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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KASEEM JABBAR WINN,

Defendant and Appellant.

C065638

(Super. Ct. No.
08F07864)

A jury found defendant Kaseem Jabbar Winn guilty of numerous counts of sexual offenses against three minors, and the trial court sentenced him to an aggregate term of 138 years eight months to life. Defendant appeals, claiming the court erred by imposing consecutive sentences as to two of the 12 counts against him. He also contends, and the People concede, that the abstract of judgment contains a clerical error that must be corrected. In addition, our review of the record reveals the trial court failed to pronounce judgment on count eleven.

We remand for sentencing on count eleven, accept the People's concession as to the clerical error and direct the trial court to correct the abstract of judgment accordingly, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's appeal concerns events occurring on July 4, 2003. We limit the facts to those relevant to his claim.

In September 2002 defendant married the mother of N.D., S.D., and F.D. Between September 2002 and August 2003 defendant committed various sex crimes against all three children.

On July 4, 2003, S.D. attended a neighborhood party, where she consumed several alcoholic drinks. At some point that evening, S.D. started feeling light-headed and sat down outside. Defendant saw her, told her she was drunk, and instructed her to go inside the apartment so that her mother (who was not present) would not see that she had been drinking. S.D. eventually went inside and lay face down, fully clothed, on the bed in her bedroom. Defendant, completely naked, entered S.D.'s bedroom. He got on top of S.D., held her down, and put his hand underneath her shirt and on her breast. S.D. told defendant to stop and struggled to push him off of her. Defendant used his other hand to push her shorts down and push her underwear to the side, and forced his penis into her vagina. The entire incident lasted approximately five minutes.

Defendant was charged with the July 4, 2003, rape of S.D. (Pen. Code, § 261, subd. (a)(2) -- count one; further statutory references are to the Penal Code); lewd and lascivious act on a

child (S.D.) aged 14 or 15 years by a defendant at least 10 years older than the child, also committed on July 4, 2003 (§ 288, subd. (c)(1) -- count two); six counts of lewd and lascivious acts upon a child (F.D.) under the age of 14 (§ 288, subd. (a) -- counts three, four, five, six, seven, and eight); two counts of rape by a defendant 10 years older than the victim, a child (F.D.) under the age of 14 (§ 269, subd. (a)(1) -- counts nine and ten); lewd and lascivious act upon a child (N.D.) under the age of 14 (§ 288, subd. (a) -- count eleven); and lewd and lascivious act upon a child (N.D.) aged 14 or 15 years by a defendant at least 10 years older than the child (§ 288, subd. (c)(1) -- count twelve). It was alleged that defendant committed the offenses in counts one, three through eight, and eleven against two or more victims. (§ 667.61, subd. (e)(5).)

Defendant's jury trial commenced in May 2010. The jury convicted him on all counts and found the section 667.61 allegations true.

On July 30, 2010, the court sentenced defendant to an aggregate term of 138 years eight months to life as follows: the upper term of three years for count two, plus a consecutive eight-month term (one-third the middle term) for count twelve, for an aggregate determinate term of three years eight months; consecutive terms of 15 years to life for counts one, three, four, five, six, seven, eight, and nine; and a concurrent term of 15 years to life for count ten, for an aggregate indeterminate term of 135 years to life.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Consecutive Sentences for Counts One and Two

Defendant contends the offenses underlying counts one and two occurred "during a single occasion" within the meaning of section 667.61, former subdivision (g), and thus the trial court's imposition of consecutive sentences for those counts was erroneous. We disagree.

At the time the relevant offenses were committed in 2003, section 667.61, former subdivision (g) provided that the term specified in former subdivision (a) or (b) -- either 25 years to life or 15 years to life, respectively -- "shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable."¹ Thus,

¹ At the time of sentencing in 2010, section 667.61 had been amended such that an altered version of former subdivision (g) became subdivision (i), providing that for certain specified offenses, "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."

the finding of separate occasions was necessary to impose consecutive sentences.

At sentencing, the trial court stated as follows: "As to Count Two [the July 4, 2003, lewd and lascivious act on S.D.], the Court will select that as the principal term. . . . I'm going to select the high term of three years, the upper term, . . . [¶] . . . [¶] As to Count One [the July 4, 2003, rape of S.D.], by operation of law, the sentence in that matter is fifteen years to life. [¶] . . . [A]s Count One, Three, Four, Five, Six, Seven and Eight all have a finding of Penal Code Section 667.61(e)(5)^[2] with -- that is multiple victims, which mandates a[n] indeterminate term of fifteen years to life as to each one. [¶] So as to Count One, the sentence is

Section 667.6, subdivision (d) provides, in part: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time 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."

² In 2003 section 667.61, former subdivision (e)(5) provided as follows: "The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

fifteen years to life. [¶] . . . [¶] As to Count One -- as to Count One, Two, Three, Four, Five, Six, Seven, Eight, and Nine and Twelve, those counts will be consecutive either by operation of law, and as to those counts in which the Court has discretion, the Court's finding that -- as indicated, that they are separate times and occasions and separate victims, is also applicable. . . ."

The court's imposition of an indeterminate term of 15 years to life for the July 4, 2003, rape of S.D. was appropriate under section 667.61, former subdivision (g). As for the July 4, 2003, lewd and lascivious act against S.D., imposition of the determinate term of three years was consistent with the final sentence of section 667.61, former subdivision (g), which states that "[t]erms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable." Thus, it is clear that count two was sentenced as the "other offense[] committed during a single occasion [defendant's July 4, 2003, sexual assault on S.D.]" under section 667.61, former subdivision (g).

Moreover, we note the court's statement that the crimes for which it had sentencing discretion were committed on "separate times and occasions," and infer from the court's use of that phrase that imposition of consecutive sentences was indeed premised on section 667.6, subdivision (d), which provides for a "full, separate, and consecutive term . . . for each violation of an offense . . . if the crimes involve . . . the same victim on separate occasions," not, as defendant suggests, on

section 667.61, former subdivision (g), which instead utilizes the term "single occasion." The court did not err by imposing consecutive sentences.

Defendant argues *People v. Jones* (2001) 25 Cal.4th 98 (*Jones*) supports his claim of error. He is wrong. In *Jones*, the defendant forced the victim into a car and, over the course of approximately an hour and a half, raped and repeatedly sodomized the victim and forced her to orally copulate him. (*Id.* at p. 101.) A jury convicted the defendant of forcible rape, three counts of forcible sodomy, and forcible oral copulation. (*Id.* at p. 102.) For the forcible rape, forcible oral copulation, and forcible sodomy, the court imposed three consecutive terms of 25 years to life pursuant to section 667.61, former subdivisions (a), (c), and (d)(2), and imposed full, separate, and consecutive terms thereon pursuant to section 667.6, former subdivision (d). (*Jones*, at pp. 102-103.) Affirming the judgment, the Court of Appeal determined the three consecutive life terms were proper and held that "when sexual 'crimes involve the same victim on "separate occasions" within the meaning of section 667.6, subdivision (d), then . . . each such crime [also] has been committed against a single victim during a different "single occasion" within the meaning of section 667.61, subdivision (g).'" (*Jones*, at p. 103.)

On review, the Supreme Court analyzed the phrase "single occasion" as used in section 667.61, former subdivision (g) and concluded that sexual offenses occur on a "single occasion" if committed in "close temporal and spatial proximity" -- i.e.,

"during an uninterrupted time frame and in a single location."
(*Jones, supra*, 25 Cal.4th at p. 107.) In so concluding, the court rejected the use of the interpretation given to the phrase "separate occasion" in section 667.6, former subdivision (d), which recognizes separate occasions whenever there is a reasonable opportunity for reflection between offenses. (*Jones*, at p. 106.) The court instead adopted the following rule:
"[F]or the purposes of Penal Code section 667.61, subdivision (g), sex offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity."
(*Jones*, at p. 107.) According to the court, this rule "should result in 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." (*Ibid.*, italics omitted.)

Under the foregoing rule, defendant may be sentenced to only one consecutive life term under section 667.61 for the two offenses committed against S.D. on July 4, 2003. A term for the other offense must be imposed as authorized elsewhere in the Penal Code. As the People accurately point out, that is exactly what the trial court did here when it imposed only one consecutive life term for count one and imposed a determinate three-year term on count two according to section 288, subdivision (c)(1).

The trial court also ordered the three-year term to run consecutive to the life term based on its finding that the two crimes against S.D. on July 4, 2003, were committed on "separate

times and occasions." Section 667.6, former subdivision (d) provides for a consecutive term "if the crimes involve . . . the same victim on separate occasions." That subdivision instructs that, "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time 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." (§ 667.6, former subd. (d).) The record here supports imposition of a consecutive term. The defendant climbed on top of S.D., and as she struggled and fought to protect herself, he used one hand to reach under her shirt and fondle her breast. Defendant ignored S.D.'s pleas to stop. Instead, he used his other hand to push S.D.'s shorts down and shove her underwear aside so that he could rape her. While the incident lasted only five minutes, between the time defendant fondled S.D.'s breast and struggled with her and the time he pushed her shorts down and rearranged her undergarment in order to be able to penetrate her, he had a reasonable opportunity to reflect upon his actions and nevertheless resumed sexually assaultive behavior.

The trial court did not err in imposing consecutive sentences for counts one and two.

II

Error in Abstract of Judgment and Pronouncement of Judgment

Defendant contends the abstract of judgment contains a clerical error in that it reflects an indeterminate sentence of 150 years to life, which is inconsistent with the court's oral pronouncement of an indeterminate sentence of 135 years to life. The People concede the abstract contains a clerical error and agree we should order the trial court to amend it accordingly.

At sentencing, the trial court imposed a consecutive, indeterminate term of 15 years to life each as to counts one, three, four, five, six, seven, eight and nine, for an aggregate indeterminate term of 135 years to life. The abstract of judgment is thus inconsistent with the court's oral pronouncement of sentence. The oral pronouncement of sentence controls where it is at variance with the minute order or the abstract of judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [pronouncement of judgment is a judicial function, while entry into the minutes and abstract of judgment is a clerical function; thus, any inconsistency is presumed to be clerical error]; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123 [appellate court has authority to correct such clerical errors].) We therefore accept the People's concession and will order the trial court to amend the abstract of judgment accordingly.

We also note a more fundamental error -- the court's failure to pronounce judgment on count eleven. The court's oral pronouncement of sentence, rather than its entry in the abstract

of judgment, constitutes the judgment. "In a case where the court fails to pronounce judgment with respect to counts on which convictions were validly obtained, the Court of Appeal has power to remand for the purpose of pronouncement of a judgment in accordance with the verdict. [Citation.] When such a mistake is discovered while defendant's appeal is pending, the appellate court should affirm the conviction and remand the case for a proper sentence. [Citation.]" (*People v. Taylor* (1971) 15 Cal.App.3d 349, 353.) We will remand for sentencing in that regard.

DISPOSITION

The trial court is directed to sentence defendant on count eleven. The court is further directed to amend section 3 of the indeterminate sentence abstract of judgment to reflect a term of 135 years to life, and to forward a certified copy of said amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

MAURO, J.