

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

<p>THE PEOPLE,</p> <p style="padding-left: 40px;">Plaintiff and Respondent,</p> <p style="padding-left: 40px;">v.</p> <p>SAENG FOU SAECHAO,</p> <p style="padding-left: 40px;">Defendant and Appellant.</p>	<p>C068192</p> <p>(Super. Ct. No. 08F01922)</p>
---	---

A jury found defendant Saeng Fou Saechao guilty of four counts of sexual intercourse with his granddaughter, a child 10 years of age or younger (Pen. Code,¹ § 288.7, subd. (a)), and two counts of lewd acts on a child (§ 288, subd. (a)).

On appeal, defendant contends that two of his section 288.7 convictions must be reversed because they violate the ex post facto clauses of the state and federal Constitutions, in that they were alleged to have been committed before section 288.7 went into effect. The People concede the error, but contend

¹ Further unspecified statutory references are to the Penal Code.

that there was sufficient evidence to support convictions on the counts of violation of section 289 (sexual penetration of a child under 14 years of age), a lesser included offense. We agree, and order the judgment modified accordingly. In all other respects, we affirm.

BACKGROUND

FACTS

In February 2008, when the victim was 11 years old, she told her mother defendant had engaged in intercourse with her more than 10 times since she was nine years old. The victim's mother arranged a pretext telephone call, during which defendant admitted the crime, told the victim he was sorry, and directed her not to tell anyone what had happened.

DISCUSSION

Defendant was charged with four counts of violating section 288.7, subdivision (a); two counts alleged commission of the crime between January 28, 2006, and January 27, 2007; the jury found defendant guilty of these crimes as alleged.

Section 288.7, however, did not become effective until September 20, 2006. (Stats. 2006, ch. 337, § 9.) Subdivision (a) of section 288.7 effectively increased the punishment for the conduct from three, six, or eight years in state prison to a term of 25 years to life in state prison: section 289, subdivision (j), under which the offenses could have been prosecuted before section 288.7 became effective, provides that "[a]ny person who participates in an act of sexual penetration with another person who is under 14 years of age and

who is more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years."

Defendant contends that because the jury could have found him guilty on counts one and two based on events that occurred before to September 20, 2006, his convictions on those counts violated the ex post facto clauses of the state and federal Constitutions. The People agree.

We also agree. Our state and federal Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1163.) "The standard for determining whether a law violates the ex post facto clause has two components, 'a law must be retrospective--that is, "it must apply to events occurring before its enactment"--and it "must disadvantage the offender affected by it" . . . by altering the definition of criminal conduct or increasing the punishment for the crime'" (*Delgado*, at p. 1164, quoting *Lynce v. Mathis* (1997) 519 U.S. 433, 441 [137 L.Ed.2d 63, 72].)

Here, it is conceivable that the jury found defendant guilty of counts one and two based on acts that occurred before the effective date of section 288.7, subdivision (a), because the verdict forms were not limited to acts occurring after September 20, 2006. Since section 288.7 increased the punishment for defendant's conduct, it cannot be applied retroactively to alter the legal consequences of defendant's acts.

The People further contend, however, there was sufficient evidence to support defendant's conviction of violation of section 289 as lesser included offenses to the two counts of violation of section 288.7. Defendant does not dispute this. Accordingly, we modify the judgment to reflect convictions of the lesser included offense of section 289, and remand the matter to the trial court for resentencing. (§§ 1181, case 6; 1260; *People v. Navarro* (2007) 40 Cal.4th 668, 675-678, 681.) "[A] remand for a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances." (*Navarro*, at p. 681.)

DISPOSITION

The judgment on the first two counts of violation of section 288.7 is modified to reflect conviction of section 289 on those counts, and the matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed. The trial court is ordered upon resentencing to send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

We concur: _____ ROBIE _____, J.

_____ HULL _____, Acting P. J.

_____ MURRAY _____, J.