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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO CAMARENA,

Defendant and Appellant.

H041013

(Santa Clara County

Super. Ct. No. CC621612)

Defendant Francisco Camarena was convicted by plea of one count of aggravated sexual assault of a child under the age of 14 (Pen. Code, § 269) and one count of lewd and lascivious conduct on a child by force, violence, duress, menace, or fear (Pen. Code, § 288, subd. (b)(1)). (All further statutory references are to the Penal Code.) On appeal, he challenges two components of his sentence.

First, he argues that the court violated his ex post facto rights when it imposed a \$300 sex offender fine (§ 290.3), since the amount authorized by statute at the time of his offenses was only \$200. The Attorney General contends defendant forfeited this claim by failing to object below and, in any event, the amount of the fine was authorized by the applicable statute at the time of defendant's offenses. We conclude that defendant's ex post facto challenge has not been forfeited, but will reject the claim on the merits since the amount imposed was authorized at the time of defendant's offenses.

Second, defendant argues that the court's order directing him not to have any contact with the victim must be stricken because the court did not have jurisdiction to issue such an order. The Attorney General concedes this issue. We hold that although the no-contact order was authorized by statute (§ 1201.3, subd. (a)), it must be stricken because the court failed to give notice of its intent to impose the order (§ 1201.3, subd. (c)). As so modified, we will affirm the judgment.

FACTS

The statement of facts is based on evidence presented at the preliminary hearing and information from the probation report.

From 2003 until 2006, Victim lived with her mother (Mother) in a rented room in defendant's house in San José. Initially, defendant and his wife lived in the house. They later moved to an apartment.

After defendant moved, he invited Victim to his apartment on several occasions to swim and play with his teenage daughter. In January 2006, defendant called Mother and said he wanted to take some photographs of Victim to send to his mother. When Mother asked Victim about it, Victim appeared scared and nervous and said she did not want to go. When Mother asked her why, Victim said defendant had been molesting her and had touched "her intimate parts" (Mother's words). Mother reported defendant to the police that day.

San José Police investigated the matter in January 2006 and the prosecution filed a felony complaint in February 2006. Defendant was not arrested until November 2012.

At the time of the preliminary hearing in September 2013, Victim was 16 years old. She testified that when she was around eight years old, defendant picked her up and took her to his apartment on "several" occasions. After they went swimming in the apartment pool, defendant took her into his bedroom. He told her to take off her pants

and underwear, which she did because she was “scared he would do something” to her. He then covered her eyes with a blindfold and touched her private parts, meaning her vagina, with his fingers. He also put his fingers inside of her. After he was done, defendant took Victim home and told her not to tell anyone, including Mother.

At the preliminary hearing, victim could not recall defendant touching her with his penis. She testified that to her mind, the Spanish word “cola”—which means “tail”—is used to refer to male genitalia. She did not recall telling the police that defendant had touched her with his “cola.” She had reviewed her statement in the police report and acknowledged that the report indicated she had said defendant touched her with his “cola.” But the statement did not refresh Victim’s recollection and she could not recall defendant touching her with his penis. Victim nonetheless testified that defendant touched her inappropriately more than 10 times.

San José Police Officer Carlos Melo, who is bilingual in English and Spanish, investigated this case in 2006 and interviewed Victim twice. Victim told him she had been to defendant’s home several times. She said defendant took her into his bedroom, blindfolded her, had her pull down her pants and underwear, and touched her vagina with his hands. On one occasion, he touched his penis to her vagina. Victim, who was then eight years old, would not use the word “penis”; she used the Spanish term “cola,” which is slang for “penis.” Victim told Officer Melo that defendant put his “cola” inside her vagina and also put his fingers inside her. She also said it hurt when defendant touched her with his “cola.”

When the police interviewed defendant in 2006, he “initially denied any wrongdoing; however, he later . . . admitted to touching [Victim’s] vagina over and under her clothing on more than one occasion. [Defendant] expressed remorse; however, [he] denied exposing his penis to [Victim], and also denied digitally penetrating her.” Defendant was not arrested at that time.

PROCEDURAL HISTORY

In February 2006, the prosecution filed a felony complaint charging defendant with two counts of aggravated sexual assault of a child under the age of 14 (§ 269) and one count of attempting to dissuade a witness (§ 136.1, subd. (b)(1)). The first sexual assault count was based on the alleged rape (§ 261, subd (a)(2)) of Victim. The second sexual assault count was based on an alleged penetration of Victim with a foreign object (§ 289, subd. (a)). The prosecution also charged defendant with one count of attempting to dissuade a witness (§ 136.1, subd. (b)(1)).

Defendant was arrested in Seattle, Washington, in November 2012. In December 2012, the prosecution filed an amended felony complaint for extradition, which charged the same offenses as the original complaint. Defendant's extradition was delayed and he was released from custody; he was rearrested in March 2013 and extradited to California.

After the preliminary hearing in September 2013, the prosecution filed an information charging defendant with three counts of aggravated sexual assault of a child under the age of 14 (§ 269) and one count of attempting to dissuade a witness (§ 136.1, subd. (b)(1)). The information alleged that each of the sexual assault counts occurred on or between September 1, 2004, and December 15, 2005, at which time Victim was seven and eight years old. During that time frame, defendant was 44 to 46 years old.

In November 2013, the parties entered into a negotiated disposition. As part of their agreement, the prosecution filed an amended information, charging defendant with one count of aggravated sexual assault of a child under the age of 14 (§ 269) and one count of lewd and lascivious conduct on a child by force, violence, duress, menace, or fear (§ 288, subd. (b)(1)). Pursuant to the plea agreement, defendant pleaded guilty to both counts in the amended information in exchange for a sentence of 18 years to life (15 years to life on the sexual assault count plus three years on the lewd and lascivious conduct count).

In March 2014, defendant retained new counsel and his new attorney filed a motion to withdraw defendant's plea. After conducting an evidentiary hearing, the trial court denied the motion. (The order on the motion to withdraw the plea is not at issue on appeal.)

In May 2014, the court sentenced defendant to 15 years to life on the aggravated sexual assault count consecutive to the lower term of 3 years on the lewd and lascivious conduct count. The court also imposed fines and fees, including a sex offender fine (§ 290.3). As for the sex offender fine, the court found that defendant had the "ability to pay through prison wages, as well as [his] job skills, a fine of \$300, plus penalty assessments, pursuant to section 290.3" The court ordered defendant to "have no contact with the victims [*sic*] in this matter." The court also issued an order "prohibiting visitation between [defendant] and the child victims [*sic*]."

DISCUSSION

Defendant challenges the amount imposed for the sex offender fine and the court's order directing him to "have no contact with the victims [*sic*] in this matter."

I. The Trial Court Did Not Err in Imposing a \$300 Sex Offender Fine

In his challenge to the amount imposed for the sex offender fine, defendant argues that the court "violated [his] ex post facto rights when it imposed a [sex offender] fine in the amount of \$300 because at the time he committed the offense, the amount was \$200." (Bold and all caps omitted.) " '[T]he ex post facto clauses of the state and federal Constitutions are "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.' " ' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 755.)

The Attorney General contends that defendant forfeited his challenge to the amount of the sex offender fine by failing to object to the fine in the trial court. On the merits, she argues that the \$300 imposed was authorized by the version of section 290.3 that was in effect when defendant committed his crimes.

A. Legal Principles Governing the Section 290.3 Sex Offender Fine

At the time of defendant's offenses in 2004 and 2005, former section 290.3 provided in relevant part: "(a) Every person who is convicted of any offense specified in subdivision (a) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for violation of the underlying offense, be punished by a fine of two hundred dollars (\$ 200) upon the first conviction or a fine of three hundred dollars (\$ 300) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (Stats. 1995, ch. 91, § 121, p. 346.) Both of defendant's offenses were subject to the fine. (Former § 290, subd. (a)(2).)

The Legislature amended section 290.3 in 2006. Among other things, the amendments increased the amount of the sex offender fine to "three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (§ 290.3; Stats. 2006, ch. 337, § 18, eff. Sept. 20, 2006; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1368, fn. 6.)

The Legislature has amended section 290.3 several times since it was enacted in 1988. (Stats. 1988, ch. 1134, § 1; Historical and Statutory Notes, 48 West's Ann. Pen Code (2014 ed.) foll. § 290.3, pp. 135-138.) We shall hereafter use the phrase "former section 290.3" to refer to the version of the statute in effect in 2004 and 2005 when defendant committed the offenses in this case.

Citing *People v. Valenzuela* (2009) 172 Cal.App.4th 1246 (*Valenzuela*), defendant urges us to modify the \$300 sex offender fine in this case and reduce it to \$200. The defendant in *Valenzuela* was convicted of one offense (lewd conduct (§ 288, subd. (a)) that was subject to the sex offender fine. (§§ 290.3, subd. (a); 290, subd. (c).) On appeal, the defendant argued that the court violated his ex post facto rights when it imposed a sex offender fine of \$300 since his offense occurred in 2003 and 2004, prior to the amendment that increased the fine for a first conviction from \$200 to \$300. (*Id.* at p. 1248.) The *Valenzuela* court held that the prohibition against ex post facto laws applies to a section 290.3 sex offender fine. (*Valenzuela*, at p. 1248.) Moreover, “under ex post facto principles, the assessable amount of a fine is calculated as of the date of the offense.” (*Id.* at p. 1248, citing *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.) The court concluded that the fine imposed was an unauthorized sentence since the amount assessed was not based on the date of the defendant’s offense and “modif[ied] the \$300 section 290.3 . . . fine to \$200, the amount statutorily authorized when [the] defendant violated section 288, subdivision (a).” (*Valenzuela*, at pp. 1248-1249.)

B. Forfeiture

The Attorney General argues that defendant has forfeited his challenge to the section 290.3 fine by failing to object in the trial court.

As we have noted, the *Valenzuela* court held that (1) under ex post facto principles, the amount of the section 290.3 fine is calculated as of the date of the offense, and (2) a fine that violates ex post facto principles is an unauthorized sentence. (*Valenzuela, supra*, 172 Cal.App.4th at p. 1248.) “The California Supreme Court has held that an unauthorized sentence may be corrected at any time even if there was no objection in the trial court.” (*Id.* at p. 1249, citing *In re Sheena K.* (2007) 40 Cal.4th 875, 886 and *People v. Smith* (2001) 24 Cal.4th 849, 854.) “Such an unauthorized sentence

may be corrected even when raised for the first time on appeal.” (*Valenzuela*, at p. 1249, citing *People v. Smith*, 24 Cal.4th at p. 854 and *People v. Scott* (1994) 9 Cal.4th 331, 354 (*Scott*).)

Quoting *Scott*, *supra*, 9 Cal.4th at page 354, the Attorney General argues that “an unauthorized sentence is one which ‘could not lawfully be imposed under any circumstances in the particular case.’ ” She asserts that claims “ ‘deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in procedurally or factually flawed manner.’ ” She contends that since the sex offender fine was lawfully imposed under the version of section 290.3 in effect at the time of defendant’s offenses, to the extent it was imposed in a procedurally or factually flawed manner, it has been forfeited on appeal because defendant did not object when it was imposed.

We disagree with the Attorney General on the forfeiture issue. Defendant has challenged the sex offender fine on ex post facto grounds. We will follow *Valenzuela* and hold that a fine that violates ex post facto principles is an unauthorized sentence that we may review even when raised for the first time on appeal. (*Valenzuela*, *supra*, 172 Cal.App.4th at pp. 1248-1249.) That a defendant may not prevail on the merits of an ex post facto claim does not mean the claim has been forfeited.

C. The \$300 Sex Offender Fine Does Not Violate Ex Post Facto Principles

Defendant contends the court “violated [his] ex post facto rights when it imposed a [sex offender] fine in the amount of \$300 because at the time he committed the offense, the amount was \$200.” We disagree. Defendant was convicted of two crimes that required imposition of the sex offender fine and the statute in effect at the time of his offenses authorized a sex offender fine of up to \$500 for the two convictions.

At the time of defendant's offenses, convictions for both (1) aggravated sexual assault of a child under 14 (§ 269) and (2) lewd and lascivious conduct (§ 288) required imposition of the sex offender fine. (Former § 290.3, subd. (a) (Stats. 1995, ch. 91, § 121, p. 346) & former § 290, subd. (a).) Thus, unlike the defendant in *Valenzuela*, who was convicted of only one offense that supported imposition of a section 290.3 fine, defendant was convicted of two offenses that support imposition of the fine.

Under former section 290.3, the amount of the sex offender fine was “two hundred dollars (\$200) upon the first *conviction*” and “three hundred dollars (\$300) upon the second and each subsequent *conviction*, unless the court determines that the defendant does not have the ability to pay the fine.” (Former § 290.3, subd. (a); italics added.)

People v. O'Neal (2004) 122 Cal.App.4th 817 (*O'Neal*) is instructive. In that case, the defendant was convicted of two offenses that were subject to the section 290.3 sex offender fine. The trial court imposed two sex offender fines plus penalty assessments, for a total of \$1,350. (*Id.* at p. 822.) On appeal, the defendant argued that the court should have imposed only one section 290.3 fine and that “multiple fines for multiple convictions in the same case are prohibited.” (*O'Neal*, at p. 822.) The appellate court disagreed and held that the “statute does not limit the number of fines that may be imposed for multiple convictions in the same case.” (*Ibid.*) The court explained: “the statute refers to fines for *convictions*, not fines for proceedings,” and since the defendant pleaded guilty to two counts, “[e]ach count involved a separate *conviction*.” (*Ibid.*; italics added.) Thus, the defendant “had a second or subsequent conviction under section 290.3.” (*Ibid.*)

Defendant, like the defendant in *O'Neal*, had two convictions that supported imposition of the section 290.3 sex offender fine. Under the version of section 290.3 in effect at the time of his offenses, the court was required to impose a fine of \$500—\$200 for his first conviction and \$300 for his second conviction—unless the court determined

that defendant did “not have the ability to pay the fine.” (Former § 290.3, subd. (a); *O’Neal, supra*, 122 Cal.App.4th at p. 822.) The court imposed a fine of \$300, which was less than the amount required by section 290.3. But the court also made an express finding that defendant had the ability to pay a \$300 fine, plus the penalty assessments attached thereto.¹ We infer from that finding that the court concluded that defendant did not have the ability to pay the \$500 fine plus penalty assessments and instead ordered him to pay \$300 plus the assessments. (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261.) Since the court’s order was made within the lawful bounds of former section 290.3, there was no ex post facto violation.

II. The No-Contact Order Must be Stricken

A. Background

Prior to sentencing, the probation officer recommended the “Court issue an order prohibiting visitation between the defendant and the child victim(s) pursuant to Section 1202.05” The probation report contains a handwritten notation next to this recommendation that says: “+ no contact.” At sentencing, the court stated: “I’m ordering that you have no contact with the victims [*sic*] in this matter. Also pursuant to section 1202.05, I’m issuing an order prohibiting visitation between you and the child victims [*sic*].” The abstract of judgment says: “No contact with victim.” Defendant challenges the portion of the court’s order that directs him not to have any contact with the victims. He does not challenge the order prohibiting visitation under section 1202.05.

¹ The amount of the penalty assessments is not at issue on appeal.

B. Contentions and Analysis

First, acknowledging that “the court may have simply misspoken,” defendant challenges the court’s order to stay away from the “victims,” arguing that there was only one victim. Based on the wording of the probation report—the use of the phrase “child victim(s),” which it appears the court relied on in pronouncing sentence—we agree that the court misspoke when it used the plural term to refer to Victim.

Second, defendant urges us to strike the no-contact order. He argues that the court was without jurisdiction to make the no-contact order. He contends, “[w]hen a court has sentenced a defendant to prison, it is without jurisdiction to order probationary terms to be followed.” And, he argues, while the court can order no visitation pursuant to section 1202.05, “it cannot order the further term that [defendant] have no contact with the victim.”

As the Attorney General notes, this issue is cognizable on appeal despite defendant’s failure to object to the no-contact order at sentencing since it involves the jurisdictional validity of the no-contact order and a claim that it was not authorized by statute. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 995-996 (*Robertson*), citing *People v. Ponce* (2009) 173 Cal.App.4th 378, 381-382 (*Ponce*).) The Attorney General agrees that the no-contact order should be stricken because it was not authorized by section 1202.05, which only prohibits visitation. As we will explain, we find the Attorney General’s concession appropriate for a different reason and will strike the no-contact order.

Several statutes permit entry of protective orders in criminal cases. “For example, section 136.2, subdivision (a) authorizes issuance of a protective order during the duration of criminal proceedings. Yet, this statute does not authorize issuance of a protective order against a defendant who has been sentenced to prison unless the defendant has been convicted of domestic violence.” (*Robertson, supra*,

208 Cal.App.4th at p. 996; *Ponce, supra*, 173 Cal.App.4th at pp. 382-383; § 136.2, subd. (i.) “Section 1203.1, subdivision (i)(2), which authorizes a no-contact order in some sex offense cases, only applies where the defendant is granted probation. Section 1201.3, subdivision (a) authorizes a no-contact order for a period of up to 10 years but only when the defendant was convicted of a sexual offense involving a minor victim.” (*Robertson, supra*, 208 Cal.App.4th at p. 996.)

In *Robertson*, the court struck an order that “the defendant will have no contact whatsoever with the victim of his crimes,” on the grounds that it was not authorized by any statute. (*Robertson, supra*, 208 Cal.App.4th at pp. 996-997.) The court stated: “ ‘[E]ven where a court has inherent authority over an area where the Legislature has not acted, this does not authorize its issuing orders against defendants by fiat or without any valid showing to justify the need for the order.’ [Citation.] . . . [T]he prosecutor did not make an offer of proof or argument justifying the need for a no-contact order. The trial was finished and [the defendant] was sentenced to prison. There was no evidence that after being charged [the defendant] had threatened a witness or had tried to unlawfully interfere with the criminal proceedings. ‘[A] prosecutor’s wish to have such an order, without more, is not an adequate showing sufficient to justify the trial court’s action.’ [Citation.]” (*Ibid.*) Accordingly, the court agreed that the no-contact order was unauthorized and had to be stricken. (*Ibid.*)

But, unlike *Robertson*, we find statutory authority for the no-contact order imposed in this case. Section 1201.3, subdivision (a) provides, in relevant part: “Upon the conviction of a defendant for a sexual offense involving a minor victim . . . , the court is authorized to issue orders that would prohibit the defendant . . . , for a period up to 10 years, from harassing, intimidating, or threatening the victim or the victim’s family members or spouse.” Subdivision (c) of section 1201.3, however, requires that “[n]otice of the intent to request an order pursuant to this section shall be given to counsel for the

defendant . . . by the prosecutor or the court at the time of conviction, . . . , and counsel shall have adequate time in which to respond to the request before the order is made.” In this case, defense counsel did not receive any notice that the court intended to impose a no-contact order when it took defendant’s plea. And the possibility of such an order was not mentioned in the probation report. As we have noted, the no-contact order seems to have been added by the trial court at the time of sentencing, as indicated by the handwritten notation that said “+ no contact” next to the recommendation contained in the probation report. Thus, defense counsel did not have notice of or adequate time to respond to the imposition of the no-contact order, as required by law. Since the court failed to comply with the procedural requirements of section 1201.3, subdivision (c), we agree with the parties that the no-contact order must be stricken.

DISPOSITION

The no-contact order is stricken. As so modified, the judgment is affirmed.

The clerk of the superior court is directed to (1) prepare an amended abstract of judgment striking the order that defendant have “No contact with victim,” but not the no-visitation order pursuant to section 1202.05; and (2) send a copy of the amended abstract to the Department of Corrections and Rehabilitation.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Grover, J.