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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS EUGENE TITTERINGTON,

Defendant and Appellant.

C069994

(Super. Ct. No. 11F00178)

Defendant Dennis Eugene Titterington was convicted of three counts of committing lewd and lascivious acts on a child under the age of 14 (counts one, two, and three; Pen. Code, § 288, subd. (a)), and one count of oral copulation on a child 10 years of age or under by a person 18 years of age or older (count five; Pen. Code, § 288.7, subd. (b)).¹ On appeal, defendant contends, and the Attorney General concedes, that his conviction on count five violates the state and federal ex post facto clauses. We agree.

¹ Further citations to an unspecified code are to the Penal Code.

The Attorney General contends, however, that we may modify the conviction on count five to a violation of section 288a, subdivision (c)(1), because its effective date preceded the acts alleged in the information. Finding that section 288a, subdivision (c)(1) is a lesser included offense of section 288.7, subdivision (b) under the accusatory pleading test in this case, we agree that we may modify the conviction on that count. Accordingly, we modify the conviction on count five, vacate the sentence, and remand for resentencing.

FACTS

The only facts relevant to this appeal are those upon which the jury relied to convict defendant on count five. Therefore, we limit our statement of the facts to that count.

Defendant's niece has a daughter, M. In April 2006, three-year-old M. and her mother moved into a home that was also occupied by defendant. M. and her mother lived in the home until August 2008. M., who at the time of trial was nearly nine years old, testified that when she was living in the same home with defendant, she would often make necklaces with defendant in his bedroom. On one of these occasions between April 1, 2006, and August 30, 2008, defendant asked M. to suck on his penis, and she did.

PROCEDURE

A jury found defendant guilty of three counts (counts one, two, and three) of lewd and lascivious acts on a child under the age of 14 (§ 288, subd. (a)), which he committed against a victim other than M. The jury also found defendant guilty of oral copulation with a child 10 years of age or under by a person 18 years of age or older, which he committed on M. (Count five; § 288.7, subd. (b).)

The trial court sentenced defendant to a determinate term of 12 years on counts one through three, plus a consecutive indeterminate term of 15 years to life on count five. The determinate term included eight years (upper term) on count one, plus consecutive terms of two years each (one-third the middle term) on counts two and three.

DISCUSSION

I

Ex Post Facto Violation

Defendant contends that his conviction on count five violated the ex post facto clauses of the state and federal Constitutions because the jury may have concluded that the oral copulation occurred before the enactment of section 288.7, subdivision (b). The Attorney General concedes the point, and we agree.

The district attorney alleged in count five of the information that defendant violated section 288.7, subdivision (b), sometime between April 1, 2006, and August 30, 2008. A specific date of the oral copulation was not established at trial, nor was the jury asked to pinpoint a specific date on which it occurred. M.'s mother testified that she and M. lived in the same home with defendant from April 2006 until August 2008. M. testified that she lived in the same home with defendant when she was three or four years old and that she was molested by defendant during that time. M. turned three years old in November 2005.

Section 288.7, subdivision (b) did not become effective until September 20, 2006 (Stats. 2006, ch. 337, § 9, pp. 2590-2591), more than five months after the first date on which defendant may have committed count five. Based on this circumstance, defendant argues that his conviction on count five violated the state and federal ex post facto clauses.

The ex post facto clauses of the state and federal Constitutions prohibit imposition of punishment for offenses committed before the effective date of the statute under which the defendant is prosecuted or sentenced. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 257.) The prosecution bears the burden of proving that the charged offense occurred on or after the effective date of the statute. (*Id.* at p. 256.) When, as in this case, the jury was not asked to make a finding that the offense occurred after the effective date of the statute, “the verdict[] cannot be deemed sufficient to establish the date of the offenses

unless the evidence leaves no reasonable doubt that the underlying charges pertained to events occurring on or after [the effective date of the statute]. [Citation.]” (*Id.* at p. 261.) Here, there is no such evidence removing doubt as to whether the offense occurred after the effective date of the statute. Accordingly, the conviction on count five, along with the indeterminate term imposed for that count, violated the ex post facto clauses.

II

Modification to a Lesser Included Offense

The Attorney General argues that we may modify the conviction in count five to a violation of section 288a, subdivision (c)(1) because its effective date preceded the acts alleged in the amended information and it is a lesser included offense of the crime charged in count five. We agree.

We have authority to modify a judgment to substitute a lesser necessarily included offense for the charged offense if we find that the evidence was insufficient to support a conviction of the charged offense. However, we may not modify a judgment to substitute an offense which is not a lesser necessarily included offense. (§§ 1181, subd. 6, 1260; *People v. Adams* (1990) 220 Cal.App.3d 680, 688-689.)

Section 288a, subdivision (c)(1) states: “Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.” This subdivision, in its present form, has been in effect since before April 2006. (See Stats. 2002, ch. 302, § 4, pp. 1204-1205.) And under the facts of this case concerning defendant’s acts with M., defendant violated this subdivision because he participated in oral copulation with M. when she was under 14 years of age and he was more than 10 years older.

“An uncharged offense is included in a greater charged offense if *either* (1) the greater offense, as defined by statute, cannot be committed without also committing the lesser (the elements test), *or* (2) the language of the accusatory pleading encompasses all

the elements of the lesser offense (the accusatory pleading test). [Citations.]” (*People v. Parson* (2008) 44 Cal.4th 332, 349, original italics.) “Under the elements test, a court determines whether, as a matter of law, the statutory definition of the greater offense necessarily includes the lesser offense.” (*Ibid.*) “Under the accusatory pleading test, a court reviews the accusatory pleading to determine whether the facts actually alleged include all of the elements of the uncharged lesser offense; if it does, then the latter is necessarily included in the former. [Citation.]” (*Ibid.*)

The Attorney General does not specify whether the elements test or the accusatory pleading test should be used. Instead, she states merely that defendant “could have been convicted of oral copulation with a minor under the age of 14, in violation of section 288a, subdivision (c)(1).” That argument is completely unhelpful because it does not answer the question of whether section 288a, subdivision (c)(1) is a lesser included offense of the crime charged in count five.

Under the elements test, section 288a, subdivision (c)(1) *is not* a necessarily included lesser offense of section 288.7, subdivision (b). A violation of section 288.7, subdivision (b) can be committed without violating section 288a, subdivision (c)(1). For example, oral copulation with a 10-year-old by an 18-year-old violates section 288.7, subdivision (b), but it does not violate section 288a, subdivision (c)(1) because the perpetrator is not more than 10 years older than the victim.

Under the accusatory pleading test, however, section 288a, subdivision (c)(1) *is* a necessarily included lesser offense of section 288.7, subdivision (b), as alleged in the amended information upon which defendant went to trial.

As pertinent, count five of the amended information alleged that “defendant, being 18 years of age or older, did willfully and unlawfully commit an act of oral copulation or sexual penetration . . . with [M.], a child 10 years of age or younger, to wit, age 3-5 years.”

Each element of section 288a, subdivision (c)(1) was included in the allegations in count five of the amended information. First, it alleged that defendant engaged in an act of oral copulation. Second, it alleged that M. was under 14. And third, it alleged that defendant was more than 10 years older than M. -- specifically, M. was three to five years of age and defendant was 18 years of age or older. Therefore, section 288a, subdivision (c)(1) is a lesser included offense of section 288.7, subdivision (b), as alleged in the accusatory pleading, and defendant was on notice that he could be convicted of a violation of 288a, subdivision (c)(1).

Defendant argues in his reply brief: “Neither test [elements or accusatory pleading] is satisfied in the context urged by respondent.” In support of that statement, however, defendant discusses the elements test only. As noted, we agree that the elements test is not satisfied here, but the accusatory pleading test establishes that, under the circumstances of this case, section 288a, subdivision (c)(1) is a lesser included offense of section 288.7, subdivision (b). Accordingly, it is appropriate for us to modify the conviction on count five to a violation of section 288a, subdivision (c)(1). (*People v. Adams, supra*, 220 Cal.App.3d at pp. 688-689.)

Since the judgment is modified, it is also appropriate to remand this case for full resentencing. (*People v. Navarro* (2007) 40 Cal.4th 668, 681 [remand for full resentencing as to all counts appropriate when one count modified to lesser included offense].)

DISPOSITION

Defendant's conviction on count five is modified to a violation of section 288a, subdivision (c)(1). The sentencing is vacated in full. And the matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

NICHOLSON, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.