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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ALFONSO RICO,

Defendant and Appellant.

D060584

(Super. Ct. No. SCD231863)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

A jury convicted Phillip Alfonso Rico of 12 felony counts committed against three minor victims. The jury found Rico guilty of two counts of continuous sexual abuse of a child (Pen. Code, § 288.5, subd. (a))¹ with substantial sexual conduct (§ 1203.066, subd. (a)(8)) (counts 1 and 2 against victims 1 and 2), eight counts of committing a lewd and lascivious act on a child 14 to 15 years of age (§ 288, subd. (c)(1); counts 3 through 10

¹ All further statutory references are to the Penal Code unless otherwise specified.

against victims 1, 2 and 3), and two counts of committing a lewd and lascivious act on a child under the age of 14 (§ 288, subd. (a); counts 11 and 12 against victim 3). The jury also found true allegations appended to counts 1, 2, 11, and 12 that Rico committed an offense described in section 667.61, subdivision (c), against more than one victim under section 667.61, subdivisions (b), (c), and (e) (the one strike law).

On appeal, Rico contends his sentences for counts 11 and 12 are unauthorized because they violate constitutional prohibitions against ex post facto punishment. In response, the People concede the sentences for counts 11 and 12 were improper, but assert the court also improperly sentenced Rico on count 2. We affirm the convictions, and reverse and remand for resentencing on counts 2, 11, and 12.

FACTUAL BACKGROUND

After the jury found Rico guilty of the 12 counts detailed above, the court sentenced him to determinate terms on counts 1 through 10 (totaling 25 years 4 months) as follows: 16 years for count 1 (principal term under § 1170.1, subd. (a)), four years for count 2, and eight terms of eight months each for counts 3 through 10.² The court sentenced Rico on counts 11 and 12 to two consecutive, indeterminate terms of 15 years to life based on the jury's finding that Rico committed an offense against more than one victim under section 667.61, subdivisions (b), (c) and (e).

² Counts 2 through 10 were sentenced in accordance with section 1170.1, subdivision (a), which provides that the "subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed"

The court based the sentence on a detailed analysis from the probation department, which the court and both counsel found to be accurate. The court also ordered Rico to serve all terms consecutively and found he was not eligible for probation.

DISCUSSION

I

Rico argues the 15-year-to-life sentences he received on counts 11 and 12 violated ex post facto principles because at the time he committed those crimes, his other offenses were not specified offenses under section 667.61, subdivision (c).

A

The federal and California Constitutions both prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. 1, § 9.) "The federal and state prohibitions against ex post facto laws apply to any statute that punishes as a crime an act previously committed which was not a crime when done or . . . inflicts greater punishment than the applicable law when the crime was committed." (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178.) A challenge under the ex post facto clause is reviewed de novo. (*U.S. v. Mason* (9th Cir. 1990) 902 F.2d 1434, 1437; see also *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799-801 [question of law is reviewed de novo]; see also *Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211, 217 [retroactivity of a statute is reviewed de novo].)

B

Discussion of the historical amendments to section 667.61 is necessary to evaluate Rico's ex post facto claims and determine his proper sentence. Section 667.61, subdivision (b), currently states: "[A] 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 . . . for 15 years to life." The law became effective on November 30, 1994.³ (Stats. 1993-1994, 1st Ex. Sess., ch. 14X, § 1, pp. 8570-8572.)

At the time section 667.61 was passed, subdivision (e) listed "committing an offense specified in subdivision (c) against more than one victim" as one of the aggravating circumstances necessary to impose a 15-year-to-life sentence. (§ 667.61, subd. (e)(4).) The law has always included crimes against multiple victims as an aggravating offense, but the offenses listed in subdivision (c) have changed over the life of the law.

Sections 288, subdivision (c), and 288.5 offenses were not included as specified offenses under subdivision (c) at the time section 667.61 was enacted. (Stats. 1993-1994, 1st Ex. Sess., ch. 14X, § 1, pp. 8570-8572.) In September 2006, a section 288.5 offense was added as a specified offense under section 667.61, subdivision (c)(9). (Stats. 2006,

³ Section 667.61, subdivision (b), initially stated a person shall be subject to "imprisonment . . . for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j)." (Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 14X, § 1, pp. 8570-8572.) The prescribed sentence of 15 years to life was included in the September 2006 amendments to section 667.61. (See Stats. 2006, ch. 337, § 33, pp. 2165-2167.)

ch. 337, § 33, p. 2166.) A section 288, subdivision (c), offense has never been a specified offense in section 667.61, subdivision (c).

C

The jury convicted Rico on counts 11 and 12 for lewd and lascivious acts against a child less than 14 years of age (§ 288, subd. (a)). Both of these counts were for lewd acts against victim 3 during the same period of time—June 17, 2002, through June 16, 2003. The jury also found on counts 11 and 12 that Rico committed crimes against more than one victim under section 667.61, subdivisions (c) and (e)(4). Because counts 11 and 12 were committed against the same victim, the multiple victim finding would have been based on the offenses against victims 1 and 2 in counts 1 through 10.

Rico was convicted of crimes against victim 1 on counts 3 through six, victim 2 on counts nine through 10, and victim 3 on counts seven through eight under section 288, subdivision (c) (lewd and lascivious acts against a child ages 14 or 15) but, as noted above, section 288, subdivision (c), has never been a specified offense under section 667.61, subdivision (c).

Rico's conviction on counts 1 and 2 under section 288.5, subdivision (a), (continuous sexual abuse of a minor) were against victims 1 and 2, so the court likely considered counts 1 and 2 as the specified offenses under section 667.61, subdivision (c), because a section 288.5 offense is *currently* listed as a specified offense. However, the conduct underlying counts 11 and 12 occurred from 2002 to 2003, prior to the addition of section 288.5 offenses to section 667.61, subdivision (c), in September of 2006.

Therefore, all of Rico's crimes committed against other victims were for offenses not included as specified offenses under section 667.61, subdivision (c), at the time he committed the crimes underlying counts 11 and 12.

A retroactive application of section 667.61 to Rico would violate the ex post facto clauses of the state and federal Constitutions. An ex post facto law "increase[s] the punishment associated with the crime after its commission." (*People v. Acosta* (2009) 176 Cal.App.4th 472, 475.) The ex post facto clauses "protect against the later adoption of a statute that inflicts greater punishment than the law in effect at the time of the commission of the crime." (*People v. Riskin* (2006) 143 Cal.App.4th 234, 244 (*Riskin*)). A section 288.5 offense was not listed as a specified offense under section 667.61, subdivision (c), at the time Rico committed the lewd acts in counts 11 and 12. To sentence him under section 667.61, subdivision (b), would impose a harsher punishment than the law in effect at the time Rico committed his crimes. We therefore vacate Rico's sentence on counts 11 and 12, and remand for resentencing according to the law applicable at the time Rico committed the crimes.

II

The People argue in their brief that the court also incorrectly sentenced Rico on count 2 against victim 2 (continuous sexual abuse of a child under the age of 14, § 288.5, subd. (a)) by not applying section 667.61 to Rico's sentence.⁴

⁴ The People do not waive a sentencing error by not filing a separate appeal. "[T]he Attorney General may raise the sentencing error for the first time in connection with defendant's appeal." (*People v. Delgado* (2010) 181 Cal.App.4th 839, 854.) Further, this

At trial, victim 2 testified the first incident of sexual abuse by Rico took place when she was about 10 years old, in or around October 2005. A second incident took place a few days later and a third incident took place a few weeks after that. Victim 2 testified that similar acts took place regularly over the next five years and several times a week, but her description of those incidents was not as specific. She also testified that when she was about 13, she began to get upset and ask Rico to stop, but he continued to touch her. The jury found Rico guilty on count 2 for abuse that took place from January 1, 2005, through October 22, 2009. At Rico's sentencing hearing, the court took note of the probation report analysis on count 2, which states: "Counts 1 and 2, [section 288.5, subdivision (a)], both of which *originated in the years prior to 2006*, are not listed under [section 667.61]. As such, it would appear that indeterminate sentencing is not an option." (Italics added.)

A

Crimes that punish a continuous course of conduct (rather than individual, isolated acts) present unique sentencing problems when the statute punishing those offenses changes during the time period the defendant committed the crimes. (See *U.S. v. Kohl* (9th Cir. 1992) 972 F.2d 294, 297-298, and cases cited therein.) An offense of continuous sexual abuse of a child under section 288.5 is one example. (See *People v. Palacios* (1997) 56 Cal.App.4th 252, 257 ["Section 288.5 punishes a continuous course

court, of its own accord, may set aside an unauthorized sentence so that the sentence may be corrected, even if the new sentence imposes a harsher penalty. (*In re Renfrow* (2008) 164 Cal.App.4th 1251, 1256.)

of conduct, not each of its three or more constituent acts."].) Continuous sexual abuse of a child when all conduct occurred prior to the addition of a section 288.5 offense to section 667.61, subdivision (c), would be punished differently from continuous abuse that all occurred after September 2006.

When the continuous conduct "straddles" the date of changes to the sentencing guidelines for that conduct, for purposes of sentencing and avoiding ex post facto applications of a law, a court should look at when a continuous course of conduct was *completed* or whether the conduct continued after the date of the amendment to the statute. "A continuous course of conduct offense cannot logically be 'completed' until the last requisite act is performed. Where an offense is of a continuing nature, and the conduct continues after the enactment of a statute, that statute may be applied without violating the ex post facto prohibition." (*People v. Palacios, supra*, 56 Cal.App.4th at p. 257; see also *People v. Grant* (1999) 20 Cal.4th 150, 158-162; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1164.)

We note that the "primary purpose of the ex post facto clauses . . . is to ensure 'that legislative Acts give *fair warning* of their effect' " (*People v. Grant, supra*, 20 Cal.4th at p. 162.) The addition of a section 288.5 offense to section 667.61, subdivision (c), gives "fair warning" to those engaged in the continuous sexual abuse of a child before its addition as a specified offense. Those who engaged in this conduct before September 2006 would not be subject to the harsher 15-years-to-life punishment. Those who chose

to continue such conduct after September 2006 were on notice that the crime would be punished more severely.

B

Here, the jury convicted Rico of continuous sexual abuse of a child from January 1, 2005, through October 22, 2009.⁵ The jury also found Rico committed the offense against more than one victim under section 667.61, subdivisions (c) and (e)(4). Rico's offense was of a continuing nature and Victim 2 testified similar conduct continued on a regular basis until she was at least 14. Because Rico's conduct continued after the 2006 amendment, section 667.61 may be applied without violating the ex post facto prohibition.

Because Rico was convicted of an offense listed in section 667.61, subdivision (c), he can be sentenced under section 667.61, subdivision (b), because he was "convicted in the present case . . . of committing an offense specified in subdivision (c) against more than one victim." (§ 667.61, subd. (e)(4). The jury convicted Rico of another act of continuous sexual abuse of a minor in count 1, and lewd acts on a child under the age of 14 in counts 11 and 12, all specified offenses in subdivision (c). The application of section 667.61, subdivision (e)(4), "does not require that the crimes against the other

⁵ To find Rico guilty of continuous sexual abuse of a child under section 288.5, subdivision (a), the People must prove: (1) Rico lived in the same home with or had reoccurring access to a minor child; (2) Rico engaged in three or more acts of substantial sexual conduct or lewd and lascivious conduct with the child; (3) three or more months passed between the first and last acts; and (4) the child was under the age of 14 years at the time of the acts. (CALCRIM No. 1120.) The People are not required to prove that each crime took place exactly on the days specified, but only that it happened reasonably close to those days or range of dates. (CALCRIM No. 207.)

victim have been subject to the one strike law when they were committed." (*People v. Alvarez, supra*, 100 Cal.App.4th at p. 1179.) Rico should have received the prescribed sentence in section 667.61, subdivision (b), for count 2.

C

In reply to the People's position, Rico argues the jury was not asked to make any specific findings as to whether the conduct underlying the continual sexual abuse of victim 2 took place after the effective date of the September 2006 amendment to section 667.61, subdivision (c). Rico argues victim 2 testified to three specific instances of sexual abuse that occurred in 2005 (about one year before the 2006 amendment to § 667.61, subd. (c)) and then provided only generic testimony that the conduct continued during the next five years. Relying on *People v. Hiscox* (2006) 136 Cal.App.4th 253 (*Hiscox*), and *Riskin, supra*, 143 Cal.App.4th 234, Rico concludes that absent specific findings of abuse after the 2006 amendment, he cannot be sentenced under section 667.61, subdivision (b). We conclude this case is distinguishable from *Hiscox* and *Riskin*.

Hiscox and *Riskin* are immediately distinguishable because the defendants were charged with specific acts of lewd and lascivious conduct under section 288. Neither case addresses ex post facto issues related to a continuous conduct offense as does section 288.5. In *Hiscox*, the defendant was charged with several counts of lewd and lascivious conduct under section 288 alleged to have occurred from 1992 to 1996. (*Hiscox, supra*, 136 Cal.App.4th at p. 257.) The section 667.61 sentencing scheme became effective on

November 30, 1994. (*Hiscox*, at p. 257.) *Hiscox* relies on *People v. Jones* (1990) 51 Cal.3d 294, which concluded a defendant may be convicted of child molestation based on "generic" testimony from the victim—"testimony describing a series of essentially indistinguishable acts of molestation," assuming the victim's testimony meets certain minimum requirements. (*Id.* at pp. 299-300, 305.) "The victim . . . must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period." (*Jones*, at p. 316.)

The *Hiscox* court found the victim's testimony was too indefinite and did not establish any of the acts occurred on or after November 1994, when section 667.61 was amended. (*Hiscox, supra*, 136 Cal.App.4th at pp. 261-262.) Also, the court found the verdicts cannot be deemed sufficient to establish the date of the offenses unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring after enactment of section 667.61. (*Hiscox*, at p. 261, citing *Chapman v. California* (1967) 386 U.S. 18, 24.)

Similarly, in *Riskin*, the court sentenced the defendant under section 667.61 based on a section 288 offense alleged to have occurred between June 15, 1994, and June 14, 1998. (*Riskin, supra*, 143 Cal.App.4th at pp. 244-245.) Relying on *Hiscox*, the court rejected the People's argument that the prosecutor proved beyond a reasonable doubt the defendant committed the section 288 offense after the effective date of section 667.61. (*Riskin*, at pp. 245.) We conclude Rico's conviction for continuous sexual abuse of a child from January 1, 2005, through October 22, 2009, is distinguishable from the evidence presented in *Hiscox* and *Riskin*. Victim 2's testimony regarding her continued abuse until the age of 15 is adequate to prove a continuous course of conduct that continued *after* the September 2006 amendment to section 667.61, subdivision (c). She described the kind of acts Rico committed on three specific instances and then testified that the events continued regularly in much the same way. She could identify the general time period when the acts began and ended. She also described the number of acts with sufficient certainty, testifying they occurred several times a week throughout the alleged time frame. The jury found true that Rico's continuous sexual abuse of victim 2 occurred between January 1, 2005, and October 27, 2009. We conclude the verdicts are sufficient to establish the alleged time frame because the evidence leaves no reasonable doubt the underlying charges pertained to a course of conduct that continued after the September 2006 amendments to section 667.61.

DISPOSITION

We reverse the sentences on counts 11 and 12 and remand for resentencing to a determinate term for those crimes. We also reverse the sentence on count 2 and remand for resentencing consistent with section 667.61. In all other respects, the judgment of conviction is affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

McINTYRE, J.