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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO MOYA CANIZALEZ,

Defendant and Appellant.

2d Crim. No. B254618  
(Super. Ct. No. 2012036388)  
(Ventura County)

Gustavo Moya Canizalez appeals from the judgment entered after a jury convicted him of three counts of lewd act on a child under the age of 14 (counts 1, 4, and 5; Pen. Code, § 288, subd. (a)),<sup>1</sup> one count of continuous sexual abuse (count 2; § 288.5), two counts of oral copulation of a person under the age of 18 (counts 3 and 6; 288a, subd. (b)(1)), and penetration by a foreign object of a person under the age of 16 by a person over the age of 21 (count 7; § 289, subd. (i)). The jury returned special findings that counts 1, 2 and 4 involved substantial sexual conduct with a person under the age of 14 (§ 1203.066, subd. (a)(8)) and, with respect to counts 1, 2, 4, and 5, that appellant committed the enumerated offense against more than one victim within the meaning of section 667.61, subdivisions (b) & (e)(4)).

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<sup>1</sup> All statutory references are to the Penal Code.

The trial court sentenced appellant to four consecutive 15-year-to-life terms (One Strike sentences) on counts 1, 2, 4, and 5, plus four years four months on counts 3, 6, and 7. We vacate the 15-year-to-life sentence on count 5 (lewd conduct on a minor) and remand for resentencing because former section 667.61 does not authorize the imposition of separate One Strike sentences on both counts 4 and 5. (See *People v. Rodriguez* (2012) 207 Cal.App.4th 204, 212.) Counts 4 and 5 involve the same victim and were committed on a single occasion "in close temporal and spatial proximity." (*People v. Jones* (2001) 25 Cal.4th 98, 107.)

#### *Facts*

Appellant was convicted of sexually abusing two boys, ages 12 and 13, first by masturbating them, then performing oral and anal sex.

#### *N.R. (Counts 4 - 7)*

In February 2004, just after N.R. turned 12, appellant and N.R. attended a quinceanera party for appellant's sister at the Oxnard Performing Arts Center. Appellant took N.R. home to get sodas and orally copulated N.R. on the couch. (Count 4.) Appellant then took N.R. to the bedroom and had N.R. put his penis in appellant's anus. (Count 5.) Appellant and N.R. returned to the party about 90 minutes later.

Appellant had sexual contact with N.R. 10 to 15 times before N.R. turned 18. On one occasion, appellant orally copulated N.R. in his mother's bedroom. (Count 6.) On another occasion, when N.R. was 14 or 15, appellant put a dildo in his anus. (Count 7.)

#### *A.C. (counts 1-3)*

In June 2009, appellant masturbated 13-year-old A.C. A.C., a family friend, slept over at the house several times a month. During the sleepovers, appellant masturbated A.C. On other occasions, appellant had oral and anal sex, digitally penetrated A.C., and inserted a dildo in A.C.'s anus. Most of the sexual contact occurred before A.C.'s 16th birthday.

In 2012, A.C. told his mother that "Gus is having sex with me." After the matter was reported to the Oxnard Police, A.C. made a pretext call. Appellant admitted

that A.C. was 13 when they started having sex and admitted having sex with N.R. In an October 5, 2012 interview with Oxnard Police Detective Erica Escalante, appellant confirmed that he had sex with N.R. and A.C. when they were minors. Appellant stated that he was 13 years older than A.C. and that he had sex with A.C. more than 20 times.

*Consecutive One Strike Sentences on Counts 4 and 5*

Appellant contends, and the Attorney General agrees, that the trial court erred in imposing consecutive One Strike sentences (15-year-to-life terms) on counts 4 and 5 which were committed on the same victim (N.R.) during a single occasion. When the offenses were committed in 2004, section 667.61, subdivision (g) provided in pertinent part: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. . . . Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." Under former section 667.61, multiple sex offenses are deemed to have occurred on a single occasion if they involve a single victim and were committed "in close temporal and spatial proximity." (*People v. Jones, supra*, 25 Cal.4th at p. 107; see *People v. Simmons* (2012) 210 Cal.App.4th 778, 799; *People v. Rodriguez, supra*, 207 Cal.App.4th at p. 212; *People v. Fuller* (2000) 135 Cal.App.4th 1336, 1343 [three rapes committed on single victim in 60 minute time frame; trial court may only impose one 25-year-to-life term].)

Counts 4 and 5 occurred over a 90 minute period when appellant orally copulated N.R. on the couch and took him to the bedroom and had anal sex. The Attorney General concedes that former section 667.61, subdivision (g) does not permit the imposition of separate One Strike sentences on count 4 and count 5. *People v. Jones, supra*, 25 Cal.4th 98, supports the Attorney General's conclusion. There defendant raped, sodomized and forced the victim to orally copulate him in the backseat of a car over the course of 90 minutes. Our Supreme Court held that former section 667.61, authorized "a *single* life sentence, rather than *three* consecutive life sentences, for a sequence of sexual

assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Id.*, at p. 107.)

*Conclusion*

We vacate the sentence and remand for resentencing. Because the record shows that the trial court intended to impose the maximum possible sentence, the trial court may, in its discretion, reconfigure its sentence choices to achieve its stated intent. We express no opinion as to how its discretion should be exercised. The convictions are affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jeffrey G. Bennett, Judge  
Superior Court County of Ventura

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Tracy J. Dressner, under appointment by the Court of Appeal, for  
Defendant and Appellant.

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