencing memorandum asked the court to impose a 25-years-to-life term on each of the five counts alleging forcible lewd conduct (§ 288, subd. (b)(1)), and on each of the three counts alleging sexual intercourse or sodomy with a child of ten years or younger (§ 288.7, subd. (a)).[4] Regarding the forcible lewd conduct against G.V. charged in counts 1 and 3, the prosecution stated that the court had the discretion to impose consecutive or concurrent terms because the offenses involved "the same victim on the same occasion," and requested the imposition of consecutive terms.

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[4] Subdivision (a) of section 288.7 provides that a 25-years-to-life term "shall" be imposed when the defendant was 18 years or older at the time of the crime. It was stipulated that appellant was born in 1958, making him 53 at the time of the crimes.

The prosecution further stated that each of the remaining counts of forcible lewd conduct (counts 5, 7, and 9) had been charged as an alternative to a specific count of sexual intercourse or sodomy with a child of ten years or younger (respectively, counts 4, 6, and 8). The prosecution asked the trial court to impose a term of 25 years to life on each count, order that the terms for sexual intercourse or sodomy with a child of ten years or younger be served consecutively, and stay the punishment for the associated counts of forcible lewd conduct (§ 654).

The trial court sentenced appellant in accordance with the prosecution's recommendations. The court imposed 25-years-to-life terms on all the counts; ordered that the terms for counts 1, 3, 4, 6, and 8 be served consecutively; and stayed the punishment for counts 5, 7, and 9.

C. *Analysis*

We discern no error in the trial court's imposition of consecutive 25-years-to-life terms on the offenses of forcible lewd conduct involving G.V., as charged in counts 1 and 3. As explained above, subdivisions (a), (j)(2), and (e)(4) of the One Strike law jointly mandate the imposition of a 25-years-to-life term on an offense of forcible lewd conduct when the victim is younger than fourteen years old and "[t]he defendant has been convicted in the present case or cases of committing" forcible lewd conduct "against more than one victim." Those circumstances were indisputably established at trial, as the jury found appellant guilty of forcible lewd conduct against both victims, and also found that they were younger than 14 years of age when the crimes occurred.

Furthermore, because the prosecution conceded that counts 1 and 3 occurred on the same occasion, the trial court had the discretion to impose consecutive terms on counts 1 and 3. (*Valdez*, *supra*, 193 Cal.App.4th at p. 1524; *Rodriguez*, *supra*, 207 Cal.App.4th at p. 214.) In ordering consecutive terms, the court noted the

victims' youth and vulnerability, as well as appellant's abuse of a position of trust, namely, his status as G.V.'s uncle. Those factors are sufficient to support consecutive terms. (Cal. Rules of Court, rules 4.421 (a)(3) & (a)(11), 4.426(b).)

Appellant contends that subdivision (f) of the One Strike law, viewed in the context of that statute, "mandates that One Strike . . . terms based solely on the 'multiple-victim' provision set forth in subdivision (e)(5) may be imposed once for each victim, whether committed on the same occasion or on separate occasions, but not more than once per victim." (Italics deleted.) Subdivision (f) states: "If only the minimum number of circumstances specified in subdivision . . . (e) that are required for the punishment provided in subdivision (a), . . . to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) . . . [or] (j) . . . , rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. However, if any additional circumstance or circumstances specified in subdivision . . . (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a) [or] (j) . . . and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other provision of law."

Additionally, pointing to subdivision (e) of the One Strike law, appellant maintains that the "multiple victim" circumstance is "sui generis." (Italics deleted.) Aside from that circumstance, subdivision (e) states that qualifying circumstances occur when the defendant, in committing the underlying sex crime, engages in kidnapping, burglary or other enumerated crimes; uses a weapon; or

binds or drugs the victim.[5] (§ 667.61, subd. (e).) Appellant argues that the "multiple victim" circumstance is established merely "upon proof of more than one victim of an enumerated offense," unlike the other specified circumstances, which "contemplate additional aggravating misconduct attending" the underlying offense.

We reject appellant's contentions for the reasons explained in *Valdez*, which addressed the same contentions. There, the defendant was convicted on seven counts of lewd conduct against three victims (§ 288, subd. (a)) (see pt. A., *ante*), and was sentenced to seven One Strike terms based on the multiple victim circumstance.[6] (*Valdez, supra,* 193 Cal.App.4th at pp. 1518, 1522.) On appeal, the defendant argued that the "multiple-victim" circumstance supported the imposition of only one One Strike term per victim, regardless of whether the

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5 The current version of subdivision (e) is materially identical to the version applicable to appellant. As effective at the time of the underlying crimes, subdivision (e) of the One Strike law stated: "The following circumstances shall apply to the offenses specified in subdivision (c): [¶] (1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5. [¶] (2) Except as provided in paragraph (4) of subdivision (d), the defendant committed the present offense during the commission of a burglary in violation of Section 459. [¶] (3) The defendant personally used a dangerous or deadly weapon or a firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53. [¶] (4) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim. [¶] (5) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense. [¶] (6) The defendant administered a controlled substance to the victim in the commission of the present offense in violation of Section 12022.75. [¶] (7) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (1), (2), (3), (5), or (6) of this subdivision . . . ."

6 Terms of 15 years to life were imposed on each of defendant's offenses under subdivision (b) of the One Strike law statute, which provides that such a term "shall" be imposed on an offense specified in subdivision (c) -- including lewd conduct (§ 288, subd. (a)) -- when one or more of the circumstances identified in subdivision (e) is established.

crimes were committed on separate occasions, relying on subdivision (f) of the One Strike law and the difference between the multiple victim circumstance and the other circumstances specified in subdivision (e). (*Valdez, supra,* at pp. 1521-1522.)

The appellate court determined that the meaning of subdivision (f) of the One Strike law "is unambiguous and its application is clear," stating: "When the minimum number of former subdivision . . . (e) circumstances were pled and proved, the sentencing court should have used them 'as the basis for imposing the term provided in subdivision (a) . . . rather than . . . to impose the punishment authorized under any other law, unless another law provides for a greater penalty.' [Citation.] On the other hand, if additional qualifying circumstances were pled and proved, the 25-year[s]-to-life sentence . . . must be imposed, with any remaining circumstances being used 'to impose any punishment or enhancement authorized under any other law.'" (*Valdez, supra,* 193 Cal.App.4th at pp. 1522-1523.) The court thus concluded that nothing in subdivision (f) "even hints at an intent to limit" the imposition of One Strike terms based on the multiple victim circumstance. (*Valdez,* at p. 1523.)

The court also concluded that no such limitation can be inferred from the difference between the multiple victim circumstance and the circumstances specified in subdivision (e) of the One Strike law describing "aggravating factors" relating to the underlying offense. (*Valdez, supra*, 193 Cal.App.4th at p. 1522.) The court explained: "'The statutory intent and scheme of . . . subdivision (e) is not difficult to discern. Where the "present offense" against a victim is a qualifying offense and the gravity of that offense is enhanced by one of the circumstances enumerated in subdivisions [specifying aggravating factors relating to the offense], the life sentence mandated by the statute shall apply. But even in circumstances where [those] subdivisions . . . do not apply, if a qualifying offense

has been committed against more than one victim, the criminal conduct is considered equally severe and that conduct merits application of the statute so long as those offenses are prosecuted "in the present case or cases." [Citation.]'" (*Ibid*., quoting *People v. Stewart* (2004) 119 Cal.App.4th 163, 171.)

We agree with *Valdez*. Subdivision (f) of the One Strike law, by its plain language, manifests an intent to secure the greatest possible punishment for crimes subject to the One Strike law; nothing within it suggests the limitation on punishment advocated by appellant. Similarly, subdivision (e), by its plain language, places the multiple victim circumstance on a par with the other enumerated circumstances, despite any differences between the former and the latter.

In addition, for the reasons discussed in *Rodriguez*, the legislative history of the One Strike law supports the conclusion that the current statute contains no limitation of the type advocated by appellant. (*Rodriguez, supra*, 207 Cal.App.4th at pp. 212-214.) Before September 2006, the One Strike law included former subdivision (g), which stated that a One Strike sentence "shall be imposed on the defendant *once* for any offense or offenses committed against a single victim during a single occasion. [Citation.] If there are multiple victims during a single occasion, the term specified in subdivision (a) . . . shall be imposed on the defendant *once for each separate victim*. . . ." (*Id*. at p. 212, italics added and omitted.) In *People v. Jones* (2001) 25 Cal.4th 98, 107, our Supreme Court concluded that the Legislature, in enacting former subdivision (g), "'intended to impose no more than one [One Strike] sentence per victim per episode of sexually assaultive behavior.'" (*Rodriguez, supra*, 207 Cal.App.4th at p. 212.) However, in September 2006, the Legislature amended the One Strike law to eliminate former subdivision (g) (Stats. 2006, ch. 337, § 33, pp. 2165-2167). (*Rodriguez, supra*, at p. 213.) As explained in *Rodriguez*, the elimination of subdivision (g) manifested

the Legislature's intent to abrogate the restriction determined in *Jones* regarding the number of One Strike sentences properly imposed for multiple offenses against a single victim on a single occasion. (*Rodriguez, supra*, at pp. 213-214.)

People v. DeSimone (1998) 62 Cal.App.4th 693 (*DeSimone*), *People v. Murphy* (1998) 65 Cal.App.4th 35 (*Murphy*) and *People v. Wutzke* (2002) 28 Cal.4th 923 (*Wutzke*), upon which appellant relies, are inapposite. Those decisions pre-date the elimination of former subdivision (g) of section 667.61 and, as explained below, provide no support for appellant's contentions.

In *DeSimone*, the defendant's sentence included two consecutive One Strike terms based on the "multiple victim" circumstance. (*DeSimone, supra*, 62 Cal.App.4th at p. 696.) On appeal, the defendant contended that the "multiple victim" circumstance supported only a single One Strike term "per case." (*DeSimone, supra*, at p. 698.) In affirming the defendant's sentence, the appellate court concluded that nothing in subdivision (e) of the applicable One Strike law -- which set forth the "multiple victim" circumstance -- supported such a restriction; in addition, the court determined that former subdivision (g) of the One Strike law was inapplicable, as the defendant's offenses occurred on different occasions and involved different victims. (*DeSimone*, at pp. 696-699.) *DeSimone* thus contains no suggestion that the "multiple victim" circumstance is subject to a restriction of the type advocated by appellant.

In *Murphy*, the defendant was convicted of six One Strike offenses against a victim on a single occasion, and another One Strike offense against a different victim on a separate occasion. (*Murphy, supra*, 65 Cal.App.4th at pp. 38, 40-41.) In sentencing the defendant, the trial court determined that former subdivision (g) of section 667.61 required the imposition of only a single One Strike term for the seven offenses. (*DeSimone, supra*, at p. 38.) The appellate court reversed, concluding that former subdivision (g) permitted the imposition of two One Strike

terms -- one per victim. (*DeSimone*, *supra,* at p. 41.) Because the current version of the One Strike law lacks that provision, *Murphy* does not aid appellant.

The same is true of *Wutzke*. There, the defendant was convicted on four counts of lewd conduct (§ 288, subd. (a)) involving two children. (*Wutzke, supra,* 28 Cal.4th at p. 927.) After the trial court imposed four One Strike terms for the offenses, the Court of Appeal reversed, concluding that the defendant's misconduct fell outside the then-applicable version of the One Strike law, which encompassed only lewd conduct by a perpetrator ineligible for probation. (*Wutzke, supra,* at pp. 927-929.) The sole issue presented to the Supreme Court was whether the defendant was eligible for probation, for purposes of One Strike sentencing. (*Wutzke,* at p. 929.) Nonetheless, in describing the One Strike sentencing scheme, the Supreme Court discussed the "multiple victim" circumstance, relying primarily on *DeSimone* and former subdivision (g). The court stated: "[P]ersons convicted of sex crimes against multiple victims . . . 'are among the most dangerous' from a legislative standpoint. [Citation.] The One Strike scheme therefore contemplates a separate life term for each victim attacked on each separate occasion." (*Wutzke,* at pp. 930-931, quoting *DeSimone*, *supra,* 62 Cal.App.4th at p. 698 and citing former subdivision (g).)[7] As the current version of the One Strike law lacks former subdivision (g), *Wutzke* offers no assistance to appellant.

Appellant contends that under the "rule of lenity," the One Strike law must be regarded as incorporating the limitation he defends regarding the application of the "multiple victims" circumstance. We disagree. As our Supreme Court has explained, "under the traditional 'rule of lenity,' language in a penal statute that truly is susceptible of more than one reasonable construction in meaning or

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[7] *Wutzke* also cites *People v. Murphy* (2001) 25 Cal.4th 136, 153 and fn. 7, in which the Supreme Court described the holdings in *Desimone* and *Murphy,* but expressly reserved judgment regarding the correctness of those holdings.

application ordinarily is construed in the manner that is more favorable to the defendant." (*People v. Canty* (2004) 32 Cal.4th 1266, 1277.) Because the One Strike law reflects no such ambiguity, appellant's contention fails. In sum, the trial court properly imposed consecutive terms of 25 years to life on counts 1 and 3.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.