

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

VALENTIN CARBAJAL,

Defendant and Appellant.

B222615

(Los Angeles County
Super. Ct. No. BA316526)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Larry Paul Fidler, Judge. Affirmed in part; reversed and remanded in part.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and G. Tracey Letteau, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Valentin Carbajal was convicted, following a jury trial, of three counts of lewd acts on a child in violation of Penal Code¹ section 288, subdivision (a). The jury was unable to reach verdicts on 10 other counts, and the trial court declared a mistrial. A retrial followed, and appellant was convicted of one count of lewd acts, one count of forcible rape in violation of section 261, subdivision (a)(2), three counts of attempted forcible rape in violation of sections 664 and 261, subdivision (a)(2), and four counts of forcible oral copulation in violation of section 288a, subdivision (c)(2). The jury found true the allegation that appellant committed an offense specified in section 667.61 against more than one victim. The trial court sentenced appellant to a total of 83 years to life in state prison, which included two consecutive terms of 15 years to life imposed pursuant to section 667.61.

Appellant appeals from the judgment of conviction, contending that the true finding on the section 667.61 allegation must be reversed. We agree. We reverse the finding and remand for resentencing.

Facts

The underlying facts can be briefly summarized, as they are not relevant to the issue on appeal. The victims in this case were Z. C. and Jessica R. The two girls are stepsisters. Appellant is Z.C.'s biological father. Appellant was married to Jessica's biological mother, Ruth. At the time of the offenses in this case appellant, Z.C., Jessica, and Ruth all lived together.

Procedural facts

In the third amended information in this case, appellant was charged with 13 counts of sexual offenses against Z.C. and Jessica. Counts 10, 11 and 12 alleged that appellant committed lewd acts upon a child in violation of section 288, subdivision (a). The victim of those counts was Jessica. The victim in the other counts was Z.C. The

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

information contained the following allegation: "It is further alleged, within the meaning of Penal Code sections 667.61(a), (b) and (e), as to defendant, VALENTIN CARBAJAL, as to counts(s) 1, 2, 6, 7, 8, 9, 10, 11, 12, and 13 that the following circumstances apply: The defendant in the present case committed an offense specified in Penal Code section 667.61, subdivision (c), against more than one victim."

The trial court instructed the jury about this allegation as follows: "If you find the defendant guilty of two or more sex offenses, as charged in Counts 1, 2, 6, 7, 8, 9, 10, 11, 12 & 13, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved."

After deliberating, the jury reached a guilty verdict on counts 10, 11 and 12, all involving Jessica as the victim. The jury could not reach verdicts on the other 10 counts, which involved Z.C. as the victim. The foreperson told the court that he/she did not believe that further deliberations would be of assistance. The court polled the jury and all the jurors agreed with the foreperson.

After a brief discussion with counsel, the trial court stated: "I will take the verdict and then I will declare a mistrial on the remaining counts." The court then directed the jury foreperson to hand "the verdict forms where you have been able to arrive at a verdict" to the bailiff.

After reading the verdict forms, the court stated: "This is certainly interesting. The jury has arrived at guilty verdicts on Counts 10 [alleging Jessica R. as the victim], 11 [alleging Jessica R. as the victim], and 12 [alleging Jessica R. as the victim]. The named victim is Jessica R. in each count. They have also found a true finding on the special allegation against more than one victim. I don't know if they can do that without a conviction. I would like to think about that. I don't know the answer to that."

After a brief consultation with counsel, the court spoke to the jury foreperson: "Juror Number 8, I have a question. Based upon your verdicts that I've taken a look at, as to counts 10, 11, and 12, you also signed a true finding on the special allegation, which

calls for the offenses to be committed against more than one victim. Is that what you wanted to do?" Juror No. 8 replied: "No, sir. I thought it was one or more counts." The court stated: "No. It has to be against one or more victims. With that in mind, what I am going to do, I am going to hand this form back to you. I'm going to ask the jury to go back in, and if you did not mean to find that as true, because I've just explained it to you, to make sure that that reflects your verdict. Once you're done, you are done with that, come back out."

The jury returned to the jury room and, in less than five minutes, returned to the courtroom. The court, apparently surprised by the jury's quick return, made the following statement: "I think I can guess what they have done. They have gone in; they signed it 'not true finding.' The problem is that's not what they should have done." The court continued: "It will be double jeopardy. Otherwise, the truth is if they are hung, the court should not take any verdict on that count because it's inappropriate." The court concluded: "I think what it is, since they are hung, we probably should not enter a finding on that at this point."

The court then addressed the jury:

"Okay. Ladies and gentlemen, I have given this some thought. Since you are unable to arrive at a decision on some of the counts, it is my belief that you should not be making a finding on that allegation unless two different victims were named.

"Now, we know what the verdicts are. You signed them, and I have read them, and counsel is aware of it. It appears to me the appropriate thing to do is – as with the other charges, is to not enter a finding. Since you are unable to arrive at a verdict, you can't find that to be true unless your belief is unanimously – if unanimously you believe not just as to the counts that you return but the entire case that there is not more than one victim.

"I mean, technically, you could come to that finding without arriving at the other counts. I think legally they could, but you would have to make a finding unanimously that there is only one victim. If you are not able to do that – if you are not able to do that, then what you should do is simply not fill in that form.

"That's correct, if you believe unanimously that that finding is not true, it's not based on the three verdicts that you returned, it's based on the entire case because you are unable to arrive at a verdict on many of the counts. You understand what I am saying?

"That enhancement – I am not going to explain anymore.

"Let's assume for a moment you had arrived at verdicts, and the verdicts named more than one victim, that's all I could say, you then would have to make a determination whether this allegation was true or not true. The problem is by signing that verdict form, you still have counts where you have been unable to arrive at a verdict, and those verdict forms do name more than one victim.

"So I sort of, I don't want to tell you what to do. I am sort of giving you what I believe the law require – you have three options: You could find it to be true, which at this point you originally signed, but you have agreed it was a mistake based upon a misunderstanding. I think I may have misled you when I sent you back out as to what – what your options were.

"Do you understand now what your options are? I see a lot of jurors nodding their heads you don't. There is a lot of counts that are still outstanding.

"Juror No. 9: Correct.

"The court: I think legally there may be some problem, but I don't want to tell you that's the law because I am not sure you are making a finding that there is not more than one victim in this case; yet you haven't decided all the counts.

"That finding does not apply just to the three counts that you decided; it applies to the entire case. If you are unable – I don't want to say anything more on that finding. I think you have to go in and discuss that.

"A lot of jurors are nodding their heads, and I think I know – Juror Number 8, you seem somewhat confused. That finding applies when the entire case has been decided, if you can, but what I am saying is there is a lot of counts you did not decide.

"Juror No. 8: Correct. Okay.

"The court: I want you to go back. I don't want to say anymore. When you're done – go in, take as much time as you need. You let us know. I am going to send the

alternates back out into the hallway. You retire and continue your deliberations. I am not comfortable saying anything more about it. I think I have explained it to the satisfaction where enough jurors could perhaps guide the discussion. Then we will just see where you stand."

The jury deliberated briefly, then returned to the courtroom. The court stated: "For the record, the jurors questioned the clerk as to whether they could leave a form blank and could they have a fresh form which was sent in to them? [¶] Juror Number 8, is that what the jury wishes to do, is to leave that form blank?" Juror No. 8 agreed that it was. The court polled the jury and all jurors agreed. The clerk then read the verdicts for counts 10, 11 and 12.

Following the reading of the verdict, the court stated: "Ladies and gentlemen, based upon my conversations with you, on the remaining counts that you were unable to arrive at a verdict on, I will find that further deliberations would not be of use. You have indicated that you have taken several ballots and no juror believes that any further deliberations will help on those counts. [¶] As to those counts, I will declare a mistrial, and the jury will now – as soon as I read the final instruction to you – will be discharged with the thanks of the court."

A second trial followed, involving the retrial of the charges against appellant in which Z.C. was the victim. The section 667.61 multiple victim allegation was also retried. The jury convicted appellant of 9 of the 10 counts alleging Z.C. as the victim and found the section 667.61 allegation true.

Discussion

1. Single trial

As discussed, *ante*, in the second trial of this matter, the jury considered only the charges involving Z.C. Evidence of appellant's conviction in the first trial was introduced, and the jury was instructed that if it found appellant guilty of one of the section 288(a) charges involving Z.C. in the present case, and found that the prosecution

had proved that appellant had been convicted of the crimes in the first trial involving Jessica, the jury could find the section 667.61 multiple victim allegation true.

Appellant contends that there was only one victim in the second trial, and there was no statutory authority for the jury in that trial to determine the truth of a multiple victim allegation pursuant to section 677.61. We do not agree.

The multiple victim enhancement of section 667.61 reads as follows: "The 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).)

The charges involving both Jessica and Z.C. were charged in the same information and were initially all tried together, before one jury. The charges were closely related. The retrial of the hung counts involving Z.C. was still the same case.

There is no absolute requirement under California law that "the same jury that finds a defendant guilty of an offense must always decide the truth of an attached penalty allegation. On the contrary, 'prior decisions have held that a trial court may receive a guilty verdict from a jury that is unable to agree on a penalty provision, declare a mistrial on the penalty provision alone, and empanel another jury to consider the issue of penalty. [Citations.]' [Citation.]" (*People v. Anderson* (2009) 47 Cal.4th 92, 119-120 [involving retrial of penalty allegation under section 667.61 without retrial of previous lewd act conviction].) "Defendant has not identified, nor have we found, a single decision holding that aggravating factors must be retried together with all the elements of the underlying offenses to which they attach. If *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466] truly required such a dramatic change in resentencing proceedings, one would expect to find case law reaching this conclusion, as well as clear guidance from the United States Supreme Court about how the change should be implemented. There is none, and we decline to create it." (*Id.* at p. 123.)

2. Double jeopardy

Appellant contends that retrial of the section 667.61 multiple victim allegation was barred by double jeopardy principles.

Appellant did not raise a claim of double jeopardy in the trial court. "If, however, a plea of former jeopardy had merit and trial counsel's failure to raise the plea resulted in the withdrawal of a crucial defense, then defendant would have been denied the effective assistance of counsel to which he was entitled. (*People v. Belcher* (1974) 11 Cal.3d 91, 96 . . . [acknowledging general rule of waiver, but addressing double jeopardy argument on direct appeal and concluding trial counsel's failure to timely raise plea of former jeopardy constituted a denial of effective assistance of counsel]; see *Strickland v. Washington* (1984) 466 U.S. 688 [80 L.Ed.2d 674, 104 S.Ct. 2052].) Consequently, although the Attorney General is technically correct in arguing the issue was waived, as in *Belcher* we nevertheless must determine whether such a plea would have had merit." (*People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1.)

Both parties agree that if the jury in the first trial found the section 667.61 allegation not true, retrial of the allegation would be barred under *People v. Seel* (2004) 34 Cal.4th 535. (*People v. Anderson, supra*, 47 Cal.4th 92, 119 ["Under *Apprendi*, the One Strike allegation had to be tried to a jury, and under *Seel* an acquittal on the allegation would have barred retrial"].)

Although the parties do not consider the alternate scenario, retrial would also be barred if the jury in the first trial had again found the section 667.61 allegation true after reconsideration, because such a finding would not be supported by the evidence as a matter of law. The jury convicted appellant only of the charges against one victim and the section 667.61 requires two or more victims. Thus, the true finding would inevitably be reversed on appeal for insufficiency of the evidence, and double jeopardy would bar retrial. (*People v. Seel, supra*, 34 Cal.4th at pp. 548-550 [double jeopardy bars retrial of penalty allegation after reversal for insufficient evidence].)

The handling of the jury finding in this matter was governed by section 1161 which provides in pertinent part: "When there is a verdict of conviction, in which it appears to the Court that the jury have mistaken the law, the Court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the

reconsideration, they return the same verdict, it must be entered; but when there is a verdict of acquittal, the Court cannot require the jury to reconsider it."

Here, the jury initially returned a true finding on the section 667.61 allegation. The court believed that the jury had mistaken the law and believed that it could find the allegation true if it had convicted appellant of multiple *counts*. The allegation involved multiple *victims*. The court's discussion with the jury foreperson supported the court's belief. Thus, the court properly directed the jury to reconsider its true finding.

It is undisputed that, following a brief period of reconsideration, the jury again returned a finding. The trial court and both parties believed that the jury finding was "not true" and both parties on appeal still share that belief. As the trial court said, apparently surprised by the jury's quick return: "I think I can guess what they have done. They have gone in; they signed it 'not true finding.' The problem is that's not what they should have done." The court added: "It will be double jeopardy." For purposes of double jeopardy, it does not matter whether that finding was "true" or "not true" because section 1161 prohibited the court from sending the jury back for further reconsideration in either case.²

Section 1161 specifies that when there is a verdict of conviction, the trial court may direct the jury to reconsider but "if, after the reconsideration, they return the same

² The jury foreperson's exchange with the court clearly shows that the jury intended to return a verdict, albeit one based on a mistake in the jury's understanding of the substantive law. The jury had correctly informed the trial court that it was hung on substantive counts, so this is not a case where the jury was confused about how to inform the court that it could not reach a verdict or mistakenly believed that it had to fill out all the forms. Thus, the circumstances of this case are not like the circumstances before the Court in *People v. Caird* (1998) 63 Cal.App.4th 578. *Caird*, and the cases considered therein, involved instances where the jury made technical or clerical errors in filling out verdict forms. The jury in *Caird*, for example, returned a guilty finding on the greater offense and a not guilty finding on a lesser included offense. The trial court, suspecting a "technical" error, polled the jury and determined that the jury "never reached a decision on the lesser included offense." (*Id.* at p. 586.) Thus, the verdict form did not reflect the jury's intent. The jury in *Caird*, like the jury in other similar cases, may well "have mistakenly believed that it was supposed to complete all the forms it had been given." (*Id.* at p. 589.)

verdict, it must be entered." Thus, if the jury had again returned a "true" finding, the court was required to enter that finding.

Section 1161 also specifies that "when there is a verdict of acquittal, the Court cannot require the jury to reconsider it." Thus, if the jury had returned a "not true" finding, the court was required to enter that finding.

"[O]nce the jury submits a verdict of acquittal to the trial court, the court may not order reconsideration of that verdict but rather must order that judgment be entered on the verdict. (§§ 1161, 1165; *People v. Blair* (1987) 191 Cal.App.3d 832, 839 [236 Cal.Rptr. 675].) Second, a trial court may not coerce a jury by rejecting its verdict and requesting it to continue deliberating. (*Ibid.*; see also *People v. Gainer* (1977) 19 Cal.3d 835, 842-843.)" (*People v. Bigelow* (1989) 208 Cal.App.3d 1127, 1134.)

"Once the jury has manifested its intention to acquit, then the court must receive and record the verdict. (§§ 1164, 1165.) The court may not thereafter declare a mistrial without giving effect to that verdict. Nor may the court, by refusing to poll the jury or otherwise impeding recordation of the verdict, deny the defendant his right to have his guilt or innocence determined by the first tribunal to hear the matter. [Citations.]" (*Bigelow v. Superior Court, supra*, 208 Cal.App.3d at p. 1135.)

Here, the court did not give effect to the jury's finding after reconsideration. Rather, the court impermissibly sent the jury back to deliberate again, after making it clear to the jury that the court expected the jury to indicate that it was hung. The jury asked if they could leave the form blank and requested a fresh form. The jury foreperson then told the court that the jury wanted to leave the form blank. This indicated that the jury was hung on the section 667.61 allegation.

Respondent contends that the court properly found that the jury's true and not true findings were inconsistent with the jury's inability to reach a verdict on the counts involving the second victim Z.C. Respondent further contends that the jury's findings appeared to be based on a mistake or confusion and the trial court had authority under section 1161 to clarify or reconcile their verdict, which respondent characterizes as "ambiguous." Respondent concludes that the trial court acted properly in directing the

jury to reconsider their finding, and so no "not true" finding was actually returned at the first trial.

As we discuss, *ante*, section 1161 permits the trial court to direct the jury to reconsider a guilty verdict (or true finding) if it appears that the verdict is based on a mistake of law. If, however, the jury again returns a guilty verdict (or true finding), the court must accept that verdict. This second verdict presumably would be no less mistaken than the first verdict, but the law limits the number of times a jury may be asked to reconsider a guilty verdict.

The law does not permit reconsideration of a verdict of acquittal (or not true finding), even if it is inconsistent. "A jury's verdict of acquittal or not true may not be questioned by anyone else or in any other forum, and a trial court may not probe further into the jury's deliberations. 'As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, "if an acquittal of one count is factually irreconcilable with a conviction on another, *or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense*, effect is given to both." [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 600 [43 Cal. Rptr.3d 1 133 P.2d 1076], italics added.) The system accepts the possibility that 'the jury arrived at an inconsistent conclusion through "mistake, compromise, or lenity." [Citation.]" (*Ibid.*)" (*People v. Guerra* (2009) 176 Cal.App.4th 933, 943 [jury convicted defendant of sex crimes against two victims but found section 667.61 multiple victim enhancement not true].)

In general, "the state has no remedy when a jury acquits 'in the teeth of both law and facts.'" (*Horning v. District of Columbia* (1920) 254 U.S. 135, 138 [65 L.Ed. 185, 41 S.Ct. 53], disapproved on other grounds in *United States v. Gaudin* (1995) 515 U.S. 506, 520 [132 L.Ed.2d 444, 115 S.Ct. 2310].)" (*People v. Guerra, supra*, 176 Cal.App.4th at p. 943.)

Respondent contends that the trial court's action was permissible under *Bigelow v. Superior Court, supra*, 208 Cal.App.3d 1127 because the court in that case stated that the trial court could have "informed the jury that the acquittal was not consistent with

findings of special circumstances and asked it to clarify its verdict to show its true intent." (*Id.* at p. 1136.) The Court in *Guerra* rejected an identical claim, pointing out that in the very next sentence of *Bigelow*, the Court of Appeal "disapproved of what the trial court there actually did: 'the court sent the jury back to deliberate.'" (*People v. Guerra, supra*, 176 Cal.App.4th at p. 944.) To be precise, the opinion in *Bigelow* reads: "The court could have . . . informed the jury that the acquittal was not consistent with findings of special circumstances and asked it to clarify its verdict to show its true intent. *But instead*, the court sent the jury back to deliberate." (*Bigelow v. Superior Court, supra*, 208 Cal.App.3d at p. 1136, italics added.)

Respondent's reliance on *Bigelow* is misplaced. Respondent cites no other authority to support its position. We are not aware of any authority which permits a trial court to send the jury back for further deliberations on a punishment allegation because it is inconsistent with the jury's verdicts on the charges. As we have just discussed, statutory and case law are to the contrary. The trial court acted improperly in refusing to accept the jury's finding. Accordingly, the true finding on the section 667.61 allegation must be reversed and a not true finding entered in the minutes.

Disposition

The jury's true finding on the section 667.61 multiple victim allegation is reversed. This matter is remanded for resentencing and for correction of the minutes. The judgment of conviction is affirmed in all other respects.

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ARMSTRONG, Acting P. J.

I concur:

MOSK, J.

KUMAR, J., Dissenting
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“[W]hen a trial produces neither an acquittal nor a conviction retrial may be permitted if the trial ended ‘without finally resolving the merits of the charges against the accused.’” (*People v. Anderson* (2009) 47 Cal.4th 92, 104 (“*Anderson*”), quoting *Arizona v. Washington* (1978) 434 U.S. 497, 503.) This is the first case that, contrary to this principle, has applied the doctrine of double jeopardy to preclude retrial of a special allegation despite the fact that the allegation was not reached and decided by a fact-finder in a prior proceeding. Because I believe that, under these circumstances, the record must demonstrate the former fact-finder (e.g., a jury) reached and decided the allegation in order to trigger a double jeopardy bar to retrial of the same allegation, I respectfully dissent.

“The double jeopardy clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and article I, section 15, of the California Constitution, guarantee that a person shall not be placed twice ‘in jeopardy’ for the ‘same offense.’ The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]” (*People v. Bright* (1996) 12 Cal.4th 652, 660-661, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.) Principles of double jeopardy have been extended to penalty allegations. (*People v. Anderson, supra*, 47 Cal.4th at pp. 105-108.)

The majority concludes that, not only did the former jury reach a decision with respect to the multiple-victim penalty allegation (§ 667.61, subds. (b) & (e)(4)) but, in some instances, the majority appears to assume the former jury found the allegation to be not true. Thus, the majority holds the doctrine of double jeopardy precluded retrial of the allegation. There are three problems with this approach.

The first stems from the nature of a section 667.61 allegation. Section 667.61, subdivision (b) provides, in pertinent part, that “any person who is convicted of an offense specified in subdivision (c) under one or more circumstances specified in subdivision (e) . . . shall be punished by imprisonment in the state prison for 15 years to life.” This statute is considered to be an alternative sentencing scheme applicable to only certain felonies. (*People v. Anderson, supra*, 47 Cal.4th at p. 102.) “[T]he jury must first decide whether all the elements of the underlying substantive crime have been proven. If not, it returns an acquittal and the case is over. *If the jury convicts on the substantive crime*, it then independently determines whether the factual allegations that would bring the defendant under the One Strike sentencing scheme [set forth in section 667.61] have also been proven.” (*Ibid.*, italics added.)

The first trial concerned two sets of sex offenses – some committed against Z.C. and others committed against Jessica – as well as a section 667.61 penalty allegation. The jury was declared deadlocked on the charges related to Z.C. but found appellant guilty of the charges corresponding to Jessica. Because appellant was not *convicted of* the Z.C. offenses in the former trial, the predicate necessary to trigger consideration of the section 667.61 allegation for those offenses was absent from that trial. Thus, it cannot be said that double jeopardy principles precluded retrial of the penalty allegation *as it applied to the Z.C. offenses* because the former jury never reached, much less resolved, the issue of whether the allegation was applicable to the Z.C. offenses.

The second relates to the absence of a section 667.61 verdict in the former proceeding. In this regard, no verdict at the first trial was ever taken or recorded on the allegation and, in fact, the only indication in the record of the nature of that verdict is a reference in the reporter’s transcript to the trial court’s “guess” that it was “not true.” The record does not demonstrate the jury was asked whether it reached a verdict and no juror volunteered that it reached a “not true” verdict. Ultimately, the court asked each individual juror whether he or she wanted to leave the verdict form blank and each juror indicated that was his or her desire. I respectfully disagree with the inference in the

majority opinion that double jeopardy precludes retrial of a penalty allegation or offense as long as a court is able to “guess” a former fact-finder resolved the corresponding issue in the defendant’s favor.¹

The third problem with the majority’s holding is that, when it is read in tandem with the California Supreme Court’s decision in *Anderson*, it creates an anomaly in the law. *Anderson* holds that “if a defendant is convicted of the substantive crime but the jury deadlocks on the attached [section 667.61] sentencing allegations, neither federal nor state double jeopardy principles bar a retrial on those sentencing allegations.” (*People v. Anderson, supra*, 47 Cal.4th at p. 105.) Thus, if the first jury had convicted appellant of the Z.C. offenses and had deadlocked on the section 667.61 allegation, the prosecutor would have been able to retry the allegation. However, the reality of the instant case evinces even stronger support for allowing retrial of the allegation – i.e., the jury deadlocked on the attached substantive crimes (i.e., the Z.C. offenses) and, therefore, never reached the penalty allegation. If the doctrine of double jeopardy does not preclude retrial of a sentencing allegation where a former jury deadlocked on that sentencing allegation then, certainly, it should not preclude retrial of that allegation if, because the former jury deadlocked on the attendant substantive offense, it never even considered the allegation. To conclude otherwise, as the majority has done, provides fodder for the inconsistent application of double jeopardy principles.

¹ The majority also appears to suggest the finding on the section 667.61 allegation must be reversed because, by declining to take the jury’s verdict when it returned to the courtroom for the second time, the trial court failed to comply with section 1161. However, “[r]eversal of a conviction for a violation of section 1161 requires a showing of actual prejudice.” (*People v. Caird* (1998) 63 Cal.App.4th 578, 587.) As explained above, any section 667.61 verdict at the first trial corresponded only to the offenses for which appellant was convicted. Thus, any error the trial court may have committed by declining to accept the jury’s verdict when it returned to the courtroom a second time was harmless because, even if the trial court accepted a “not true” verdict, double jeopardy principles would not have precluded the prosecution from proving the section 667.61 allegation in the subsequent trial on the deadlocked counts.

In sum, the record is devoid of any indication that the former jury reached a verdict resolving the issue of whether the section 667.61 allegation was applicable to the counts on which the jury hung and formed the basis for the second trial. If the prosecution were barred from proving a charge-specific penalty allegation simply because a prior jury was declared deadlocked on the charge, the defendant would be provided with an unjustified windfall. There is no authority supporting the application of double jeopardy principles in this manner. This case should not be the first.²

KUMAR, J.*

² I would direct the abstract of judgment be corrected. In pertinent part, the prosecution alleged section 667.61 applied to counts 1, 2, 6, 7, 8, 9, 10, 11, and 12. The first trial resulted in guilty verdicts on counts 10, 11, and 12. Following the second trial, the jury found appellant guilty as charged in counts 1, 2, 6, 7, 8, and 9; and the section 667.61 allegation was found true. The trial court sentenced appellant pursuant to section 667.61 only on counts 1 and 10. However, appellant should have been sentenced to consecutive 15 years-to-life terms, pursuant to section 667.61, on counts 2, 6, 7, 8, and 9 because: (1) a trial court may not strike a section 667.61 allegation (§ 667.61, subd. (i)); and (2) the crimes were committed on separate occasions (§ 667.67, subd. (i); § 667.6, subd. (d)). In addition, due to the fact that neither jury found the section 667.61 allegation applicable to count 10, the trial court incorrectly imposed a 15-years-to-life sentence for that offense. But, because the court expressed a desire to impose the maximum term, remand is not necessary. The abstract of judgment should be corrected to reflect the maximum term of eight years (§§ 288, subd. (a), 667.6, subds. (d) & (e)(5)) in state prison on count 10 as well as consecutive 15 years-to-life terms on counts 2, 6, 7, 8, and 9.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.