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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEDY S. IDRIS,

Defendant and Appellant.

A130258

(San Mateo County
Super. Ct. No. SC067176)

In July 2010, appellant Dedy Idris was convicted by jury of 10 counts of lewd conduct with two children, both under the age of 14 at the time of the offenses, committed between 1988 and 1992. (Pen. Code, § 288, subs. (a), (b).)¹ At issue here is only one of those convictions, a violation of section 288, subdivision (a), in which he was found to have touched the vagina of the young victim. Idris argues that the conviction is barred by the statute of limitations, since the conduct alleged was not “substantial sexual conduct” as required to extend the limitations period. (§ 803, subd. (f).) We disagree and affirm the conviction.

I. BACKGROUND

In June 2010, Idris was charged by amended information with 124 felony sex offenses against five minor girls that were allegedly committed between 1988 and 1993. The only count at issue in this appeal is count 44, which alleged that on and between

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

January 1, 1991, and December 31, 1992, Idris committed a lewd or lascivious act by touching the vagina of K.D. with his hand or hands when K.D. was under 14 years old in violation of section 288, subdivision (a), a felony. It was alleged that the act was substantial sexual conduct within the meaning of section 1203.066, subdivision (b) (section 1203.066(b)), rendering him ineligible for probation under section 1203.066, subdivision (a)(8). Specifically, it was alleged that the act constituted masturbation of the victim. It was further alleged that count 44 was filed within one year of a report by the victim to a law enforcement agency, thus rendering the information timely under former section 803, subdivision (g)(1). (See current § 803, subd. (f)(1); former § 803, subd. (g)(1) as added by Stats. 2005, ch. 2, § 3, and amended by Stats. 2005, ch 479, § 3.)²

The evidence at trial showed that for several years Idris lived in Pacifica with a family whose youngest child was K.D.'s cousin, C.D. K.D. stayed with the family during the summers from 1991 through 1993 when she was in third to fifth grade. In 1993, when Idris moved out, C.D. and K.D. were about 10 years old.

In September 1993, Pacifica police received a report that another child may have been molested by Idris. K.D.'s name came up in the investigation, but she could not be located for an interview. Idris was interviewed by police, but not initially arrested. Based on other information gathered in the investigation, a warrant was later issued for Idris's arrest. He could not be located and police later learned he had gone to Indonesia. About 14 years later, in 2007 or 2008, police located Idris abroad. He surrendered to the FBI in Indonesia and was arrested and returned to the United States. Police first interviewed K.D. in October 2008. At that time, she reported the incidents she later described at trial.

K.D. testified that when she stayed with C.D.'s family she usually slept with C.D. in C.D.'s bedroom, which was on the same floor as Idris's bedroom. Sometimes Idris

² Because section 803, subdivision (f) (hereafter section 803(f)) is substantively identical to former section 803, subdivision (g), we refer to the current statute in our opinion.

took C.D. and her from where they were sleeping and moved them to his bed. On one occasion, K.D. woke to discover she was in Idris's bed, her panties were pulled down below her knees, Idris was on his knees between her legs on the bed, and he was touching her vagina (the outside of her vulva near the opening of her vagina). K.D. ran to a hallway bathroom, locked and blocked the door, and stayed there all night because she was scared. On several other occasions, K.D. also woke to find she had been moved to Idris's bed and on some of those occasions she noticed that her panties had been pulled down.

A jury convicted Idris of count 44 as well as nine other of the 124 counts.³ With respect to count 44, the jury found true the substantial sexual conduct allegation and the section 803(f)(1) allegations. Idris was sentenced to the middle term of six years on count 44 as the base term. He was sentenced to the middle term of six years on each of the other nine counts as well, with six to run as full-term consecutive sentences and three to run concurrently, for a total prison sentence of 42 years. As we discuss *post*, the court also imposed a suspended \$2,000 parole revocation fine under section 1202.45.

II. DISCUSSION

A. *Substantial Sexual Conduct*

Because of the delay in prosecuting Idris, the People needed to establish that the charges were timely under section 803(f), which provides in relevant part:

“(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section . . . 288 [¶] (2) This subdivision applies only if all of the following occur: [¶] (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired. [¶] (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066,

³ Certain of the charged offenses were dismissed during trial. A mistrial was declared on the remaining counts, and they were subsequently dismissed.

excluding masturbation that is not mutual. [¶] (C) There is independent evidence that corroborates the victim’s allegation. . . .” Section 1203.066(b) defines “substantial sexual conduct” to include “masturbation of either the victim or the offender.” Idris contends that “a mere touching of victim’s vagina, which is all the evidence shows, is not enough to constitute substantial sexual conduct” and that his conviction on count 44 must therefore be reversed. We disagree.

Idris’s argument turns on the proper interpretation of section 1203.066(b). On issues of statutory interpretation, our review is de novo. (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1337 (*Singleton*)). Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. (Code Civ. Proc., § 1859.) Intent is determined foremost by the plain meaning of the statutory language. If the language is clear and unambiguous, there is no need for judicial construction. When the language is reasonably susceptible of more than one meaning, it is proper to examine a variety of extrinsic aids in an effort to discern the intended meaning. We may consider, for example, the statutory scheme and the apparent purposes underlying the statute. (See *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775–776.)

Once we have construed the statute, the question of whether the evidence presented at trial was sufficient to establish a violation of the statute so construed is subject to deferential review. (*Singleton, supra*, 155 Cal.App.4th at p. 1339.) Our “task is to ‘review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*Ibid.*)

Section 1203.066(b) defines “substantial sexual conduct” as “penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, *or masturbation of either the victim or the offender.*” (Italics added.) Several courts have concluded that “masturbation” as used in this and an analogous statute consists of any touching or contact with the genitals of the victim or the defendant, however slight and whether over or under clothing, with lewd or lascivious

intent.⁴ (*People v. Terry* (2005) 127 Cal.App.4th 750, 771–772 (*Terry*); see also *People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 (*Lopez*) [“any touching or contact of the genitals of either the victim or the offender, whether over or under clothing, with the requisite intent” is “substantial sexual conduct” under a former provision of the Sexually Violent Predators Act, former Welf. & Inst. Code, § 6600.1, subd. (b) (hereafter Welf. & Inst. Code, § 6600.1(b)) as enacted by Stats. 1996, ch. 461, § 3]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 464 [similar]; *People v. Chambless* (1999) 74 Cal.App.4th 773, 787 [similar] (*Chambless*); *id.* at pp. 786–787 [Legislature took Welf. & Inst. Code, § 6600.1(b) definition of “substantial sexual conduct” from § 1203.066(b)].)

In his opening brief, Idris argues that if mere touching of the vagina without rubbing or penetration were sufficient to establish substantial sexual conduct under section 1203.066(b), the subdivision’s specific reference to “penetration” would be superfluous. He contends that if the Legislature had intended mere touching to qualify as substantial sexual conduct, “it would not have included penetration of the vagina within its definition of that term.” He relies on the principle that “[c]ourts should give meaning to every word of a statute if possible” (*Reno v. Baird* (1998) 18 Cal.4th 640, 658 (*Reno*)) and “a construction that renders a word surplusage should be avoided” (*People v. Arias* (2008) 45 Cal.4th 169, 180 (*Arias*)). Idris’s suggested application of that rule to this case is unclear. Section 1203.066(b)’s definition of substantial sexual conduct expressly references three categories of sexual conduct: penetration, oral copulation, and masturbation. None of those acts necessarily encompasses another. Therefore, the inclusion of each of the three acts is necessary to the Legislature’s intended definition of substantial sexual conduct and none of the three can be deemed mere surplusage.

The cases Idris cites in support of his surplusage argument are readily distinguishable. In *Reno*, the Supreme Court considered whether damage claims for employment discrimination under the California Fair Employment and Housing Act

⁴ The exclusion in section 803(f)(2)(B) of “masturbation that is not mutual” refers to “masturbation involving one person, i.e., self-masturbation.” (*People v. Lamb* (1999) 76 Cal.App.4th 664, 680 (*Lamb*)). The exclusion therefore does not apply here.

(FEHA) (Gov. Code, § 12900 et seq.) could be stated against individual supervisory employees, in addition to the “employer.” (*Reno, supra*, 18 Cal.4th at p. 643.) The question was legislative intent in the reference to any “agent” in the statutory definition of an “employer” covered by FEHA. The court found that the purpose of the language was to reference the employer’s vicarious liability for its employees’ actions, but was not surplusage, even if courts would likely have construed the statute to impose vicarious liability in the absence of the “agent” language. (*Reno*, at pp. 657–658.) “[T]he Legislature may choose to state all applicable legal principles in a statute rather than leave some to even a predictable judicial decision. Express statutory language defining the scope of employer liability is not surplusage.” (*Id.* at p. 658.) *Reno* has no application here. In *Arias*, the Court held that the phrase “[o]riginal factory equipment of a vehicle that is modified, altered, or changed” in a false compartment statute (Health & Saf. Code, § 11366.8, subd. (d)(2)) necessarily implied that *unmodified* original factory equipment used as a compartment did not come within the prohibition of the statute. (*Arias, supra*, 45 Cal.4th at p. 180.) In that case, the language “that is modified, altered, or changed” *would* be surplusage if the Court construed the statute to prohibit use of unmodified original factory equipment as well. Nothing in the language of section 1203.066(b) is rendered surplus when “masturbation” is defined as “any touching.”

In his reply brief, Idris raises a new argument. He contends that *Chambless*, and inferably *Terry*, were wrongly decided and should not be followed by this court. We ordinarily do not entertain an argument raised for the first time in a reply brief. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500.) Even if we were to exercise our discretion to do so, we would reject the argument and would adopt *Chambless*’s definition of masturbation as a form of substantial sexual conduct under section 1203.066(b).

Idris’s first challenge to *Chambless* is a criticism of the following passage in the decision: “[‘Masturbation’] appears to have been used [in California case law] simply in its commonly understood meaning to describe the touching of one’s own or another’s

private parts without quantitative requirement for purposes of defining conduct that was lewd or sexually motivated. For example, in cases involving violations of . . . sections 314 and 647, subdivision (a), for the public display of a person’s private parts in a willful and lewd manner and for disorderly conduct based on such conduct, the term ‘masturbation’ has been used to describe the type of prohibited conduct which involves the touching of the genitals. (See *In re Smith* (1972) 7 Cal.3d 362, 364–366 [(*Smith*); [citation].)”) ⁵ (*Chambless, supra*, 74 Cal.App.4th at pp. 784–785.) Idris argues that *Smith* in fact uses the term “masturbation” to describe not mere touching of the genitals but manipulation of the genitals. Idris’s observation about *Smith* is arguably correct. (See *Smith*, at p. 365 [describing one incident as “the defendant . . . stood masturbating in front of the female tenant whose apartment he had entered” and another incident as “he had exposed himself and was holding his penis in his hand, facing her” without calling it “masturbation”]; but see *ibid.* [describing an incident as “ ‘[the defendant] moved his hand over his private parts’ ” without calling the incident “masturbation”].)

The observation, however, is beside the point. *Chambless* expressly cites *Smith* as authority that “masturbation” is commonly understood as “involv[ing] the touching of genitals” and *Smith* supports that understanding. (*Chambless, supra*, 74 Cal.App.4th at pp. 784–785.) *Chambless* then reasons that masturbation is properly defined as touching of the genitals with lewd intent. This conclusion is also consistent with *Smith*, which cites examples of “masturbation” that all involved circumstantial evidence of lewd intent. (*Smith, supra*, 7 Cal.3d at pp. 365–366.) *Chambless* next reasons that it would be illogical to require any “quantitative requirement” for such touching because “common sense suggests that . . . the extent of genital touching that would excite or gratify one person may be different than the amount of touching required to do so for another.”

⁵ *Chambless* also cites *People v. Swearington* (1977) 71 Cal.App.3d 935, 943–945 (*Swearington*) in this passage, but Idris correctly observes that *Swearington* does not mention masturbation but simply cites *Smith* as authority on the definition of lewd exposure in violation of section 313, subdivision 1. We agree that *Swearington* does not independently support *Chambless*’s definition of masturbation.

(*Chambless*, at p. 784, fn. 16.) Thus, *Chambless* continues, the Legislature must have intended masturbation to be defined by “an objective standard tied to the purpose for which the amended legislation was adopted, i.e., to protect children under the age of 14” from recidivism by repeat child molesters. (*Ibid.*) While this final conclusion is not compelled by *Smith*, it is not inconsistent with *Smith* and we find *Chambless*’s reasoning persuasive.

Idris next faults *Chambless* for reasoning by analogy from a definition of oral copulation to support its definition of masturbation. Discussing *People v. Grim* (1992) 9 Cal.App.4th 1240 (*Grim*), *Chambless* states, “In *Grim*, the court considered the appropriateness of jury instructions concerning the sufficiency of the evidence to find substantial sexual conduct based on oral copulation as defined in Penal Code section 1203.066, subdivision . . . (b). ([*Grim*], *supra*, at pp. 1241–1243.) It found that the instruction telling the jury that ‘[a]ny contact, however slight, between the mouth of one person and the sexual organ of another person constitutes “oral copulation” ’ and that penetration of the mouth was not required was proper for finding ‘oral copulation’ sufficient to constitute substantial sexual conduct under such section. (*Ibid.*) Because the Legislature took the definition of substantial sexual conduct for the [the Sexually Violent Predators] Act ([§ 6600.1(b)]) directly from [section 1203.066(b)] [citation], we presume it intended to use the terms in a like manner. [Citation.] Thus, the type or extent of oral copulation sufficient to show substantial sexual conduct under [section 6600.1(b)] would necessarily be the same as that construed by the court in *Grim*. [¶] Similarly, because [Welfare and Institutions Code, section 6600.1(b)] provides that masturbation as well as oral copulation can mean substantial sexual conduct, by parity of reasoning we believe the Legislature intended the extent of touching of the genitals required to meet the definition of masturbation would also be the same as in *Grim*. Hence, any contact, however slight of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn as substantial sexual conduct under the Act.” (*Chambless*, *supra*, 74 Cal.App.4th at pp. 786–787, fn. omitted.)

Idris argues “[t]here is no ‘parity’ [of reasoning] between oral copulation and masturbation. Unlike masturbation, oral copulation is a codified offense and carries a specialized legal definition.” This distinction, however, makes no difference with respect to *Chambless*’s reliance on *Grim*. It is true that oral copulation is specifically criminalized and defined in the Penal Code (see § 288a), whereas masturbation is not (see *Chambless, supra*, 74 Cal.App.4th at p. 784). However, the statutory definition of oral copulation—“the act of copulating the mouth of one person with the sexual organ or anus of another person” (§ 288a, subd. (a))—is incomplete and has required judicial explication. Specifically, courts have had to decide whether penetration of the mouth or substantial contact between the mouth and the sexual organ or anus is required to establish an act of oral copulation under this statute. *Grim* decided neither penetration nor substantial contact were required and held that “any contact, however slight,” between the mouth and the sexual organ or anus sufficed. (*Grim, supra*, 9 Cal.App.4th at pp. 1241–1243.) The legal issue before the court in *Chambless* was analogous: there was no dispute that masturbation involved touching of the sexual organs, but there was a dispute about the amount or quality of the touching that was required. (*Chambless*, at p. 782.) The issue needed to be decided by the courts because it was not addressed in specific statutory language. The *Chambless* court decided that any touching, however slight, of the genitals sufficed. In sum, the legal issues in *Grim* and *Chambless*—the specific meaning of general statutory language—were analogous. One might reasonably argue that *acts* of oral copulation are not analogous to *acts* of masturbation such that the amount of touching required to reach the level of “substantial sexual contact” is less in the former than in the latter. However, Idris does not make that argument. We conclude that *Chambless*’s reasoning by analogy to *Grim* is reasonable and lends some support to its definition of masturbation.

Idris next faults *Chambless*’s consideration of legislative intent. *Chambless* reasoned that its definition of masturbation “comport[ed] with the Legislature’s express intent to provide additional protection under the [Sexually Violent Predators] Act for underage children from those ‘predispose[d] . . . to the commission of criminal sexual

acts.’ [Citations.]” (*Chambless, supra*, 74 Cal.App.4th at p. 787.) Idris argues that “even if substantial sexual conduct did not encompass any slight touching or contact of the genitals, the 1996 amendment unquestionably furthered the Legislature’s goal of stepping-up the protection of children.” We agree that legislative intent does not *compel* the conclusion that masturbation is any touching, however slight. However, the fact that *Chambless*’s definition is consistent with legislative intent lends some support to *Chambless*’s holding.

Finally, Idris argues the *Chambless* definition of masturbation is inconsistent with the plain meaning of “substantial sexual conduct.” He relies on a concurring opinion in *Lopez, supra*, 123 Cal.App.4th 1306, which expresses the view that “adoption of the phrase ‘any touching or contact, however slight, of the genitals’ (*Chambless, supra*, [74 Cal.App.4th] at p. 783) suggests a doubtful minimum standard of ‘substantial sexual conduct.’ The *Chambless* definition would permit finding ‘substantial sexual conduct’ in simple misdemeanor lewd conduct, the elements of which include ‘the touching of genitals.’ (CALJIC No. 16.400.) [¶] . . . To apply the standard ‘any touching . . . , however slight,’ contradicts the Legislature’s requirement of ‘*substantial* sexual conduct.’ . . . The Legislature has set the standard at ‘substantial’; it should not be transmuted to ‘slight.’ ” (*Lopez, supra*, 123 Cal.App.4th at pp. 1315–1316 [con. opn. by Walsh, J.].) We disagree. CALJIC No. 16.400 describes the offense of lewd conduct in a public place in violation of section 647, subdivision (a). Welfare and Institutions Code, section 6600.1, the “substantial sexual conduct” statute at issue in *Lopez*, applies only to certain enumerated offenses that do not include section 647, subdivision (a) (see Welf. & Inst. Code, § 6600, subd. (b)),⁶ and the Sexually Violent Predators Act applies if those

⁶ The only offenses listed in section 6600, subdivision (b) that could be committed by act of masturbation are section 288, subdivision (a), which criminalizes “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 sexual intent, and section 288, subdivision (b), which criminalizes the same act when committed with the use of force, violence, duress, menace or fear against a child under the age of 14 years or a dependent person (§ 288, subd. (b));

offenses are committed against a child under the age of 14 (see § 6600.1, subd. (a)). We have no difficulty accepting that the Legislature viewed any touching, however slight, of a sexual organ with lewd intent when the incident involves a child under the age of 14 as substantial sexual conduct for purposes of identifying a felon as a sexually violent predator.

Here, the applicable statute extends the statute of limitations only for certain enumerated offenses (see § 803(f)(1)) and only if the victim was a child under the age of 18 when the offense was committed and there also is independent corroborating evidence of the crime (see § 803(f)(2)). Again, the enumerated offenses do not include section 647, subdivision (a). (See § 803(f)(1).) The only enumerated offenses that could be committed by an act of masturbation (not also involving oral copulation, sodomy or penetration) are lewd and lascivious contact with a child under the age of 14 (§ 288, subds. (a), (b)(1)), with a child age 14 to 15 by a person at least 10 years older (§ 288, subd. (c)(1)), or with a dependent person by a caretaker (§ 288, subds. (b)(2), (c)(2)), and continuous sexual abuse of a child under the age of 14 (§ 288.5). Again, we have no difficulty accepting that the Legislature viewed such acts as substantial sexual conduct for purposes of extending the statute of limitations for child sexual abuse when the abuse is corroborated by independent evidence. The Legislature knew how to limit the types of masturbation that constitute substantial sexual conduct when it chose to do so: it expressly excluded “masturbation that is not mutual,” which has been construed to mean masturbation involving only one person or self-masturbation. (See *Lamb, supra*, 76 Cal.App.4th at p. 680.) The Legislature’s failure to further restrict “masturbation” by requiring penetration or rubbing clearly indicates that the Legislature found such distinctions irrelevant.

2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Sex Offenses and Crimes Against Decency, §§ 38, 41, pp. 433-435, 437-439).

We affirm Idris's conviction on count 44 because substantial evidence shows that he touched K.D.'s vagina, thus making his violation of section 288, subdivision (a) substantial sexual conduct and rendering the charge timely under section 803(f).

B. *Parole Revocation Fine*

Idris argues, and the People concede, that the trial court's imposition of a \$2,000 suspended parole revocation fine under section 1202.45 must be reversed under the federal and state ex post facto clauses. Section 1202.45 was added to the Penal Code in 1995 and became effective on August 3, 1995. (Stats. 1995, ch. 313, §§ 6, 24; Cal. Const., art. IV, § 8, subd. (c)(3).) Idris's crimes were committed between 1988 and 1993. In *People v. Callejas*, the court held that imposing a section 1202.45 parole revocation fine when the underlying offense of conviction occurred before the effective date of section 1202.45 would violate ex post facto principles. (*People v. Callejas* (2000) 85 Cal.App.4th 667, 678 (*Callejas*).) The *Callejas* court concluded its holding was compelled by the United States Supreme Court's decision in *Johnson v. United States* (2000) 529 U.S. 694, which holds that, in order to avoid serious constitutional questions, certain penalties for parole violations had to be attributed to the underlying offense of conviction rather than to the act that constituted the parole violation. (*Callejas*, at pp. 677–678, citing *Johnson*, at pp. 700–701.) Consequently, the ex post facto clause prevented imposition of those penalties in cases arising from offenses that were committed before the effective date of the penalty statutes. (*Callejas*, at pp. 677–678.) We find *Callejas*'s analysis persuasive and hold that the suspended parole revocation fine in this case must be stricken.

III. DISPOSITION

The suspended parole revocation fine imposed pursuant to section 1202.45 is stricken. In all other respects the judgment is affirmed.

Bruiniers, J.

We concur:

Simons, Acting P. J.

Needham, J.