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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. DANIEL MERINO, Defendant and Appellant.	2d Crim. No. B232466 (Super. Ct. No. BA367462) (Los Angeles County)

Daniel Merino appeals his conviction, by jury, of four counts of kidnapping a child under the age of 14 for purposes of molestation (Pen. Code, § 207, subd. (b)),[1] three counts of committing a lewd act on a child (§ 288, subd. (a)), one count of an attempted lewd act on a child (§§ 664/288, subd. (a)), and one count of possession of child pornography. (§ 311.11, subd. (a).) The trial court sentenced appellant, as a one strike offender pursuant to section 667.61, subdivision (a), to a total term of eight years plus 75 years to life in state prison. He contends his trial was fundamentally unfair because the prosecutor incorrectly asserted in closing argument that identification testimony from just one of the four victims would be sufficient to establish appellant's identity as the perpetrator of the other three offenses. He further contends the trial court erred in imposing and staying six additional terms of 15 years to life under section

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

667.61, subdivision (b) because the trial court used the same kidnapping circumstance to support both sentences. We vacate the sentences imposed but stayed under section 667.61, subdivision (b). In all other respects, we affirm.

Facts

Appellant victimized four different girls, who were then between the ages of 8 and 10, on four separate occasions beginning in February 2008 and ending in November 2009. On each occasion, he approached the child as she was walking alone to her elementary school. Appellant engaged the child in conversation and then asked if she would like to walk his daughter to school. When the girl agreed, appellant would lead her inside a nearby apartment building and then up the elevator or the stairs to an isolated part of the building, such as the roof or stairwell. Once there, appellant touched three of the children briefly; the fourth pushed his hand away before he could touch her. When the girls began to cry, appellant threatened them and detained them briefly but then either let them leave or walked away himself. With respect to each victim, appellant was charged with kidnapping for purposes of child molestation and committing a lewd act on a child. The child pornography count (count 13) relates to a video of appellant's young son. The video depicts the child naked, fondling his genitals, displaying his buttocks, rubbing himself and thrusting and grinding on a towel.

Counts 5 and 9: On the morning of February 29, 2008, then nine-year-old J.G. was walking to school when she saw appellant walking toward her. He asked if she wanted to walk his daughter to school. J.G. did not respond. Appellant kept walking beside her. Soon they stopped in front of an apartment building. Appellant acted as if he was calling his daughter on his cell phone. Then he told J.G. that she wasn't answering. Someone opened the door to the building. Appellant took J.G. by the hand and led her inside, to a hallway on the third floor, near a stairwell. Appellant said he was going to take some pictures of J.G. He took off her jacket and backpack and used his cell phone to snap some pictures. He touched the button of her pants and told her to take them off. She refused and started to cry. Appellant said he has something in his back pocket and would use it if she refused. J.G. assumed he had a knife and took off her pants. He told

her to remove her underwear and threatened to rape her if she did not. J.G. complied. Appellant took some pictures and then told J.G. that he knew where she lived and would hurt her if she told anyone. Then, he left.

Counts 6 and 10: On April 30, 2008, appellant approached S.H. while she was walking to school. After S.H. agreed to walk his daughter to school, appellant grabbed her wrist and led her to an apartment building across the street. Once they were inside, he led her up the stairs to the second or third floor and then outside to a balcony overlooking the front sidewalk. Appellant told S.H. not to be scared and then he unzipped her jeans. S.H. started crying. Appellant said, "Alright, then leave." She ran down one set of stairs while he went down the other.

Counts 7 and 11: Appellant offered to pay N.T. $10 if she would walk his daughter to school. She agreed. He gave her the cash and walked her inside a nearby apartment building. They took the elevator and then went up some stairs to the roof. Appellant took out a camera and said he was going to take some pictures of N.T. He told her to pull up her shirt. She started crying. Appellant moved his hand near her blouse. She pushed it away without actually touching him. Appellant threatened to hit N.T. if she didn't cooperate. Her cries got louder and he left the building. This incident occurred in July 2009.

Counts 8 and 12: In November 2009, appellant approached nine-year-old K.G. while she was walking to school with the same story about his daughter. When she agreed to help him, appellant directed her to go inside an apartment building with him. She was scared, but he spoke firmly so she went with him. He walked her up a flight of stairs to the third floor where she saw a sign that said "roof." When appellant told K.G. to open the door, she became frightened and started to cry. Appellant told her to be a good girl or he would hit her. He put his fist against her right cheek when he said this. Appellant put one hand on her breast and started rubbing in a circular motion. She pushed him away and kept crying. When K.G. started making noise, appellant walked away. K.G. ran to school and reported the incident to school authorities.

The four victims each identified appellant from a photographic line up and in court. Investigating officers also obtained security camera footage from apartment buildings and adjacent businesses showing appellant with three of the four victims. For example, 8-year old S.H., who was assaulted on April 30, 2008, told investigators that the man had been leaning against a blue sedan when he contacted her. Surveillance video from that date and location showed a blue sedan parked on the street. It also showed the suspect walking with a distinctive gait. Surveillance video taken at the time of K.G.'s November 4, 2009 assault showed the same vehicle, which investigators determined to be a Mazda Millennium. By combing through DMV records for Mazda Millenniums registered in the general area of the crimes, a detective found one registered to appellant and noted that his driver's license photograph matched the suspect shown in the surveillance videos. The same detective drove to the address listed in the DMV records. She saw appellant walk to a Mazda Millennium, with the same distinctive gait depicted in the surveillance videos, and then drive it into the apartment complex. While executing a search warrant at appellant's apartment, investigators located clothing, a cap and shoes matching those worn by the suspect in the surveillance videos. Appellant lived within about two miles of each assault.

Discussion

Error in Closing Argument

CALCRIM No. 1190 informs the jury that, "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone." CALCRIM No. 301 states: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The trial court instructed the jury with both of these pattern instructions.

The prosecutor misquoted CALCRIM No. 1190 in his rebuttal argument. He argued, "These are what the Judge is going to read you, and they are the law in this case. Here is the first one: [¶] Conviction of a sexual assault crime -- we're talking about this case -- may be based on the testimony of a complaining witness alone. One witness. A case can be proven beyond a reasonable doubt with one witness. "

The prosecutor asked the jury to "choose a witness[,]" for example, J.G. He reviewed her testimony identifying appellant, including the fact that she "testified without any contradiction that [appellant] was the person who kidnapped her and molested her. [¶] [J.G.], one witness, picked him out of a six-pack. Didn't hear any impeachment about that. [¶] Identified him at the preliminary hearing. Identified him in court. And remember how definitive she was when she identified him. [¶] One witness. [¶] I would be done proving identification with one witness. But I don't just have one witness. I have four witnesses who went with the defendant to isolated locations where they spent time with him, where he threatened them, where he gave them instructions, and where they had an opportunity to observe him. [¶] . . . [D]id the witnesses ever fail to identify the defendant? No. [¶] Six-pack, in-court, never failed to identify the defendant. [¶] Now, multiply that by four. Four different girls who did not know each other at the time of the incident, who did not know each other at the time of the six-packs, identified the defendant. Four different people. [¶] Then I'm going to call this the double check our work, or maybe even triple check our work. [¶] So you've got the one witness that I'm required to have to prove I.D. One witness who beyond a reasonable doubt, but besides [J.G.], you get [K.G.], you get [N.T.], you get [S.H.]."

Appellant contends the prosecutor misstated the law in a way that lowered the People's burden of proof because he substituted the word "case," for "crime," when discussing CALCRIM No. 1190. He told the jury that the "case" could be proven with a single witness, rather than correctly quoting the instruction, which states that a crime may be proven with a single witness. Appellant has, however, forfeited appellate review of this claim because he did not object to the prosecutor's statement at trial or request a curative admonition. (*People v. Lancaster* (2007) 41 Cal.4th 50, 81-82.) If the claim had not been forfeited, we would rule that any error was harmless because this brief misstatement of CALCRIM No. 1190 did not render appellant's trial fundamentally unfair. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

" 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied

the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' (*People v. Frye* [(1998)] 18 Cal.4th [894], at p. 970. . . .)" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) Where the prosecutor's remarks are "brief and fleeting, asserting nothing the evidence did not already suggest . . . [,]" any misconduct is harmless. (*Id.* at p. 554.)

Here, the prosecutor misquoted CALCRIM No. 1190 by substituting the word "case" for "crime." But that brief misstatement was not sufficient to render appellant's trial fundamentally unfair. First, taken in context the prosecutor's remark did not encourage the jury to find appellant guilty of each charged offense based on the testimony of a single witness. Rather, it reminded the jury that appellant's identity as the perpetrator had been established many times over, because each of the four victims identified him from a photographic line up and in court. Each identification corroborated the others, serving as a "triple check" or "quadruple check" on the investigating officers' work in identifying appellant from surveillance camera images of him and his car and from DMV records.

We conclude there is no reasonable likelihood the jury understood or applied this single, brief remark in an erroneous manner. To the contrary, the jury was instructed in terms of CALCRIM No. 3515: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." Its verdicts demonstrate that the jury followed this instruction. One victim, N.T., testified that appellant's hand never actually touched her. The jury convicted appellant of the lesser included offense of attempting to commit a lewd act against N.T., rather than the charged crime, a completed lewd act. (See, e.g., *People v. Soper* (2009) 45 Cal.4th 759, 784.)

Sentencing Error

The jury found appellant guilty of committing a lewd act against three victims, each act in violation of section 288, subdivision (a). It also found true the "one

strike" sentencing allegations that appellant kidnapped each victim and had multiple victims. As a consequence, appellant met the criteria for sentencing under either subdivision (a) or subdivision (b) of section 667.61. (§ 667.61, subd. (a), (b), (d)(2), (e)(1), (e)(4).) Relying on *People v. McQueen* (2008) 160 Cal.App.4th 27, the trial court first imposed consecutive terms of 25 years to life for each of the three lewd acts, pursuant to section 667.61, subdivision (a). It then imposed and stayed two terms of 15 years to life on each lewd act conviction, pursuant to section 667.61, subdivision (b).

Appellant contends the trial court erred in imposing and staying the sentences under subdivision (b) because the kidnapping circumstance used to qualify for sentencing under section 667.61, subdivision (a) is the same as the kidnapping circumstance used to qualify him for sentencing under subdivision (b), a result that is prohibited by subdivision (f) of the statute. Respondent contends the sentences were correct because subdivisions (a) and (b) are separate "sentencing schemes" for which separate sentences should be imposed, even though one of them must ultimately be stayed.

We conclude the trial court erred. Subdivisions (a) and (b) of section 667.61 are not separate "sentencing schemes." They are part of a single statute that authorizes the trial court to impose a sentence of either 25 years to life or 15 years to life when a defendant is convicted of an enumerated sex offense committed under specified circumstances. (*People v. Acosta* (2002) 29 Cal.4th 105, 118 [one strike sentence is " 'an *alternate* penalty for the underlying felony itself,' " not an enhancement].) Sentencing a defendant under both subdivisions, regardless of the number of "circumstances" found true by the jury, results in multiple sentences for precisely the same crime. (See, e.g., *People v. Neely* (2009) 176 Cal.App.4th 787, 796-800; *People v. Palmore* (2000) 79 Cal.App.4th 1290, 1295-1296.) This result violates basic principles of due process, the statutory prohibition on multiple punishment (§ 654), and the terms of the one strike statute itself.

Section 667.61, subdivision (a) provides, "[A]ny person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances

specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life." Subdivision (b) of section 667.61 provides, "Except as provided in subdivision (a) . . . , any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life." A lewd act committed in violation of section 288, subdivision (a) is one of the offenses specified in subdivision (c). (§ 667.61, subd. (c)(8).)

The circumstances specified in section 667.61, subdivision (d)(2) include, "The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c)." The circumstances specified in subdivision (e) include, "Except as provided in [subdivision (d)(2)] the defendant kidnapped the victim of the present offense in violation of Section 207 . . . [,]" and "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)(1), (e)(4).)

In *People v. McQueen* (2008) 160 Cal.App.4th 27, the defendant was eligible for sentencing under section 667.61, subdivision (a) and under another sentence enhancement statute, section 667.71, subdivision (b).[2] The court concluded that the two statutes present "alternate sentencing schemes" for specified sex offenses. (*Id.* at p. 36.) Where a defendant is eligible for sentencing under both statutes, the *McQueen* court held, the correct procedure is to "impose a sentence under both, but stay one of the sentences pursuant to rule 4.447, rather than dismissing or striking the true findings attendant to the stayed sentence. . . . This we think is the more rational approach because . . . it preserves

[2] Section 667.71 provides enhanced sentences for "habitual sexual offenders," which the statute defines as "a person who has previously been convicted of one or more of the offenses specified in subdivision (c) and who is convicted in the preset proceeding of one of those offenses." Appellant has no prior convictions and was not eligible for sentencing under this statute.

the integrity of both sentencing schemes; promotes clarity in sentencing; and avoids confusion with respect to the trial court's exercise of discretion under section1385; avoids the risk that 'the used finding will be invalidated' [citation] at some future time; and avoids any violations of the one strike law's prohibition on striking special circumstances [citation]." (*Id.* at p. 38.)

Respondent urges us to apply *McQueen* because the circumstances found true by the jury make appellant eligible for sentencing under two subdivisions of section 667.61. *McQueen* has no application here because it considered sentences imposed under two separate statutes, which it described as separate sentencing schemes. Here, appellant was sentenced under subdivision (a) of section 667.61 and then again under subdivision (b) of the same statute for the same underlying substantive crimes. These subdivisions do not constitute separate "sentencing schemes;" they are parts of a single statute that authorizes sentences of varying lengths for particular crimes committed under specific circumstances. (See, e.g., *People v. Palmore, supra,* 79 Cal.App.4th at pp. 1295-1296.) It is the underlying substantive crime, not the attendant special circumstances, for which sentence is imposed. (*People v. Fuller* (2006) 135 Cal.App.4th 1336, 1343.) Basic principles of due process mandate that only one sentence may be imposed for each substantive crime. This remains true even if the substantive crime was committed under two or more of the "special circumstances" described in subdivisions (d) and (e). (*People v. Palmore, supra,* 79 Cal.App.4th at pp. 1297-1298.)

Nothing in section 667.61 authorizes the practice of imposing multiple sentences for a single crime. To the contrary, subdivision (b) makes it clear that the 15-year term it authorizes applies, "[e]xcept as provided in subdivision (a), (j), (l), or (m) . . . ." Each of those subdivisions authorizes a term that is longer than 15 years to life. In other words, the term of 15 years to life is to be imposed for a qualifying crime committed under specified circumstances, unless one of the longer terms established by the statute could be imposed. Had the Legislature intended for sentences to be imposed under both subdivision (a) and subdivision (b) for the same underlying crime, the limiting phrase, "Except as provided in subdivision (a) . . . [,]" would not have been necessary.

Disposition

We vacate each of the terms imposed pursuant to section 667.61, subdivision (b) and stayed pursuant to section 654. In all other respects, the judgment imposed eight years plus three consecutive terms of twenty-five years to life, is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Ronald S. Coen, Judge

Superior Court County of Los Angeles

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.