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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.

JORGE VERGARA BALTAZAR,

Defendant and Appellant.

E053985

(Super.Ct.No. RIF10002485)

OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan,
Judge. Affirmed with directions.

Susan K. Shaler, 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, Barry Carlton, and Sharon L.
Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jorge Vergara Baltazar sexually molested his stepdaughter, Jane Doe,
continuously between 2001 and 2010. The acts included touching her genitalia with his

hands, orally copulating her, and rubbing his penis against her vagina, partially penetrating her on one occasion. He also physically abused her on occasion, and threatened to harm or kill her mother and brothers if she told anyone about the abuse. A jury convicted him of eight counts of lewd and lascivious conduct upon a child under the age of 14 by force, fear or duress (Pen. Code,¹ § 288, subd. (b)(1)), one count of forcible rape (§ 261, subd. (a)(2)), one count of attempted forcible rape (§§ 664, 261, subd. (a)(2)), and two counts of forcible oral copulation. (§ 288a, subd, (c).) He was sentenced to an aggregate term of 69 years in state prison and appealed.

On appeal, defendant raises two issues: (1) double jeopardy's prohibition against multiple convictions for the same conduct was violated where it charged conduct covering a span of years while counts 2 through 8 covered conduct in specific years within that span; and (2) the fully consecutive sentence for the attempted rape was unauthorized because that crime is not listed in section 667.61, subdivision (i). The People agree that the sentence for the attempted rape count was unauthorized. We remand for resentencing but otherwise affirm.

BACKGROUND

Jane Doe was born in 1994. She has two full brothers, S.N. and M.N., who are one year and two years younger than she is, respectively. When Jane Doe was four or five years old, the defendant became involved with Jane Doe's mother and acted as her

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

stepfather. In June of 2000, Jane Doe's mother gave birth to another son, J.V., whose father is the defendant.

Beginning when Jane Doe was approximately five years old, defendant touched her inappropriately on multiple occasions. When the inappropriate touching started, the family was living in Corona. The earliest incident recalled by Jane Doe involved the defendant calling her over to a bed, covering her with blankets, and touching her vaginal area with his hands, under her clothing. Defendant also physically abused Jane Doe while the family lived in Corona, punching her in the stomach when she had been suspended from school when she was in the second grade.

After Corona, the family moved to Mira Loma where the inappropriate touching continued. At that time, the family was renting a room in the residence of an aunt of the defendant's while Jane Doe's mother was in the hospital giving birth to J.V. Defendant told Jane Doe's brothers to go play outside and proceeded to touch her under her clothing, despite the fact Jane Doe asked him to stop. Jane Doe was afraid to push him away because defendant threatened to kill Jane Doe's mother and brothers, more than once.

After Mira Loma, the family moved to Riverside. Jane Doe was nine or 10 years old and the family lived in an apartment. When Jane Doe's mother was away from home, defendant engaged in more inappropriate touching. While her brothers were outside, defendant touched her vaginal area while she was on a bed and made her kiss him on the

lips. Jane Doe refused to kiss him and tried to get away from him, but he told her to kiss him and grabbed her.

The family eventually lived in a house in Riverside. The incidents of molestation continued despite Doe's protests. When Jane Doe tried to get away, defendant grabbed her by the hand, and sometimes would offer her money if she cooperated in the sexual acts. Later, defendant would take away her telephone and not let her go out with her friends if she said "No" to him. If Jane Doe tried to resist him by slapping him, defendant would slap her back on the face and throw her on the bed.

When Jane Doe was 11 or 12 years old, defendant licked her vagina for the first time. The oral copulation and other acts of molestation occurred weekly, whenever Jane Doe's mother was gone. Defendant removed his clothes and those of Jane Doe and then would lie on top of her, and kiss her. Occasionally he licked her vagina and rubbed his penis on her vagina. He also touched her breasts with his hands, under her clothing.

The frequency of the sexual abuse increased as Jane Doe became a teenager. The physical abuse also continued; defendant struck Jane Doe with a belt on one occasion after finding a letter in her backpack from a boy who liked her, and punched her in the face three times on New Year's because she was talking to her boyfriend on the telephone. There were other incidents of physical abuse that were witnessed by Jane Doe's mother and brothers.

When Jane Doe was 15, defendant attempted to have intercourse with her. Defendant's penis penetrated a little bit on one occasion. However, Jane Doe moved so

his penis only went in between her legs. Defendant was never able to fully penetrate her. Otherwise, every week the defendant would rub his penis on her vagina. The last time defendant attempted sexual intercourse with Jane Doe was on April 18, 2010, while Jane Doe's mother was away. After this incident, Jane Doe reported the abuse.

Jane Doe's brothers witnessed several incidents of sexual abuse. S.N. saw defendant touch Jane Doe between her legs when they were driving in a car. He also witnessed incidents where defendant called Jane Doe into his bedroom although she did not want to go. S.N. could hear noises from movement of the bed. When Jane Doe came out of the room afterwards, she looked upset. S.N. was aware of this happening five or 10 times when Jane Doe would have been about 14 years old.

M.N. also witnessed incidents of defendant's inappropriate behavior towards Jane Doe. He observed defendant kissing his sister on the mouth, not in an affectionate way. He also heard his sister screaming from inside defendant's bedroom more than once, on different days. When the door was open, M.N. saw his sister in the bed; defendant told the boys to go to their room. M.N. recalled an incident while the family lived in the apartment when he had come inside after playing outside, to get some water. The bedroom door was open and M.N. saw both Jane Doe and defendant in the bed under a blanket, and heard his sister screaming. Defendant demanded to know what M.N. was doing and threatened to hit both M.N. and his mother.

M.N. also saw defendant lick Jane Doe's breasts more than five times, by forcibly pulling down her shirt and her bra. Like his brother, M.N. observed defendant touch his

sister between the legs while driving in the car. Defendant told M.N. not to tell his mother what was happening between defendant and Jane Doe.

On April 21, 2010, Doe was interviewed by police detectives, who arranged a “pretext call” between Jane Doe and defendant. In the call, Jane Doe informed defendant that she was having trouble at school due to the things happening at home, that she did not like the things he did and that he was dirty. Defendant told her not to discuss things about home at school. Although Jane Doe was not specific during the call, she did bring up the issue of touching and defendant told her they would talk about it later, but he did not deny anything.

Later that same day, the detectives interviewed defendant.² After initially denying any inappropriate conduct with Jane Doe, defendant eventually admitted that he put his hands inside her clothes, touched and kissed her breasts, licked her vagina and put his penis close to her vagina.

Defendant was tried by a jury and was convicted of eight counts of lewd or lascivious conduct with a child under the age of 14, by force, fear, threats or duress (§ 288, subd. (b)(1), counts 1-8), one count of forcible rape (§ 261, subd. (a)(2), count 9), one count of attempted rape (§§ 664, 261, subd. (a)(2), count 10), and two counts of oral

² A DVD of the interview was translated from Spanish into English, transcribed, certified, and played for the jury.

copulation by or violence.³ (§ 288a, subd. (c)(2), counts 11, 12.) At sentencing, the court sentenced defendant to fully consecutive terms for all counts. As to counts 1 through 9, 11 to 12, the court imposed the middle term of six years. The court imposed a term of three years consecutive for count 10. Defendant appeals.

DISCUSSION

1. Convictions On Count 1, Covering the Years 2001 to 2008, and Counts 2 Through 8, Covering Single Specific Years Within That Time Span, Do Not Violate Double Jeopardy.

Defendant seeks reversal on count 1, which alleged a violation of section 288, subdivision (b) between 2001 and 2008, because the other 288, subdivision (b) counts alleged discrete years within that time span. Defendant argues that double jeopardy concerns are raised from the fact that count 1 covered all the time frames for the offenses charged in counts 2 through 8, which allege discrete years, as well as a violation of the separation of powers doctrine. He asserts it cannot be concluded that the jurors convicted him on count 1 based on acts *other than* the acts charged in counts 2 through 8. Because

³ Counts 9 and 10 were originally charged as forcible rape of a child under 14 and more than 10 years younger than the offender, (§§ 269, 261, subd. (a)(2).) After the People rested, the court granted defendant's section 1118.1 motion, striking the allegations under section 269. Subsequently, the jury acquitted defendant of the greater offense of rape alleged in count 10, and found him guilty of the lesser offense of attempted rape for that count.

the main thrust of defendant's argument addresses the double jeopardy issue, we will direct our focus to that assertion.⁴ No double jeopardy violation occurred.

The double jeopardy provisions of the federal and state Constitutions protect against successive prosecutions for the same offense after acquittal or conviction, and against multiple punishment for the same offense. (*People v. Wader* (1993) 5 Cal.4th 610, 670, citing *North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [89 S.Ct. 2072, 23 L.Ed.2d 656]; *Brown v. Superior Court* (2010) 187 Cal.App.4th 1511, 1524.)

However, while the double jeopardy clause may protect a defendant against cumulative punishments for convictions on the same offense, the clause does not prohibit the state from prosecuting respondent for such multiple offenses in a single prosecution. (*People v. Jurado* (2006) 38 Cal.4th 72, 95-96, citing *Ohio v. Johnson* (1984) 467 U.S. 493, 500 [104 S.Ct. 2536, 81 L.Ed.2d 425].)

Under California law, section 654 provides that an act or omission that is punishable in different ways by different provisions of law shall be punished under the

⁴ Defendant's separation of powers argument consists of the following statement, "Further, because the executive branch's authority to prosecute derives solely from legislative enactments, which define criminal offenses, an act by the executive - - such as multiplicitous [*sic*] charging - - that expands the offenses charged violates the separation of powers doctrine. ([*Garrett*] v. *United States* (1985) 471 U.S. 773, 789, fn. 2 [85 L.Ed.2d 764, 105 S.Ct. 2407].)" The footnote in *Garrett* does not support the statement for which it was cited, nor does it state that the practice of charging multiple acts during a general time period, along with specific acts within that time frame, violates the separation of powers doctrine. Cases are not authority for points not considered. (*People v. Jennings* (2010) 50 Cal.4th 616, 684.) Based on the argument presented, we find no separation of powers violation.

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. This statute protects against multiple punishment, not multiple convictions. (*People v. Correa* (2012) 54 Cal.4th 331, 336-337; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, if a person rapes a 13-year-old, he can be convicted of both rape and lewd conduct with a child on the basis of that single act, but he cannot be punished for both offenses. (*People v. Siko* (1988) 45 Cal.3d 820, 823.) Insofar as a single act is charged as the basis for the conviction, the defendant can be punished only once. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Whether multiple convictions are based upon a single act is determined by examining the facts of the case. (*People v. Mesa* (2012) 54 Cal.4th 191, 196.) This case does not involve a single act charged in different ways under different provisions. Jane Doe testified to multiple acts which occurred on multiple occasions during the period between 2001 and 2008. Given the testimony, the prosecutor could have charged many, many more counts during each of the years alleged in count 1 without running afoul of section 654 or double jeopardy.

In making his argument, defendant acknowledges that the People were authorized to present generic testimony of a child victim. (*People v. Jones* (1990) 51 Cal.3d 294, 299-300.) The issue in *Jones* was whether generic pleading and testimony violated a defendant's right to a unanimous verdict. In that case, the court acknowledged the need for jury unanimity but rejected the contention that jury unanimity is unattainable where

testimony regarding repeated identical offenses is presented in child molestation cases. (*Id.* at pp. 318, 320-321.) It held that although a jury may not be able to readily distinguish between the various acts, it is certainly capable of unanimously agreeing that they took place in the number and manner described. (*Id.* at p. 321.)

The *Jones* court went on to explain that if an information charged two counts of lewd conduct during a particular time period, the child victim testified that such conduct took place three times during that same period, and the jury believed that testimony in toto, its difficulty in differentiating between the various acts should not preclude a conviction of the two counts charged, so long as there is no possibility of jury disagreement regarding the defendant's commission of any of these acts. (*People v. Jones, supra*, 51 Cal. 3d at p. 321.) That same reasoning applies here.

Defendant does not demonstrate how properly alleged charges, and testimony that presents no possibility of jury disagreement regarding the defendant's commission of any of the acts alleged, violates double jeopardy principles. He asserts simply that Jane Doe's testimony did not link specific conduct to specific dates, and that the unanimity instruction given permitted the jurors to convict on count 1 based on the same conduct that was the basis for convicting defendant on any one of counts 2 through 8. Defendant is mistaken as the jury was instructed that each count alleged a separate crime, and that the jury must agree on which act defendant committed for each offense. (CALCRIM Nos. 3501, 3515.)

So long as there was evidence of more criminal acts committed than were charged,

and the jury was properly instructed on the need for unanimity, any difficulty in differentiating between the various acts does not preclude convictions on the counts charged. (*People v Jones, supra*, 51 Cal.3d at p. 321.)

Defendant has not established that the acts alleged in counts 2 through 4 refer to the identical conduct alleged in count 1. The jury was properly instructed that it must find that defendant committed at least one act for the time period alleged, and that it must unanimously agree on which act defendant committed for each offense. (CALCRIM No. 3501.) It was further instructed that each count charged a separate crime. (CALCRIM No. 3515.) Since we must presume the jury followed the instructions (*People v. Thomas* (2012) 53 Cal.4th 771, 832, citing *People v. Avila* (2006) 38 Cal.4th 491, 574), we must conclude that the act for which defendant was convicted in count 1 was a separate, distinct, and different act from the acts charged in counts 2 through 8.

Given the ample number of criminal acts, and the instructions which told the jury that each count alleged a separate crime, the conviction for count 1 did not violate section 654 or double jeopardy.

2. A Full Sentence for Count 10 Was Authorized, But Not By Section 667.6, Subdivision (d), So the Judgment and Abstract Must Be Modified.

Defendant argues that a fully consecutive sentence for the attempted rape conviction in count 10 must be reversed because attempted rape is not listed as one of the enumerated offenses in section 667.61, subdivision (c). The People argue that the court sentenced defendant under section 667.6, rather than section 667.61, but that the fully

consecutive term is unauthorized nonetheless because attempted rape is not one of the enumerated offenses under that section. In actuality, the court stated the sentence was “pursuant to 667(c) of the Penal Code, . . .” As we will explain, full strength consecutive terms for counts 1 through 9 and counts 11 through 12, were required by section 667.6, subdivision (d); the sentence for count 10 was governed by section 1170.1, but the term is wholly separate from, not consecutive to, the sentence for the violent sex offenses, pursuant to section 667.6, subdivision (d).

First, we point out that section 667.61 provides for indeterminate sentences of 15 years to life or 25 years to life for certain sex offenses, listed under subdivision (c) of that section, committed under certain specified circumstances. Because none of the required circumstances specified under section 667.61, subdivisions (d) and (e) are present here, defendant could not have been sentenced under that section.

Section 667.6, subdivision (c), applies when the defendant commits an enumerated sex offense against the same victim on the same occasion. The section gives the court discretion to impose full strength consecutive sentences, or to sentence the offender under the determinate sentencing law. (*People v. Jones, supra*, 46 Cal.3d at p. 592.) This case involved the same victim but different occasions, so section 667.6, subdivision (c), was inapplicable. To the extent the court’s statement indicated an intent to sentence the defendant under subdivision (c) of section 667.6, it was in error.

Section 667.6, subdivision (d), mandates a full, separate, and consecutive term for certain enumerated offenses, as listed under subdivision (e) of that section, committed

against the same victim on separate occasions. A conviction for a lewd or lascivious act by force is one of the enumerated offenses (§ 667.6, subd. (e)(5)), as is rape (§ 667.6, subd. (e)(3)), and forcible oral copulation. (§ 667.6, subd. (e)(7).) Attempted rape is not. As such, a full *consecutive* term was not mandated for that particular count, but is required for each of the remaining counts.

Defendant requests that we simply modify the sentence to impose one-third the middle term for count 10, pursuant to section 1170.1, subdivision (a). This we cannot do. When a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then added to the terms for the other offenses as calculated under section 1170.1. (*People v. Pelayo* (1999) 69 Cal.App.4th 115, 124.) The terms imposed under section 667.6, subdivision (d), are not included in any determination pursuant to section 1170.1. (§ 667.6, subd. (d).)

Such sentencing has been described in terms of sentencing in separate boxes. (*People v. Neely* (2009) 176 Cal.App.4th 787, 798, citing *People v. Ottombrino* (1982) 127 Cal.App.3d 574, 588, fn. 4, disapproved on other grounds in *People v. Belmontes* (1983) 34 Cal.3d 335, 345.) The “box” theory requires the trial court to impose sentence under section 1170.1 in one box, and then to impose sentence under section 667.6, without regard to the section 1170.1 sentence, in another “box.” (*People v. Reeder* (1984) 152 Cal.App.3d 900, 924.) All counts except for the attempted rape count are classified as enumerated sexual offenses for which mandatory consecutive sentences are

imposed. (§ 667.6, subds. (d), (e)(1) [rape], (e)(5) [lewd or lascivious acts under § 288, subd. (b)], (e)(7) [oral copulation].) The term for the attempted rape count must be separately calculated under section 1170.1, subdivision (a), and then added to the computation for the section 667.6, subdivision (d), terms. (*Belmontes*, at p. 346.)

The matter must be remanded for resentencing. On resentencing, the trial court should calculate the appropriate term for count 10 pursuant to section 1170.1, making the necessary discretionary choices concerning the length of the principal term (lower, middle, upper). This term should then be added to the full term, consecutive sentences for counts 1 through 9, and 11 through 12. (See *People v. Pelayo*, *supra*, 69 Cal.App.4th at p. 125.)

DISPOSITION

The convictions are affirmed. The matter is remanded to the trial court for resentencing.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.