Filed 9/14/09

CERTIFIED FOR PARTIAL PUBLICATION[1]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. DUKE AUSTIN GOODLIFFE, Defendant and Appellant.	C058588 (Super. Ct. No. CM028077)

APPEAL from a judgment of the Superior Court of Butte County, Robert A. Glusman, Judge. Reversed in part and affirmed in part.

Elizabeth M. Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, Brook Bennigson, Deputy Attorney General, for Plaintiff and Respondent.

Does a general statement of legislative intent trump the plain meaning of a statute? The issue arises in the application

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[1] The Reporter of Decisions is directed to publish the opinion except for parts II and III of the Discussion.

of subdivision (c) of Penal Code section 667.6.[2] It provides that a "full, separate and consecutive term" may be imposed for each violation of a violent sexual offense listed in subdivision (e), but only if the "*crimes involve the same victim on the same occasion*." (Italics added.) Notwithstanding the plain meaning of this provision, the trial court imposed a full, consecutive term on defendant Duke Austin Goodliffe for a crime committed against a separate victim. He appeals.

Defendant pleaded no contest to four sexual offenses involving four young children[3] including one offense specified in section 667.6, subdivision (e) (count 9).[4] He was sentenced to 19 years, four months in state prison,[5] including a full,

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[2] A reference to a section is to the Penal Code unless otherwise designated.

[3] Defendant pleaded no contest to one count of committing a lewd and lascivious act upon a child who is 14 or 15 years old by a person who is at least 10 years older (§ 288, subd. (c)(1) -- count 1), two counts of committing a lewd and lascivious act upon a child under the age of 14 (§ 288, subd. (a) -- counts 5 and 10), one count of committing a forcible lewd and lascivious act upon a child under the age of 14 (§ 288, subd. (b)(1) -- count 9), and one count of bigamy (§ 281, subd. (a) -- count 11) in exchange for dismissal of the remaining counts and an enhancement allegation.

[4] Count 9 charged defendant with a forcible lewd and lascivious act upon a child under the age of 14 (§ 288, subd. (b)(1)). It is listed as an offense in subdivision (e). (§ 667.6, subd. (e)(5).)

[5] The sentence consisted of eight years (the upper term) on count 10, a consecutive eight months (one-third the middle term) on count 1, a consecutive two years (one-third the middle term) on count 5, a consecutive eight years (the full upper term) on

consecutive term for count 9 under subdivision (c). We requested supplemental letter briefs addressing whether defendant was properly sentenced to a full, consecutive term under section 667.6.

On appeal defendant claims that he is not subject to subdivision (c) because the other crimes of which he was convicted did not involve the same victim on the same occasion. The People concede that is the case. However they argue that a literal reading of subdivision (c) would lead to the "absurd consequence[]" of "lessen[ing] the number of sex offenders who fall under the purview" of Jessica's Law, in conflict with its stated intention.[6] They ask that we rewrite subdivision (c) to reinsert language that Jessica's Law repealed.[7] That we cannot do.

"[T]he basic principle of statutory . . . construction

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count 9 (§ 667.6, subd. (c)), and a consecutive eight months (one-third the middle term) on count 11. The court also ordered defendant "have no visitation with the victims pursuant to [section] 1202.05 . . . ."

[6] Jessica's law was enacted by an initiative, The Sexual Predator Punishment and Control Act, whose stated intent is "to strengthen and improve the laws that punish and control sexual offenders." (Prop. 83, § 31, approved Nov. 7, 2006, eff. Nov. 8, 2006.) The amendment to subdivision (c) of section 667.6 was one of two dozen statutes amended or added by the initiative.

[7] Jessica's Law repealed language that authorized a trial court to impose "a full, separate, and consecutive term . . . for each violation of [enumerated sex offenses] *whether or not the crimes were committed during a single transaction.*" (Former § 667.6, subd. (c), as amended by Stats. 2002, ch. 787, § 16, italics added.)

. . . mandates that courts, in construing a measure, not undertake to rewrite its unambiguous language. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348[].)" (*People v. Skinner* (1985) 39 Cal.3d 765, 775 (*Skinner)*.) There are a few exceptions to the rule. "[It] is not applied . . . when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body. (*Pepper v. Board of Directors* (1958) 162 Cal.App.2d 1, 4.)" (*Skinner, supra,* 39 Cal.3d at p. 775.) The rule also does not apply where a literal reading would achieve the absurd consequence of rendering other provisions of the same enactment ineffective. (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899 (*Pieters*).

Pieters is relied on by the People in this appeal. However, *Pieters* does not apply to this case because subdivision (c) does not render ineffective any other provision of Jessica's Law.

Accordingly, we shall reverse the judgment insofar as it imposes a full, consecutive term on count 9 and remand the matter for resentencing.[8]

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[8] Pursuant to the unpublished portion of the opinion we shall also reverse a no visitation order, as it applies to the victims of the bigamy offense, K. G. (born 1980) and J. B.

DISCUSSION[9]

I.

In his supplemental letter brief, defendant contends the trial court erred in sentencing him to a full, consecutive term on count 9 because his crimes did not "involve the same victim on the same occasion" as required by section 667.6, subdivision (c). We agree.

Section 667.6, subdivision (c) authorizes a trial court to impose "a full, separate, and consecutive term . . . for each violation of an offense specified in subdivision (e) *if the crimes involve the same victim on the same occasion*."[10] (Italics added.) Subdivision (c) further provides that "[a] term may be imposed consecutively pursuant to this subdivision if a person

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[9] The facts of the underlying offenses are not relevant to the issues raised in this appeal.

[10] By contrast, subdivision (d) mandates a trial court to impose "[a] full, separate, and consecutive term . . . for each violation of an offense specified in subdivision (e) *if the crimes involve separate victims or involve the same victim on separate occasions.*" (Italics added.) Unlike subdivision (c), this mandatory sentencing scheme applies only when a defendant stands convicted of more than one offense specified in subdivision (e). (*People v. Jones* (1988) 46 Cal.3d 585, 594, fn. 5, 595-596 (*Jones*).) Defendant was convicted of but one offense specified in subdivision (e), a forcible lewd and lascivious act upon a child under the age of 14. (§ 288, subd. (b)(1)-- count 9.) (§ 667.6, subd. (e)(5).) For that reason he is not subject to the mandatory consecutive sentencing scheme in subdivision (d).

is convicted of at least one offense specified in subdivision (e)."[11]

The People concede that defendant's crimes did not involve the same victim on the same occasion,[12] but argue that giving subdivision (c) its literal meaning would conflict with the electorate's stated intent in Jessica's Law "to strengthen and improve the laws that punish and control sexual offenders." (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, § 31, p. 138.)[13] Given that intent, the People find it

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[11] Section 667.6, subdivision (c) states in its entirety: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e). If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison."

[12] Indeed, the trial court indicated it was "exercising its discretion to impose a fully consecutive sentence" on count 9 because the crime "occurred at a separate time and place than the earlier counts," "involved a separate act of sexual violence," and "multiple victims."

[13] The Voter Information Pamphlet is not included in the record on appeal, but, as an official government document, is a proper subject of judicial notice. (Evid. Code, § 452, subd. (c); *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 22.) Accordingly, we take judicial notice of the Voter Information Pamphlet.

an "absurd consequence[]" that section 667.6, subdivision (c) would "lessen the number of sex offenders who fall under [its] purview . . . by making [it] inapplicable to a defendant who is convicted of committing an [enumerated sex offense] against one victim and a non-[enumerated sex offense] against a separate victim on a separate occasion."

As noted (fn. 7), Jessica's Law *repealed* language that authorized a trial court to impose "a full, separate, and consecutive term . . . for each violation of [enumerated sex offenses] *whether or not the crimes were committed during a single transaction*." (Former § 667.6, subd. (c), as amended by Stats. 2002, ch. 787, § 16, italics added.) Notwithstanding, the People urge us to insert language that would undo the repeal.[14] That we cannot do.

In interpreting a voter initiative "we apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685; see also *People v. Elliott* (2005) 37 Cal.4th 453, 478.) As noted, "the basic principle of statutory

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The "Official Title and Summary" prepared by the Attorney General states that Jessica's Law "[i]ncreases penalties for violent and habitual sex offenders and child molesters." (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) Official Title and Summary of Prop. 83, p. 42.)

[14] They would have us either reinsert the repealed language or insert language to the same effect - the word "even" in between the words "subdivision (e)" and "if" so that the subdivision reads "a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) ***even*** if the crimes involve the same victim on the same occasion." (Italics added.)

. . . construction . . . mandates that courts, in construing a measure, not undertake to rewrite unambiguous language. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348[].)" (*Skinner, supra,* 39 Cal.3d at p. 775.)[15] "In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . ." (*California Teachers Assn. v. Governing Board of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632.) A court "'"is not authorized to . . . rewrite the statute to conform to an assumed intention which does not appear from its language."'" (*In re Hoddinott* (1996) 12 Cal.4th 992, 1002. It is only when the language to be construed is ambiguous that the courts may look to legislative intent to resolve the ambiguity. As the People concede, section 667.6's language is not ambiguous.

The absurd consequences exception to the plain meaning rule cannot be applied whenever it is claimed to run counter to a generalized legislative intent. The meaning of absurd consequences appears only in the narrow factual circumstances of its application. That is made clear in *Pieters*, upon which the People rely for the proposition that the "'language of a statute should not be given a literal meaning if doing so would result

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[15] "That rule is not applied, however, when it appears clear that a word has been erroneously used, and a judicial correction will best carry out the intent of the adopting body." (*Skinner, supra,* 39 Cal.3d at p. 775.) That is not the case here.

in absurd consequences which the Legislature [or, as in this case, the electorate] did not intend.'" (52 Cal.3d at p. 898.)

In *Pieters*, the court held that "drug quantity" enhancements imposed pursuant to Health & Safety Code section 11370.4 are impliedly excepted from the double-base term limitation of former section 1170.1, subdivision (g). (52 Cal.3d at pp. 896-897.) The court explained: "Quantity enhancements under [Health & Safety Code] section 11370.4 were enacted in 1985. [Citation.] The express legislative purpose in adding [that] section was 'to punish more severely those persons who are in the regular business of trafficking in, or production of, narcotics and those persons who deal in large quantities of narcotics as opposed to individuals who have a less serious, occasional, or relatively minor role in this activity.' [Citation.] [¶] The double-base-term limitation, on the other hand, first became operative in 1977. [Citation.] In cases involving multiple sentences, [that] rule limit[ed] the maximum term to twice the number of years imposed as the base term under . . . section 1170.1, subdivision (b). Then, as now, the rule admitted specific exceptions. Quantity enhancements pursuant to [Health & Safety Code] section 11370.4, however, were not explicitly included among those exceptions until 1988 -- after defendant had committed the crimes charged." (*Id.* at p. 898.)

In *People v. Carvajal* (1988) 202 Cal.App.3d 487, cited with approval in *Pieters, supra,* 52 Cal.3d at pages 899-901, "the Court of Appeal initially observed that [Health & Safety Code]

section 11352 provides allowable base terms of three, four, or five years. [Citation.] The court reasoned that if [Health and Safety Code] section 11370.4 were subject to the double-base-term limitation, only the three-year enhancement could be applied regardless of the chosen base term: a five-year enhancement could be imposed only if the defendant received the upper, [and a] five-year base term, and a ten-year enhancement '*could never be imposed.*'" (*Pieters,* at p. 899, summarizing and quoting *Carvajal, supra,* 202 Cal.App.3d at p. 501.) As a consequence, a literal reading of the double-base-term limitation would render ineffective other provisions of the enactment of which it was a part.

The present case is distinguishable. No provision of section 667.6 would be rendered ineffective if subdivision (c) is given its literal meaning. While defendants whose crimes involve separate victims or the same victim on separate occasions are not subject to subdivision (c)'s discretionary sentencing scheme, they are included in subdivision (d)'s mandatory sentencing scheme in cases where a defendant is convicted of more than one subdivision (e) offense.[16] (§ 667.6,

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[16] Subdivision (e) specifies the following offenses: "(1) Rape, in violation of paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261. [¶] (2) Spousal rape, in violation of paragraph (1), (4), or (5) of subdivision (a) of Section 262. [¶] (3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1. [¶] (4) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 286. [¶] (5) Lewd or lascivious act, in violation of subdivision (b) of Section 288. [¶] (6) Continuous sexual abuse of a child, in violation

subd. (d); *Jones, supra,* 46 Cal.3d at pp. 595-596.) Because, however, subdivision (d)'s mandatory sentencing scheme applies only where a defendant is convicted of more than one such offense (§ 667.6, subds (c), (d); *Jones, supra,* 46 Cal.3d at pp. 594, fn. 5, 595-596), defendants whose crimes involve separate victims or the same victim on separate occasions, but who are convicted of only one offense enumerated in subdivision (e), would not be subject to a full consecutive sentence if subdivision (c) is given its literal meaning.

While such a construction may be viewed as inconsistent with the electorate's generalized intent "to strengthen and improve the laws that punish and control sexual offenders" insofar as it narrows, albeit slightly, subdivision (c)'s application, it does not follow that the plain, unambiguous language of subdivision (c) should not be given its literal meaning. Unlike the present case, *Pieters* involved "an unambiguous expression of legislative purpose" as "evidenced by both the express purpose of the section and the graduated sentence enhancements provided therein." (52 Cal.3d at pp. 901-902.)

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of Section 288.5. [¶] (7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d) or (k), of Section 288a. [¶] (8) Sexual penetration, in violation of subdivision (a) or (g) of Section 289. [¶] (9) As a present offense under subdivision (c) or (d), assault with intent to commit a specified sexual offense, in violation of Section 220. [¶] (10) As a prior conviction under subdivision (a) or (b), an offense committed in another jurisdiction that includes all of the elements of an offense specified in this subdivision."

Here, section 667.6 was one of over two dozen statutes amended or added by Jessica's Law.[17] (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, §§ 3-30, pp. 127-138.) While the electorate's general intent in enacting Prop. 83 was to strengthen and improve the laws that punish sex offenders (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) text of Jessica's Law, § 31, p. 138), we cannot say that it did not intend that section 667.6, subdivision (c) not be given its literal meaning. This is particularly so where, as here, the drafters plainly intended to omit the "whether or not" language.

"When construing . . . initiative measures, . . . the intent of the drafters may be considered . . . if there is reason to believe that the electorate was aware of that intent [citation] and we have often presumed, in the absence of other indicia of the voters' intent such as ballot arguments [citation] or contrary evidence, that the drafters' intent and understanding of the measure was shared by the electorate." (*Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7; see also *People v. Hazelton* (1996) 14 Cal.4th 101, 123.)

In amending subdivision (c), the drafters not only repealed the "whether or not" language, but added the following sentence:

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17 In addition to section 667.6, Prop. 83 amended or added the following: §§ 209, 220, 269, 288.3, 290.3, 311.11, 667.5, 667.51, 667.61, 667.71, 1203.06, 1203.065, 1203.75, 3000, 3000.07, 3001, 3003, 3003.5, 3004, 12022.75; Welf. & Inst. Code, §§ 6600, 6600.1, 6601, 6604, 6604.1, 6605, 6608. (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, §§ 3-30, pp. 127-138).)

"A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." (§ 667.6, subd. (c); (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) text of Prop. 83, § 11, p. 130).) In *Jones, supra,* 46 Cal.3d at page 589, the Supreme Court held that "a single conviction of an enumerated sex offense is sufficient to trigger the sentencing court's discretion under . . . section 667.6, subdivision (c), to impose a full, consecutive sentence for that conviction." At the time the defendant in that case was sentenced, (before Jessica's Law), section 667.6, subdivision (c) authorized a trial court to impose "a full, separate and consecutive sentence . . . for each violation of [certain enumerated sex offenses] *whether or not* the crimes were committed during a single transaction." (*Id.* at p. 591, fn. 2, italics added.) In holding that a single conviction of an enumerated sex offense was sufficient to trigger the sentencing court's discretion under subdivision (c), the court relied substantially on the "whether or not" language, explaining that "it is at once apparent that the 'whether or not' language was intended to broaden the scope of subdivision (c)'s effect not to restrict it." (*Id.* at p. 593.) "The entire 'whether or not' clause is to be read as the Legislature's shorthand pronouncement that the court may discretionarily impose a full, consecutive sentence for each [enumerated sex offense] conviction, irrespective of whether the violent sex crime and the other crime making section 1170.1 potentially

applicable were committed 'during a single transaction.'" (*Id.* at p. 594.)

While we do not know why the "whether or not" language was deleted, we do know that it was not inadvertent because of the addition of the following sentence: "A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." (§ 667.6, subd. (c).) Given the court's holding in *Jones*, the only explanation for this addition was the removal of the "whether or not" language. The drafters plainly were concerned that without the "whether or not" language, subdivision (c) might be interpreted as applicable only where a defendant is convicted of more than the offenses specified in subdivision (e).[18] We decline to read back into the statute language that was intentionally removed.[19]

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[18] As the People acknowledge, "the electorate essentially codified the holding of *Jones*" by including the additional language.

[19] The People also suggest that a "second way to reconcile the unintended result and absurd result would be to find that . . . the electorate also intended to broaden the reach of subdivision (d) so that it applies when there is only one [offense specified in subdivision (e)] committed. . . . [¶] . . . . In [that] instance, [defendant] should have been sentenced under subdivision (d) -- as his crimes involved separate victims on separate occasion[s] -- and the court was mandated to impose a full, separate, consecutive term on [c]ount 9."

As the People acknowledge, such an interpretation of subdivision (d) would conflict with our Supreme Court's interpretation of subdivision (d) in *Jones*, *supra,* 46 Cal.3d at pages 595-597. As previously discussed, the drafters of

On this record, we cannot say that giving section 667.6, subdivision (c) its literal meaning will result in absurd consequences which the electorate did not intend. Accordingly, subdivision (c)'s plain meaning governs our review. A court may impose a full, separate and consecutive sentence for each violation of an enumerated sex offense *only if the crimes involve the same victim on the same occasion*. (§ 667.6, subd. (c).) Because defendant's crimes did not involve the same victim on the same occasion as required by subdivision (c), the trial court erred in imposing a full, consecutive upper term on count 9.

II.

Defendant contends the imposition of consecutive sentences violated his Sixth and Fourteenth Amendment rights as determined in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] and *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856]. His contention is foreclosed by the California Supreme Court's decision in *People v. Black* (2007) 41 Cal.4th 799, 821-823, and the recent decision of the United States Supreme Court in *Oregon v. Ice* (2009) ___ U.S. ___ [172 L.Ed.2d 517] (*Ice*).

After briefing in this case was completed, the United States Supreme Court ruled in *Ice* that "twin considerations -- historical practice and respect for state sovereignty -- counsel

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Jessica's Law plainly were aware of *Jones* and had they intended subdivision (d) to be interpreted in a manner contrary to its holding, they would have amended subdivision (d) accordingly.

against extending *Apprendi's* rule to the imposition of sentences for discrete crimes. The decision to impose sentences consecutively is not within the jury function that 'extends down centuries into the common law.' [Citation.] Instead, specification of the regime for administering multiple sentences has long been considered the prerogative of state legislatures." (*Ice*, *supra*, 555 U.S. at p. ___ [172 L.Ed.2d at p. 525].) Because *Ice* has been decided adversely to him, defendant's *Apprendi/Blakely/Cunningham* claim must fail.

III.

Defendant contends, and the People concede, that the order prohibiting him from having any visitation with the victims of the bigamy offense is unauthorized and must be stricken. We agree.

At defendant's sentencing, the court ordered that "defendant will have no visitation with the victims pursuant to [section] 1202.05 . . . ." The minute order and abstract of judgment lists the victims' names. We do not include them to protect the victims' confidentiality.

Section 1202.05, subdivision (a) provides in pertinent part: "Whenever a person is sentenced to the state prison on or after January 1, 1993, for violating Section 261, 264.1, 266c, 285, 286, 288, 288a, 288.5, or 289, and the victim of one or more of those offenses is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim."

K. G. (born 1980) and J. B. were not victims of any of the offenses enumerated in section 1202.05. Rather, they were victims of the bigamy offense (§ 281)-- defendant married K. G. while he was still married to J. B. Therefore, the order prohibiting all visitation between defendant and K. G. (born 1980) and J. B. was unauthorized by section 1202.05.

Because this error constitutes an unauthorized sentence not subject to change on remand, we are compelled to correct it now. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)

DISPOSITION

The judgment is reversed insofar as it relates to defendant's sentence under section 667.6, subdivision (c) and the no visitation order as it applies to K. G. (born 1980) and J. B., and the matter is remanded for resentencing. The judgment is affirmed in all other respects.

BLEASE, J.

We concur:

SCOTLAND, P. J.

BUTZ, J.