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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.

ROGELIO VILLAREAL VILLANUEVA,

Defendant and Appellant.

G045585

(Super. Ct. No. 09HF0594)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Affirmed in part and reversed in part.

Melissa Hill, 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, Christine Levingston Bergman and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

Rogelio Villanueva appeals from a judgment sentencing him to life in prison for committing multiple sex crimes against multiple children. He contends: 1) his convictions on six of the counts must be reversed under the lesser included offense doctrine; 2) some of the charges were time-barred; and 3) his sentence is cruel and unusual. As the Attorney General concedes, the first contention has merit. We will therefore reverse appellant's convictions on six of the counts. In all other respects, we affirm.

FACTS¹

In December 2003, Vanessa A. was 13 years old. One day when she came home from school, appellant, her defacto stepfather, told her it was time she learned how to kiss for her future boyfriends. He then forced open her mouth by pressing her cheeks together and stuck his tongue inside her mouth. Frightened by appellant's actions, Vanessa pushed him away, ran to her room and locked the door. Although she was very troubled about what had happened, she did not tell anyone because she did not want to cause problems for her family.

That incident marked the beginning of appellant's sexual exploitation of Vanessa. Over the course of the next year, he routinely kissed her against her will and made lewd comments about her body. He also touched her breast and buttocks over and under her clothing. Then, in 2004-2005, when Vanessa was 14, he forcibly raped her on two occasions. He also raped her twice between December 2007 and April 2009. And, he put his mouth on her vagina on two separate occasions during that time period.

Vanessa was not appellant's only victim. During 1996-1997, he forcibly kissed Vanessa's 12-year-old aunts Lucia G. and Rosario P. on separate occasions when he had them alone in his car. Appellant used the same cheek-squeezing technique on

¹ Appellant complains in his reply brief that respondent's statement of facts is taken from the probation report and fails to include precise citations to the record. However, we decline to consider appellant's request to strike respondent's statement of facts because his request was not properly served and filed in a written motion as required by the Rules of Court. (Cal. Rules of Court, rule 8.54(a)(1).)

Rosario that he used on Vanessa. And in Lucia's case, he grabbed hold of her, forced his tongue inside her mouth, and did not relent until she bit his tongue.

Trial was by jury. Appellant was convicted of six counts of forcible lewd conduct on a child, based on his actions in kissing Vanessa, Lucia and Rosario and touching Vanessa's buttocks. (Pen. Code, § 288, subd. (b)(1).)² As to each of the particular acts alleged in those six counts, appellant was also convicted of the lesser included offense of lewd conduct on a child. (§ 288, subd. (a).) In addition, appellant was convicted of raping and orally copulating Vanessa and touching her lewdly when she was at least 10 years his junior. (§§ 261, subd. (a)(2); 288a, subd. (c)(2); 288, subd. (c)(1).)

The jury also found true the special allegation appellant committed a forcible lewd act against more than one child, in violation of the One Strike law. (§ 667.61, subd. (e).) Therefore, the court sentenced appellant to consecutive terms of 15 years to life on each of the six counts involving that conduct. (§ 667.61, subd. (b).) Appellant received the same sentence on the six counts involving the lesser included offense of lewd conduct on a child, but the court stayed his sentence on those counts. (§ 654.) As to the remaining counts, appellant received a determinate term of 30 years, bringing his aggregate sentence to 120 years in prison.

I

The parties agree appellant should not have been convicted of the six counts of lewd conduct on a child. Because those counts were based on the very same acts that formed the basis of his convictions for forcible lewd conduct on a child, and because lewd conduct on a child is a lesser included offense of forcible lewd conduct on a child (*People v. Ward* (1986) 188 Cal.App.3d 459), we reverse his convictions on those

² Although the evidence indicated appellant committed numerous acts of forcible lewd conduct on Vanessa, the prosecution only charged him with four of those acts, based on the first and last time he forcibly kissed her and first and last time he forcibly touched her buttocks.

All further statutory references are to the Penal Code.

six counts. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

II

Appellant also claims the charges regarding Lucia and Rosario were time-barred because they were not prosecuted within six years from the time they arose. He is wrong.

In counts 15 and 17, appellant was charged with committing a forcible lewd act on Lucia and Rosario, respectively. The crimes were alleged to have occurred between 1996 and 1997 and are punishable by a maximum sentence of eight years in prison. (§ 288, subd. (b)(1).) The statute of limitations for crimes punishable as such is generally six years. (§ 800.) Yet appellant’s prosecution did not commence until 2009, well beyond that time limit.

But that does not mean counts 15 and 17 were time-barred. As to those counts, the jury also found true the special allegation appellant committed the alleged crimes against more than one victim, in violation of the One Strike law. (§ 667.61, subd. (e).) That transformed the maximum punishment for those crimes from eight years, to fifteen years to life, in prison. (§ 667.61, subd. (b).) Since an offense punishable by life in prison “may be commenced at any time” (§ 799), appellant’s prosecution was timely.

In arguing otherwise, appellant relies on section 805. That section provides: “For the purpose of determining the applicable limitation of time pursuant to this chapter: [¶] (a) An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. *Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense.*” (§ 805, subd. (a), italics added.)

Appellant contends the One Strike law should be treated as an “enhancement” for purposes of this provision. However, “the One Strike law does not

establish an enhancement, but ‘sets forth an alternative and harsher sentencing scheme for certain enumerated sex crimes’ when a defendant commits one of those crimes under specified circumstances. [Citations.]” (*People v. Acosta* (2002) 29 Cal.4th 105, 118-119.) As an alternative sentencing scheme, the law operates to increase the base term, unlike an enhancement which is imposed as an additional term of imprisonment over and above the base. (*People v. Jones* (1997) 58 Cal.App.4th 693, 709.)

Although the legal distinction between an alternative sentencing scheme and an enhancement is one that has developed over time (see generally *People v. Brookfield* (2009) 47 Cal.4th 583 [discussing gang and firearm provisions]), “the narrow, technical definition of ‘enhancement’ [was well known] back in 1984, when the current statute of limitations scheme was enacted. [Citations.]” (*Anthony v. Superior Court* (2011) 188 Cal.App.4th 700, 719.) Therefore, it is reasonable for us to apply that distinction in this case. Because the One Strike law does not fit the long-standing definition of an enhancement, it does not constitute an enhancement for purposes of section 805.

Appellant nevertheless claims we should disregard the One Strike law in determining the statute of limitations for his crimes under *People v. Turner* (2005) 134 Cal.App.4th 1591. However, *Turner* was a Three Strikes case, not a One Strike case. The reason the *Turner* court disregarded the Three Strikes law in determining the applicable statute of limitations for the defendant’s crimes in that case is because the punishment prescribed under that law applies to a particular offender *based on his past criminal conduct*, not on the particular circumstances attendant to his present offenses. (*Id.* at p. 1597.)

Unlike the life sentence at issue in *Turner*, appellant’s life sentence was not predicated on past criminal behavior. Rather, it was based on the fact he victimized multiple children in carrying out the charged offenses. We agree with the Sixth Appellate District that, under these circumstances, *Turner* is inapt; indeed, *Turner*

“should be narrowly construed to apply only to the antirecidivist Three Strikes law, and not the One Strike Law, which punishes, as relevant here, not recidivism but the commission of sexual offenses against more than one victim.” (*People v. Perez* (2010) 182 Cal.App.4th 231, 241; accord, *Anthony v. Superior Court, supra*, 188 Cal.App.4th at p. 717 [*Turner* must be limited to its particular facts because it “was entirely focused on the nexus between the statute of limitations scheme and the Three Strikes law”].)

Because the circumstances of the crimes alleged in counts 15 and 17 “were serious enough to earn [appellant] a life sentence [under the One Strike law] they were serious enough to warrant prosecution at any time during his natural life.” (*People v. Perez, supra*, 182 Cal.App.4th at pp. 241-242.) Therefore, the crimes were timely prosecuted.

III

Appellant also raises a narrow sentencing issue. Although he received 30 years to life for forcibly touching Vanessa’s buttock on two occasions, and another 30 years for raping and orally copulating Vanessa and victimizing her when she was 10 years his junior, he does not contest those terms. Rather, his claim is limited to the 15 year to life sentences he received on each of the four remaining counts, which alleged forcible lewd conduct on child. Because those counts involved forcible kissing, as opposed to more serious sexual conduct, appellant claims the aggregate term of 60 years to life he received on those counts is cruel and unusual. We cannot agree.³

Prescribing the punishment for a crime is a uniquely legislative function which the courts may not second-guess unless the penalty is cruel or unusual. (*People v. Dillon* (1983) 34 Cal.3d 441, 477-478.) This occurs when the punishment is “grossly out of proportion to the severity of the crime” (*Gregg v. Georgia* (1976) 428 U.S. 153, 173) or is “so disproportionate to the crime for which it is inflicted that it shocks the

³ Although appellant did not challenge his sentence as being cruel or unusual in the trial court, we will consider his argument on the merits to forestall his claim his attorney was ineffective for failing to do so.

conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424; fn. omitted.) The burden of demonstrating such disproportionality, which occurs “with exquisite rarity in the case law,” rests with the defendant. (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

“In determining whether a particular punishment is cruel and/or unusual, courts examine the nature of the particular offense and offender, the penalty imposed in the same jurisdiction for other offenses, and the punishment imposed in other jurisdictions for the same offense. [Citations.]” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 199.)

Appellant concedes that, like California, other states have laws that authorize lengthy prison sentences for sex offenders who commit lewd acts against children. And while California law ordinarily reserves a sentence of 15 years to life for crimes that are more serious than forcibly kissing a child, such as second degree murder and attempted premeditated murder, appellant’s sentence was not due to the commission of single criminal offense involving a single victim. Rather, he received 15 years to life on the subject counts because he victimized multiple children on multiple occasions. As our Supreme Court has recognized, “persons convicted of sex crimes against multiple victims within the meaning of [the One Strike law] ‘are among the most dangerous’ from a legislative standpoint” and that is why the law “contemplates a separate life term for each victim attacked on each separate occasion.” (*People v. Wutzke* (2002) 28 Cal.4th 923, 930-931.)

Still, considering he had no criminal record before this case arose, and given the subject counts involved forcible *kissing*, as opposed to more serious forms of sexual misconduct, appellant contends his sentence is unconstitutional. The lack of a prior record is a factor in appellant’s favor, but the kissing wasn’t just an isolated incident; it occurred repeatedly and was accompanied by force and intimidation. And with Vanessa, it allowed appellant to gain a foothold of psychological control that paved

the way for more egregious forms of abuse. Therefore, we cannot lightly dismiss appellant's behavior. As to each of his victims, he engaged in highly exploitive and intrusive conduct that is likely to have long-lasting effects. Although he received a severe sentence, we do not believe it is cruel or unusual in any respect. (*People v. Alvarado, supra*, 87 Cal.App.4th at pp. 199-201 [rejecting constitutional challenge to indeterminate sentence imposed pursuant to the One Strike law]; *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1277-1282 [same]; *People v. Crooks* (1997) 55 Cal.App.4th 797, 803-809 [same].)

DISPOSITION

Appellant's convictions for the lesser included offense of lewd conduct on a child in counts 2, 4, 6, 8, 16 and 18 are reversed. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.