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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO JAVIER RIVAS,

Defendant and Appellant.

H036657

(Santa Clara County

Super. Ct. No. CC588251)

Defendant Franciso Javier Rivas was charged with seven counts of aggravated sexual assault of a child under 14 years of age and more than 10 years younger than defendant. The sex crimes involved defendant's preteen niece. Defendant was convicted after a bench trial of six of the charges. He was sentenced to a total prison term of 90 years to life, based upon six consecutive terms of 15 years-to-life.

Defendant claims that the court erred by imposing consecutive sentences on the six convictions. That sentencing (defendant argues) was based upon the erroneous view that the court was required under Penal Code section 667.6¹ to

¹ All further statutory references are to the Penal Code unless otherwise stated.

impose consecutive sentences. We conclude that there was no error. We will therefore affirm the judgment.

FACTS²

Defendant was born in 1971 and was 39 years old at the time of trial. A., defendant's niece, was born in 1993 and was 17 at the time of trial. In her preteen years, A. lived in the same San Jose household as defendant on two separate occasions. She lived in one apartment with her mother, defendant, his wife, and their two children when A. was between the approximate ages of five and seven. Later, when A. was in the fifth grade and was nine or 10, she lived for approximately one year in a duplex with her mother, defendant, and his family.

During the first time period in which A. lived in the same apartment as defendant and his family, A. testified that there were more than six occasions in which defendant raped her. During the first time, defendant took her from the room in which she was sleeping into his bedroom, pulled down her pants, and put his penis into her vagina. She cried the whole time. After about five minutes, defendant cleaned A., pulled her pants back up, and took her back to her room. Defendant instructed A. later that same morning not to tell her mother about what had happened. A. recounted in her testimony five similar incidents in which defendant raped her while they lived in the apartment.

During the second period in which A and her mother lived in a duplex with defendant and his family, A. testified that there were at least four instances in which defendant raped her. She provided specifics about two of those occasions.³

² We present a summary of the evidence from the trial utilizing the applicable standard. We resolve factual conflicts in support of the verdict. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)

³ Defendant testified that he never had sex with A.

PROCEDURAL BACKGROUND

Defendant was charged by information with seven felony counts of aggravated sexual assault of a child under 14 years old and more than 10 years younger than defendant in violation of former section 269.⁴ Each of the counts was based upon the allegation that the sexual assaults involved the commission of rape (§ 261, subd. (a)(2)). It was alleged that the offenses charged in counts 1 through 4 each occurred within the five-year period of February 1997 and February 2002. It was further alleged in the information that the offenses charged in counts 5 through 7 each occurred within the 19-month period of February 12, 2002 and September 13, 2004. (§ 269)

After the parties waived a trial by jury, defendant was convicted in a court trial of six counts charged in the information (counts 1 through 6), and was acquitted on count 7. On January 10, 2011, the court sentenced defendant to a total aggregate term of 90 years to life. It imposed six separate, consecutive 15-years-to-life terms for the convictions in counts 1 through 6, inclusive. Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

I. *The Imposition Of Consecutive Sentences For The Section 269 Convictions*

A. *Background and Contentions*

⁴ Former section 269 provided in relevant part: “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. . . .” (Former § 269, subd. (a)(1), Stats. 1993-1994, 1st Ex. Sess., ch. 48 (S.B.30), § 1, p. 8761, eff. Nov. 30, 1994.) The statute was amended in 2006 to decrease the age difference between the defendant and the child to seven or more years. (Stats. 2006, ch. 337 (S.B.1128), § 6, p. 2589, eff. Sept. 20, 2006.)

The trial court imposed six consecutive terms of 15 years to life for the aggravated sexual assault of a child convictions. It did so based upon the view that consecutive sentencing was mandatory pursuant to section 667.6(d).

Defendant contends that the court erred by imposing six consecutive terms for the section 269 convictions. He asserts that under the plain language of former section 667.6, subdivision (d) (former section 667.6(d)), mandatory consecutive sentences must be imposed “when a defendant ‘violates’ a sex crime specified in subdivision (e) of the section and the ^{l,1}involve the same victim on separate occasions^{l,1}” (Quoting former section 667.6(d).) Although defendant concedes that rape is one of the sex crimes specified in section 667.6, because defendant was not charged with that offense but instead was charged and convicted of aggravated sexual assault of a child under section 269, a crime which was *not* specified in former section 667.6, mandatory consecutive sentencing under former section 667.6 did not apply here. Defendant urges that “[i]f the Legislature had intended the section 667.6, subdivision (d), mandatory sentencing provision to apply to aggravated sexual assault, it would have explicitly included in subdivision (e) the crime of aggravated sexual assault. It did not, and an appellate court has no authority to write into the statute something left out by the Legislature.”⁵

⁵ We observe that defendant’s argument concerning former section 667.6 is somewhat imprecise in that it refers to offenses listed in subdivision (e) as being those for which mandatory consecutive sentencing applies under subdivision (d). At the time the offenses were committed by defendant, subdivision (e) of the statute did not exist. (See Initiative Measure (Prop. 83, § 11, approved Nov. 7, 2006, eff. Nov. 8, 2006.) But under the version of section 667.6 applicable at the time defendant committed the crimes, former section 667.6(d) did not include aggravated sexual assault of a child as one of the crimes for which consecutive sentencing was mandatory. Accordingly, whether one refers to subdivision (e) of current section 667.6 or former section 667.6(d), neither statute specifically identified aggravated sexual assault of a child in violation of section 269 as one of the crimes for which consecutive sentencing was required.

The Attorney General disagrees. She urges this court to follow appellate precedent in which arguments similar to those urged here were rejected, namely, the Fifth District Court of Appeal's decision in *People v. Jimenez* (2000) 80 Cal.App.4th 286 (*Jimenez*), and the decision of the Fourth District Court of Appeal (Division Two), *People v. Figueroa* (2008) 162 Cal.App.4th 95 (*Figueroa*).

B. *There Was No Sentencing Error*

Former section 667.6(d) provided in relevant part: "A full, separate, and consecutive term shall be served for each violation of . . . paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261 . . . if the crimes involve separate victims or involve the same victim on separate occasions." (See Stats. 2002, ch. 787, § 16, amended by Initiative Measure (Prop. 83, § 11) Nov. 7, 2006.) Admittedly, while the statute enumerated a variety of specific sex crime statutes for which mandatory consecutive sentencing applied, it did not include section 269. But section 667.6 was enacted in 1979, some 14 years prior to the enactment of section 269. Defendant argues that because the Legislature did not amend section 667.6(d) to expressly include section 269, the trial court is not required to impose consecutive terms where there are multiple convictions under section 269.

In *Jimenez, supra*, 80 Cal.App.4th 286, the Fifth District Court of Appeal rejected nearly the precise argument raised here by defendant.⁶ The court there

⁶ Although the defendant's conviction under section 269 in *Jimenez* was based upon his committing sodomy (§ 286) on a minor (not, as here, forcible rape under section 261, subdivision (a)(2)), he argued similarly that the omission of section 269 from former section 667.6(d) meant that multiple violations of section 269 were not subject to mandatory consecutive-term sentencing. (*Jimenez, supra*, 80 Cal.App.4th at p. 290.)

reasoned: “Section 667.6 and section 269 serve two different objectives. Subdivision (d) of section 667.6 aggravates sex offenses involving multiple victims or multiple offenses. It . . . provide[s] increased punishment for cases where defendant’s culpability is increased by the ‘number and violence of his crimes.’ [Citation.] Section 269 . . . increases the penalties for enumerated sexual offenses where the victim is under 14 years of age and the perpetrator is more than 10 years older than the victim. Thus, the Legislature intended to aggravate punishment for forcible sexual offenses where the defendant’s culpability is increased by a substantial age disparity. [¶] . . . [The defendant] makes too much of this omission [of any reference to section 269 in section 667.6(d)], ignoring the fact that violation of section 286 is one of the predicate offenses of section 269. . . . When the jury found [the] defendant had violated section 269 under the circumstances presented here, it necessarily found he had violated section 286 and he had done so by force or fear. Thus, the factual predicate necessary to apply section 667.6, subdivision (d)[,] was proved beyond a reasonable doubt.” (*Id.* at p. 291.)

The *Jimenez* court reasoned further: “It would be irrational to suppose the Legislature intended that criminals who commit multiple violent sexual offenses would be exempt from the aggravated punishment prescribed by section 667.6 merely because their victims happened to be children under age 14 who were 10 or more years younger than they. [The d]efendant does not proffer any decisional or historical support for his assertion that by enacting section 269 the Legislature created a separate sentencing scheme for violent sexual offenders who prey on a particular class of victims. . . . [¶] In sum, we agree with respondent that section 667.6, subdivision (d)[,] and section 269 are cumulative, not alternative, to each other. [The d]efendant here was rightfully subject to enhanced penalties for two different reasons, the first being the disparity in age and the second being the

multiplicity of offenses. . . .” (*Jimenez, supra*, 80 Cal.App.4th at pp. 291-292; see also *People v. Glass* (2004) 114 Cal.App.4th 1032, 1037 [legislative history of section 269 suggests “the Legislature anticipated that a defendant convicted of violating section 269 would be subject to the sentencing requirements of section 667.6, even though section 269 was not listed in section 667.6.”].)

Here, like in *Jimenez*, the predicate offense on which each of defendant’s section 269 convictions was based was a crime expressly mentioned in former section 667.6(d), namely, rape. Moreover, former section 667.6(d) required separate term sentencing for multiple *violations* of section 261, subdivision (a)(2); it did not base this requirement upon separate *convictions* under section 261, subdivision (a)(2). By its terms, former section 269, subdivision (a)(1), required the commission of a predicate offense, in this instance, “[a] violation of paragraph (2) of subdivision (a) of Section 261.” (Former § 269, subd. (a)(1), Stats. 1993-1994, 1st Ex. Sess., ch. 48 (S.B.30), § 1, p. 8761, eff. Nov. 30, 1994.) The court below found beyond a reasonable doubt that defendant had committed each of the predicate offenses of rape supporting the six convictions under section 269.

In *Figueroa*, the defendant was convicted of a number of sex crimes involving a minor, including two counts of aggravated sexual assault of a minor where the predicate offense in both instances, as is the case here, was forcible rape in violation of section 261, subdivision (a)(2). (*Figueroa, supra*, 162 Cal.App.4th at pp. 97-98.) The defendant in *Figueroa*—making the same argument raised by defendant here—argued that the trial court had erred in imposing consecutive sentences of 15 years to life on the two aggravated sexual assault of a minor convictions, asserting that section 667.6(d) did not specify section 269 as a crime for which consecutive sentencing was mandatory. (*Figueroa*, at p. 98.) The court rejected this argument. The court determined that because the defendant had been convicted of violating former section 269, subdivision (a)(1), by raping the victim

in violation of section 261, subdivision (a)(2), “the jury necessarily found that he committed violations of section 261, subdivision (a)(2), for which section 667.6, subdivision (d) imposes mandatory consecutive sentences.” (*Figueroa*, at p. 98.) The *Figueroa* court also followed the analysis of the court in *Jimenez, supra*, 80 Cal.App.4th 286, concluding that section 667.6(d) plainly applied to the rapes the jury concluded that the defendant had committed. (*Figueroa*, at p. 100.)

The defendant in *Figueroa* made an additional argument—one also made by defendant here—concerning the September 2006 amendment to section 269 that included a requirement of consecutive sentences for each offense where they involved different victims or the same victim on different occasions.⁷ The defendant argued that “the amendment of section 269 in September 2006, to expressly apply the mandatory consecutive provision of section 667.6, subdivision (d) signal[ed] that the applicability of section 667.6, subdivision (d) to section 269 was ambiguous before that date. [The defendant also cite[d] the Legislative Counsel’s Digest for the 2006 amendment to section 269 which state[d], ‘The [amendment] would require the court to impose a consecutive sentence for each offense that results in a conviction under this provision.’ [Citation.]” (*Figueroa, supra*, 162 Cal.App.4th at p. 100.) The *Figueroa* court rejected the defendant’s

⁷ “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.” (§ 269, subd. (c).) Because the offenses of which defendant was convicted were committed before the effective date of the amendment to section 269 concerning mandatory consecutive sentencing, we do not believe it appropriate for the court to have relied on section 269, subdivision (c) as the statutory basis for imposing consecutive sentences. The Attorney General concedes this point. But this conclusion is of no benefit to defendant, because we hold that consecutive sentences for multiple convictions under section 269 were mandated by section 667.6(d).

position: “No doubt, the amendment does, indeed, require a consecutive sentence for each offense. However, the digest did not state that that requirement did not already exist under section 667.6, subdivision (d). Not to be ignored is the analysis of the Assembly Committee on Public Safety in 1994 that multiple convictions under section 269 were to be punished consecutively under section 667.6, former subdivision (d). Additionally, section 667.6, subdivision (d) has not, since 2006, been amended to add section 269. What we are left with then, at best for defendant, are dueling legislative analyses and an interpretation of inaction on the part of the Legislature. Rather than attempt to sort out these legislative tea leaves, we prefer to adopt the reasoned analysis of our colleagues at [the Fifth District] in *Jimenez*. Section 667.6, subdivision (d) was crystal clear, at the time defendant committed his crimes, in its application to the rapes that the jury in this case found beyond a reasonable doubt to have been committed. Therefore, consecutive sentencing was mandatory under that subdivision.” (*Ibid.*, fns. omitted.)

We conclude under the terms of the statute, and based upon the reasoning in both *Jimenez* and *Figueroa*, that each “violation” of section 261, subdivision (a)(2) that served as the predicate offense for a conviction under section 269 carried mandatory separate sentencing under former section 667.6(d). The trial court therefore was required to impose separate consecutive terms for the six convictions under section 269. There was no sentencing error.

DISPOSITION

The judgment is affirmed.

Duffy, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.