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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL WOODWARD, Defendant and Appellant.	C063517 (Super. Ct. No. 06F10109)

In *People v. Woodward* (2004) 116 Cal.App.4th 821, we affirmed defendant Daniel Woodward's convictions for possessing child pornography (Pen. Code, § 311.11, subd. (a))[1] and committing a lewd and lascivious act on a child under the age of 14 (§ 288, subd. (a)) against B., his daughter. (*Id.* at pp. 825-826.) While defendant was serving the resulting prison sentence, the Sacramento County District Attorney charged defendant with committing two counts of lewd and lascivious acts on a child under the age of 14 against T.C. and A.G. (§ 288,

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[1] Undesignated statutory references are to the Penal Code.

subd. (a).) Defendant was also alleged to have committed the offenses against multiple victims within the meaning of the "One Strike Law." (Former § 667.61, subd. (e)(5) (One Strike Law).)[2]

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[2] Defendant was charged with committing the offenses between January 1999 and December 2002. At the time, former section 667.61 provided in pertinent part:

"(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j).

"(b) Except as provided in subdivision (a), 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 life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j).

"(c) This section shall apply to any of the following offenses: [¶] . . . [¶] (7) A violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066.

"(d) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] (1) The defendant has been previously convicted of an offense specified in subdivision (c) . . . . [¶] (2) The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c). [¶] (3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206. [¶] (4) The defendant committed the present offense during the commission of a burglary, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

"(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶] (5) The

A jury convicted defendant as charged and found true the multiple victim allegation. The trial court sentenced defendant

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defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim. [¶] . . . [¶]

"(f) If only the minimum number 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. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other law. Notwithstanding any other law, the court shall not strike any of the circumstances specified in subdivision (d) or (e).

"(g) 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.

"[¶] . . . [¶]

"(i) For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." (Stats. 1998, ch. 936, § 9, pp. 6874-6876, eff. Sept. 28, 1998.)

Further references to section 667.61 are to this version of the statute.

to an aggregate term of 30 years to life in prison, composed of consecutive 15-year-to-life sentences.

On appeal, defendant contends (1) the prosecution commenced this case after the applicable six-year statute of limitations had run, (2) the failure to plead that he was not eligible for probation precluded the application of the One Strike Law, (3) the trial court erred in hearing defense counsel's motion for a hearing pursuant to Evidence Code section 782 even though defendant was not personally present, and (4) the trial court abused its discretion by sentencing him to consecutive terms while unaware of its discretion to impose concurrent terms and without stating its reason for imposing consecutive terms.

We vacate the sentence and remand the case so that the trial court may exercise its discretion in determining whether to impose consecutive or concurrent sentences. In all other respects, we affirm defendant's convictions.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

In July 1999, defendant "met" T.A. online and they developed a relationship over the ensuing months. In December 1999, T.A. and her two daughters, T.C. and A.G., moved from Florida to live with defendant in Sacramento, California. T.C. was nine years old and A.G. was seven years old.

One day in spring 2000, defendant was sitting on the couch watching a movie with T.C. and A.G. T.A. was not home at the time. Defendant told A.G. to come to his bedroom with him. Defendant sat in his computer chair and instructed A.G. to sit

on his lap. Defendant began touching A.G.'s leg before putting his hand into her pants. He rubbed her vagina and inserted his finger. Defendant stopped when T.C. called for her sister from the living room. Defendant told A.G. not to tell anyone.

T.A. and her daughters moved out of defendant's apartment after living with him for approximately three months. After moving out, T.C. and A.G. visited defendant twice a month. On two or three occasions, the girls spent the night at defendant's apartment.

During a sleepover in the spring of 2000, defendant and T.C. were sitting on a couch in the living room and watching a movie. T.C. was wearing a knee-length nightgown. Defendant was lying with his back against the end of the couch, and T.C. was "laying against him" in a "sort of spooning" position. Defendant put his hand on her vagina on the outside of her clothes. T.C. felt uncomfortable with the touching, which lasted about five seconds. She got up and left the room. After the incident, T.C. asked her mother to not spend the night at defendant's apartment anymore.

In May 2006, T.C. and A.G. reported to law enforcement that defendant had molested them.

In 2009, as part of its case-in-chief, the prosecution introduced evidence of defendant's prior child molestation offense in November 2000 pursuant to Evidence Code section 1108. The evidence concerned defendant's molestation of his daughter, B. On November 25, 2000, B. and her brother spent the night at defendant's house. B. was six years old and her brother was

seven. On November 26, 2000, B. sat on defendant's lap while they watched a movie from his couch. She was wearing one of defendant's t-shirts but did not have any underwear on. Her brother was sitting in front of the couch with his back toward B. and defendant.

Defendant touched her vagina with his finger. He then announced that it was "bath time." B.'s brother continued to watch the movie while defendant and B. headed to the bathroom. After B. got into the bath, defendant "washed [her] as if [she] were a little girl." At the time, B. typically took baths by herself when at home with her mother.

Defendant took off his clothes and got into the bath with B. He made her "wash the lower part of his body all over, including his penis." Defendant's penis was erect. Defendant turned on the shower and rinsed both of them off. After the shower, defendant dried B. off with a towel and told her not to tell anyone.

Later that day, B. told her grandmother, who immediately reported the incident to the police. That night, the police went to defendant's apartment to question him about B.'s report of being molested. Defendant invited the police officers into the apartment where the officers observed a desktop computer with a picture of a girl with a dildo in her vagina. The desktop of the computer showed files related to incest and bestiality. Defendant told the police "that he was not a child molester, that he was doing research" on incest and bestiality.

The prosecution introduced a certified copy of the abstract of judgment showing defendant's conviction for committing a lewd and lascivious act against B. (§ 288, subd. (a).)

Defense Evidence

Defendant testified on his own behalf. He acknowledged having child pornography on his computer when the police came to question him in November 2000. Defendant stated that he had been "researching incest and bestiality, rape, and molestation" to educate himself on the subjects so that he could persuade a girlfriend who lived in Indiana to seek counseling for her childhood sexual abuse.

Defendant acknowledged that B. and her brother visited him on November 25, 2000. After arriving at his apartment around 7:00 p.m., B. and her brother quickly changed into defendant's t-shirts in lieu of their own pajamas. B. sat on defendant's lap while they all watched a movie. During the movie, B. began to tickle defendant, who tickled her back. Defendant admitted that he took a shower with B. but denied that she touched his penis or that he had an erection. Defendant acknowledged that he had been convicted for molesting B.

Defendant denied ever touching T.C. or A.G. inappropriately. He explained that A.G. could not have sat on his lap in his home office because of the shape of his ergonomic chair. Defendant denied that he ever fondled T.C.

DISCUSSION

I

Claimed Expiration of the Statute of Limitations

Defendant contends that the six-year statute of limitations for his crimes expired before the prosecution filed its complaint. We reject the contention.

Although defendant raises the statute of limitations issue for the first time on appeal, we consider it even though he might have presented it first in the trial court. As the California Supreme Court has explained, "a defendant may not inadvertently forfeit the statute of limitations and be convicted of a time-barred charged offense. We maintain the rule that if the charging document indicates on its face that the charge is untimely, absent an express waiver, a defendant convicted of that charge may raise the statute of limitations at any time." (*People v. Williams* (1999) 21 Cal.4th 335, 338.) Accordingly, we proceed to consider the merits of defendant's claim that his prosecution of section 288, subdivision (a), was time barred after six years.

Defendant was convicted of two counts of violating subdivision (a) of section 288. Ordinarily, a conviction of subdivision (a) of section 288 is subject to a maximum prison term of eight years.[3] Offenses subject to prison terms of no

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[3] In pertinent part, subdivision (a) of section 288 provides that "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the

more than eight years must be prosecuted within six years after the offense was committed. To this end, section 800 provides that "[e]xcept as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after commission of the offense." Thus, defendant asserts that prosecution was time-barred because the district attorney did not charge him until April 2008 -- more than six years after the offenses committed in 2000. Not so.

Offenses subject to life imprisonment do not have a limitation on the time to commence a prosecution. Section 799 provides, in relevant part, that "[p]rosecution for an offense punishable by death or by imprisonment in the state prison for life or for life without the possibility of parole, or for the embezzlement of public money, may be commenced at any time."

When an offense is subject to alternate sentencing schemes, it is the longest potential period of confinement without any sentence enhancement that determines the applicable statute of limitations. Section 805 provides that "[f]or 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

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lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

disregarded in determining the maximum punishment prescribed by statute for an offense."

Although violations of section 288, subdivision (a), are generally subject to a maximum eight-year prison term, they may also be prosecuted under the One Strike Law when committed against multiple victims. Section 667.61 imposes a 15-year-to-life prison sentence for each conviction of a lewd and lascivious act on a child under age 14 if "[t]he defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim." (§ 667.61, subd. (e)(5); see also *id.* at subds. (b) & (c)(7); see also § 288, subd. (a).)

In *People v. Perez* (2010) 182 Cal.App.4th 231 (*Perez*), the Court of Appeal rejected a contention that the eight-year statute of limitations applied to three counts of lewd and lascivious acts on a child by force or fear (§ 288, subd. (b)(1)) against separate victims. (*Perez, supra,* at p. 237.) The defendant in *Perez* received a sentence of 45 years to life in prison under the One Strike Law. (*Id.* at p. 234.) The *Perez* court held that the One Strike Law's life imprisonment penalty prevented the eight-year statute of limitations from applying.

Perez explained that "[s]ection 667.61 is an alternate penalty scheme that, when charged, defines the length of imprisonment for the substantive offense of violating section 288, subdivision (b)(1). Thus, the unlimited time frame for prosecution set out in section 799 for an offense 'punishable by death or by imprisonment in the state prison for life . . . '

applies, given that defendant was found guilty of violating section 288, subdivision (b)(1) *and* 'in the present case or cases' (§ 667.61, subd. (e)(5)) was found guilty of another such violation involving another victim (*ibid*.), and therefore was subject to the life-term sentencing provision contained in section 667.61, subdivision (b)." (*Perez*, *supra*, 182 Cal.App.4th at pp. 239-240)

We find the reasoning of *Perez* persuasive and applicable to this case. Defendant was sentenced under the One Strike Law because he molested multiple victims within the meaning of subdivision (e)(5) of section 667.61. The multiple victim circumstance in the One Strike Law provides for a life sentence and does not qualify as an enhancement. (*Perez*, *supra*, 182 Cal.App.4th at p. 238.) In other words, the One Strike Law imposes a life sentence without any resort to separately proved sentence enhancements. As the California Supreme Court has held, "Section 667.61 sets forth an *alternative, harsher sentencing scheme* for certain forcible sex crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 738 (*Mancebo*), italics added.) Because the life sentence imposed by the One Strike Law is not an enhancement, section 799 applies to preclude any deadline to file the charges in this case.

Defendant denies the applicability of section 799 by contending that "in cases such as the instant case, California courts have repeatedly and recently stated the limitations period applicable to violations of [] section 288, subdivision (a) is the six-year period set forth in [] section 800." None

of defendant's cited cases aids him. All but one of his cited cases did not involve prosecution under the One Strike Law. (See *People v. King* (2002) 27 Cal.4th 29, 32 [not charged under section 667.61]; *People v. Superior Court* (*Maldonado*) (2007) 157 Cal.App.4th 694, 697 [same]; *People v. Johnson* (2006) 145 Cal.App.4th 895, 898 [same]; *People v. Linder* (2006) 139 Cal.App.4th 75, 78, 81 [same]; *People v. Terry* (2005) 127 Cal.App.4th 750, 763 [same]; *People v. Superior Court* (*German*) (2004) 116 Cal.App.4th 1192, 1195 [same]; *People v. Robertson* (2003) 113 Cal.App.4th 389, 392 [same]; *People v. Maguire* (2002) 102 Cal.App.4th 396, 399 [same]; *People v. Smith* (2002) 98 Cal.App.4th 1182, 1187 [same].)

In defendant's cited case of *People v. Delgado* (2010) 181 Cal.App.4th 839, the appellate court rejected the contention that defendant was subject to only the six-year prison term specified in section 288, subdivision (a). (*Id.* at p. 848.) The defendant in *Delgado* was convicted and sentenced under the One Strike Law for molesting multiple children within the meaning of section 288, subdivision (a). (*Id.* at p. 845.) *Delgado* held the prosecution to have been timely commenced even though the defendant was not charged within six years of commission of the offenses against his first victim. (*Id.* at p. 848.) The *Delgado* court relied on the fact that the prosecution had commenced within a year of that victim's reporting of the molestations. (*Id.* at p. 849 [relying on § 803].) *Delgado* did not refer to the One Strike Law or section 799 in affirming the timeliness of the prosecution. (*Id.* at pp. 848-849.) Even so,

Delgado's reasoning and result do not undermine our conclusion that the One Strike Law is not subject to the six-year statute of limitations set forth in section 800. (See also *Perez*, *supra*, 182 Cal.App.4th at p. 238.)

In short, the One Strike Law's imposition of a life term for child molestation committed against multiple victims is not subject to a statute of limitations. (§§ 667.61, subds. (b), (c)(7), (e)(5), 799.) Thus, we reject defendant's contention that his trial attorney was ineffective for failing to move to dismiss the case as time-barred. Any objection to defendant's prosecution on the basis of the statute of limitations would have been meritless. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463 ["Representation does not become deficient for failing to make meritless objections"].)

II

Claimed Defective Pleading of the One Strike Law

Defendant next argues that the trial court was precluded from sentencing him under the One Strike Law because the prosecution failed to plead that he was not eligible for probation. Defendant does not argue that he was actually eligible for probation, but only that the failure to expressly plead his ineligibility for probation in the charging document precluded his sentencing under the One Strike Law. We are not persuaded.

As we have noted, defendant was charged with two counts of lewd and lascivious acts on a child under the age of 14, against T.C. and A.G. And, he was alleged to have "committed the . . .

described offense(s) against two or more victims, within the meaning of [] Section 667.61(e)(5)." The jury convicted defendant as charged and found true the allegation that he committed the offenses against multiple victims.

Defendant argues that the application of the One Strike Law set forth in subdivision (i) of section 667.61 requires the pleading to allege that defendant is ineligible for probation as set forth in former section 1203.066.[4]

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[4] At the time defendant committed his offenses, subdivision (a) of section 1203.066 rendered ineligible for probation any person convicted of specified sex offenses, such as those committed with great bodily injury, against multiple victims, or with the use of a weapon. As pertinent to this case, subdivision (c) of section 1203.066 provided that a defendant who committed a violation of section 288 was eligible for probation only "when the court makes all of the following findings: [¶] (1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household. [¶] (2) A grant of probation to the defendant is in the best interest of the child. [¶] (3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence. [¶] (4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. . . . [¶] (5) There is no threat of physical harm to the child victim if probation is granted."

Subdivision (d) of section 1203.066 provided that "[t]he existence of any fact that would make a person ineligible for probation . . . shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury."

Subdivision (i) of section 667.61 sets forth the pleading and proof requirement for the One Strike Law as follows: "For the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact." Allegations that the charged offenses violated subdivisions (d) or (e) of section 667.61 require the trial court to impose either a 15-year-to-life or a 25-year-to-life sentence depending on the number of applicable factors listed in those subdivisions.[5]

The only exception to the mandatory life prison term set forth in the One Strike Law is for defendants who violated only section 288, subdivision (a), and are eligible for probation. As our Supreme Court has noted, "conviction of nonforcible lewd or lascivious acts on a child under the age of 14 years (§ 288, subd. (a)) will qualify for One Strike sentencing treatment 'unless the defendant qualifies for probation under subdivision (c) of section 1203.066.' (§ 667.61, subd. (c)(7).)" (*Mancebo*, *supra*, 27 Cal.4th at p. 741, fn. 3.)

Defendant seizes on the exception set forth in subdivision (c)(7) of section 667.61 to argue that the district attorney's failure to plead his ineligibility for probation

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Further references to section 1203.066 are to this version of the statute.

[5] See footnote 2, *ante* [setting forth the text of former section 667.61].

prevented his sentencing under the One Strike Law. In so arguing, defendant acknowledges that the information filed against him *did* plead the application of the One Strike Law by alleging multiple victims and referring to subdivision (e)(5) of section 667.61. Nonetheless, he contends that the information's pleading of the One Strike Law was insufficient without also alleging that he was ineligible for probation under section 1203.066.

In support of his argument, defendant relies on *Mancebo*, *supra*, 27 Cal.4th 735 and *People v. Hammer* (2003) 30 Cal.4th 756 (*Hammer*). Neither case supports his argument.

In *Mancebo, supra*, 27 Cal.4th at page 738, the validity of the One Strike sentence imposed was uncontested. Instead, *Mancebo* involved only the issue of whether defendant's use of a gun could serve both as a basis for invoking One Strike sentencing and to impose firearm enhancements under section 12022.5, subdivision (a). (*Mancebo*, at p. 738.) The Supreme Court concluded that the gun use, "having been properly pled and proved as a basis for One Strike sentencing, was unavailable to support section 12022.5(a) enhancements." (*Mancebo*, at p. 739.) Although requirements of One Strike pleading were not at issue in *Mancebo*, the high court did note that "[t]he language of subdivision (i) of section 667.61, requiring that '[f]or the penalties provided in this section to apply, the existence of any fact required under subdivision (d) or (e) shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact,' is

straightforward and plain." (*Mancebo*, at p. 749.) Thus, the *Mancebo* court deemed sufficient the One Strike pleading in a case in which the information "made specific reference to subdivision (e) of section 667.61 . . . ." (*Mancebo*, at p. 749.)

Here, the information expressly alleged that defendant molested multiple victims and specifically referred to subdivision (e)(5) of section 667.61 as the provision rendering the One Strike Law applicable. As in *Mancebo*, the pleading was sufficient to invoke the application of the One Strike Law.

In *Hammer*, the California Supreme Court considered whether a defendant who had been granted probation for an earlier conviction of section 288, subdivision (a), could later be sentenced under the One Strike Law in reliance on the prior child molestation conviction. (*Hammer, supra*, 30 Cal.4th at p. 759.) The *Hammer* court noted that eligibility for probation under subdivision (c) of section 1203.066 allows the trial court to avoid imposing a life sentence for a conviction otherwise subject to the One Strike Law. (*Hammer* at p. 759.) Nonetheless, *Hammer* affirmed the One Strike sentence despite the defendant's prior term of probation for the earlier child molestation. (*Ibid.*)

In affirming the One Strike sentence, the *Hammer* court noted that "section 1203.066—-enacted more than a decade before the Legislature adopted the One Strike [L]aw--generally requires prison sentences and bars probation for those who are convicted of violating section 288 and related offenses. (See § 1203.066,

subd. (a).) As we recounted in *People v. Jeffers* (1987) 43 Cal.3d 984, 993-997 (*Jeffers*), however, the Legislature was motivated by various policy considerations to enact a limited exception to the general bar on probation. Accordingly, subdivision (c) of section 1203.066 provides that if the defendant is the victim's 'relative' or 'member of the victim's household,' and if other conditions are met, a trial court may exercise discretion to grant probation to a defendant convicted of violating section 288, subdivision (a)." (*Hammer*, *supra*, 30 Cal.4th at pp. 765-766.) *Hammer*, however, does not hold that the failure to plead ineligibility for probation under section 1203.066 precludes the application of the One Strike Law.

Defendant asks us to impose a rule of pleading that would require the prosecution plead the absence of a fact that might *decrease* the penalty sought. We decline to do so.

Any fact serving to increase the penalty must be pled. As the California Supreme Court has explained, "before a defendant can properly be sentenced to suffer the *increased* penalties flowing from . . . [a] finding . . . [of a prior conviction] the fact of the prior conviction . . . must be charged in the accusatory pleading, and if the defendant pleads not guilty thereto the charge must be proved and the truth of the allegation determined by the jury, or by the court if a jury is waived."' ([*People v.*] *Lo Cicero* [(1969)] 71 Cal.2d [1186,] 1192-1193, quoting *People v. Ford* [(1964)] 60 Cal.2d [772,] 794.)" (*In re Varnell* (2003) 30 Cal.4th 1132, 1140 (*Varnell*), italics added.)

The converse is not true. The prosecution need not allege the absence of a factor, such as eligibility for probation, that may lighten the punishment on defendant. (See *Varnell*, *supra*, 30 Cal.4th at p. 1132 [rejecting contention that "a defendant is entitled as a matter of due process to notice in the accusatory pleading of his ineligibility for less restrictive alternate punishments" such as probation].) Probation eligibility does not represent the sort of increase in penalty that the Supreme Court has required to be pled. (*Id.* at p. 1140.) As this court has noted, "[f]inding a defendant ineligible for probation is not a form of punishment, because probation itself is an act of clemency on the part of the trial court." (*People v. Benitez* (2005) 127 Cal.App.4th 1274, 1278.) Rather than being a burden on the prosecution to disprove, any eligibility for probation must be shown *by the defendant*. "[A] defendant has the burden to present evidence showing that he is entitled to consideration for probation under subdivision (c) of section 1203.066." (*People v. Groomes* (1993) 14 Cal.App.4th 84, 89.)

Here, the prosecution satisfied the One Strike pleading requirement by alleging its applicability due to defendant's commission of qualifying offenses against multiple victims. (§ 667.61, subd. (e)(5).) Section 667.61 does not require that the People also allege the inapplicability of a circumstance that might remove defendant from the statutory scheme's penalty provisions.

Even if the pleading had been defective as defendant contends, he cannot demonstrate prejudice because the evidence

at trial showed that T.C. and A.G. were not relatives or members of his household. Consequently, defendant did not meet the requirement set forth in subdivision (c)(1) of section 1203.066 that he be a relative of the victims or a member of their household. No outcome more favorable to defendant would have resulted from any change in pleading requirements. (*People v. Watson* (1956) 46 Cal.2d 818, 834-836.)

III

Claimed Absence from a Critical Proceeding

Defendant contends his state and federal constitutional rights to be personally present during trial were denied when the trial court heard defense counsel's motion for an Evidence Code section 782 hearing in defendant's absence. Defendant does not argue that the trial court erred in denying the motion for a hearing pursuant to Evidence Code section 782, but only that his personal presence from the courtroom during the discussion of the need for such a hearing violated his rights to be personally present during all critical stages of the proceedings against him. We disagree.

During a pretrial appearance, defense counsel moved for an evidentiary hearing under Evidence Code section 782 to cross-examine T.C., A.G., and B. about their sexual histories.[6]

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[6] Evidence Code section 782, subdivision (a), provides in pertinent part:

"[I]f evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness . . . , the following procedure shall be followed: [¶] (1) A written motion shall be made by the defendant to the court and

Defendant was personally present at the time. The trial court deferred ruling on the motion.

On September 29, 2009, defense counsel filed a written motion under Evidence Code section 782. The prosecution opposed the motion and the court heard the motion the same day. Defendant was not personally present.

The prosecution and defense argued about whether the motion should be granted. As the trial court clarified with defense counsel, the motion was directed only at prior sexual conduct and reports of molestations by the victims that did not involve defendant:

"THE COURT: We're here because you brought a motion under [Evidence Code section] 782 to admit evidence concerning prior incidents, *not the facts revolving around your client*, right?

"[Defense counsel]: Okay.

"THE COURT: Okay. That's why we're here. Right?

"[Defense counsel]: Yes." (Italics added.)

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prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness. [¶] (2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated. . . . [¶] . . . [¶] (4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

The court expressed skepticism about the legal sufficiency of the motion under Evidence Code section 782 as follows:

"THE COURT: Okay. And all I have is one line, okay? And the problem I'm trying to get at is you haven't laid out to me what exactly you seek to elicit with respect to this jury for me to be able to make a cogent ruling."

The court later followed up on defendant's absence during the following colloquy:

"THE COURT: You're waiving your client's appearance, by the way?

"[Defense counsel]: I am, for the record, your Honor, yes."

Shortly thereafter, the trial court denied the defense's motion for a hearing.

On the issue of a criminal defendant's right to be personally present during court proceedings, the California Supreme Court has explained that, "[u]nder the Sixth Amendment's confrontation clause, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.' (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17, 96 L.Ed.2d 631; *People v. Cole* [(2004)] 33 Cal.4th [1158,] 1231.) The Fourteenth Amendment guarantees the right to be present as a matter of due process at any 'stage . . . that is critical to [the] outcome' and where the defendant's 'presence would contribute to the fairness of the procedure.' (*Kentucky v. Stincer, supra*, 482 U.S. at p. 745;

Cole, at p. 1231.)" (*People v. Harris* (2008) 43 Cal.4th 1269, 1306 (*Harris*).) The state right to be present at trial is coextensive with the federal due process guarantee. (*Ibid.*)

A criminal defendant may waive the right to be personally present during non-capital trials. "Neither the constitutional right to confrontation nor the right to due process precludes waiver of a defendant's right to be present at a critical stage of a capital trial. [Citation.] Section 977[7] permits a felony defendant, with leave of court, to waive his or her presence at all stages of the trial other than arraignment, plea, presentation of evidence, and sentencing. Section 977 requires, however, that the defendant personally execute, in open court, a written waiver of the right to be present." (*People v. Romero* (2008) 44 Cal.4th 386, 418, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 629.)

The right of a defendant to be personally present does not extend to every court proceeding. As the *Harris* court noted, "neither the state nor the federal Constitution, nor the statutory requirement that a defendant be present at 'all . . . proceedings' (§ 977, subd. (b)(1)), provides a criminal defendant with the right to be personally present in chambers or at bench discussions outside the jury's presence on questions of

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7 Section 977, subdivision (b)(2), provides in pertinent part that "[t]he accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court. However, the court may specifically direct the defendant to be personally present at any particular proceeding or portion thereof."

law or other matters as to which his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him." (*Harris, supra,* 43 Cal.4th at p. 1306, fn. omitted.)

In *Kentucky v. Stincer* (1987) 482 U.S. 730 [96 L.Ed.2d 631], the United States Supreme Court upheld a conviction for child molestation after the defendant in that case was absent from a hearing to determine the competency of child witnesses who later testified against him. (*Id.* at pp. 732-733 [96 L.Ed.2d at pp. 639-640].) The hearing had taken place during trial but outside the presence of the jury. (*Id.* at p. 732 [96 L.Ed.2d at p. 639].) The nature of the questioning at the competency hearing did not require the children to testify about the alleged crimes, but only to demonstrate that they were able to provide credible testimony. (*Id.* at pp. 745-746 [96 L.Ed.2d at pp. 647-648].) In rejecting the claim of a constitutional violation, the Supreme Court explained that defendant gave "no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify. He . . . presented no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency." (*Id.* at p. 747 [96 L.Ed.2d at p. 648].)

Defendant did not personally waive his right to be present during court proceedings as required by section 977. Consequently, his absence from the courtroom during the hearing on the defense's motion constitutes error unless defendant's presence offered no assistance on the matter addressed.

Defense counsel's motion for a hearing under Evidence Code section 782 sought to explore the victims' prior similar experiences that did not involve conduct with defendant. Thus, defense counsel focused exclusively on matters that were not within the personal knowledge of defendant. Defendant's absence from the hearing on the motion under Evidence Code section 782 did not prejudice his ability to present a defense. (*Harris, supra*, 43 Cal.4th at p. 1307.)

Moreover, the trial court denied the motion on the ground that defense counsel failed to comply with the requirement in Evidence Code section 782 to show sufficient similarity between the alleged offenses committed by defendant and the matters for which the defense sought to cross-examine T.C., A.G., and B. Defendant's presence in court would not have improved the legal sufficiency of the motion for a hearing under Evidence Code section 782. His absence did not result in a denial of his federal or state rights to be personally present during the criminal proceedings. (*Harris, supra*, 43 Cal.4th at p. 1307.)

The trial court did not err in considering the defense's motion for a hearing under Evidence Code section 782 at a time when defendant was not personally present.

IV

Sentencing Error

Finally, defendant contends the trial court abused its discretion by sentencing him to consecutive terms on the basis of the probation report's erroneous statement that the terms could not be ordered to run concurrently. The contention has merit.

The One Strike Law does not require consecutive terms for each conviction carrying a sentence of 15 years to life. "[A]lthough the statutory language of section 667.61, subdivision (b), mandates the imposition of 15 years to life for *each* count involving separate occasions and separate victims, section 667.61 does *not* mandate that those terms must be served consecutively. (See § 667.61, subd. (g); *People v. Murphy* (1998) 65 Cal.App.4th 35, 39, 43.)" (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262 (*Rodriguez*).) Instead, the sentencing court has discretion to order the terms to run consecutively or concurrently. (*Ibid.*; see also § 669 [prison sentences may be consecutive or concurrent unless prohibited by another statute].)

In this case, the trial court imposed the consecutive sentences after explaining: "I am going to follow the recommendation of the Probation Department and sentence you, with respect to Count 1, to 15 to life and with regard to Count 2, also 15 to life and run that consecutive." The court articulated no other reason for imposing the consecutive terms.

The probation report erroneously stated that "[c]onsecutive sentencing is mandated pursuant to [] Section 667.61(g)." Subdivision (g) of section 667.61 does not require consecutive terms for multiple convictions.[8] (*Rodriguez*, *supra*, 130 Cal.App.4th at p. 1262.) Thus, the trial court erred by relying on the probation report in sentencing defendant to consecutive terms.

Although the trial court had discretion to select consecutive or concurrent sentences, "[a]n erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion." (*People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247.) "'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court.' (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) A court cannot exercise that 'informed discretion' where it is unaware of the scope of its discretionary powers. (*Ibid.*)" (*Bruce G., supra,* 97 Cal.App.4th at pp. 1247-1248.) When a trial court appears to have imposed a sentence without an accurate understanding of its discretion, remand for resentencing is appropriate. (*Ibid.*)

The Attorney General argues against resentencing on two grounds: (1) the issue is forfeited because it was not raised

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[8] See footnote 2, *ante* [setting forth the text of former section 667.61]. Subdivision (g) of current section 667.61 also does not require consecutive sentencing when it provides: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any of the circumstances specified in subdivision (d) or (e) for any person who is subject to punishment under this section."

in the trial court; and (2) remand would be an idle and unnecessary act given the facts of this case. As to the forfeiture claim, we address the issue to forestall a claim of ineffective assistance of counsel because there can be no tactical justification for failure to object to a trial court's misunderstanding of sentencing discretion when the mistake is adverse to the defendant. (*People v. Lewis* (1990) 50 Cal.3d 262, 282 [considering claim of prosecutorial misconduct not objected to in trial court to forestall claim of ineffective assistance of counsel]; see also *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383 [defendant entitled to sentencing decision based on trial court's properly "'informed discretion'"]; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, fn. 13 [remand appropriate when record shows trial court misunderstood scope of its discretion].)

The Attorney General argues that remand would be an idle and unnecessary act because the trial court would have abused its discretion had it imposed concurrent sentences. "'"[T]he term judicial discretion 'implies absence of arbitrary determination, capricious disposition or whimsical thinking.'" [Citation.] "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered."' (*People v. Mullens, supra,* 119 Cal.App.4th at p. 658.)" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1450.) To support its claim, the Attorney General relies on *People v. Coelho* (2001) 89 Cal.App.4th 861 (*Coelho*) and *People v. Deloza*

(1998) 18 Cal.4th 585 (*Deloza*). *Coelho* is distinguishable. *Deloza* supports remand for resentencing.

In *Coelho, supra,* 89 Cal.App.4th at page 889, the trial court imposed consecutive sentences for all 10 of the defendant's convictions. Although four of the convictions allowed for concurrent terms, the *Coelho* court declined to remand the matter under the "unique circumstances" of the case. (*Id.* at p. 866) The trial court had stated that "it would impose consecutive sentences even if it had discretion over all 10 convictions." (*Id.* at p. 889.) Here, by contrast, the trial court did not indicate that it made a choice between concurrent and consecutive sentences.

In *Deloza, supra*, 18 Cal.4th at page 600, the sentencing court imposed consecutive sentences for defendant's robbery convictions. Although the trial court recognized the scope of its discretion to strike a prior serious felony conviction, the trial court misunderstood the scope of its discretion to impose concurrent sentences and erroneously believed consecutive sentences were mandatory. (*Ibid.*) Accordingly, the California Supreme Court remanded the matter back to the trial court for resentencing. (*Ibid.*) In this case, as in *Deloza*, it appears the trial court misunderstood the scope of its discretion to impose concurrent sentences and imposed consecutive sentences based on an erroneous probation report stating that consecutive sentences were mandatory. Thus, remand is appropriate here.

In *Rodriguez, supra,* 130 Cal.App.4th 1257, the Court of Appeal remanded for resentencing a case in which defendant was

convicted of four counts of lewd and lascivious acts against his two daughters. (*Id.* at p. 1259) As in this case, defendant was sentenced to consecutive terms under section 667.61 by a court that did not consider its discretion to select between consecutive and concurrent sentences. (*Id.* at pp. 1262-1263.) Defendant's convictions of two counts of lewd and lascivious acts against children under the age of 14 are similar to the convictions recounted in *Rodriguez*. (*Id.* at p. 1259.) Thus, as in *Rodriguez*, remand is warranted.

DISPOSITION

The sentence is vacated. The matter is remanded to the trial court to exercise its discretion in resentencing in accordance with this opinion. The clerk of the superior court is then directed to prepare a new abstract of judgment and to forward a certified copy of the same to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HOCH, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.

Filed 6/27/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DANIEL WOODWARD, Defendant and Appellant.	C063517 (Super. Ct. No. 06F10109) ORDER OF PUBLICATION

APPEAL from a judgment of the Superior Court of Sacramento County, Jaime R. Román, Judge. Sentence vacated and judgment affirmed in all other respects. Cause remanded to the trial court with instructions.

Victor S. Haltom, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette and Michael P. Farrell, Assistant Attorneys General, and Kelly E. LeBel, Deputy Attorney General, for Plaintiff and Respondent.

THE COURT:

The opinion in the above-entitled matter filed on May 31, 2011, was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be

partially published in the Official Reports. Accordingly, it is ordered that the opinion be published with the exception of parts I, III, and IV of the DISCUSSION pursuant to California Rules of Court, rules 8.1105(b) and 8.1110. Appellant's additional request for publication is denied.

BLEASE, Acting P. J.

NICHOLSON, J.

HOCH, J.