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

THE PEOPLE,

Plaintiff and Respondent,

v.

LLOYD LESLIE KINDRED,

Defendant and Appellant.

C067348

(Super. Ct. No.
09F09146)

Over a period of several years, the defendant molested several young female family members. A jury convicted him of numerous counts of committing a lewd act on a child under 14 (Pen. Code, § 288, subd. (a))¹ and related crimes, and the trial court sentenced him to an aggregate term of four years, plus 150 years to life, in state prison.

¹ Further code citations, though unspecified, are also to the Penal Code.

On appeal, the defendant contends the court erred by (1) imposing consecutive life terms for several of the lewd-act counts and (2) failing to give the jury a unanimity instruction concerning one of the lewd-act counts. We affirm.

PROCEDURE

The defendant was charged by information as follows:

Count	Crime	Victim
1	§ 288, subd. (a)	C.K.
2	§ 288, subd. (a)	C.K.
3	§ 288, subd. (a)	C.K.
4	§ 288, subd. (a)	C.K.
5	§ 288, subd. (a)	C.K.
6	§ 288, subd. (a)	C.K.
7	§ 288, subd. (a)	C.K.
8	§ 288, subd. (a)	C.K.
9	§ 288, subd. (a)	C.K.
10	§ 288, subd. (a)	C.K.
11	§ 288, subd. (a)	C.K.
12	§ 288, subd. (a)	C.K.
13	§ 288, subd. (a)	C.K.
14	§ 288, subd. (a)	C.K.
15	§ 288, subd. (a)	C.K.
16	§§ 664, 288, subd. (a)	A.G.
17	§ 288, subd. (a)	M.N.
18	§ 288, subd. (a)	A.B.

19	§ 288, subd. (a)	M.V.
20	§§ 664, 288, subd. (c)(1)	N.P.
21	§ 311.4, subd. (c) [using a minor to pose or model, involving sexual conduct]	
22	§ 311.4, subd. (a) [possessing matter depicting minor in sexual conduct]	

A jury convicted the defendant on all counts except count 16, on which it acquitted him. The jury also found true a multiple-victims allegation. (§ 667.61, subd. (e)(5).)

The trial court sentenced the defendant, under section 667.61, the "One Strike" law, to 10 consecutive terms of 15 years to life and eight concurrent terms of 15 years to life for the 18 lewd-act convictions. The court also sentenced the defendant to a determinate term of three years for count 21, with consecutive terms of eight months and four months for counts 22 and 20, respectively.

FACTS

The defendant married Deborah in 2001. The lewd-act victims were Deborah's family members.

C.K., Deborah's granddaughter, moved in with the defendant and Deborah in 2002 when C.K. was six years old. From the time C.K. was six years old until she was 13 years old, when the defendant was arrested in 2009, the defendant molested C.K. on numerous occasions. The abuse occurred "[a]bout every other day," in C.K.'s words, and sometimes included intercourse.

M.N., another of Deborah's granddaughters, frequently visited the defendant's home. When M.N. was six or seven years old, the defendant touched her vagina with his hand on two different occasions.

When A.B., Deborah's grand-niece, was seven or eight years old, she lived in the defendant's home. The defendant touched her breasts and vagina several times.

When M.V., Deborah's daughter, was 12 years old, the defendant entered her room, kissed her on the face, and rubbed her inner thigh, moving his hand up towards her genital area.

N.P., another of Deborah's daughters, took nude pictures of herself and saved them on her computer, beginning when she was 13 years old. Using the home computer network, the defendant saved a nude picture of N.P. on his computer.

When N.P. was 14 years old, the defendant entered her room while she was sleeping. She awakened to find the defendant pulling the strap of her tank top aside to reveal her nipple.

We discuss additional facts as they become relevant to discussion of the defendant's contentions on appeal.

DISCUSSION

I

Consecutive Indeterminate Sentences

The defendant contends the trial court abused its discretion by imposing consecutive indeterminate sentences for counts four and five, both of which took place on a day that C.K. stayed home from school, and for counts six and seven, both of which took place when C.K. accompanied the defendant to work.

This contention was forfeited because the defendant failed to make it in the trial court (he objected solely on cruel-and-unusual-punishment grounds), and, in any event, the contention is without merit.

When C.K. was 11 or 12 years old (about 2007 or 2008), she went to work with the defendant on a weekend when no one else was there. The defendant had C.K. sit on a table, then he pulled down her pants and his own and licked and touched C.K.'s breasts and vagina. He then pulled a tampon out of C.K.'s vagina and inserted his penis. These facts were alleged as lewd acts in counts six [penis to vagina], seven [mouth to vagina], and eight [hand to breasts]. And the trial court imposed consecutive sentences on counts six and seven, with a concurrent sentence on count eight.

When C.K. was 13 years old, she stayed home sick from school one day. On that day, the defendant licked C.K.'s vagina, inside and outside. He also inserted his penis in her vagina. These facts were alleged as counts four [mouth to vagina] and five [penis to vagina]. And the trial court imposed consecutive sentences for both counts.

Concerning the consecutive sentences for counts four through seven, the court stated: "I would note that as to those counts, there is substantially more serious conduct. There are instances in those counts, and I apologize to the family to refer to the conduct, but there's Count Four, mouth to vagina; Count Five, penis touched or inserted in the vagina, as is Count Six, and Count Seven, again, the mouth to the vagina, and these

are significantly amongst the kinds of conduct inflicted on [C.K.], much more serious than the hand to the breast and some of the other conduct. [¶] The conduct, involving this victim there were numerous instances for which the Court could impose consecutive sentences and did not, and I am considering that. [¶] I am also considering that most of these crimes occurred at different times and places and were separate acts and that the defendant was acting in a position of trust."

The defendant cannot raise a claim for the first time on appeal that the sentencing court abused its discretion. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353.) The defendant objected to the consecutive sentencing, but only on the ground that it constituted cruel and unusual punishment. That is not the claim the defendant raises on appeal. Therefore, the current argument is forfeited because the defendant did not give the trial court the opportunity to address it.

In any event, even on the merits of the trial court's exercise of discretion in imposing consecutive sentences, the defendant fails to show an abuse of discretion. Section 667.61 provides for a life sentence for child molestation under specified circumstances applicable in this case. (See Pen. Code, § 667.61, subd. (e)(4) [multiple victims].) Relying on section 667.61, the trial court imposed sentences of 15 years to life for the lewd-act convictions because they involved more than one victim (§ 667.61, subd. (e)) rather than the determinate sentence of three, six, or eight years under section

288, subdivision (a).² The court then cited aggravating factors upon which the court relied to make the sentences consecutive.

The defendant notes that consecutive sentencing was not mandatory in this case involving violations of section 288, subdivision (a). However, he recognizes that the trial court had broad discretion to impose consecutive sentences. (See *People v. Valdez* (2011) 193 Cal.App.4th 1515, 1524.)

The defendant argues that some of the consecutive sentences were for counts that occurred at the same time in the same place. However, he does not discuss the many other factors the trial court may consider, and did consider, when determining whether to impose consecutive sentencing. (See Cal. Rules of Court, rule 4.425 [applicable to determinate sentencing (see Cal. Rules of Court, rule 4.403), but also applicable by analogy to indeterminate sentencing (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262-1263)].) The defendant also does not cite any authority for the proposition that, under the law at the time of his crimes, consecutive life terms were prohibited unless the counts were committed at separate times and places. Because the defendant fails to discuss any other factors in the discretionary decision to impose consecutive sentencing and fails to cite authority establishing that the trial court abused

² Former section 667.61, subdivision (g) provided that the indeterminate term was to be imposed only once for crimes committed against a victim on a single occasion. (Stats. 1997, ch. 817, § 6.) That provision was deleted from the statute in 2006 (Stats. 2006, ch. 337, § 33), and the defendant committed the crimes in counts four through seven after 2006.

its discretion, he has failed to support his argument that the trial court abused its discretion.

Instead, the factors cited by the trial court were convincing on the issue of consecutive sentencing -- (1) the consecutive counts were substantially more serious than the concurrent counts, (2) there were numerous molestations for which the court could have but did not impose consecutive sentences, (3) most of the crimes occurred at different times and places, (4) the counts were separate acts, and (5) the defendant was in a position of trust over all the victims. The consecutive sentencing on counts four through seven was not an abuse of discretion.

II

Unanimity Instruction

M.N. testified concerning two instances in which the defendant touched her vagina with his hand. The information charged only one lewd act on M.N. (count seventeen), and the trial court did not include that count in the unanimity instruction given by the court. On appeal, the defendant contends that the failure to give the unanimity instruction as to that count was prejudicial error. We disagree because the prosecutor elected one of the instances as the conduct alleged in count seventeen.

M.N. testified that, when she was six years old, the defendant reached under her clothes and rubbed her vagina with his hand while she was sitting on his lap in the computer room. On another occasion, also when M.N. was six years old, the

defendant again reached under her clothes and touched her vagina while she was lying on an air mattress in the living room.

The information alleged in count seventeen that the defendant committed a lewd act on M.N. In closing argument, the prosecutor stated to the jury: "The defendant is not being charged with two counts [as to M.N.]. He is not being charged with rubbing her in the computer room and with a separate count for rubbing her in the livingroom [*sic*]. He's just being charged for one of those times, and under the law I need to elect for you which time we are talking about, and we are just talking about the computer room." Although the trial court instructed on unanimity as to other counts, it did not do so as to count seventeen.

"Where the jury receives evidence of more than one factual basis for a conviction, the prosecution must select one act to prove the offense, or the court must instruct the jury that it must unanimously agree on one particular act as the offense. [Citations.]" (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.)

The defendant contends that the failure to give a unanimity instruction as to count seventeen was error and it was prejudicial despite the prosecutor's election because the jury may have forgotten about the prosecutor's election before it delivered its verdict two days later. This contention is frivolous. Given the prosecutor's election, no unanimity instruction on count seventeen was required. (*People v. Jantz*,

supra, 137 Cal.App.4th at p. 1292.) Because there was no error, no prejudice analysis is necessary.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.