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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.

BRYAN CARLETON MICEK,

Defendant and Appellant.

G045870

(Super. Ct. No. 10NF0246)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed and remanded with directions.

Randi Covin, 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, Melissa Mandel, Meredith S. White, Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged Bryan Carleton Micek with nine counts of committing a lewd act with a child under the age of 14. (Pen. Code, § 288, subd. (a).)¹ Count 1 alleged he committed a lewd act with Jennifer C. between June 2, 2002 and June 1, 2004. Counts 2 through 9 alleged lewd acts committed with Jennifer's younger sister, Stephanie C. Counts 2 and 3 specified the act was committed between March 19, 2006 and March 18, 2007, counts 4 and 5 alleged the act was committed between March 19, 2007 and March 18, 2008, counts 6 and 7 alleged the act was committed between March 19, 2008 and March 18, 2009, and counts 8 and 9 alleged the act was committed between March 19, 2009 and August 31, 2009. The information also alleged Micek committed lewd acts with multiple children within the meaning of section 1203.066, subdivision (a)(7), had substantial sexual conduct with them as defined in section 1203.066, subdivision (a)(8), and that he committed an offense specified in section 667.61, subdivision (c) with more than one child (§ 667.61, subd. (b), (e)(5)). The latter provision, section 667.61, is sometimes referred to as the "One Strike" law.

After a jury found Micek guilty of all counts and found true all three enhancement allegations, the trial court sentenced him to a total indeterminate term of 75 years to life. The court arrived at this sentence by imposing five consecutive terms of 15 years to life (counts 1, 2, 4, 6, & 9) and concurrent terms of 15 years to life on the remaining four counts (counts 3, 5, 7, & 8).

Micek argues the imposition of more than one life term is not authorized by section 667.61, subdivision (e) and constitutes an abuse of the trial court's sentencing discretion. In the alternative, he claims the proscription against double punishment contained in section 654 requires a stay on eight of the nine life terms. He also contends a sentence of 75 years to life, which a 53-year-old man cannot reasonably expect to serve within his normal lifespan, amounts to cruel and unusual punishment in violation of state

¹ All further statutory references are to the Penal Code.

and federal Constitutions. Finally, he argues the trial court erred by failing to “correct” a statement contained in the probation report. We find no merit in these assertions and affirm the judgment, except as to the probation report.

FACTS

Because Micek does not challenge the sufficiency of the evidence to support the jury’s verdict, we present an abbreviated version of the record.

Shortly after her husband died in 2002, T. C. met Micek and allowed him to move into her home. Her two daughters, Jennifer and Stephanie, were nine and five years old, respectively. Micek moved out of their home in 2009 after his relationship with T. soured. A short time after he moved out of her home, T. was arrested following a domestic dispute with Micek. A few days after this incident, a social worker came to the girls’ school to interview them.

In the course of the interview, Jennifer told the social worker Micek had touched her breasts and vagina when she was nine or ten years old. She told him it made her feel uncomfortable and she asked him to stop. Micek complied, and Jennifer said he did not repeat this conduct with her. Stephanie was not as fortunate.

According to Stephanie, Micek started to molest her when she was nine or ten years old. The first incidents Stephanie recalled involved Micek rubbing her breasts and vagina. On one of these occasions, he also inserted his fingers into her vagina. After a second similar incident, Micek told Stephanie that he loved her, and he admonished her to not tell her mother what had occurred. Stephanie kept the secret because she feared Micek would go to jail if she said anything. Stephanie explained that Micek picked her up from school every day except Fridays because her mother worked and was not at home. She often asked him for help with her homework. On one such occasion, he had her sit on his lap while he rubbed her back and touched her breasts.

Micek engaged in the same type of conduct, including digital penetration, repeatedly over the next four years. At trial, Stephanie testified Micek touched her

private parts, i.e., breasts and vagina, at least once a month for four years. She never disclosed his actions because she loved him and feared losing him.

After Micek moved from the home he shared with Jennifer, Stephanie and T., he met Rebecca Mayeaux. Micek told Mayeaux about his previous relationship, but claimed the relationship failed because T. and her children did not keep a clean house.

At first, Mayeaux thought Micek to be a “doting father,” and he seemed depressed about the family breakup. However, on December 23, 2009, Micek failed to show up for a scheduled date with Mayeaux. The next day, he called her and explained he had been arrested and questioned about sexual contact with Jennifer and Stephanie. Initially, Mayeaux sympathized with Micek and believed he was the victim of a vindictive woman, but she changed her mind after Micek admitted the allegations were true. He said he was in love with Stephanie, and that “he didn’t know how a 52-year-old man and an 11 year old could fall in love, but they had.” He also claimed Jennifer had misinterpreted innocent physical contact, and that Stephanie started to pursue him after she entered puberty.

Micek testified on his own behalf. In essence, he denied engaging in sexual conduct with either Jennifer or Stephanie, and emphasized the dysfunction in his relationship with T. and within her family. After he moved out of T.’s home, he met Mayeaux through an online dating service. He admitted talking to Mayeaux about his failed relationship and former family life, but denied the allegations were true and intimated Mayeaux was merely angry with him because he was seeing other women at the time he dated her.

Sentencing Hearing

Prior to the sentencing hearing, the prosecution filed a sentencing brief seeking imposition of a term of 135 years to life, the maximum term allowable under section 667.61. The probation report also recommended a prison sentence, noting Micek’s ineligibility for a grant of probation due to the jury’s findings he committed the

offenses with more than one victim and had substantial sexual conduct with them. A psychological test used as an actuarial risk assessment for sexual offender recidivism predicted he was a low risk to reoffend if released from custody.

The probation report listed three circumstances in aggravation – the planning involved in arranging times to be alone with the girls indicated criminal sophistication (Cal. Rules of Court, rule 4.421(a)(8)),² the fact Micek took advantage of a position of trust (rule 4.421(a)(11)), and the fact he “engaged in violent conduct” (rule 4.421(b)(1)).³ The lone mitigating factor listed was Micek’s lack of a prior criminal record (rule 4.423(b)(1)).⁴

Prior to the imposition of sentence, the trial court stated it had read and considered the probation report, noted Micek’s statutory ineligibility for probation, and found counts 2 through 9 occurred on separate occasions with “no close temporal or spacial proximity between the offenses.” The court then imposed sentence as follows: “As to count 1, it’s 15 years to life pursuant to section 288(a) and section 667.61(b), (e)(5), the multiple victim. That’s with Jane Doe number 1. [¶] Count 2 is 15 years to life consecutive to count 1. And that’s pursuant to Penal Code section 288 and also Penal Code section 667[.61](b), (e)(5), the multiple victim, and that’s to run consecutive. [¶] Count 3 is a 288, as well as the enhancement, pursuant – not the enhancement. But it’s a 15 year to life pursuant to 288 and 667.61(b), (e)(5), multiple victim. The court’s going

² All further rules citations are to the California Rules of Court.

³ Micek correctly notes there was no evidence of violent conduct adduced at trial. Consequently, we do not rely upon this factor in rendering our decision, even though Micek’s trial counsel did not object on this ground at the sentencing hearing.

⁴ At oral argument, Micek’s attorney argued Stephanie’s “willingness” to cooperate with Micek and the dynamics of her family should be considered mitigating factors. However, neither of these situations is a mitigating factor under rule 4.423. Furthermore, as a matter of law, Stephanie cannot be a “willing” participant.

to run that concurrent to the remaining counts, to all the counts. ¶ As to count 4, it's a 15 to life pursuant to 288 and 667[.61](b), (e)(5). The court will run that consecutive. ¶ Count 5, 15 years to life pursuant to 288 and 667[.61](b), (e)(5). The court will run that concurrent. ¶ Count 6, 15 years to life pursuant to 288 and 667[.61](b), (e)(5). That's 15 to life consecutive on count 6. ¶ Count 7, it's 15 years to life. The court's going to run it concurrent. And that's pursuant to 288 and 667[.61](b), (e)(5) of the Penal Code. ¶ Count 8, 15 years to life concurrent pursuant to 288 and 667.61(b), (e)(5). ¶ Count 9, 15 years to life consecutive pursuant to 288 and 667.61(d), (e)[(5)], the multiple victims. So it's a total of 75 years to life."

DISCUSSION

Section 667.61

The Legislature enacted section 667.61 to ensure serious sexual offenders receive long prison sentences regardless of their prior criminal records. (*People v. Wutzke* (2002) 28 Cal.4th 923, 926, 929; see also *People v. Luna* (2012) 209 Cal.App.4th 460, 465.) To this end, section 667.61,⁵ subdivision (b) provides, in relevant part, "a person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life."⁶ Subdivision (e)(5) of section 667.61 lists the following circumstance: "The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) *against more than one victim.*"

⁵ The One Strike law has undergone several revisions since its enactment in 1994. (Stats. 1993-1994, ch. 14, §§ 1-4; Stats. 1994, ch. 447, §§ 1-4.) The trial court applied the pre-2006 version of section 667.61 because the count involving Jennifer occurred prior to the effective date of the 2006 amendment, and two of the counts involving Stephanie may have occurred prior to the 2006 amendment. Neither party objected to the trial court's decision. Thus, we utilize this version of the statute on appeal. Differences between this version and its current incarnation are not material to the appeal.

⁶ Section 288, subdivision (a) is one of the enumerated crimes. (Section 667.61, subdivision (c)(7).)

(Italics added.) Former section 667.61, subdivision (f), provided, “If only the minimum of circumstances specified in subdivision (d) or (e) which are required for the punishment provided in subdivision (a) or (b) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a) or (b) rather than being used to impose the punishment authorized under any other law, unless another law provides for a greater penalty.”

Micek relies on the above-quoted subdivisions of section 667.61 to argue, “[t]aken together, these subdivisions indicate that section 667.61, subdivision (e)(5), authorizes only one life term for qualifying offenses against two victims on multiple separate occasions.” He equates section 667.61, subdivision (f) with section 654’s prohibition against multiple punishment, and attempts to rely on the prohibition against the dual use of facts contained in section 1170, subdivision (b) and rule 4.425.

He also discusses section 667.61, subdivision (g), which states, “The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision (a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.” Micek reasons that former subdivision (g) of section 667.61 “states generally that multiple terms must be imposed for offenses against the same victim on separate occasions but does not make clear what triggering circumstances are required,” and he asserts this language renders the statute ambiguous and gives rise to application of the rule of lenity in his case. He also argues the various subdivisions of section 667.61 read together mean, “The multiple victim circumstance was used up the first time the single count involving Jennifer was used to support a One [] Strike life term in a count involving Stephanie.”

Micek acknowledges that other appellate courts have rejected his arguments. (*People v. Valdez* (2011) 193 Cal.App.4th 1515, 1523 (*Valdez*); *People v. Stewart* (2004) 119 Cal.App.4th 163, 171; *People v. Murphy* (1998) 65 Cal.App.4th 35, 40-41 (*Murphy*); *People v. DeSimone* (1998) 62 Cal.App.4th 693, 697-698 (*DeSimone*)), and he concedes the California Supreme Court has relied on *DeSimone* and *Murphy* in deciding other related cases (*People v. Wutzke* (2002) 28 Cal.4th 923, 931-944 and *People v. Jones* (2001) 25 Cal.4th 98, 107). However, he contends the high court merely mentioned these adverse cases in dicta, and he claims the non-forcible nature of section 288, subdivision (a) warrants different treatment for offenders convicted of this crime. We are not convinced by any of his claims.

As the *Valdez* court found, “The statutory intent and scheme of . . . section 667.61, subdivision (e) is not difficult to discern. Where the “present offense” against a victim is a qualifying offense and the gravity of that offense is enhanced by one of the circumstances enumerated in subdivisions (e)(1), (2), (3), (4), (5), (6), or (7), the life sentence mandated by the statute shall apply. But even in circumstances where the subdivisions enumerated above do not apply, if a qualifying offense has been committed against more than one victim, the criminal conduct is considered equally severe and that conduct merits application of the statute so long as those offenses are prosecuted “in the present case or cases.” [Citation.]’ [Citations.]” (*Valdez, supra*, 193 Cal.App.4th at p. 1522.) In other words, the point of the One Strike law is the imposition of lengthy prison terms for certain specified sex offenses committed under listed aggravating circumstances.

Micek’s reliance on former subdivision (g) of section 667.61 is no more availing. Subdivision (g) of section 667.61 merely limited the imposition of multiple life terms if the defendant committed a specified offense during a single occasion. Here, Micek committed a lewd act with Jennifer and multiple lewd acts against Stephanie, all committed on separate, unrelated occasions.

Nor are we persuaded Micek's clean criminal record precludes the imposition of multiple life terms. As Micek asserts, the court has discretion to impose concurrent life terms in such circumstances, but nothing in the statute permits the court to entirely forgo the imposition of a life term for any single count. Nor are we convinced the statute prohibits the court's exercise of discretion to impose more than one consecutive life term using the multiple victim circumstance. As the *Valdez* court noted, the plain language of the statute simply does not support a limitation of a single life term per case based on a finding of multiple victims. (*Valdez, supra*, 193 Cal.App.4th at p. 1523; see also *DeSimone, supra*, 62 Cal.App.4th at p. 699; *People v. Jones*, (1997) 58 Cal.App.4th 693, 719.)

Moreover, we are not convinced the trial court abused its discretion by imposing consecutive life terms for counts 1, 2, 4, 6, and 9. The court properly relied on the fact Micek took advantage of the position of trust presented him and exhibited sophistication and planning in arranging to be alone with the girls. Although we agree there was no violent conduct, a single aggravating factor is sufficient to justify the imposition of an aggravated sentence. (*People v. Forster* (1994) 29 Cal.App.4th 1746, 1758.) Here, the trial court concluded the aggravating factors cited in the probation report outweighed the sole mitigating factor, i.e., Micek's lack of a prior criminal record.⁷ In short, Micek fails to establish the trial court's determination in this regard resulted in an arbitrary or capricious sentence. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 615.)

⁷ In the appellant's opening brief and at oral argument Micek's attorney noted the trial court did not expressly state its reasons for imposing consecutive sentences. However, Micek's trial counsel had a meaningful opportunity to object to these sentencing choices and failed to do so. Therefore, the issue has been waived. (*People v. Scott* (1994) 9 Cal.4th 331, 348-353.)

Section 654

In the alternative, Micek argues the imposition of multiple life terms violates the proscription against multiple punishment contained in section 654.⁸ Again, we disagree.

Section 654 states an act or omission made punishable in different ways by different provisions may be punished under either of such provisions, “but in no case shall [it] be punished under more than one” Section 654 bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, disapproved on another point in *People v. Correa* (2012) 54 Cal.4th 331, 341; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Neal v. State of California, supra*, 55 Cal.2d at p. 19, italics added.)

The trial court found Micek committed multiple criminal acts on separate occasions. He is not being subjected to multiple punishments for the same act, nor is he being punished for the same act under different sections of the Penal Code. (See *People v. Massie* (1967) 66 Cal.2d 899, 908 [“A defendant may not bootstrap himself into

⁸ The Attorney General argues Micek forfeited this claim by failing to object on section 654 grounds in the trial court. The California Supreme Court disagrees: “Ordinarily, a section 654 claim is not waived by failing to object below. ‘[T]he waiver doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.’ [Citation.] This is an exception to the general rule that only those claims properly raised and preserved by the parties are reviewable on appeal. This exception is not required by the language of section 654, but rather by case law holding that a court acts in excess of its jurisdiction and imposes an unauthorized sentence when it fails to stay execution of a sentence under section 654. [Citation.]” (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

section 654 by claiming that a series of divisible acts, each of which had been committed with a separate identifiable intent and objective, composes an ‘indivisible transaction’]; see also *People v. Britt* (2004) 32 Cal.4th 944, 952, [“[C]ases have sometimes found separate objectives when the objectives were . . . consecutive even if similar”]; *People v. Surdi* (1995) 35 Cal.App.4th 685, 689 [Multiple offenses were not subject to section 654 where “they were separated by considerable periods of time during which reflection was possible”]; *People v. Andra* (2007) 156 Cal.App.4th 638, 640 [In reviewing a defendant’s claim that the court erred in failing to stay a sentence pursuant to section 654, the “defendant’s intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence”].) Consequently, section 654 does not apply here.

The Attorney General asserts section 654 does not apply because the One Strike law is an alternative sentencing scheme, citing *DeSimone, supra*, 62 Cal.App.4th at page 700. Micek concedes the issue, citing *People v. Perez* (2010) 182 Cal.App.4th 231, 238 and *People v. McQueen* (2008) 160 Cal.App.4th 27, 37-38, but argues section 667.61 is “analogous to an enhancement for purposes of section 654[,]” and notes that section 654 applies to sentence enhancements. (*People v. Ahmed* (2011) 53 Cal.4th 156, 162-164.) We need not decide whether section 667.61 is an alternative sentencing scheme, a sentence enhancement, or some hybrid of the two. Even assuming section 654 applies, it would not bar imposition of sentence on the counts involving Stephanie because Micek committed these offenses on separate occasions, and he is not being punished for a course of conduct with but one intent and objective.

Cruel and Unusual Punishment

Micek next contends a sentence of 75 years to life in his case, something he describes as a de facto sentence of life without possibility of parole, constitutes cruel and unusual punishment. We disagree.

Under Article I, section 17 of the California Constitution courts have typically looked to the following factors: (1) the degree of danger the offender and the offense pose to society; (2) how the punishment compares with punishments for more serious crimes in the same jurisdiction; and (3) how the punishment compares with punishments for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427; *People v. Dillon* (1983) 34 Cal.3d 441, 479-482.) The Eighth Amendment to the United States Constitution also contains a “narrow proportionality principle,” but application of that principle is reserved for “extreme sentences that are ‘grossly disproportionate’ to the crime.” [Citations.]” (*Ewing v. California* (2003) 538 U.S. 11, 20, 23.)

Micek’s argument focuses on the first prong of the *Lynch* analysis, i.e., the nature of the offense and the danger he poses to society. He asserts “this was a very mild One-Strike case. There was no force, violence, or threats[,]” and he “had no prior criminal record of any kind.” Micek’s lack of criminal history aside, his convictions involved gaining the trust of two young children and their mother, and then abusing that trust by sexually violating the girls. True, the probation department report assessed him as a low risk for recidivism, but his opportunistic breach of trust has caused life-long ramifications for Stephanie and Jennifer. Under the circumstances, his sentence is neither shocking nor inhumane when the nature of the offense and offender is considered. (See, e.g., *People v. Dillon, supra*, 34 Cal.3d 441, 479, 482-488 [determinations whether a punishment is cruel or unusual may be based solely on the nature of the offense and offender]; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Correction of the Probation Report

Finally, Micek contends the probation report is inaccurate because it states Stephanie told the social worker Micek “would make her touch his erect penis,” but at trial she testified she touched his penis of her own volition. He argues the Department of Corrections and Rehabilitation and the parole board rely on the probation department

report when making their respective discretionary decisions and the error could affect his housing, work, and prison privileges and affect his parole suitability. He is correct.

Both agencies utilize the probation report in making various decisions. The probation officer prepared the report by reviewing the records of the arresting agency, not the trial transcript. With an assertion of this inflammatory nature, the probation report should mirror the evidence adduced at trial. Consequently, we remand the matter to the trial court to correct the probation report to reflect Stephanie's trial testimony.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to (1) correct the probation report as described in this opinion; (2) forward a copy of the corrected probation report to the Department of Corrections and Rehabilitation; and (3) instruct the Department of Corrections and Rehabilitation to use the corrected probation report for all purposes.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.