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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.

JOSE LUIS SOTO AGUILAR,

Defendant and Appellant.

E055007

(Super.Ct.No. RIF10002946)

O P I N I O N

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks.

(Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art.

VI, § 6 of the Cal. Const.) Affirmed in part and reversed in part with directions.

Eric R. Larson, 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, and William M. Wood and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant was convicted by a jury of eight crimes arising from his sexual assaults and lewd and lascivious conduct against two children under 14 years of age. The jury also found true an allegation that he committed the offenses in the present case against more than one victim within the meaning of Penal Code former section 667.61, subdivision (e)(5).¹ The trial court sentenced him to a total prison term of 61 years to life. The court also imposed a fine in the amount of \$6,052 pursuant to section 290.3.

On appeal, defendant contends the multiple victims finding must be reversed because the record on appeal indicates that the jury did not convict defendant of crimes committed against more than one victim. As we explain below, the argument is based on a mistranscription of the reading of the verdicts and ambiguous redaction of the jury's verdict forms. After the briefs were filed in this case, the reporter corrected the transcript and we obtained the original, unredacted verdict forms from the trial court. The record is now clear that the jury found two different victims. As a result, there is no factual basis for defendant's argument.

Defendant further contends the court's imposition of the \$6,052 fine under section 290.3 constituted an unauthorized sentence and that we should direct the trial court to hold a new sentencing hearing. We agree.

¹ Subdivision (e)(5) of section 667.61 was renumbered subdivision (e)(4) of that section in 2010. (Stats. 2010, ch. 219, § 16, p. 1026.) All further statutory references are to the Penal Code unless otherwise indicated.

II. FACTUAL BACKGROUND

The individuals identified in the reporter's transcript as "Jane Doe 1" and "Jane Doe 2" are sisters. Defendant is their grandmother's boyfriend.

In April 2007, the father of Jane Doe 1 and Jane Doe 2 learned that defendant had inappropriately touched his niece, who is identified in the reporter's transcript as "Jane Doe 3." The father asked Jane Doe 2 if defendant had ever touched her. Jane Doe 2, who was seven years old at that time, said that defendant had touched her "nah-nah," a phrase she used to mean her vagina.

The mother of Jane Doe 1 and Jane Doe 2 then talked to Jane Doe 1. Jane Doe 1 was 12 years old at that time. She told her mother that defendant had touched her "privates" and showed her pictures of naked people. The father then called the police.

At the time of trial in September 2011, Jane Doe 1 was 16 years old. She testified to numerous lewd acts upon her by defendant that took place when she was 10 and 11 years old. We need not describe particular instances because defendant concedes, for purposes of appeal, that "the prosecution's evidence established that [defendant] committed over 40 lewd acts against Jane Doe No. 1, far more than enough for a conviction in each of the lewd act charges" relevant to this appeal.

Jane Doe 2 was 11 years old at the time of trial. She testified to one incident that occurred when she was about seven years old. She and defendant were sitting on the couch in the living room of her house. Defendant reached his hand underneath her pajama pants and underwear and touched her vagina and buttocks.

The prosecution offered the testimony of Jane Doe 3 as evidence of defendant's prior conduct. Jane Doe 3 was 27 years old at the time of trial. She testified that when she was 12 or 13 years old, she was sitting on defendant's lap playing a video game. Defendant touched and rubbed her vagina under her underwear.

The defense submitted the testimony of a 13-year-old girl defendant had known since she was nine years old. She lived with defendant between the ages of 9 and 11. Defendant never did anything bad to her. According to her, defendant was a nice person, not violent with children, and respectful toward others.

III. PROCEDURAL HISTORY

Defendant was charged with: rape (count 1; § 269, subd. (a)(1)); oral copulation on a child under age 14 (count 2; § 269, subd. (a)(4)); aggravated sexual assault of a child under age 14 (count 3; § 269, subd. (a)(5)); forcible lewd act on a child under age 14 (count 4; § 288, subd. (b)(1)); four counts of lewd acts on a child under age 14 (counts 5, 6, 7, & 9; § 288, subd. (a)); and exhibiting harmful matter to a minor for purposes of seduction and sexual gratification (count 8; § 288.2, subd. (a)).

It was further alleged that defendant has been convicted in this case of committing lewd and lascivious acts in violation of section 288 against more than one victim for purposes of former section 667.61, subdivision (e)(5).

A jury found defendant guilty on counts 2 through 9. The jury also found true the multiple victim allegation. The jury could not reach a verdict on the charge of rape alleged in count 1.

IV. ANALYSIS

A. *Multiple Victim Finding*

Under former section 667.61, a person who is convicted of, among other crimes, a lewd or lascivious act in violation of section 288, subdivision (a) in the same case against more than one victim, is subject to a sentence enhancement of 15 years in prison.

(Former § 667.61, subds. (b), (c)(4), (c)(8), (e)(5).) The People alleged, and the jury expressly found, that defendant committed an offense against more than one victim during the commission of counts 1 through 7 and count 9.

Defendant contends the jury's multiple victims finding must be stricken because the record indicates that the jury convicted him of crimes against only one victim, viz., Jane Doe 1. We reject this argument for the reasons that follow.

In the information, the district attorney named "JANE DOE #1 (D.S.)" as the victim in counts 1, 2, and 4 through 7, and "JANE DOE #2 (S.S.)" as the victim in count 9. The allegations regarding counts 3 and 8 did not refer to a particular victim.

The verdict forms signed by the jury foreperson indicate the full names of the victims.² The name of the victim on the verdict forms for counts 2 through 8 is different from the name of the victim on the verdict form for count 9. The name of the victim on verdict forms for counts 2 through 8 has the initials D.S. The name of the victim on the

² Copies of the original verdict forms were deemed a part of the record on appeal and mailed to counsel by order of this court dated December 27, 2012.

verdict form for count 9 has the initials S.S. (To protect the confidentiality of the victims, we will not disclose their names.)

The verdicts were read by the courtroom clerk with the jury present. After the reading, the court asked the jury: “Ladies and gentlemen of the jury, are these your verdicts?” The jurors responded: “Yes.”

In preparing the record on appeal, the names of the victims on the copies of the verdict forms were redacted. On two of the verdict forms, including the verdict form for count 9, the victims’ names were removed, leaving blank spaces in their place. On other verdict forms, the victim’s name was removed and replaced with “JANE DOE.”

In the reporter’s original transcription of the reading of the verdict, the reporter omitted the victims’ names and, as to each verdict, inserted “Jane Doe 1.”

On appeal, defendant argues that the reference to “Jane Doe 1” in the reporter’s transcript for each of the verdicts indicates that the jury convicted him of crimes against one person, not two. He also supports his argument by pointing to the redacted verdict forms, which do not identify different victims.

After the briefs were filed, the court reporter filed a corrected page to the reporter’s transcript and we obtained the original, unredacted verdict forms from the trial court. The reporter’s transcript, as corrected (but still redacted), now shows the victim as to count 9 to be “Jane Doe 2.” As stated above, the verdict forms indicate the full names of one victim (with the initials D.S.) as to counts 2 through 8, and a second victim (with the initials S.S.) as to count 9.

Defendant’s argument had a colorable basis given the state of the record at the time the briefs were filed. The reporter’s use of “Jane Doe 1” in place of each victim’s name when the verdicts were read and the ambiguous nature of the redacted verdict forms arguably permit the inference urged by defendant on appeal. However, the receipt of the unredacted verdict forms and the correction to the reporter’s transcript renders defendant’s argument without factual basis. Accordingly, we reject the argument.

B. New Sentencing Hearing to Determine and Specify Fines

At the relevant times, section 290.3, subdivision (a), provided for a fine of \$200 for the first commission of certain specified offenses and \$300 for the second and each subsequent conviction “unless the court determines that the defendant does not have the ability to pay the fine.”³ (Former § 290, subd. (a).)

At the sentencing hearing, the court imposed a “fine in the amount of \$6,052 pursuant to [section] 290.3” This mirrors the probation officer’s recommendation that the court impose a “fine in the amount of \$6,052.00 (including penalty/assessments); pursuant to Section 290.3” Neither the probation officer nor the court explained how this amount was determined or cited any statutes other than section 290.3.

Defendant contends the fine is unauthorized because it exceeds the amount that could be imposed under section 290.3. The People agree that section 290.3 does not permit a fine of \$6,052 in this case. According to the Attorney General, the maximum fine permitted in

³ Although section 290.3 was amended in 2006 to increase the fines to \$300 for the first offense and \$500 for the second and subsequent offenses, the parties in this case agree that the earlier version of the statute applies here.

this case under that statute is \$2,300. This is correctly based upon the sum of a \$200 fine for one count and \$300 fines for each of the seven other convictions.⁴

The People contend the court should have also imposed additional (and mandatory) penalties and a surcharge that would make the total maximum fines and penalties \$7,728.⁵ Although the amount imposed by the court may reflect some amount of the fine permitted by section 290.3 plus other fines, neither side has suggested a possible combination of applicable fines, penalties, surcharge, or assessments that would add up to \$6,052.

Both parties assert that a new sentencing hearing is required. We agree. When the imposition of a fine is statutorily mandated, the trial court's failure to impose the fine as mandated is a jurisdictional error that can be corrected on appeal. (See, e.g., *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1530; *People v. Stewart* (2004) 117 Cal.App.4th 907, 910.) However, the fine that can be imposed under section 290.3 is not mandatory—it is subject to the trial court's determination “that the defendant does not have the ability to pay the fine.” (§ 290.3, subd. (a); see *People v. Stewart, supra*, at p. 911.)

⁴ Defendant asserts the maximum fine is \$1,700. However, he incorrectly uses \$300 for one count and \$200 for each of seven other counts.

⁵ The Attorney General arrives at this amount by adding to the \$2,300 base amount under Penal Code section 290.3 the following penalties and surcharge: \$2,300 pursuant to Penal Code section 1464, subdivision (a); \$1,610 pursuant to Government Code section 76000; \$1,058 pursuant to Government Code section 70372, subdivision (a)(1); and \$460 pursuant to Penal Code section 1465.7, subdivision (a).

Nor can we infer the requisite finding. Although the court's decision to impose a fine under section 290.3 may imply an ability to pay the amount imposed (\$6,052), it does not imply a finding of an ability to pay the full amount of the section 290.3 fine plus the mandatory fines, penalties, and surcharge identified by the Attorney General. (See *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249-1250.) This is a determination that must be made by the trial court in the first instance. Accordingly, the court must hold a new hearing to determine whether defendant has the ability to pay the applicable fines. (*Ibid.*)

Defendant also correctly points out that the court's minute order of the sentencing hearing and the abstract of judgment refer only to section 290.3 as the statutory authority for the \$6,052 fine. As stated above, the amount stated far exceeds the amount permitted by section 290.3. To the extent the \$6,052 amount includes the additional penalties and surcharge suggested by the Attorney General, the statutory bases for such penalties and surcharge are not specified in the abstract of judgment. We agree with defendant that this is error. The amounts and statutory bases for such penalties and surcharge must be stated in the abstract of judgment. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200; *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332.)

Finally, the Attorney General asserts that defendant has forfeited the right to object at the new sentencing hearing to the imposition of any fine less than \$6,052. We disagree. Defendant contends the fine of \$6,052 is an unauthorized sentence. Indeed, he asserts that

any fine imposed under section 290.3 over \$1,700 is unauthorized.⁶ Although he did not object to the amount of the fine below, he is permitted to raise the matter on appeal because “[a]n unauthorized sentence is a narrow exception to the requirement that the parties raise their claims in the trial court to preserve the issue for appeal.” (*People v. Breazell* (2002) 104 Cal.App.4th 298, 304.) The Attorney General does not dispute the application of this principle here. It would make little sense to permit defendant to assert that the \$6,052 fine is unauthorized on appeal, but preclude him from objecting to the imposition of the same fine in the trial court following remand.

The cases cited by the People are inapposite. They address the question of a defendant’s forfeiture of an argument on appeal, not the defendant’s ability to assert an objection at a new hearing after remand. (See *People v. McMahan* (1992) 3 Cal.App.4th 740, 750; *People v. Menius* (1994) 25 Cal.App.4th 1290, 1298-1299 [Fourth Dist., Div. Two].) Moreover, the argument conflicts with the general rule that “[w]hen a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.) Although a remand order may limit or restrict the scope of the hearing (see *People v. Murphy* (2001) 88 Cal.App.4th 392, 396), we do not agree with the People that we

⁶ As noted above, defendant’s \$1,700 calculation is flawed. (See *ante*, fn. 4.) If the Attorney General’s calculation is used, any amount imposed under section 290.3 (without regard to additional fines, penalties, or surcharge) in excess of \$2,700 is unauthorized.

should preclude defendant from asserting arguments made on appeal concerning the determination of the fine under section 290.3 and the imposition of other applicable fines, penalties, assessments, or surcharge.

V. DISPOSITION

Defendant's convictions are affirmed. The \$6,052 fine imposed pursuant to section 290.3 is vacated. Following remand, the court shall hold a new sentencing hearing to determine whether to impose the fine under former section 290.3 and to state the amount of such fine, if any, and other applicable fines, penalties, or surcharge. The trial court is directed to amend the minute order and the abstract of judgment to reflect the amount of such fines, penalties, or surcharge and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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KING
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.