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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOAQUIN MANUEL
RODRIGUEZ-ROJAS,

Defendant and Appellant.

G044236

(Super. Ct. No. 09CF1223)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
John Conley, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and
Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Joaquin Manuel Rodriguez-Rojas appeals from the judgment entered after a jury found him guilty of three counts of committing a forcible lewd act on a child under the age of 14 years, one count of aggravated sexual assault of a child by oral copulation, and one count of aggravated sexual assault of a child by sexual penetration by a foreign object. As to the counts of committing a forcible lewd act on a child under the age of 14 years, the jury found true the allegation defendant committed substantial sexual conduct with a child within the meaning of Penal Code section 1203.066, subdivision (a)(8). (All further statutory references are to the Penal Code.) Defendant challenges the judgment on the ground the trial court erred by sentencing him to consecutive 15-year-to-life terms for the aggravated sexual assault of a child by oral copulation count and the aggravated sexual assault of a child by sexual penetration by a foreign object count.¹

We affirm. Consecutive sentences for defendant's aggravated sexual assault offenses were statutorily mandated by the version of section 667.6, subdivision (d) in effect during the time period defendant committed those offenses (former section 667.6(d)). We find no error.

BACKGROUND

Defendant was charged in an information with two counts of committing a lewd act upon a child under 14 years of age, in violation of section 288, subdivision (a) (counts 1 and 2); three counts of committing a forcible lewd act on a child under 14 years

¹ In his opening brief, defendant also argues his actual custody credits were miscalculated by the trial court. In his reply brief, defendant states that since the opening brief was filed, and at his request, the trial court recalculated his custody credits and ordered the judgment modified to state the correct number of days of custody credits. Defendant further states in his reply brief that in light of the trial court's action, "the credit issue raised in Appellant's Opening Brief is moot." We therefore do not address this issue further.

of age in violation of section 288, subdivision (b)(1) (counts 3, 4, and 5); one count of aggravated sexual assault of a child by oral copulation, in violation of section 269, subdivision (a)(4) (count 6); and one count of aggravated sexual assault of a child by sexual penetration by a foreign object, in violation of section 269, subdivision (a)(5) (count 7). As to counts 1 through 5, the information alleged defendant engaged in substantial sexual conduct with a child within the meaning of section 1203.066, subdivision (a)(8); performed a lewd act on multiple children, within the meaning of section 1203.066, subdivision (a)(7); and committed a specific sex offense against more than one victim, within the meaning of section 667.61, subdivisions (b), (c), and (e)(5).

During a jury trial, evidence showed that when defendant was 18 years old, he began sexually abusing his six- or seven-year-old niece, R. Defendant's sexual abuse of R. included defendant (1) showing R. a Playboy magazine and telling her she should do the things shown in the pictures; (2) physically forcing his penis into R.'s mouth; (3) sucking on R.'s breast; (4) digitally penetrating R.'s vagina; and (5) putting her hand toward his penis and instructing her to masturbate him until he ejaculated. Evidence also showed that on one occasion, defendant made R.'s younger sister, J., grab defendant's penis, and, on another occasion, he digitally penetrated J.'s vagina.

The jury found defendant not guilty of counts 1 and 2, but found him guilty of counts 3 through 7. The jury found true the allegation that in the commission of the offenses charged as counts 3, 4, and 5, defendant had substantial sexual conduct with a child. The jury found untrue the allegations that in committing counts 3, 4, and 5, defendant committed a lewd act on multiple children and committed a specific sex offense against more than one victim.

The trial court sentenced defendant to a total prison term of "30 years to life indeterminate, plus 6 years determinate" by imposing (1) a prison term of 15 years to life on count 6; (2) a prison term of 15 years to life on count 7 to run consecutively to the prison term imposed on count 6; (3) a prison term of six years as to count 4; and (4) a

prison term of six years each as to counts 3 and 5, for which execution of sentence was stayed pursuant to section 654. Defendant appealed.

DISCUSSION

The sole issue before us is whether the trial court erred by imposing “mandatory” consecutive sentences for counts 6 and 7. Defendant argues the trial court imposed consecutive sentences by erroneously applying subdivision (c) of section 269, which did not become effective until after the charged offenses occurred.² He thus contends the trial court’s application of section 269, subdivision (c) here violated his rights under the ex post facto clauses of the United States Constitution and California Constitution. For the reasons we will explain, consecutive sentences for counts 6 and 7 were statutorily mandated by former section 667.6(d).

As pertinent to the issue on review, the jury found defendant guilty of committing count 6 (aggravated sexual assault of a child by oral copulation, in violation of former section 269, subdivision (a)(4)) and count 7 (aggravated sexual assault of a child by sexual penetration by a foreign object, in violation of former section 269, subdivision (a)(5)) as charged in the information. The information alleged those offenses occurred between January 1, 1997 and December 16, 2002.

² The version of section 269 in effect at the time of the charged offenses (former section 269) provided: “(a) Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated sexual assault of a child: [¶] (1) A violation of paragraph (2) of subdivision (a) of Section 261. [¶] (2) A violation of Section 264.1. [¶] (3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. [¶] (4) Oral copulation, in violation of Section 288a, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. [¶] (5) A violation of subdivision (a) of Section 289. [¶] (b) Any person who violates this section is guilty of a felony and shall be punished by imprisonment in the state prison for 15 years to life.”

In 2006, former section 269 was amended to add subdivision (c), which provides: “The court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.” (Stats. 2006, ch. 337, § 6.) In the respondent’s brief, the Attorney General acknowledges that because section 269, subdivision (c) “was not in existence at the time of his crimes, section 269, subdivision (c), did not apply to [defendant]’s sentence.” Nothing in the record shows the trial court relied upon section 269, subdivision (c) in sentencing defendant in this case. But even if the record showed the trial court had erroneously relied on section 269, subdivision (c) in imposing consecutive sentences, any such error would have been harmless in light of the applicability of the mandatory consecutive sentencing provision of former section 667.6(d).

Former section 667.6(d) provided: “A full, separate, and consecutive term shall be served for each violation of . . . subdivision (a) of Section 289 [unlawful sexual penetration by a foreign object], . . . or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions.” The crimes of oral copulation in violation of section 288a and unlawful sexual penetration by a foreign object in violation of section 289, subdivision (a) are the predicate acts for defendant’s convictions for counts 6 and 7. By finding defendant guilty of count 6, and thus of violating former section 269, subdivision (a)(4), the jury necessarily found defendant committed the act of “[o]ral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury” within the meaning of former section 667.6(d). By finding defendant guilty of count 7, and thus of violating former section 269, subdivision (a)(5), the jury necessarily found defendant committed unlawful sexual penetration by a foreign object, in violation of section 289, subdivision (a).

Defendant does not contend otherwise. As the jury found defendant committed the offenses listed in former section 667.6(d) by finding him guilty of counts 6 and 7, former section 667.6(d)'s mandatory consecutive sentencing provision applied to counts 6 and 7.

Our analysis is supported by *People v. Jimenez* (2000) 80 Cal.App.4th 286, 291. In that case, the appellate court held that a conviction for committing the offense of aggravated sexual assault of a child in violation of former section 269 was subject to the mandatory consecutive sentencing provision of section 667.6, subdivision (d), if the predicate crime for the aggravated sexual assault of a child offense is one of the crimes listed in section 667.6, subdivision (d). (*People v. Jimenez, supra*, at p. 291.) The court reasoned that because the defendant was convicted of aggravated sexual assault of a child by means of forcible sodomy, and because forcible sodomy is listed in section 667.6, subdivision (d), the mandatory consecutive sentencing provision of section 667.6, subdivision (d) applied. (*People v. Jimenez, supra*, at p. 291.) The appellate court rejected the defendant's argument that section 667.6, subdivision (d) did not apply because it did not specifically mention section 269, stating: "Defendant correctly points out that section 667.6, subdivision (d) does not explicitly provide that it applies to violations of section 269. However, he makes too much of this omission, ignoring the fact that violation of section 286 is one of the predicate offenses of section 269." (*People v. Jimenez, supra*, at p. 291.)

In *People v. Figueroa* (2008) 162 Cal.App.4th 95, 98-100, the appellate court followed the reasoning of *People v. Jimenez, supra*, 80 Cal.App.4th 286, in holding that section 667.6, subdivision (d) applied to violations of former section 269, which occurred before former section 269 was amended in 2006 to add subdivision (c)'s mandatory consecutive sentencing provision.

Although defendant argues *People v. Jimenez* and *People v. Figueroa* were wrongly decided, defendant fails to cite any statute or case supporting his argument.

We find the reasoning of those cases persuasive and conclude the trial court did not err by imposing consecutive sentences on counts 6 and 7.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.