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

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS PALACIO ANGELES,

Defendant and Appellant.

C068545

(Super. Ct. No. SF114305A)

A jury found defendant Jesus Palacio Angeles guilty of continuous sexual abuse of A. Doe (Pen. Code, § 288.5, subd. (a)--count one; unless otherwise set forth, all statutory references are to the Penal Code), four counts of lewd acts upon A. Doe, age 14 years (§ 288, subd. (c)--counts two through five), two counts of forcible rape of A. Doe (§ 261, subd. (a)(2)--counts six & seven), and two counts of forcible rape of J. Doe (counts eight & nine). As to counts one and six through nine, the jury found defendant committed offenses against more than one victim within the meaning of section 667.61, subdivision (e)(4). Defendant was sentenced to prison for 75 years to life, consisting of consecutive terms of 15 years to life on counts one and six through nine. Concurrent low terms of

one year each were imposed on counts two through five. Defendant was awarded 248 days' custody credit and zero days' conduct credit. He was ordered to pay various fines and fees, make restitution to the Victims Compensation Claims Board, and pay \$1,850 restitution to the Stockton Police Department for the cost of medical examinations of the victims.

Defendant contends, and the People concede, (1) the concurrent sentences on counts two and three must be stayed pursuant to section 654, and (2) defendant is entitled to additional custody and conduct credit. Defendant further contends the order for restitution to the Stockton Police Department must be stricken. We modify the judgment.

FACTS AND PROCEEDINGS

The facts of counts eight and nine, involving victim J. Doe, are not at issue and need not be set forth in this opinion.

A. Doe was born in Stockton in August 1995. In March 2010, she lived there with her mother, two brothers, stepsisters J. Doe and F., and her stepfather, defendant.

Defendant has sexually abused A. Doe since she was age 10. The abuse occurred in his bedroom and included acts of sexual intercourse. The first incident was painful. A second incident occurred approximately one week later. During the four years that followed, the abuse escalated from once per week to several times per day.

Defendant sometimes restrained A. Doe by placing his hands on her shoulder. On other occasions he would "tell [her] something that was going to happen." Defendant told A. Doe that, if she ever reported the abuse, defendant would leave her mother, who would be miserable; and A. Doe's brothers would miss their father. A. Doe asked defendant if their sexual activity was wrong, and he said it was not wrong.

As a matter of routine, defendant would "put [his ejaculated sperm] in a red towel," which he also used to wipe A. Doe's vagina. He kept the towel under the bed. At times, they would have intercourse while she was menstruating. On multiple

occasions, he had her put her mouth on his penis. He occasionally watched pornographic movies during the sexual activity.

The sexual abuse left A. Doe both emotionally and physically hurt. In early 2010, she learned it was wrong to commit adultery. She reported the sexual activity to her priest, who encouraged her to tell someone. She later told a friend at school, who also told her the activity was wrong. A. Doe never told her mother because she was afraid an argument would ensue.

The final incident occurred in March 2010. A. Doe's mother was away on business and defendant had picked up A. Doe from school. Defendant sent the boys away to play, and A. Doe went upstairs to defendant's bedroom. She routinely went to the bedroom because she knew, if she did not, he would be angry at her and in a bad mood as to the entire family. A. Doe removed her clothes, and she and defendant had intercourse on his bed.

In March 2010, the school friend's mother reported the sexual abuse to the principal. The matter was referred to law enforcement. Eventually both A. Doe and defendant underwent physical examinations. A. Doe was found to have a bruised arm and suction injuries to both breasts.

A search of defendant's bedroom yielded a red towel underneath the bed. Both blood and semen were detected on the towel. A mixture of DNA from A. Doe and defendant was detected.

DISCUSSION

I

Concurrent Sentences on Counts Two and Three

Defendant contends, and the People concede, the one-year concurrent sentences imposed on counts two and three must be stayed pursuant to section 654 because the

lewd and lascivious acts alleged in those counts are the forcible rapes found true in counts six and seven. We accept the People's concession.

Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Thus, where section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited. (E.g., *People v. Correa* (2012) 54 Cal.4th 331, 337.)

The lewd act charged in count two is the "1ST TIME INTERCOURSE WHEN VICTIM IS 14 YEARS OLD." The offense charged in count six is the "1ST TIME FORCIBLE RAPE WHEN VICTIM IS 14[YEARS] OLD." No evidence suggested defendant ever had consensual, nonforcible sex with A. Doe. Thus, the allegations of lewd act and forcible rape necessarily refer to the same sexual act. The one-year prison term on count two must be stayed pursuant to section 654.

Similarly, the lewd act charged in count three is the "LAST TIME INTERCOURSE WHEN VICTIM IS 14[YEARS] OLD." The offense charged in count seven is the "LAST TIME FORCIBLE RAPE WHEN [VICTIM IS] 14[YEARS OLD]." Again, no evidence suggested defendant engaged in nonforcible sex with A. Doe. Thus, the two allegations necessarily refer to the same sexual act, and the one-year prison term on count three must be stayed pursuant to section 654. We modify the judgment accordingly.

II

The Restitution Order

Defendant contends the \$1,850 restitution order imposed pursuant to section 1203.1h must be reversed because the trial court never made an express finding of his

ability to pay all or part of the costs of the medical examinations, and no evidence in the record supports an implied finding of ability to pay.

The People respond that defendant forfeited the claim by failing to assert it in the trial court, and the record supports an implied finding of ability to pay. We agree with the People that the claim is forfeited.

Section 1203.1h, subdivision (b), provides in relevant part: “In addition to any other costs which a court is authorized to require a defendant to pay, upon conviction of any offense involving sexual assault or attempted sexual assault, including child molestation, the court may require that the defendant pay, to the law enforcement agency, county, or local governmental agency incurring the cost, the cost of any medical examinations conducted on the victim for the collection and preservation of evidence. *If the court determines that the defendant has the ability to pay* all or part of the cost of the medical examination, the court may set the amount to be reimbursed and *order the defendant to pay* that sum to the law enforcement agency . . . *in the manner in which the court believes reasonable and compatible with the defendant's financial ability.* In making the determination of whether a defendant has the ability to pay, the court *shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution.*” (Italics added.)

Generally, sentencing determinations are not reviewable on appeal absent a timely objection. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Our Supreme Court explained: “Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” (*Ibid.*) Nothing in *People v. Butler* (2003) 31 Cal.4th 1119, on which defendant relies, “should be construed to undermine the forfeiture rule of” *Scott*. (*Butler*, at p. 1128, fn. 5.)

Consistent with this general rule, claims that fines were improperly imposed are forfeited if not raised below. (E.g., *People v. Nelson* (2011) 51 Cal.4th 198, 227 [failure to consider ability to pay section 1202.4 restitution]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [§ 1202.5, subd. (a), crime prevention fine]; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1076 [§ 1203.1b fee]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 [insufficient evidence of ability to pay former Gov. Code, § 13967, subd. (a) restitution fine].)

This court recently addressed an analogous issue in *People v. McCullough* (2011) 193 Cal.App.4th 864 [criminal justice administration fee], which is pending review in the California Supreme Court. (*McCullough*, review granted June 29, 2011, S192513.) Although *McCullough* has no precedential value, we adhere to the views expressed therein unless and until our Supreme Court holds that we erred.

We see no reason the forfeiture rule should not apply in this case.

III

Credits

Defendant contends, and the People concede, the judgment must be modified to award defendant additional custody and conduct credit. We accept the People's concession.

The trial testimony indicates defendant was arrested on March 4, 2010. The probation report indicates he was released from custody on March 11, 2010. Thus, defendant is entitled to eight days' custody credit for this period.

The probation report indicates defendant returned to custody on September 1, 2010. He was sentenced on May 2, 2011. Thus, he is entitled to 244 days' custody credit for this period.

The trial court awarded defendant 248 days' custody credit for these periods of incarceration, not the 252 days' credit to which he is entitled. Moreover, the court inexplicably awarded him no conduct credit.

Because defendant was convicted of violent offenses within the meaning of section 2933.1, subdivision (a), he is entitled to conduct credit at the rate of 15 percent. Thus, his 252 days' custody credit entitles him to 37 days' conduct credit. We modify the judgment accordingly.

DISPOSITION

The judgment is modified to stay the sentence on counts two and three pursuant to section 654 and to award defendant 252 days' custody credit and 37 days' conduct credit. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____ HULL _____, Acting P. J.

We concur:

_____ MURRAY _____, J.

_____ DUARTE _____, J.