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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.

CLAUDE LEE COKER,

Defendant and Appellant.

G045112

(Super. Ct. No. 08NF1325)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James E. Rogan, Judge. Affirmed.

Wallin & Klarich and Stephen D. Klarich for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Bradley Weinreb and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Claude Lee Coker of 12 counts of committing lewd acts on a child under age 14 (Pen. Code, § 288, subd. (a); all statutory citations are to the Penal Code), and found he committed lewd acts against more than one child (§ 667.61, subds. (b), (c) & (e)(5)). Coker contends the trial court erred by failing to advise the jury he faced a sentence of 15 years to life if convicted, and determining he was statutorily ineligible for probation. He also argues the abstract of judgment must be corrected to reflect custody and conduct credit awarded by the court. Finding none of his contentions persuasive, we affirm.

I

FACTUAL AND PROCEDURAL HISTORY

Five of Coker's granddaughters testified he molested them between November 1996 and February 2008 at his La Palma home. The abuse occurred when the girls were between the ages of five and 12 years old, and involved Coker rubbing and touching the girls' chests and vaginal areas under their clothing. The girls disclosed the abuse to each other, and one told high school friends, but no girl told a parent until February 2008.

Coker testified he put the girls to bed and allowed them to sit on his lap at the computer or on the couch, but he never touched them inappropriately. Coker's wife testified she never observed any inappropriate behavior.

Following a trial in November 2011, a jury convicted Coker as noted above. In July 2011, the trial court imposed concurrent 15-years-to-life terms for each conviction.

II

DISCUSSION

A. *The Trial Court Did Not Err by Precluding Defense Counsel from Advising the Jury Coker Faced a Potential Life Sentence If Convicted*

Prior to jury selection, the prosecutor moved to exclude “[a]ny statements regarding possible penalty” Defense counsel responded that he understood he was precluded from “mention[ing] it’s a life case.”¹ Coker contends “the trial court’s directive . . . served to violate [Coker’s] rights to a fair trial, right to a jury trial, and right to due process of law”

Coker relies on the federal district court’s opinion in *United States v. Polouizzi* (E.D.N.Y. 2010) 687 F.Supp.2d 133, vacated by *United States v. Polouizzi* (2d Cir. Sept. 22, 2010, No. 09-4594-CR) 393 Fed.Appx. 784, 2010 WL 3667647, a nonpublished opinion. In *Polouizzi*, the defendant was charged with several counts of receipt of child pornography, and relied on an insanity defense. Questioned after rendering a guilty verdict, jurors stated that had they known the conviction carried a mandatory minimum five-year prison sentence, they might not have convicted him. The district court concluded the defendant had a Sixth Amendment right to be tried by a jury informed of the sentencing impact of its decisions. The court noted that when a jury refuses to convict on the basis of what it thinks is an unjust law as applied, a misconceived prosecution, or an excessive penalty, it is performing its historical role as imposed by the Sixth Amendment. (*Polouizzi*, at pp. 167-169.)

¹ Notwithstanding the pretrial ruling, defense counsel’s closing argument included the following: “It’s your job to decide the facts of the case and not to feel sorry either for Mr. Coker and say, you know, I don’t want this old man to die in prison away from his wife of 59 years, or feel sorry for these kids. That’s not your job.”

Coker’s reliance on *Polouizzi* is misplaced. It is firmly established law that the jury has a limited function — to determine guilt or the lack thereof — and that the jury has no role in sentencing with the exception of certain types of cases, such as capital cases, that are not relevant here. In *Shannon v. United States* (1994) 512 U.S. 573, the Supreme Court observed: “It is well established that when a jury has no sentencing function, it should be admonished to ‘reach its verdict without regard to what sentence might be imposed.’ [Citation.] [Fn. omitted.] The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. *Information regarding the consequences of a verdict is therefore irrelevant to the jury’s task.* Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.” (*Id.* at p. 579, italics added; cf. *id.* at p. 587 [although instruction on consequences of verdict not to be given as a matter of general practice, an instruction in some form may be necessary to remedy an improper statement concerning consequences].)

In *People v. Engelman* (2002) 28 Cal.4th 436, our Supreme Court recognized “[the] defendant hardly can dispute, the jury must follow the court’s instructions, ‘receiv[ing] as law what is laid down as such by the court.’ [Citation.] A juror who actually refuses to deliberate is subject to discharge by the court [citation], as is a juror who proposes to reach a verdict without respect to the law or the evidence.

[Citation.] *And in cases not involving the death penalty, it is settled that punishment should not enter into the jury’s deliberations.* [Citations.]” (*Id.* at p. 442, italics added.)

The trial court did not err by directing Coker’s lawyer to refrain from mentioning potential punishment, or refusing to instruct the jury Coker faced a life sentence if convicted.

B. The Trial Court Did Not Err in Determining Coker Was Ineligible for Probation

Coker also contends the trial court erred by finding him ineligible for probation under section 1203.066 because the court had previously granted the prosecution’s request to dismiss the section 1203.066 allegations before submission of the case to the jury. He argues “[s]ynthesizing [the former versions of sections 1203.066 and 667.61 in effect], it appears . . . that, in order for a defendant to be statutorily ineligible for probation and exposed to a potential 15 [years] to life sentence, the defendant must be charged with a violation of section 288, subdivision (a), . . . the defendant must also be alleged to have committed the offense against multiple victims ‘pursuant to’ section 667.61, and the defendant must also be alleged to have committed the offense against multiple victims ‘pursuant to’ section 1203.066.”

Section 667.61 provides that a person convicted of violating section 288, subdivision (a) (§ 667.61, subd. (c)(8)) who “has been convicted in the present case or cases of committing” a violation of section 288, subdivision (a), “against more than one victim” (§ 667.61, subd. (e)(4)) must “be punished by imprisonment in the state prison for 15 years to life” (§ 667.61, subd. (b)). Also, under section 667.61, subdivision (h): “Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to

punishment under this section.” Coker was subject to punishment under section 667.61.² He was thus statutorily ineligible for probation under section 667.61, subdivision (h).

C. *Abstract of Judgment Correctly Reflects Custody Credits*

Finally, Coker argues the abstract of judgment does not reflect presentence custody and conduct credits awarded by the court. At sentencing, the trial court awarded credits of 146 actual days and 21 days of conduct credits. While the credits are not listed in box 14 (“CREDIT FOR TIME SERVED”) of the abstract of judgment, that box contains a star, and a second star under item 11 (“Other orders”) specifies the credits ordered by the court. No correction is required.

² Section 667.61 was first enacted in 1994. (Stats. 1993-94, 1st Ex. Sess., ch. 14, § 1.) It originally mandated a one-strike sentence for multiple-victim violations of section 288, subdivision (a) “unless the defendant qualifies for probation under subdivision (c) of Section 1203.066.” (Former § 667.61, subd. (c)(7).) Former section 1203.066, subdivision (c), authorized probation in the trial court’s discretion where, among other things, the defendant was a relative, probation was in the best interest of the child, and rehabilitation of the defendant was feasible. Effective September 20, 2006, the Legislature amended section 667.61 to remove the reference to section 1203.066. (Stats. 2006, ch. 337, § 33.) There is no dispute counts 1 and 2 occurred after September 20, 2006. Accordingly, former section 1203.066, subdivision (c), did not authorize probation, and Coker was statutorily ineligible for probation under section 667.61, subdivision (h).

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.