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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE VARGAS ROSALES,

Defendant and Appellant.

F072060

(Super. Ct. No. F11906202)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Tennant Nieto and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Poochigian, J. and Detjen, J.

Defendant Jose Vargas Rosales contends on appeal that the trial court violated the prohibition against ex post facto laws by sentencing him under a statute that was not in effect at the time he committed the crimes. The People concede. We vacate the sentences and remand for resentencing.

BACKGROUND

On June 1, 2015, defendant was convicted by jury trial of two counts of forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1);¹ counts 2 & 3), attempted forcible lewd act upon a child (§§ 664, 288, subd. (b)(1); count 4), and battery (§ 242; count 6).

On July 27, 2015, the trial court sentenced defendant to 17 years four months in prison as follows: eight years on count 2, eight years on count 3, and one year four months on count 4. The court imposed the midterm on all three counts. On count 2, the court stated: “[I]t will be the judgment and sentence of the court that the defendant be imprisoned in the Department of Corrections for the midterm or middle term of eight years.” On count 3, the court stated: “[T]he defendant will similarly be [imprisoned] in the Department of Corrections for a term of eight years” On count 4, the court stated: “[The] defendant will be imprisoned in the Department of Corrections for the term of one year and four months to run consecutively to the sentence imposed in the previous counts” The abstract of judgment reflects imposition of the midterm on each count.

DISCUSSION

“The Constitution forbids the passage of *ex post facto* laws, a category that includes ‘[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.’ ” (*Peugh v. United States* (2013) 569 U.S. ___, ___ [133 S.Ct. 2072, 2077-2078]; U.S. Const., art. I, § 10.) The California state Constitution also prohibits ex post facto application of laws. (Cal. Const., art. I, § 9; see *People v. Farley* (1996) 45 Cal.App.4th 1697, 1705.)

¹ All statutory references are to the Penal Code.

In this case, the prosecution alleged that the crimes in counts 2, 3, and 4 occurred on or about September 1, 2009, through September 1, 2010. During that time, former section 288, subdivision (b)(1) provided punishment of three, six, and eight years in prison. (Stats. 2004, ch. 823, § 7, effective Sept. 28, 2004.) The trial court, however, applied the amended section 288, subdivision (b)(1) that provided punishment of five, eight, and 10 years in prison. (Stats. 2010, ch. 219, § 7, effective Sept. 9, 2010.)

Defendant urges us to modify the sentences because the trial court imposed the midterm on all three counts. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1473 [appellate court has authority to modify a defendant's sentence under § 1260 in lieu of remanding the matter to the trial court for a new and unnecessary sentencing hearing].) We choose, however, to remand for the trial court to reconsider the sentences in its discretion.

DISPOSITION

The sentences on count 2 (§ 288, subd. (b)(1)), count 3 (§ 288, subd. (b)(1)), and count 4 (§§ 664, 288, subd. (b)(1)) are vacated and the matter is remanded to the trial court for resentencing under the statute in effect at the time defendant committed the crimes.