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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR CHANNE CAMPOS,

Defendant and Appellant.

E052820

(Super.Ct.No. FSB057459)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Affirmed in part; reversed in part with directions.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott Taylor, and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Cesar Channe Campos sexually abused several young girls, most of whom were the daughters of his live-in girlfriends. Defendant was charged with¹ continuous sexual abuse against J.E. (Pen. Code, § 288.5, subd. (a));² count 1); forcible lewd and lascivious acts against J.C. (§ 288, subd. (b)(1); counts 2-4); forcible lewd and lascivious acts against D.C. (§ 288, subd. (b)(1); count 5); lewd and lascivious acts against C.C. (§ 288, subd. (a); count 6); forcible lewd and lascivious acts against J.C. and C.C. (§ 245, subd. (a)(2); counts 7 and 8); and aggravated sexual assault, consisting of oral copulation, against J.A. (§ 269, subd. (a)(4)). It was also alleged, as to counts 1 through 6 and 9, that there were multiple victims (§ 667.61, subd. (b)) and that defendant used a firearm as to counts 7 and 8 (§ 12022.5, subds. (a) and (d)). During the trial, the court granted defendant's motion to dismiss counts 5, 7, and 8 under section 1118. The jury convicted defendant of the remaining charges and allegations. The trial court sentenced defendant to an aggregate sentence of 32 years, plus 105 years to life.

Defendant contends the trial court committed prejudicial instructional error by failing to give sua sponte a unanimity instruction as to counts 2, 3, 4, and 6. Defendant also asserts the trial court made various sentencing errors, including improperly sentencing defendant under both the determinate sentencing scheme and the One Strike

¹ We refer to defendant's victims by their initials and the victims' mothers by their first names in order to preserve the victims' anonymity.

² Unless otherwise noted, all statutory references are to the Penal Code.

scheme; violating ex post facto laws by sentencing defendant on count 1 under the One Strike statute (§ 667.61), rather than the sentencing statute effective when defendant committed the crime; and erroneously assuming consecutive sentencing was mandated as to counts 2 through 4, 6, and 9. Additionally, defendant contends his attorney provided ineffective representation by not objecting to the prosecution amending the information to add a multiple victim enhancement to count 9.

We conclude the trial court did not commit reversible error by not giving a unanimity instruction and we reject defendant's contention he received ineffective representation at trial. As to defendant's sentencing challenges, we conclude they have merit and remand the matter to the trial court with instructions to correct the various sentencing errors; by sentencing defendant solely under the One Strike scheme, as to counts 2, 3, 4, 6, and 9; resentencing defendant on count 1 under the determinate sentencing statute in effect when defendant committed count 1; and exercising the court's discretion in imposing either concurrent or consecutive sentencing as to counts 2 through 4, 6, and 9, rather than assuming consecutive sentencing is mandatory. We affirm the judgment in all other respects.

II

FACTS

Sexual Acts Against J.E. and J.A. (Counts 1 and 9)

In 1995, R. began dating defendant and moved in with him that same year. Defendant, R., and R.'s daughter, J.E. (born in 1992), lived in one bedroom of a rented house. Other renters lived in the other rooms. J.E., who was eight years old at the time

of trial, testified defendant was like a father to her. He later began hitting her when he got mad. Sometimes he hit her so hard she would fall to the ground. He would kick her or he would smack her in the head with his keys.

When J.E. was five or six years old and in kindergarten, defendant began molesting her. He would touch her and have her touch him while in the garage and in their house. He grabbed her hand and made her touch his penis. He continued molesting her every few months. When J.E. was in first or second grade, defendant began inserting his fingers in her vagina. He also began forcing J.E. to orally copulate him and would orally copulate J.E. When J.E. was in second grade and was seven or eight years old, defendant began having sexual intercourse with her.

When J.E. was 10 years old and in fifth grade, defendant, R., J.E., and J.E.'s younger brother moved to a two-bedroom house. By this time, defendant was having intercourse with J.E. almost daily, along with sometimes watching pornographic movies with her. If J.E. refused to participate in the sexual acts, defendant would hit her.

When J.E. was in sixth grade, J.E.'s best friend, J.A., who was also in sixth grade and 11 years old, walked over to defendant's house to pick her up for a sleepover. Defendant told J.E. she could not leave until she took a shower. While J.E. was taking a shower, defendant told J.A. he wanted to show her something. He grabbed her by the arm, took her into his bedroom, pushed her onto his bed, and pulled down J.A.'s pants and underwear. Defendant told J.A. she had to let him touch her vagina to be friends with J.E. J.A. saw two guns in the bedroom, which frightened her. Defendant orally copulated J.A. for about 30 seconds, until he heard J.E. turn off the shower.

In 2005, when J.E. was 12 years old and in seventh grade, R., J.E., and J.E.'s brother moved out of defendant's house. J.E. and her brother, who was defendant and R.'s son, visited defendant on weekends. Defendant continued to sexually abuse J.E. After a few months, J.E. stopped visiting defendant.

In 2006, when J.E. was in eighth grade, J.E. told a friend and then a school counselor defendant had sexually abused her. J.E. was afraid to tell R. until after J.E. reported the abuse to the counselor and police.

Sexual Acts Against J.C., D.C., and C.C. (Counts 2-8)

In 2005, after defendant separated from R., Margarita became defendant's girlfriend. Margarita and her three daughters, C.C., who was 11 years old, J.C., who was nine years old, and D.C., who was five years old, moved in with defendant. They all shared one bedroom, with defendant and Margarita sleeping in a bed and the girls sleeping on the floor.

After Margarita and her daughters had lived with defendant for about a month, defendant began hitting J.C. with a belt and touching her vagina. J.C. testified that the first time defendant put his finger in J.C.'s vagina they were in the garage. J.C. let defendant touch her because she was afraid. Defendant told her not to tell her mother. Margarita testified J.C. regarded defendant as her father.

Two days after the first incident, while Margarita was at work, defendant called J.C. to his room. Defendant closed and locked the door and told J.C. to remove her clothes. Defendant put his fingers into J.C.'s vagina. Two weeks after the second incident, defendant called J.C. into his bedroom again, and told her to lay down and take

her clothes off. He did not do anything to her. One month after the third incident, defendant called J.C. into his bedroom and told her to close and lock the door, and take her clothes off. Defendant then inserted his fingers into J.C.'s vagina. A week after the fourth incident, defendant told J.C. to remove her clothes, lay on the bed, and orally copulate him. J.C. complied. J.C. reported the abuse to Margarita but Margarita did not believe her. When J.C. was in third grade, the school counselor called each student into her office individually and asked if anything was wrong. J.C. told the counselor defendant was molesting her.

C.C. testified that defendant sexually abused her twice while Margarita was at work. The first time defendant took C.C. into his bedroom and touched her breasts over her clothes. The second time, defendant touched C.C.'s breasts in the living room, while she was watching television by herself. C.C. did not initially tell anyone because she feared defendant would hit her. Eventually, C.C. told Margarita defendant was molesting her but Margarita did not believe her. When the police interviewed C.C., she denied that defendant had abused her.

D.C. testified defendant would hit her, J.C., and C.C. with a belt. D.C. denied that defendant touched her vagina or made her touch him. D.C. conceded she did not like talking about what defendant did to her.

In August 2006, police officers interviewed each student at J.C., C.C., and D.C.'s elementary school to investigate possible sexual abuse by defendant. Officers then went to defendant's house. When the officers arrived, defendant and Margarita were in the driveway. Defendant fled and was apprehended seconds later.

After defendant's arrest, R. took care of his home because she contributed to the mortgage. While cleaning defendant's house, R. discovered a taped telephone message from J.C. and J.A. on defendant's answering machine. The girls were moaning as if they were having sex and asked defendant to insert his finger into his anus as if he were in a pornographic film. They ended their telephone message, saying, "Okay, Pappi, I love you." R. testified she burned the tape. Before defendant's arrest, R. and defendant were in a custody dispute over their son.

Defendant testified R. was angry with him after they separated and had coached J.C. to accuse him of sexually and physically abusing her. J.C.'s accusations caused the other girls also to make false accusations against him. Defendant denied molesting any of the girls.

III

UNANIMITY INSTRUCTION

Defendant contends the trial court erred in failing to give, sua sponte, a unanimity instruction, CALCRIM No. 3500, as to counts 2, 3, 4, and 6. The evidence showed multiple acts which could form the basis of each count. The jurors were instructed that they must unanimously agree on a single act underlying each count. Counts 2 through 4 charged defendant with committing forcible lewd acts with J.C., and count 6 charged defendant with committing lewd acts with C.C. The People agree the trial court should have given a unanimity instruction as to count 6, but argue the omission was harmless. As to counts 2 through 4, the People argue a unanimity instruction was not required.

A. *Applicable Law*

“In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; see also *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-188 [Fourth Dist., Div. Two].) “Where no election is made, the court has a duty to instruct sua sponte on the unanimity requirement.” (*People v. Curry* (2007) 158 Cal.App.4th 766, 783 (*Curry*).)

The court in *People v. Jones* (1990) 51 Cal.3d 294, 321 explained that: “In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim.” (*Id.* at pp. 321-322.) Neither the standard unanimity instruction (CALCRIM No. 3500) nor the modified unanimity instruction (CALCRIM No. 3501) was given in the instant case.

B. Discussion

Here, there was testimony describing discrete acts of molestation which defendant committed against J.C. and C.C.

1. Count 6

Defendant was charged in count 6, with committing a lewd act against C.C. (§ 288, subd. (a).) C.C. testified defendant touched her breasts twice. The first time he touched her breasts over her clothing while in defendant's bedroom. The second time, on another day, defendant touched her breasts in the living room. The prosecutor argued during closing argument that defendant touched C.C. on two separate occasions. The prosecutor did not specify which incident constituted the basis of count 6. Therefore, the trial court erred in not giving sua sponte a standard unanimity instruction, as required. Nevertheless, the error was harmless.

“The failure to provide a unanimity instruction is subject to the *Chapman* harmless error analysis on appeal.^[3] [Citations.] Under that standard the question is “whether it can be determined, beyond a reasonable doubt, that the jury actually rested its verdict on *evidence* establishing the requisite [elements of the crime] independently of the force of the . . . misinstruction.” [Citation.]” (*Curry, supra*, 158 Cal.App.4th at p. 783.)

“Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the

³ *Chapman v. California* (1967) 386 U.S. 18.

failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]’ [Citation.]” (*Curry, supra*, 158 Cal.App.4th at p. 783.)

The People argue any error in failing to instruct the jury on unanimity was harmless because it is apparent from the verdicts that the jury rejected the defense. We agree. By convicting defendant of count 6, the jury must have believed C.C.’s testimony and concluded defendant committed both of the alleged lewd acts committed against C.C. The jury verdicts demonstrate that the jury rejected defendant’s defense that R. and C.C. fabricated the sexual abuse allegations. The jury resolved the basic credibility dispute against defendant and therefore would have found him guilty of both of the lewd acts against C.C. The record provides no rational basis for the jury to find defendant committed one but not the other lewd act against C.C. A unanimity instruction would not have changed the outcome. The error in failing to instruct the jury on unanimity as to count 6 was therefore harmless beyond a reasonable doubt.

2. Counts 2, 3, and 4

Defendant argues the evidence disclosed multiple lewd acts that could have formed the basis of counts 2, 3, and 4. Therefore, a unanimity instruction was required. We disagree. J.C. testified to four specific acts that could have formed the basis of counts 2, 3, and 4. J.C. testified that, on three separate occasions, defendant inserted his finger into her vagina. Defendant committed the first offense in defendant’s garage and

the second and third acts in his bedroom. J.C. also testified defendant committed a fourth lewd act of compelling J.C. to orally copulate him. The prosecution did not separately charge defendant with oral copulation against J.C.

Even though there was evidence of four, rather than only three lewd acts, the prosecutor indicated during closing argument that the prosecution was basing counts 2, 3, and 4 on the three digital penetration acts. The prosecutor argued with regard to defendant molesting J.C.: “When she went inside [the garage], the defendant pulled her pants down, her underwear down, and stuck his finger into her vagina. . . . She indicated that this happened approximately three times, once in the garage and twice in the defendant’s bedroom.” The prosecution did not argue oral copulation was one of the lewd acts which formed the basis of counts 2, 3, and 4. The prosecution implicitly elected to base counts 2, 3, and 4 on the three acts of digital penetration. Therefore the trial court did not err in not giving a unanimity instruction as to counts 2, 3, and 4.

Even if there was error in not giving a unanimity instruction, such error was harmless. The record indicates the jury resolved the basic credibility dispute against defendant and therefore would have convicted him of each of the various offenses shown by the evidence. The failure to give the unanimity instruction was therefore harmless. (*Curry, supra*, 158 Cal.App.4th at p. 783.) Furthermore, since the prosecution argued counts 2, 3, and 4 were based solely on the three acts of digital penetration, we conclude that, if there was any error in not giving unanimity instructions as to counts 2, 3, and 4, the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

IV

SENTENCING ERROR ON COUNTS 2, 3, 4, 6, and 9

Defendant contends, and the People agree, that the trial court erred in imposing on counts 2, 3, 4, 6, and 9, both a determinate sentence and an indeterminate sentence under the One Strike law (§ 667.61). We note that the statutory sentence for count 9, under section 269, subdivision (b) was actually not a determinate term but, rather, an indeterminate term of 15 years to life. Sentencing solely under the One Strike law applied to counts 2, 3, 4, 6, and 9, because defendant sexually abused multiple victims, in violation of section 667.61, subdivision (b).

“The One Strike law (§ 667.61) was added to the Penal Code in 1994. [Citations.] Like the Three Strikes law, the One Strike law is an alternative sentencing scheme, but it applies only to certain felony sex offenses. [Citation.] It mandates an indeterminate sentence of 15 or 25 years to life in prison when the jury has convicted the defendant of a specified felony sex crime (§ 667.61 [listing applicable crimes]) (*People v. Anderson* (2009) 47 Cal.4th 92, 102.)

Section 667.61, subdivision (b) of the One Strike law provides that a defendant convicted of specified offenses, including violations of sections 288, subdivision (b) and 288.5, “shall be punished by imprisonment in the state prison for 15 years to life.” (§ 667.61, subd. (b).) The trial court therefore appropriately sentenced defendant to terms of 15 years to life for each of counts 2, 3, 4, 6, and 9. However, the trial court also sentenced defendant to determinate terms for each of these same counts and to an additional 15 years to life term as to count 9. Imposing this dual sentencing scheme was

improper. The trial court had no authority to impose both the indeterminate sentences under the One Strike law and additional parallel sentencing on counts 2, 3, 4, 6, and 9, under the applicable crime statutes. (*People v. Chan* (2005) 128 Cal.App.4th 408, 423.) Therefore the trial court must strike the determinate sentences on counts 2, 3, 4, and 6, and, as to count 9, the court must strike the 15 years to life sentence imposed under section 269, subdivision (b).

V

EX POST FACTO BAR AS TO COUNT 1

Defendant contends, and the People agree, defendant's sentence on count 1 violated the ex post facto clause under the state and Federal Constitutions. We agree as to the indeterminate term of 15 years to life imposed under the One Strike law.

Defendant was charged in count 1 and convicted of continuous sexual abuse of a child, from January 1, 2001, through December 31, 2004 (§ 288.5). During that time period, the One Strike law (§ 667.61) did not include section 288.5 as a predicate offense. Rather, sentencing was punishable by imprisonment for six, 12, or 16 years under section 288.5, subdivision (a). Defendant argues the trial court therefore improperly sentenced defendant to an indeterminate term under the One Strike law, which did not apply when defendant committed count 1. Section 288.5 was not added to the One Strike law as a predicate offense until 2006. (§ 667.61, subd. (c).)

Under the ex post facto clause, any statute which makes more burdensome or increases the punishment for a crime after its commission is prohibited as ex post facto. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1164.) A law violates the ex post facto

clause if it is retrospective; “that is, “it must apply to events occurring before its enactment” – and it “must disadvantage the offender affected by it” . . . by altering the definition of criminal conduct or increasing the punishment for the crime’

[Citation.]” (*Ibid.*)

The version of the One Strike law amended in 2006, which added section 288.5 as a predicate offense (§ 667.61, subd. (c)), inflicts greater punishment than the punishment permitted under the sentencing law in effect when defendant committed the section 288.5 crime. Therefore defendant’s sentence on count 1, under section 667.61, subdivision (c), must be stricken and defendant must be sentenced under the sentencing law applicable when he committed the crime charged in count 1, during the period of January 1, 2001, through December 31, 2004. Defendant would thus be subject to a determinate sentence of imprisonment for six, 12, or 16 years, under section 288.5.

VI

INEFFECTIVE ASSISTANCE OF COUNSEL (IAC)

Defendant contends his trial attorney provided ineffective representation by failing to object to the prosecution adding a multiple victim allegation (§ 667.61, subd. (b)) as to count 9, in violation of section 1009.

A. IAC

To secure the reversal of a conviction based on IAC, a defendant must show (1) his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney, and (2) counsel’s deficient performance so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

having produced a just result. The appellate court must presume counsel's conduct fell within the wide range of reasonable professional assistance and accord great deference to counsel's tactical decisions. (*People v. Lewis* (2001) 25 Cal.4th 610, 674.)

Furthermore, because it is inappropriate for a reviewing court to speculate about the tactical reasons for counsel's actions, when the reasons are not readily apparent in the record, the court will not reverse unless the record discloses no conceivable tactical purpose. (*People v. Lewis, supra*, 25 Cal.4th at pp. 674-675.) If the record sheds no light on the reasons for counsel's actions, a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Here, there was no IAC because defense counsel's failure to object to the amendment did not constitute deficient performance when measured against the standard of a reasonably competent attorney and there was no prejudice. A reasonably competent attorney could have concluded that the trial court likely would reject such an objection and conclude the proposed amendment was proper.

B. Procedural Background

The operative complaint, filed in August 2006, included multiple victim enhancements as to counts 1 through 6, but not as to count 9. In November 2008, defendant waived a preliminary hearing on the charges. When filing the second amended information in September 2009, the prosecution added a multiple victim enhancement to count 9. The enhancement was also included in the third amended information filed in May 2010. Defendant did not object in the trial court to the prosecution adding the

multiple victim enhancement to count 9. In May 2010, defendant pled not guilty to the charges and enhancements alleged in the third amended information. The jury found defendant guilty of count 9 and the multiple victim enhancement.

C. Law Applicable to Amending the Information

An indictment or information may be amended by the district attorney at any time before defendant pleads, and the court may allow amendment of the accusatory pleading “for any defect or insufficiency, at any stage of the proceedings.” (§ 1009; *People v. Burnett* (1999) 71 Cal.App.4th 151, 165.) Section 1009 is also applicable to enhancements. (*People v. Hall* (1979) 95 Cal.App.3d 299, 314.) The question of whether the prosecution should be permitted to amend the information is a matter within the sound discretion of the trial court. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005.)

An indictment or accusation, however, “. . . cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination.” (§ 1009; *People v. Burnett, supra*, 71 Cal.App.4th at p. 165; *People v. Winters, supra*, 221 Cal.App.3d at p. 1007.) The court in *Burnett* observed, “Many cases illustrate the rule that a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based.” (*Burnett*, at pp. 165-167.) A trial court thus has no “discretion” to amend an information so as to charge an offense or enhancement not shown by the evidence at the preliminary examination.

D. Discussion

Citing on *People v. Peyton* (2009) 176 Cal.App.4th 642 [Fourth Dist., Div. Two], defendant argues that, because defendant waived the preliminary hearing, the prosecution was barred from amending the information to add a multiple victim enhancement to count 9. (*Id.* at p. 655, fn. 7.) In *Peyton*, the defendant waived a preliminary hearing and therefore the court held the defendant did not have notice of the added forcible lewd act charge (§ 288, subd. (b)). This court in *Peyton* reversed the defendant's conviction on the added charge "because it constituted an additional charge not pled in the amended complaint to which defendant waived his right to a preliminary hearing." (*Peyton*, at p. 649.) "Simply put, section 1009 prohibits adding new charges to an accusatory pleading after the defendant has waived his right to a preliminary hearing on that pleading. In enacting section 1009, the Legislature determined that an accusatory pleading cannot be amended based on evidence not taken at the preliminary hearing. And when, as here, no preliminary hearing is held, the pleading cannot be amended to add *additional* charges." (*Id.* at p. 654.)

People v. Peyton, supra, 176 Cal.App.4th 642, is distinguishable. In *Peyton*, the prosecution added a completely new substantive offense. This did not occur in the instant case. Here, the prosecution added the multiple victim enhancement to count 9. The multiple victim enhancement already had been properly alleged in the complaint and information as to the other child molestation charges (counts 1 through 6). When waiving the preliminary hearing, defendant implicitly admitted the multiple victim enhancement for purposes of the preliminary hearing, as to the other counts. The

amended information added the same enhancement to count 9. Defendant was therefore already on notice of, and implicitly admitted, the facts supporting the multiple victim enhancement.

Under such circumstances, it was unlikely the trial court would have sustained an objection to the prosecution amending the information to add the multiple victim enhancement to count 9. Defense counsel could have reasonably concluded there was no tactical purpose in challenging the proposed amendment. Because defense counsel's failure to object was reasonable, his performance did not constitute ineffective representation.

VII

CONSECUTIVE SENTENCING

The trial court sentenced defendant on count 1 to 15 years to life, plus a 12-year determinate sentence, with consecutive terms imposed on each additional conviction (counts 2 through 4, 6, and 9). Defendant contends, and the People agree, that the trial court erred in imposing consecutive sentences under section 667.61, subdivision (b).

The record shows the trial court imposed consecutive sentences under the misapprehension that the One Strike law (§ 667.61) mandated full, consecutive sentencing. During the sentencing hearing, the trial court stated: "In this matter with respect to concurrent or consecutive, the Court will find that *I am mandated to find consecutive sentencing pursuant to Penal Code Section 667.61(b) in this matter.* A lot of these crimes were independent of each other. They involved separate acts of violence or threats of violence. They were committed at different times and different places than

being all at the same time. [¶] Also in this matter, I will note pursuant to Penal Code Section – to rule section 4.426 for violent sex crimes that Mr. Campos engaged in multiple violent sex crimes with separate victims, separate occasions, the same victim, same occasions. The defendant has been convicted of multiple crimes which, one, includes a violent sex crime.” (Italics added.)

At the time defendant committed the underlying offenses, the One Strike law did not explicitly mandate either consecutive or concurrent sentencing, leaving that decision to the trial court’s discretion. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262 [Fourth Dist., Div. Two].) In *Rodriguez*, this court explained that section 669 sets forth the general rule that sentencing courts have discretion to impose consecutive or concurrent sentences; however, it noted the presumption in favor of discretion applies “[a]bsent an express statutory provision to the contrary” (*Rodriguez*, at p. 1262.)

As both parties agree, the trial court retained discretion to impose either consecutive or concurrent terms. (*People v. Rodriguez, supra*, 130 Cal.App.4th at pp. 1262-1263.) If a court is unaware of its sentencing discretion, the matter must be remanded except where remand would be “an idle and unnecessary, if not pointless, judicial exercise.” (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889; see also *People v. Deloza* (1998) 18 Cal.4th 585, 599-600.) Here, the trial court imposed consecutive sentences under the misapprehension that the One Strike law (§ 667.61) mandated consecutive sentencing. Since there is no indication in this record that remand would be an idle act, this matter shall be remanded to the trial court for resentencing, to allow the trial court to exercise its discretion to impose consecutive or concurrent sentences.

VIII

DISPOSITION

The imposed sentence is reversed. The trial court is directed to strike the determinate sentences on counts 2, 3, 4, and 6, and, as to count 9, strike the 15 years to life sentence imposed under section 269, subdivision (b).

The trial court is further directed to conduct a new sentencing hearing where it may exercise its discretion in selecting between a consecutive or concurrent sentence on counts 2 through 4, 6, and 9.

As to count 1, the trial court is directed to strike the One Strike 15 years to life sentence imposed on count 1 and resentence defendant under the version of section 288.5, subdivision (a) in effect when the crime was committed, allegedly during the period of January 1, 2001, through December 31, 2004. Sentencing during that time was punishable by imprisonment for six, 12, or 16 years under section 288.5, subdivision (a).

In all other respects, the judgment is affirmed.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

RICHLI

J.