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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.

JEREMIAS ZABALA GONZALEZ,

Defendant and Appellant.

E052861

(Super.Ct.No. RIF10001225)

OPINION

APPEAL from the Superior Court of Riverside County. Joe O. Littlejohn, Judge. (Retired judge of the San Diego Super. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part and remanded for resentencing.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lilia E. Garcia and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant Jeremias Zabala Gonzalez appeals from his conviction of a forcible lewd act (Pen. Code,¹ § 288, subd. (b)(1), count 1); aggravated sexual assault (§ 269, subd. (a)(1), § 261, subd. (a)(2), counts 2 through 6); and unlawful sexual intercourse with a child 10 years or younger (§ 288.7, subd. (a), counts 7 through 11). Defendant contends: (1) his convictions of violating section 288.7 must be reversed because the jury was not required to find that the acts occurred before the effective date of that statute; (2) the victim’s “generic testimony” was insufficient to support the verdict on some of his convictions; (3) the term “10 years of age or younger,” as used in section 288.7, subdivision (b) means the statute does not cover a child after her 10th birthday; and (4) his sentence for count 1 must be stayed under section 654. We conclude defendant’s sentence for count 1 must be stayed under section 654 and his convictions of four counts under section 288.7 must be reversed and the matter remanded for resentencing.

II. FACTS AND PROCEDURAL BACKGROUND

A. Prosecution Testimony

1. Jane Doe’s Testimony About the Molestation

The victim, defendant’s daughter Jane Doe, was born on November 30, 1996. In 2006 when Doe was nine years old, her family’s home was damaged in a fire, and they moved into a rental home. In the summertime, while they were living in the rental home,

¹ All further statutory references are to the Penal Code.

Doe's mother, Lucina Zabala, left for at least a month on a church trip. One night, defendant called Doe into his bedroom. He told her to take off her clothes and lie on his bed. She did so, and defendant took off his own clothes. He got on top of her, spread her legs with his hands, and "started to hump on" her. She explained that he touched his private part, "where he pee[d]" to her private part where she peed, and "he kept putting it in." She testified he put it "[a]ll the way in." She was not sure if defendant's private part had gone beyond the vaginal lips, but it had gone between the vaginal lips. She felt pain and started screaming and hitting him, but he told her to be quiet or he would hit her. When he finished, she ran back to her room crying. She did not tell anyone what had happened because she was afraid defendant would hit her.

In a second incident, the family was still living in the rental house, and Lucina was still on her trip. One day when no one else was home, defendant entered Doe's room and closed the door. She removed her pants because she was afraid he would hit her. Defendant removed his own pants and underwear, told her to lie on the bed, and again "started humping on" her in the same way as before. Again, she did not tell anyone because she was afraid.

A third incident occurred after the family had moved back to their own home when Doe was still nine years old. When everyone else was asleep, defendant entered her room, told her to take off her clothes, and took off his own clothes. He committed the same acts as before and then went back to his room.

A fourth incident occurred in the summertime when Doe accompanied defendant to a house where he worked as a gardener. In the backyard of the house, defendant told

her to pull down her pants and lie on the ground. He pulled down his own pants, got on top of her, and “started humping on [her] again” in the same way as in the previous incidents.

Doe testified that defendant had engaged in sexual intercourse with her more than the four times she had described, and each time, his conduct was essentially the same. The last time occurred before Doe turned 11 years old but after her youngest sister was born in October 2006. During the molestations, defendant had touched Doe’s chest and “butt.”

Defendant had sometimes whipped her with a belt and pinched her. He had also beaten Doe’s younger siblings, and in 2008 had kicked her brother.

2. Doe’s Disclosures

In 2006, when she was nine years old, Doe told a teacher what defendant had done. When the police talked to her, she did not repeat the allegations because she was afraid they might arrest her or that defendant would go to jail.

Doe told Lucina that defendant was sexually molesting her. Lucina first rejected the accusation and then told Doe to scream if it happened again and Lucina would stop defendant. However, when defendant later molested Doe in Doe’s bedroom, Lucina never came in to stop him. Lucina told Doe not to tell anyone.

Doe also told her paternal grandmother, Modesta Gonzalez, that defendant had molested her, and the grandmother then kept Doe and her younger siblings at the grandmother’s house for three days in June 2007. The grandmother convened a family meeting at which Doe told the family members what defendant had done. Defendant

responded that Doe was lying and that she had been “watching some sort of show like that.” The grandmother and the other family members did not report Doe’s accusation to the authorities.

Modesta called child protective services in March 2008 because Doe told her defendant was touching Doe’s breasts, and Modesta had seen defendant forcefully kiss Doe on the lips after church.

3. Doe’s Interview with Social Worker

Sarah Walker, a social worker and forensic interviewer with the Riverside County Child Assessment Team (RCAT) interviewed Doe in March 2008, and a videotape of the interview was played for the jury, and the jury was given a transcript.

Doe told Walker that the family’s house had burned and they moved to a rental house. While they lived in the rental house, and before Doe’s youngest sister was born, Doe’s mother had gone to the mountains for church, and while the mother was gone, Doe’s “dad abused [her] sexually.” When the mother returned, they moved back to their old house, and “[her] dad started doing it again.” When asked to described the sexual abuse, Doe responded, “He got on me and he um, pulled my pants down and underwear and then he started . . . [¶] . . . [¶] . . . abusing me.” Her father took her hand and led her to his room and closed the door; she thought he wanted her to massage his back. He told her to get on the bed, and he took off her pants and underwear. He took off his own pants.

Doe said when she was 10 years old, she had told her mother and grandmother about what had happened, and in front of her parents and other family members, she again told them what had happened, but defendant accused her of lying.

She said he was “humping” on her “middle part,” where she peed, while she screamed and told him to stop. Defendant was using his “middle part,” where he peed. She could feel his “middle part” “getting on” her “middle part,” and it “hurt a lot.” She described “humping” as “[l]ike going up and down.” When asked whether defendant had been inside or outside her “middle part,” Doe replied, “It was like in the inside. He tried to open it, but it never did, but it really hurt . . .” When defendant finished, he said he was sorry and would never do it again.

Doe described a second incident when they had returned to their own house. When Lucina was asleep, defendant came into Doe’s room and “took off [her] pants and underwear again and he started doing the stuff again.” Doe told the interviewer she was then 10 years old. Doe stated “it happened a lot of times,” and “[i]t was the same.” She later stated, “I think it was ten or five.”

4. Other Witnesses’ Testimony

Luisana Hernandez, Lucina’s friend, testified that in October 2006, Lucina told her she (Lucina) had found defendant in bed with Doe. Lucina was crying and angry. The conversation occurred while Lucina was pregnant, and Hernandez believed the incident had happened close in time to the conversation.

Lucina denied ever seeing defendant with his pants down in Doe’s room.

A pediatrician performed a medical examination of Doe in April 2008. Doe's genitalia and anus were normal; however, the pediatrician testified that genital tissue generally heals within three days of an injury. Doe told the pediatrician that she had had painful urination after the first incident. The pediatrician could neither confirm nor negate sexual abuse. Although Doe's hymen was intact, intercourse does not necessarily perforate the hymen because a person "can penetrate the labia majora/minora without touching the hymen, [and] the patient will feel that the male genitalia is inside of her without being touched on the hymen."

B. Defense Evidence

Defendant produced character evidence from his niece, sister, and brother.

C. Jury Verdicts and Sentence

The jury found defendant guilty of a forcible lewd act (§ 288, subd. (b)(1), count 1); aggravated sexual assault (§ 269, subd. (a)(1), § 261, subd. (a)(2), counts 2 through 6); and unlawful sexual intercourse with a child 10 years or younger (§ 288.7, subd. (a), counts 7 through 11). The trial court imposed a consecutive indeterminate term of 25 years to life for each of counts 7 through 11, and a consecutive aggravated term of eight years for count 1. The trial court imposed an indeterminate term of 15 years to life for each of counts 2 through 5, but stayed those terms under section 654.

III. DISCUSSION

A. Sufficiency of Evidence that Crimes Were Committed After the Effective Date of Section 288.7

Defendant contends his convictions of violating section 288.7 in counts 7 through 11 must be reversed because the jury was not required to find that the acts occurred before the effective date of that statute.

1. Additional Background

The information alleged that defendant committed count 1 (§ 288, subd. (b)(1)) “on or about October 2006”; counts 2 through 6 (§ 269, subd. (a)(1), § 261, subd. (a)(2)) “on or about year of 2006, through and including year of 2007”; and counts 7 through 11 (§ 288.7, subd. (a)) “on or about October 2006, through and including 2007.” The trial court’s instruction to the jury as to counts 7 through 11 did not require the jury to make any finding as to the dates the offenses occurred.

2. Standard of Review

We review error in application of ex post facto principles under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Farley* (1996) 45 Cal.App.4th 1697, 1710.)

3. Analysis

Section 288.7, subdivision (a) provides: “Any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of

25 years to life.” That statute became effective September 20, 2006. (Stats. 2006, ch. 337, § 9 (S.B. 1128, § 9, eff. Sept. 20, 2006.)

The state and federal Constitutions prohibit ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9.) A law violates those ex post facto clauses if (1) it applies to events occurring before its enactment and (2) it disadvantages the offender by altering the definition of criminal conduct or increasing the punishment for a crime. (*People v. Delgado* (2006) 140 Cal.App.4th 1157, 1163-1164. The People concede that defendant cannot be convicted under section 288.7 for crimes that occurred before September 20, 2006.

Defendant argues that the People failed to establish beyond a reasonable doubt that any of the crimes took place after that date. In *People v. Hiscox* (2006) 136 Cal.App.4th 253, the defendant appealed from his sentencing under section 667.61 (the “One Strike Law”) which took effect on November 30, 1994. (*Hiscox, supra*, at p. 257.) The evidence established only that the crimes had occurred between 1992 and 1996; however, the jury was not instructed that its findings under section 667.61 were restricted to offenses committed after the effective date of the statute. The appellate court reversed, concluding the jury could have returned guilty verdicts without considering when any particular offense had occurred. (*Hiscox, supra*, at pp. 260-261.) The court explained, “Since the jury was not asked to make findings on the time frame within which the offenses were committed, the verdicts 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 One Strike law]. [Citation.]” (*Id.* at p. 261; italics added.)

In *People v. Riskin* (2006) 143 Cal.App.4th 234 (*Riskin*), the defendant was convicted of a forcible lewd act on his daughter that was alleged to have occurred between June 15, 1994, and June 14, 1998. The victim testified to several acts that occurred within that time frame. The defendant appealed from his sentence of 15 years to life under the One Strike Law, and the court reversed, noting that the victim had given inconsistent testimony about her age when the defendant committed the various acts; it was not clear which act the jury found constituted the charged offense; and the victim’s testimony did not establish that all the acts occurred after the effective date of the One-Strike Law. (*Riskin, supra*, at p. 245.)

Doe testified that two incidents had occurred at the rental house where her family had lived for a month when she was nine years old. Thus, those incidents could have occurred before September 20, 2006. The People concede error under ex post facto principles with respect to two counts. The People argue, however, that the evidence was sufficient to establish beyond a reasonable doubt that the other three counts were committed after the effective date of the statute.

Doe testified that a third incident had occurred when she was nine years old after the family had moved back to their own home. In her RCAT interview, she stated she thought she was 10 when defendant committed the act in her bedroom in the family home. The People argue that other evidence “reasonably establishe[d]” that the third incident occurred in October 2006, specifically, Hernandez’s conversation with Lucina in

which Lucina was crying and angry about finding defendant in bed with Doe. However, Hernandez initially testified that the conversation had taken place around December 2007, and later testified that it had taken place “around October of 2006.” Here, as in *Riskin*, the evidence was inconsistent about when the incident occurred. Under the standard that governs our review, we cannot say the evidence leaves no reasonable doubt that the third incident Doe described occurred on or after September 20, 2006. (See *Riskin, supra*, 143 Cal.App.4th at p. 245.)

The People next assert that the back yard incident occurred when Doe was 10 years old. Contrary to that assertion, however, Doe did *not* testify that she was 10 years old when defendant committed the act in the back yard. She could only remember that the act took place in the summertime, and she did not remember if her sister had yet been born when the outside incident occurred. Again, we cannot say the evidence leaves no reasonable doubt that act occurred after the effective date of section 288.7.

Doe did testify, however, that defendant had molested her after her sister was born in October 2006 and after her 10th birthday in November 2006. Thus, we conclude the evidence established beyond a reasonable doubt that at least one act of molestation occurred after the effective date of section 288.7.

We will therefore reverse defendant’s conviction as to four counts under section 288.7. Although defendant was charged under separate statutes (see § 954), the unlawful intercourse (§ 288.7) charges (counts 7 through 11) were based on the same facts as the aggravated sexual assault (§ 269, subd. (a)) charges (counts 2 through 6), and the trial court stayed defendant’s sentences for counts 2 through 6 under section 654. We will

therefore remand the case for resentencing so the trial court may lift the stay and impose sentence as to four counts of aggravated sexual assault.

B. Sufficiency of Evidence of Multiple Offenses

Defendant contends Doe’s “generic testimony” was insufficient to support his conviction of count 1 and was sufficient to support only four counts of aggravated sexual assault.

1. Standard of Review

When a criminal defendant challenges the sufficiency of the evidence to support his conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

2. Analysis

In *People v. Jones* (1990) 51 Cal.3d 294, our Supreme Court held that child molestation convictions may be based on “generic” or nonspecific testimony. When a defendant lives with the victim or has continuous access to her, “the victim typically testifies to repeated acts of molestation occurring over a substantial period of time but, lacking any meaningful point of reference, is unable to furnish many specific details, dates or distinguishing characteristics as to individual acts or assaults.” (*Id.* at p. 299.) Moreover, “testimony describing a series of essentially indistinguishable acts of molestation is frequently the only testimony forthcoming from the victim. To hold that such testimony, however credible and substantial, is inadequate to support molestation

charges would anomalously favor the offender who subjects his victim to repeated or continuous assaults.” (*Id.* at p. 300.) Thus, the court held, “even generic testimony (e.g., an act of intercourse ‘once a month for three years’) outlines a series of *specific*, albeit undifferentiated, incidents, *each* of which amounts to a separate offense, and *each* of which could support a separate criminal sanction.” (*Id.* at p. 314.) Such evidence is sufficient if it describes the kind of act or acts committed with sufficient specificity, the number of acts with sufficient certainty to support all the counts alleged, and the general time period during which the acts took place. (*Id.* at pp. 315-316.)

Under the standards set forth in *People v. Jones, supra*, 51 Cal.3d 294, the evidence was sufficient to support all of defendant’s convictions. As we discuss below, the People concede on appeal, and we agree, that the act that formed the basis for count 1 was also one of the same acts, and defendant’s sentence for count 1 must be stayed under section 654.

3. *Sufficiency of Evidence of Five Counts of Aggravated Sexual Assault*

As recounted, Doe described four specific acts of sexual intercourse. The first occurred in defendant’s bedroom in the rental house during the nighttime when she was nine years old and while her mother was on a church trip. The second also occurred in the rental house in Doe’s bedroom during the daytime when she was nine years old, and no one else was home. The third occurred in her bedroom in the nighttime after the family returned to their own home; Doe was then nine or 10 years old, and her mother was sleeping in another room. The fourth occurred in the summertime in the back yard of a house where defendant was working. As to each of these occurrences, Doe

described how defendant ordered her to remove her clothes, removed his own clothes, spread her legs, and lay on her while putting his penis in her vagina. Doe further testified that defendant had engaged in similar acts more than just those four times, and the additional acts had taken place in the family home. She told the social worker the acts had occurred “a lot of times” and “I think it was ten or five” times. Thus, there was sufficient evidence as to the type of acts (similar acts of intercourse) and of the number of acts committed (at least five) to support all five counts of aggravated sexual assault alleged. (*Jones, supra*, 51 Cal.3d at p. 316.)

4. Sufficiency of Evidence of Forcible Lewd Act

The information alleged a violation of section 288, subdivision (b) in count 1 that took place in October 2006. Defendant contends that “Doe did not describe any lewd conduct occurring in 2006 and 2007 other than ‘humping,’ and none of the incidents she described “supported a finding of a lewd act occurring in October 2006”

The trial court instructed the jury that to provide count 1, the People were required to prove that “one, the defendant willfully touched any part of a child’s body either on . . . the bare skin or through the clothing; and two, in committing the act, the defendant used force, violence, duress, menace or fear of immediate and unlawful bodily injury to the child or someone else; and three, the defendant committed the act with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the child; and four, the child was under the age of 14 years at the time of the act.” Any one of the acts about which Doe testified was a lewd act within the meaning of the statute.

Moreover, contrary to defendant’s contention, the People were not required to prove the exact date the offense was committed. (E.g., *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130 [Fourth Dist., Div. Two].) Rather, “[t]he proof need not conform to the exact date laid in the information, it being sufficient to prove the commission of the offense at any time prior to the filing of the information within the statutory period—the commission of the act here charged is not the kind that does not constitute a crime unless committed on a specific date; time is not of the essence or a material ingredient of the offense” [Citation.]” (*Ibid.*) The evidence was amply sufficient to establish that defendant committed a forcible lewd act on Doe before the information was filed and within the statute of limitations.

C. Section 288.7 Offenses

Defendant contends the term “10 years of age or younger” as used in section 288.7, subdivision (a), means the statute does not cover a child after her 10th birthday, and therefore his convictions of counts 7 through 11 must be reversed.

In *People v. Cornett* (2012) 53 Cal.4th 1261, our Supreme Court recently held that the term “ten years of age or younger” as used in section 288.7, subdivision (b) covers children until they reach their 11th birthday. (*Cornett, supra*, at p. 1275.) It was undisputed that all of defendant’s crimes occurred before Doe’s 11th birthday. We therefore reject defendant’s argument.

D. Section 654

Defendant contends his sentence for committing forcible lewd acts in count 1 must be stayed under section 654, because that charge was based on the same facts as his

convictions of aggravated sexual assault on a child in counts 2 through 6 and of sexual intercourse with a child in counts 7 through 11. The People concede error, and we agree. We will therefore direct the trial court on remand to stay defendant's sentence for count 1 under section 654.

IV. DISPOSITION

Defendant's conviction is reversed as to four counts of violating section 288.7, and the matter is remanded for resentencing to allow the trial court to lift the section 654 stay as to four of the aggravated sexual assault convictions. In addition, defendant's sentence for count 1 must be stayed under section 654. In all other respects, the judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.