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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.

DANIEL NATHAN WILLIAMSON,

Defendant and Appellant.

E061450

(Super.Ct.No. SWF10000631)

OPINION

APPEAL from the Superior Court of Riverside County. Alfred J. Wojcik, Judge.

Affirmed with directions.

Mary Woodward Wells, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Hawley, Deputy Attorneys General, for Plaintiff and Respondent.

# I

## INTRODUCTION

This case is before us for a second time. In the first appeal (case No. E055227), we held there was insufficient evidence of force or duress to support defendant Daniel Nathan Williamson's count 3 conviction for forcible oral copulation of a minor under the age of 14 (Pen. Code, § 269, subd. (a)(4)).<sup>1</sup> We reduced defendant's conviction on count 3 to the lesser included offense of nonforcible oral copulation of a minor under the age of 14 (§ 288a, subd. (c)(1)), and remanded for resentencing.

In the instant appeal, defendant contends the trial court abused its discretion resentencing defendant to the upper term on count 3. Alternatively, defendant argues his attorney provided ineffective assistance of counsel (IAC) by not objecting to the trial court imposing the upper term. Defendant also contends, and the People agree, the trial court erred in calculating his presentence custody credits.

We conclude defendant's sentence on count 3 was proper and was not an abuse of discretion. However we agree the trial court miscalculated defendant's presentence custody credits. The judgment is therefore modified and this matter is remanded solely for recalculation of defendant's custody credits. The judgment is affirmed as modified.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

## II

### FACTS AND PROCEDURAL BACKGROUND

Since the facts in the previous appeal are the same here, we will only summarize those facts relevant in the instant appeal to resentencing defendant on count 3 (oral copulation of Doe 1).

Defendant and Sarah married in 2007. Sarah had three younger biological sisters, Jane Does 1, 2, and 3, who lived with her Sarah's father, Ra.D., and stepmother, Ro.D. Ra. shared custody of Does, 1, 2, and 3 with his ex-wife, K.D. Sarah also had three stepsisters, Jane Does 4, 5, and 6. At the time of trial in October 2011, Doe 1 was 14, Doe 2 was 10, Doe 3 was 12, Doe 4 was 15, and Doe 6 was 18 years old. From Christmas 2009, until Easter 2010, defendant sexually assaulted five of Sarah's sisters, four of whom were under the age of 14.

According to Maria Hughes, the school psychologist who assessed Doe 1's cognitive abilities, Doe 1 had "mild mental retardation," which qualified her for special education. According to Hughes, this meant she had the least severe form of mental retardation. Doe 1 was able to function in society and had been mainstreamed in some of her classes. Doe 1 was identified as having a learning disability but not a developmental disability. In some cognitive areas, Doe 1 showed mental development approaching that of a normal child her age but in the majority of areas, she was less developed than a normal child, particularly in the area of understanding requests made of her and the ability to communicate her desires. Doe 1 qualified for special education services for speech and language impairment but not for mental retardation or brain injury.

On Easter 2010, and before then, when Doe 1 was 11 or 12 years old, defendant touched Doe 1 in inappropriate places numerous times, including in the genital area several times and on her breasts three or four times.

The following facts are from Doe 1's recorded statement, taken on April 6, 2010, and her trial testimony.

*Counts 1 and 2*

Defendant inserted his penis in Doe 1's vagina while she was sitting on his lap in a Jacuzzi at defendant's apartment. He forced her to do it even though she did not want to. Defendant lifted Doe 1's body up and down. Doe 1 was scared of defendant because he was bigger than her, she was a child, and defendant was an adult.

*Counts 3 and 4*

The same day as the Jacuzzi incident, while Doe 1 and defendant were in his apartment playing on the computer in the bedroom, defendant licked Doe 1's genital area. Doe 1 was scared when he did it. She did not try to push him away or object. Doe 1 testified that defendant forced her. She did not want to do it. Other than when she eventually reported the incident, Doe 1 did not tell anyone about the incident because she was afraid of defendant and afraid to tell anyone.

*Count 5*

On Christmas 2009, Doe 1 and defendant played a video game upstairs, while the rest of the family was downstairs. Defendant digitally penetrated Doe 1's vagina with one hand while playing the video game with his other hand. Defendant said to Doe 1, "You feel so good." Defendant told her not to tell anyone. Doe 1 did not tell anyone

until April 5, 2010, when she told her sisters, who told her parents. She did not tell anyone before that because she was scared she would get in trouble.

*Count 7*

Defendant penetrated Doe 1's vagina when she was at defendant's apartment, sitting next to him on the couch under a blanket, while watching a movie. Doe 1 did not tell defendant to stop because she was scared.

*Count 8*

On another occasion at Doe 1's mother's house, defendant forced Doe 1 to sit on his lap, on the couch. She did not want to do it. Defendant pulled her onto his lap and covered himself and Doe 1 with his jacket. Defendant then inserted his finger into Doe 1's vagina.

*Counts 6 and 9*

Doe 1 saw defendant's penis twice. Both times she was at defendant's apartment. He made her hold it and squeeze it with her hand. Another time, defendant squeezed white liquid out of his penis and rubbed the liquid on her lips.

During defendant's recorded interview, he admitted to touching inappropriately all six of his victims. Defendant denied penetrating Doe 1's vagina with his penis and orally copulating her at his apartment. Defendant, however, admitted orally copulating Doe 1 in the Jacuzzi. At the end of defendant's interview, defendant wrote an apology letter to Doe 1.

The jury found defendant guilty of convictions for aggravated sexual assault (forcible oral copulation) of a minor under the age of 14 (count 3; § 269, subd. (a)(4));

lewd and lascivious conduct on a child under age 14 (counts 5 - 9 and 11 - 13; § 288, subd. (a)); and battery (§ 242; count 18). The court also found true the allegation as to counts 3 and 5 through 13, that the crimes were committed against multiple victims (§ 667.61, subd. (e)(5)). The trial court sentenced defendant to 135 years to life in prison.

In defendant's first appeal, this court concluded as to count 3 that there was insufficient evidence of force and duress to support defendant's conviction for forcible oral copulation (§ 269, subd. (a)(4)). We therefore reduced defendant's conviction on count 3 to the lesser included offense of nonforcible oral copulation of a minor under the age of 14 (§ 288a, subd. (c)(1)), and remanded the case for resentencing.

During resentencing on May 12, 2014, in accordance with this court's ruling on defendant's first appeal, the trial court struck defendant's count 3 conviction for forcible oral copulation and his sentence of 15 years to life. The court stated it intended to impose the upper term of eight years for the lesser included offense of nonforcible oral copulation. In response, defense counsel requested the trial court to impose the sentence concurrently. Defense counsel added that he did not know what the basis or reason for the court imposing the upper term and running it consecutive to the other terms. The court responded: "[T]hese were based upon different incidents, different events, different times. Based upon severity of the crimes, the court will impose the upper term of eight years consecutive to all other custody to be imposed."

The prosecutor stated he agreed with the court's tentative ruling. The court stated it would be the court's order unless there was anything further. Defense counsel objected to the court's ruling on defendant's custody credits but made no objection to the trial

court's reasons for imposing a consecutive, upper term on count 3. The trial court then sentenced defendant to a consecutive, upper term on count 3.

### III

#### SENTENCING ERROR

Defendant contends the trial court abused its discretion in imposing an upper term on count 3 based on the improper factors of “different incidents, different events, different times” and the “severity of the crimes.”

##### *A. Forfeiture*

The People assert defendant forfeited his objection to the trial court imposing an upper term on count 3 by failing to object in the trial court. We agree. Although defense counsel had the opportunity, he failed to raise the objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 356, 357, fn. 19 (*Scott*); *People v. de Soto* (1997) 54 Cal.App.4th 1, 4 (*de Soto*.)

In *de Soto, supra*, 54 Cal.App.4th 1, the defendant argued on appeal that the trial court violated the dual-use prohibition contained in former Rules of Court, rule 420(c)<sup>2</sup> by imposing a one-year enhancement for being armed while committing a burglary and also relying on the use of the weapon in selecting the upper term. (*Id.* at p. 7.) The *de Soto* court rejected the defendant's dual-use objection on forfeiture grounds, stating “A defendant cannot for the first time on appeal challenge the manner in which the

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<sup>2</sup> Renumbered Rules of Court rule 4.420(c). Undesignated rule references are to the California Rules of Court.

sentencing judge exercises discretion in making sentencing choices or articulates his or her supporting reasons.” (*Id.* at p. 4, citing *Scott, supra*, 9 Cal.4th at p. 356.)

The *de Soto* court explained application of the forfeiture doctrine as follows: “In *Scott*, our Supreme Court first enunciated the rule that ‘complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.’ [Citation.] ‘Included [within the forfeiture doctrine] are . . . cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.’ [Citation.] In articulating the reason behind the rule, the Supreme Court stated: ‘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. As in other waiver [and forfeiture] cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them.’ [Citation.] The *Scott* rule has been consistently applied to cases in which no objections were interposed at the time of sentencing in the trial court. [Citations.]” (*de Soto, supra*, 54 Cal.App.4th at p. 8.)

Likewise, here defendant forfeited his sentencing objection to the upper term by not raising it in the trial court even though he was given sufficient opportunity to do so. Merely requesting the trial court to state its reasons for imposing a consecutive upper

term is not sufficient to avoid forfeiture. We will nevertheless address defendant's objection on the merits because he is asserting IAC.

### *B. Applicable Law*

The trial court is free to impose an upper term sentence based upon any aggravating circumstance the court deems significant, subject to specific prohibitions. (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.) Section 1170, subdivision (b), provides in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (See rule 4.420.) Section 1170, subdivision (c), also states "The court shall state the reasons for its sentence choice on the record at the time of sentencing." (See also rule 4.420(e).)

"The court should not use the same reason to impose a consecutive sentence as to impose an upper term of imprisonment." (The Advisory Committee Comment for rule 4.420; see *People v. Avalos* (1984) 37 Cal.3d 216, 233.) However, the court's upper term sentence choice may be based on a single aggravating factor. (*People v. Black* (2007) 41 Cal.4th 799, 813 (*Black*).) "An aggravating circumstance is a fact that makes the offense 'distinctively worse than the ordinary.' [Citation.] Aggravating circumstances include those listed in the sentencing rules, as well as any facts 'statutorily declared to be circumstances in aggravation' (Cal. Rules of Court, rule 4.421(c)) and any other facts that

are ‘reasonably related to the decision being made.’ (Cal. Rules of Court, rule 4.408(a).)” (*Id.* at p. 817.)

Defendant’s numerous acts of sexually abusing Doe 1 and her siblings (“different incidents, different events, different times”) was a proper aggravating factor for imposing a consecutive sentence (rule 4.424(a)(3)) but could not also support imposing the upper term. (*People v. Avalos, supra*, 37 Cal.3d at p. 233.) The only remaining factor the trial court mentioned it relied upon was the severity of defendant’s crimes. Defendant argues this is not a proper aggravating factor because a sentence may not be aggravated based on a crime’s inherent seriousness or gravity. (*People v. Price* (1984) 151 Cal.App.3d 803, 813.) “An aggravating circumstance is a fact that makes the offense ‘distinctively worse than the ordinary.’” (*Black, supra*, 41 Cal.4th at p. 817.)

The trial court, however, could have reasonably concluded defendant’s crime of oral copulation was distinctively worse than ordinary based on Doe 1 being particularly vulnerable, defendant taking advantage of a position of trust or confidence, and defendant using planning and sophistication to commit the crime. These are all proper aggravating factors which support imposing the upper term. (Rule 4.421(a)(3), (8), and (11).) Doe 1 was particularly vulnerable because she was alone with defendant in his bedroom and she suffered from a mental disability and difficulty communicating her desires. As Doe 1’s older brother-in-law, defendant exploited a position of trust and confidence by fostering a friendly relationship with Doe 1 during family visits. Earlier in the day, defendant went in the Jacuzzi with Doe 1. Later that day, he played computer games with her in his bedroom. Defendant used planning and sophistication in perpetrating count 3 by being

friendly with Doe 1, inviting her to his bedroom, playing computer games with her, and then sexually abusing Doe 1 while alone with her in his bedroom.

Even though the trial court did not state it relied on the aggravating factors of victim vulnerability, victim trust and confidence, and using planning and sophistication, the trial court did not commit prejudicial error. The trial court's ruling is presumptively correct. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775.) "Although the statement of reasons is intended to facilitate 'meaningful review,' this means no more than that review to which defendant is entitled." (*Ibid.*) When a defendant claims the trial court made an impermissible dual use of a fact, the reviewing court looks at whether the trial court could have based the aggravating factor on evidence other than that which gave rise to the upper term. If so, the sentence may stand. (*Ibid.*; *People v. Edwards* (1981) 117 Cal.App.3d 436, 445.)

"Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error." [Citation.] Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]." (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.)

In this case, there was no prejudicial error because the court likely would have articulated additional, proper aggravating factors justifying the imposition of both a consecutive sentence and upper term, had the court been aware it had not stated sufficient factors to support the upper term. It is also reasonably probable the trial court would

have imposed the upper term even if defense counsel had objected to the specified aggravating factors. Since there was no prejudice in defense counsel failing to object, defendant also has not established the alternative theory of IAC. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Mendoza* (2000) 24 Cal.4th 130, 158-159.)

#### IV

#### CUSTODY CREDITS

Defendant contends, and the People agree, the trial court erred in calculating his presentence custody credits following resentencing.

At resentencing on May 12, 2014, the trial court acknowledged defendant was entitled to custody credits from the time of his arrest until resentencing. But rather than including in the resentencing order defendant's total custody credits, the trial court deferred to the Department of Corrections and Rehabilitation calculation of the exact number of credits. The sentencing order and abstract of judgment only include the trial court's award of presentence custody credits, including good conduct credits, for the period between the date of defendant's arrest and his original sentencing date. The resentencing abstract of judgment on May 12, 2014, does not show defendant's total custody credits as of the resentencing hearing on May 12, 2014.

Under *People v. Buckhalter* (2001) 26 Cal.4th 20, 40-41 (*Buckhalter*) and *People v. Johnson* (2004) 32 Cal.4th 260, 263 (*Johnson*), the sentencing order on May 12, 2014, should have included defendant's actual presentence custody credits from the time of his arrest on April 8, 2010, until his May 12, 2014, resentencing. The People request that

instead of remanding this matter to the trial court, this court recalculate and order defendant's presentence custody credits. The People and defendant state defendant's custody credits totaled 1,587 days custody credit (1,496 days custody credits, plus 91 days good conduct credits).

The reporter's transcript for the original sentence on December 12, 2011, indicates defendant was credited with 611 days of presentence custody plus 91 days of good conduct credit, for a total of 702 days presentence credits. The initial abstract of judgment, however, shows a total of 661 actual days plus 91 days of good conduct credit, for a total of 752 days. Because of this inconsistency, as well as the custody credit error raised in this appeal, this matter is remanded to the trial court for an accurate calculation of defendant's credits.

## V

### DISPOSITION

The sentencing order deferring to the Department of Corrections and Rehabilitation calculation of custody credits is stricken. The judgment is modified and remanded solely for the purpose of recalculating defendant's total custody credits. The judgment is affirmed in all other regards. The trial court is directed to calculate defendant's total custody credits consistent with this decision, *Buckhalter, supra*, 26 Cal.4th at pages 40-41, and *Johnson, supra*, 32 Cal.4th at page 263, by determining defendant's presentence custody credits from the time of his arrest on April 8, 2010, until his most recent resentencing. The trial court is ordered to issue an amended abstract of

judgment reflecting defendant's total custody credits, and to forward a certified copy to the Department of Corrections and Rehabilitation.

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CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

KING  
J.