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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON WILKERSON,

Defendant and Appellant.

E052094

(Super.Ct.No. SWF024546)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed in part; conditionally reversed in part with directions.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Byron Wilkerson guilty of six counts of committing a lewd or lascivious act upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)¹ The trial court sentenced defendant to prison for a term of 10 years. Defendant contends that his convictions for counts 1 and 2 must be reversed because: (1) there was an implied acquittal on those counts; (2) the trial court failed to record the original verdicts rendered on those counts; and (3) the trial court directed the jury's verdict on those two counts. Additionally, defendant contends that the fines imposed pursuant to Government Code section 70373 must be stricken. We affirm in part, and conditionally reverse in part.

FACTUAL AND PROCEDURAL HISTORY

A. FACTS

The victim, a female, was born in November 1985. Defendant is the victim's maternal uncle. Defendant babysat the victim while the victim's mother (Mother) was at work. Defendant began babysitting the victim when she was three years old. The victim often saw defendant at her home in Lake Elsinore, and at her grandmother's home in Perris.

When the victim was three years old, defendant sat next to the victim and rubbed her leg, but stopped when Mother entered the room. When the victim was five years old, defendant would instruct her to sit on his lap, or pick her up and place her on his lap. Defendant rubbed the victim's breasts under her shirt, with his hand, while she sat on his lap. When the victim was approximately nine years old defendant would "grind"

¹ All subsequent statutory references will be to the Penal Code unless indicated.

on her, with his hip area grinding against her hip area, so that the victim could feel defendant's penis against her genitalia, although their clothes were on. The "grinding" incident, or incidents, took place on a couch in a living room or in the victim's bed; during the grinding the victim was sitting up, but at other times she was lying down. During the "grinding," defendant kissed the victim's chest, neck, and face.

Defendant continued touching the victim's breasts from the time she was five years old until she was 13 years old. However, when the victim was 10 or 11 years old, she told Mother about defendant's actions. Mother then told her mother (Grandmother) about defendant's actions, and defendant "stayed away for a couple of years." Mother and Grandmother instructed the victim not to tell anyone about defendant's conduct.

When the victim was in middle school, Mother and Grandmother wanted the victim to speak to defendant on the telephone, so that the victim could "try to get some closure." Defendant apologized to the victim. After the telephone conversation, the victim began seeing defendant at family functions and "it was the same thing over again." When the victim was 13 years old, she stopped going to Grandmother's house, and "tried to stay [a] distance" from defendant.

In August 2007, the victim learned that Grandmother was planning a birthday party for herself and Mother. The victim overheard that defendant would be at the party. The victim was upset by this information, and she told Mother that she did not want to see defendant. Mother did not acknowledge how upset the victim was at the possibility of seeing defendant, so the victim called the police and informed a detective of defendant's actions.

B. INFORMATION

The complaint against defendant was filed on February 22, 2008. The first amended information, filed on August 4, 2010, charged defendant with six counts of committing a lewd or lascivious act upon a child under the age of 14 years. (§ 288, subd. (a).) Count 1 covered the time period from November 1994 through December 1995. Count 2 concerned the time period from January 1995 through December 1995.

In the first amended information, the district attorney alleged that counts 1 and 2 were being brought pursuant to section 803, subdivision (f)(1), which concerns a tolling or extension of the statute of limitations. Specifically, section 803, subdivision (f)(1), provides “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[.]”

C. JURY INSTRUCTIONS

The trial court instructed the jury on section 803, subdivision (f)(1). The trial court explained that a defendant cannot be convicted of committing a lewd or lascivious act upon a child under the age of 14 years (§ 288, subd. (a)), unless the prosecution began within 10 years of the crime. The trial court then explained that there was an exception to the 10-year rule, and a defendant could be convicted of a molestation that occurred more than 10 years before the prosecution if the district attorney could establish (1) the original 10-year time period had expired; (2) the prosecution commenced within one year of the crime being reported to a California law enforcement

agency; (3) the offense involved substantial sexual conduct; and (4) there was independent evidence that corroborated the victim's allegations.

The trial court gave further details regarding the exception, and then informed the jury, "Thus, if you find the defendant committed the offense of [molestation] as charged in Count 1 or the offense of [molestation] as charged in Count 2, you must also make a finding of whether the exception applies. Your jury verdicts will include a separate form for this finding."

D. ORIGINAL VERDICT FORMS

For the section 288 charges in counts 1 and 2, the trial court gave the jury four verdict forms: Each count had one "guilty" form and one "not guilty" form. For the statute of limitations findings (§ 803, subd. (f)(1)) related to counts 1 and 2, the trial court also gave the jury four verdict forms.

1. *STATUTE OF LIMITATIONS HAS NOT EXPIRED*

One of the statute of limitations verdict forms given to the jury reflected the following language; an almost identical form was given for count 2, but referred to "Count 2," rather than "Count 1":

"We the jury, in the above entitled case, do not find that with respect to Count 1:

"1. The original 10 year statute of limitations has expired.

"2. The prosecution was commenced within one year of the date of the report to a California law enforcement agency.

"3. The offense involved substantial sexual conduct.

“4. There is independent evidence that corroborates the allegation made by the victim by [a] clear and convincing evidence standard.”

2. *STATUTE OF LIMITATIONS HAS EXPIRED*

The second statute of limitation verdict form given to the jury reflected the following language; an almost identical form was given for count 2, but referred to “Count 2,” rather than “Count 1”:

“We the jury, in the above entitled case, find that with respect to Count 1:

“1. The original 10 year statute of limitations has expired.

“2. The prosecution was commenced within one year of the date of the report to a California law enforcement agency.

“3. The offense involved substantial sexual conduct.

“4. There is independent evidence that corroborates the allegation made by the victim by [a] clear and convincing standard.”

3. *SIGNATURES*

In regard to count 1, the jury returned signed copies of the following forms: (1) a guilty finding on the molestation charge (§ 288, subd. (a)); and (2) a finding that the statute of limitations had not expired, i.e., the conviction was not time-barred (§ 803, subd. (f)(1)). On the form for finding that the statute of limitations had expired, i.e., the offense was exempt from the statute of limitations, the foreperson signed his/her name, but then crossed-out the signature. The jury completed the same forms for count 2: finding defendant guilty of the substantive offense as alleged in the information, and returning a signed form for the “had not expired” statute of limitations finding, i.e., the

offense was time-barred; the jury also returned the “had expired” finding form with a crossed-out signature.

After the trial court reviewed the verdict forms, it spoke with the jury foreperson. The trial court said, “I’m a little bit confused,” and asked if it was correct that the jury found the statute of limitations allegations to be untrue. The following exchange then took place:

“[Foreperson]: This is what—that did not expire. That was guilty.

“The Court: Why don’t you have a seat there. I’m going to ask some pointed questions. Is that all right?

“[Prosecutor]: Sure.

“[Defense Counsel]: All right.

“The Court: Let’s take Count 1. Did you find that the original 10 year statute of limitations had expired?

“[Foreperson]: No, but it had.

“The Court: Counsel, I’m really at a loss without me being a juror.

“[Defense Counsel]: Try talking about it one more time.

“The Court: Sure. I’ll ask the jury to step out. It will be real quick. [Recess.]

“The Court: Okay. We’re back in open court. All the jurors, the defendant and both attorneys are present. [¶] Jurors, I’m going to give you knew [*sic*] verdict forms for Count 1 and Count 2 and for the allegation[s]. I’m going to ask you to read the jury instruction that talks about [section] 803 carefully before signing these. I’m going to keep the other ones. I’m just going to keep those for appellate purposes, because

they're inconsistent. Okay. So the deputy will take you back to the jury deliberation room. [Jurors exited.]”

The trial court then gave counsel an opportunity to state whether they agreed or disagreed with the court’s decision regarding sending the jury back to deliberate. Defense counsel stated an unreported conversation had taken place during the recess, and defense counsel summarized the statements he made during that conversation. Defense counsel objected to the jury being sent back for deliberations, because he felt the verdict forms were unambiguous, in that they reflected defendant was guilty of the charged offense, but the convictions were time-barred.

Defense counsel asserted that the problem should have been solved by individually polling the jurors. Defense counsel argued that giving the jury fresh verdict forms was problematic because it implied the factual findings were incorrect. Defense counsel also expressed concern about seeing the jury foreperson, in the courtroom, “chatting with the juror next to him, trying to figure out what the problem was” in regard to the forms.

The trial court responded, “But it’s kind of strange in the sense that you know that it was beyond the 10 year period.” Defense counsel replied, “Right. They still have to find—it still would have been a situation where they did not find that there was substantial sexual conduct even though.”²

² The statute of limitations finding had four elements: (1) the original 10-year statute of limitations had expired; (2) the prosecution commenced within one year of the crime being reported to a California law enforcement agency; (3) the offense involved
[footnote continued on next page]

The trial court explained why it found the verdict forms inconsistent: “If they do not find that with respect to Count 1 that the original 10 year statute of limitations has expired, they don’t find that, then there is no problem with the guilty verdict. Because there is no statute of limitation problem, if I accept them as finding that. So the guilty verdict as signed would have to stand. But we all know that the statute of limitations had run, even though it’s a factual issue for the jury. I couldn’t in good con[science] say, ‘I’m going to sentence him on the count that I know the statute has run on.’ It’s just putting my reasoning out there. That it [is] totally inconsistent. Well, maybe it’s not totally inconsistent because, okay, if it’s not inconsistent, then he’s guilty on Counts 1 and 2. And end of story. But we know that factually that is not right.”

The prosecutor stated the verdict forms may have been inconsistent with the jury’s intent. The prosecutor believed the trial court did not err by directing the jury to reread the section 803 instruction. The trial court explained that the jury was sent back to the deliberation room with four fresh verdict forms for count 1 and four fresh verdict forms for count 2 (guilty, not guilty, expired, and not expired), as well as forms for the lesser included offenses. The jury was sent to redeliberate at 4:19 p.m. on August 12, 2010.

E. RECORDED VERDICT FORMS

At 4:29 p.m. on August 12, 2010, the jury indicated it reached new verdicts. As to count 1, the jury found defendant guilty, and found the offense was exempt from the

[footnote continued from previous page]
substantial sexual conduct; and (4) there was independent evidence corroborating the allegation made by the victim by a clear and convincing standard. (§ 803, (f)(2).)

statute of limitations. As to count 2, the jury also found defendant guilty, and found the offense was exempt from the statute of limitations. After each verdict was read aloud by the clerk, the trial court asked, “Ladies and gentlemen of the jury, is this your verdict?” After the special findings were read aloud by the clerk, the trial court asked, “Ladies and gentlemen of the jury, is this your finding?” The jury responded affirmatively to the questions. The trial court asked if either side wanted the jury to be polled, and both sides responded, “No.”

DISCUSSION

A. DIRECTED VERDICT

Defendant contends the trial court erred by directing a verdict in favor of the prosecution. We agree.

““The prohibition against directed verdicts ‘includes perforce situations in which the judge’s instructions fall short of directing a guilty verdict but which nevertheless have the effect of so doing by eliminating other relevant considerations if the jury finds one fact to be true.’ [Citation.]”” (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 315.) “[R]egardless of how overwhelmingly the evidence may point” towards defendant’s guilt, the trial court is “barred from attempting to override or interfere with the jurors’ independent judgment in a manner contrary to the interests of the accused.” (*U.S. v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 573.) “[N]o fact, not even an undisputed fact, may be determined by the judge.’ [Citations.]” (*People v. Figueroa* (1986) 41 Cal.3d 714, 724.) “[I]t matters not whether the issue in question is one of fact or law. Due process requires that it be submitted to the jury.’ [Citation.]”

(*Yarbrough*, at p. 315.) We apply the de novo standard of review when considering this issue. (*People v. Severance* (2006) 138 Cal.App.4th 305, 319.)

All the evidence in this case reflects that the crimes charged in counts 1 and 2 occurred more than 10 years prior to defendant being charged. The crimes were also charged as having occurred more than 10 years prior to the commencement of the prosecution. It appears from the record the trial court also found that the crimes in counts 1 and 2 must have occurred more than 10 years prior to defendant being charged, which leads to the problem created in this case: There was only one special finding form that allowed for the finding that the crimes occurred more than 10 years before defendant being charged, and that form was the one that provided for the offenses being exempt from the statute of limitations.

The first special finding form, which provided for a finding the offenses were time-barred, required findings that (1) the crimes occurred *within* the 10-year statute of limitations; (2) the prosecution *was not* commenced within one year of the crime being reported; (3) the offense *did not* involve substantial sexual conduct; and (4) there was *not* independent evidence corroborating the victim's allegations.

The second special finding form, which provided for a finding that the offenses were *not* time-barred, required findings that (1) the crimes occurred *beyond* the 10-year charging time period; (2) the prosecution was commenced within one year of the crimes being reported; (3) the offense involved substantial sexual conduct; and (4) there was independent evidence corroborating the victim's allegations.

Given the two forms, if the jury followed the evidence, it would *have to* find the crimes were exempt from the statute of limitations, because only the second form gave the option for finding the crimes occurred *outside* the statute of limitations—the “not exempt” form did not provide such an option. Despite the lack of true options given on the special finding forms (in light of the evidence regarding the time period of the offenses) the jury submitted the form finding the crimes were *not* exempt from the statute of limitations, but the trial court rejected this finding for obvious reasons—there was only one form that included the “right” finding about the 10-year time period, and that form was the one finding the crimes were exempt from the statute of limitations.

There was a fundamental problem with the special finding forms, in that the form that provided for finding (1) the victim’s allegations were not corroborated, and (2) the crimes did not involve substantial sexual conduct, did not have an option for finding that the crimes occurred beyond the 10-year statute of limitations. Since the trial court concluded the jury’s finding that the crimes occurred within the 10-year statute of limitations was inconsistent, and required the jury to fix its “mistake” with further deliberations, while providing only one form with the “correct” answer, the trial court effectively directed the jury’s finding on the statute of limitations issue.

In other words, by questioning the jury about the expiration portion of its finding, telling the jury that the finding it had made was inconsistent, and giving the jury only one form with the supposedly consistent finding, the trial court ensured that only one result was possible—a finding that the offenses were exempt from the statute of limitations, despite the possibility that the jury may have found the crimes did not

involve substantial sexual conduct or that there was not corroborating evidence for the victim's allegations. Thus, we conclude the trial court directed the jury's special finding, because the trial court eliminated other relevant considerations, based on one fact being true (the 10-year period). (See *People v. Yarbrough*, *supra*, 169 Cal.App.4th at p. 315.) A directed verdict is a structural error, and thus the convictions for counts 1 and 2 must be conditionally reversed, subject to retrial of the statute of limitations allegations.³ (*People v. Lawson* (1987) 189 Cal.App.3d 741, 753.)

The People assert that the trial court did not err “[b]ecause there was no material dispute that the statute of limitations had expired, [and] if the jury found that the prosecution did not satisfy the requirements of . . . section 803 [(the statute of limitations exemption)], then it should have acquitted him.” The People argue the trial court did not instruct the jury on which form to change, so the jury could have changed the guilty/not guilty forms, if it so chose, as opposed to changing the special finding forms. The People cite to the statute of limitations instruction given to the jury which read: “A defendant may not be convicted of any of the charged crimes or lesser included offenses unless the prosecution began within 10 years of the date the crimes (were committed). The present prosecution began on February 24[,] 2008. [¶] The People have the burden of proving by a preponderance of the evidence that prosecution of this case began within the required time. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the People must prove that it is more likely than not that prosecution of

³ We explain the conditional reversal *post*.

this case began within the required time. If the People have not met this burden, *you must find the defendant not guilty of the crimes.*” (CALCRIM No. 3410, italics added.)

The People’s argument is not persuasive because, while the trial court did not explicitly tell the jurors how to complete the second set of verdict forms, it explicitly questioned the jury about the special finding, and only the special finding—not the guilty finding. In particular, the trial court asked the jury foreperson, “Did you find that the original 10 year statute of limitations had expired?” The trial court then told the jury that its findings were “inconsistent,” and sent them back to redeliberate.

The trial court’s questioning implied that the jury erred in regard to the expiration finding. The trial court only provided the jury with one form with the “right” expiration finding—the form concluding that the crimes were exempt from the statute of limitations. While the People cite to CALCRIM No. 3410, which directed the jury to acquit defendant if it found the prosecution did not begin within 10 years of the date of the offenses, the People fail to explain how the jury should have reconciled that instruction with the contradictory instruction that provided: “[I]f you find the defendant committed the offense of [section 288(a)] as charged in Count 1 or the offense of [section 288(a)] as charged in Count 2, you must also make a finding of whether the [statute of limitations] exception applies. Your jury verdicts will include a separate form for this finding.”

So, on one hand, the jury was instructed that if it found the crime occurred beyond the 10-year statutory period, then it must acquit defendant; but, on the other hand, it was instructed that if found defendant guilty, then it must make a finding related

to the statute of limitations exemption. Given the contradictory instructions, we are not persuaded by the People’s argument that CALCRIM No. 3410 solved the problems created at trial, especially in light of the trial court’s direct questioning regarding the expiration finding, the forms with only one “right” answer, and the trial court requiring the jury to redeliberate despite the jury having already submitted findings that defendant was guilty but the convictions were time-barred.

Next, the People argue the alleged error only affected the special findings—not the verdicts—and “the court was under no obligation even to submit a separate form to the jury to reflect its conclusions regarding the statute of limitations.” The People contend they are not aware of any authority requiring a statute of limitations finding to be recorded in a special verdict. The People distinguish the statute of limitations finding from “true findings” for sentence enhancement or special sentencing provisions, where a jury is statutorily required to render a separate verdict. (See, e.g., § 1158 [“verdict or finding” related to prior convictions].)

We infer the People are relying on the legal principal that a special finding can be implied in a general guilty verdict. For example, there is not necessarily an error where a special verdict form is not given on a statute of limitations issue, because the finding that the crime is exempt from the statute of limitations can be inferred from the general guilty verdict on the substantive offense. (*People v. Allen* (1941) 47 Cal.App.2d 735, 747-748.) The problem with relying on this legal principle is that there is a vast difference between an implied finding and a directed finding. In the cases where a finding is implied, the jury was given an opportunity to decide the issue; whereas, in a

case such as the instant matter, where a finding is directed, the jury does not decide the issue. So, if the jury had not been given special verdict forms in this case, there would still be an error to the extent the trial court directed the verdict. In other words, the fact the trial court maybe did not need to give the jury special finding forms is not persuasive, because the error is the result of the trial court taking the finding away from the jury—whether a form is required is not the issue, the finding can be implied or explicit, but the jury must make the finding. Accordingly, we find the People’s argument to be unpersuasive.

B. RETRIAL

We asked the parties to provide supplemental briefing on the issue of whether the statute of limitations allegations (§ 803, subd. (f)(1)) could be remanded for retrial. We conclude that the allegations may be retried.

In a felony case, an appellate “court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.” (§ 1260.)

The statute of limitations provision at issue in this case provides for when “a criminal complaint may be filed.” (§ 803, subd. (f)(1).) Thus, the allegations relate to jurisdiction, and are not an element of the crime. (*People v. Lopez* (1997) 52

Cal.App.4th 233, 244 (*Lopez*); *People v. Castillo* (2008) 168 Cal.App.4th 364, 369 (*Castillo*.)

The case law appears fairly well settled that the statute of limitations allegations may be remanded for a hearing at the trial court. (See *Lynch, supra*, 182 Cal.App.4th at pp. 1276-1277 [citing Supreme Court cases].) Specifically, our Supreme Court has concluded that when there is a problem with the statute of limitations on appeal, then “the fairest solution is to remand the matter to determine whether the action is, in fact, timely.” (*People v. Williams* (1999) 21 Cal.4th 335, 345.)

Given that the statute of limitations typically does not involve an element of the crime, and that our Supreme Court has authorized the retrial of statute of limitations issues, we conclude the prosecution may retry defendant as to the statute of limitations allegations. (§ 803, subd. (f)(1).)

Defendant asserts this court does not have the authority to order a limited remand in a felony case. Defendant argues that we may order a new trial as to the substantive charges and associated statute of limitations allegations for counts 1 and 2, but we cannot remand the matter solely on the statute of limitations allegations. We disagree with defendant’s argument because, (1) section 1260 authorizes this court to remand a case “to the trial court for such further proceedings as may be just under the circumstances”; and (2) our Supreme Court has concluded that when there is a problem with the statute of limitations on appeal, then “the fairest solution is to remand the matter to determine whether the action is, in fact, timely.” (*People v. Williams, supra*, 21 Cal.4th at p. 345.) Given the foregoing law, we conclude this court is authorized to

conditionally remand the matter back to the trial court for a retrial on the statute of limitation issues.

At oral argument, the People urged this court to decide whether defendant has a right to a jury at the retrial; the People asserted defendant did not have the right to a jury. We decline to decide this issue because it is not ripe for our review. Our Supreme Court has given explicit instructions regarding prospective retrial issues: “Perhaps the lesson bears repeating here . . . the question of former jeopardy, or any other question regarding further proceedings, is premature unless and until the People elect to pursue such further proceedings and, in particular, seek to retry [the] defendant[.]” (*People v. Swain* (1996) 12 Cal.4th 593, 610.) It is unclear if the prosecution in this case will seek to retry defendant. Thus, any opinion regarding defendant’s right to a jury at the retrial is premature.

C. IMPLIED ACQUITTAL

Defendant contends his convictions for counts 1 and 2 must be reversed because there were implied acquittals on counts 1 and 2. We disagree.

As set forth *ante*, the jury instructions and forms for the statute of limitations allegations were confusing and contradictory. When the trial court asked the jury foreperson to explain the jury’s statute of limitations findings, the foreperson gave a contradictory response. The trial court asked, “Let’s take Count 1. Did you find that the original 10 year statute of limitations had expired?” The foreperson responded, “No, but it had.” Given the troubles with the foreperson’s response, the jury instructions, and the verdict forms, it is difficult to determine what the jury explicitly

intended to do, much less what the jury implicitly intended to do. Ultimately, the trial court's second set of instructions, combined with the second set of forms, had the effect of directing a verdict by eliminating other relevant considerations if the jury found one fact to be true. But that directed verdict does not mean the jury's initial statute of limitations finding implied an acquittal; rather, it reflects a confusing set of directions and forms, and that the trial court effectively selected which of the confusing forms the jury needed to complete. Accordingly, we conclude the record does not support the conclusion that the jury implicitly acquitted defendant.

D. FAILURE TO RECORD THE ORIGINAL VERDICTS

Defendant contends the trial court erred by not recording the original verdicts rendered on counts 1 and 2. We disagree.

Section 1161 provides: “[W]hen there is a verdict of acquittal, the Court cannot require the jury to reconsider it.” However, a trial court may direct the jury to reconsider its verdict “[w]hen there is a verdict of conviction, in which it appears to the Court that the jury [may] have mistaken the law, the Court may explain the reason for [its] opinion and direct the jury to reconsider [its] verdict, and if, after the reconsideration, they return the same verdict, it must be entered.” (§ 1161.) A trial court clerk is required to record the jury's verdict “[w]hen the verdict given is receivable by the court.” (§ 1164.)

In the original verdict forms the jury found defendant guilty of the substantive offenses in counts 1 and 2. As to the initial statute of limitations findings, the jury found the 10-year statute of limitations *had not* expired. Thus, the jury found defendant

guilty and found the offense was *not* time-barred. Accordingly, there was not a judgment of acquittal; rather, there was a judgment of conviction. As set forth *ante*, the statute of limitations verdict forms were problematically worded, and therefore, the trial court could reasonably question the jury's understanding of the law. For example, due to the wording of the form, the jury found the 10-year statute of limitations *had not* expired, but submitted the form seemingly indicating the exception or tolling factors were *not* satisfied. In other words, it seemed the jury might have meant to find the statute of limitations exception did not apply, but the finding was problematic because that form required a finding that the crimes occurred *within* the 10-year limitations period, i.e., the verdict form was internally inconsistent. Thus, there were questionable judgments of conviction, and therefore we conclude the trial court acted properly in not recording the initial verdicts and sending the jury to reconsider its findings.

E. FINES

Defendant contends the fines imposed on him pursuant to Government Code section 70373 must be stricken because defendant's crimes took place before the code section was enacted, and there is nothing in the statute indicating that it may be retroactively applied. This court rejected an identical argument in *People v. Lopez* (2010) 188 Cal.App.4th 474, 478-480 [Fourth Dist., Div. Two]. Defendant's argument does not persuade us to reconsider the issue, so we again reject the argument.

DISPOSITION

The convictions for counts 1 and 2 are conditionally reversed. The prosecution has 90 days from the date of the filing of this opinion to commence the process of

retrying the statute of limitations allegations. If it is found that count 1 satisfies the statute of limitations exemption (§ 803, subd. (f)(1)), then the judgment of conviction for count 1 may be reinstated as of the date of that finding. If it is found that count 2 satisfies the statute of limitations exemption (§ 803, subd. (f)(1)), then the judgment of conviction for count 2 may be reinstated as of the date of that finding. If the prosecution misses the 90-day deadline or elects not to retry the statute of limitations allegations, then the convictions remain reversed and the trial court is directed to resentence defendant. If it is found that the charges in counts 1 and/or 2 do not satisfy the statute of limitations exemption (§ 803, subd. (f)(1)), then the convictions remain reversed and the trial court is directed to resentence defendant. (See *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1769-1770 [Fourth Dist., Div. Two] [resentencing]; see also *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1554 [Fourth Dist., Div. Two].) In all other respects, the judgment is affirmed.

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/s/ MILLER

J.

We concur:

/s/ HOLLENHORST

Acting P. J.

/s/ CODRINGTON

J.