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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.

GABRIEL CABRERA LOPEZ,

Defendant and Appellant.

E053445

(Super.Ct.No. RIF129100)

OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge.  
(Retired Judge of the Mun. Ct. for the Orange Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meredith S. White and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gabriel Cabrera Lopez (defendant) appeals after a jury convicted him of multiple sex crimes involving two victims; he received a sentence of 90 years to life. Defendant claims ex post facto protections barred both his “One Strike” law sentences on four counts of forcible lewd acts on a child (Pen. Code, § 288, subd. (b))<sup>1</sup> and his very conviction for aggravated sexual assault of a child (§ 269). This is because, he argues, the jury could not have concluded beyond a reasonable doubt that he committed the offenses after the date the relevant statutes became effective—November 30, 1994. The People concede and, we agree, that two of the four forcible lewd act counts should be vacated and the matter remanded for resentencing on those counts because the evidence did not establish beyond a reasonable doubt that appellant committed these offenses on or after November 30, 1994. However, we conclude that an additional count of forcible lewd acts should also be remanded for resentencing, for the same reason. We affirm the convictions, and sentences on the remaining counts, including the conviction for aggravated sexual assault of a child.

#### **FACTS AND PROCEDURE**

Defendant molested his daughter, C., over 30 times, from the time she was three or four years old, until she was 10 years old. C. revealed the molestations to her mother when she was about 10 years old. They disclosed the molestation to law enforcement in May 2005. These crimes are not the subject of this appeal.

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<sup>1</sup> All further statutory references are to the Penal Code.

Previously, defendant had also molested his niece, A., from the time she was five years old until she was nine or 10 years old. In 2006, when the adult A. heard that defendant had been arrested for molesting C., she came forward and disclosed the molestation to law enforcement. These crimes are the subject of this appeal because defendant argues they could have taken place before November 30, 1994.

The People filed a first amended information on February 17, 2011. Regarding C., the People charged defendant in counts 1 and 3 with committing a lewd act on a child (§ 288, subd. (a)),<sup>2</sup> and in counts 2 and 4 with aggravated sexual assault on a child (§ 269, subd. (a)).<sup>3</sup> Regarding A., the People charged defendant in counts 5 through 8 with committing a forcible lewd act on a child (§ 288, subd. (b)(1)), and in count 9 with aggravated sexual assault of a child (§ 269, subd. (a)(4)).<sup>4</sup> The counts regarding A. were filed outside the normal statute of limitations pursuant to section 803, subdivision (f). The People further alleged that defendant had committed lewd acts upon a child against more than one victim, within the meaning of section 667.61. The effect of the allegation under section 667.61 is to increase the punishment for committing a forcible lewd act on

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<sup>2</sup> The People alleged defendant committed the offenses in count 1 from on or about January 1, 1997 to January 1, 1998, and in count 3 from on or about January 1, 2002 through January 1, 2003.

<sup>3</sup> The People alleged defendant committed the offenses in count 2 from on or about January 1, 1999 to January 1, 2000, and in count 4 from on or about January 1, 2002 to January 1, 2003.

<sup>4</sup> The People alleged defendant committed the offenses in counts 5 through 9 from on or about October 31, 1992 to October 31, 1996.

a child, as in counts 5 through 8, to 15 years to life on each count, instead of the normal sentence of three, six or eight years. This is known as the One Strike law.

On February 25, 2011, a jury found defendant guilty on counts 3 through 9 and deadlocked on counts 1 and 2. At sentencing on April 22, 2011, the court deemed a true finding on the section 667.61 multiple victim allegation to be inherent in the verdicts. The court sentenced defendant to consecutive terms of 15 years to life on counts 4 through 9, and a concurrent term of 15 years to life on count 3, for a total term of 90 years to life. This appeal followed.

### **DISCUSSION**

Defendant argues he should be resentenced on counts 5 through 8 because the principles of ex post facto prohibit him from receiving a 15-year-to-life sentence on these counts under the One Strike law for actions that took place before the law's effective date of November 30, 1994. Defendant asserts the testimony at trial was not sufficient to allow the jury to determine beyond a reasonable doubt that each of the acts included in counts 5 through 8 took place on or after November 30, 1994. This is why, defendant argues, the jury was asked to return general verdicts. The unanimity instructions told the jury that the People presented more than one act to prove defendant committed the offenses and that the jury must agree that appellant committed at least one of the acts and agree as to which act he committed.

The effective date of the One Strike law was November 30, 1994. (Stats. 1994, 1st Ex. Sess. 1993-1994, ch.14, § 1, pp. 8570-8572.) Consequently, the section 667.61 multiple victim allegation subjected defendant to a maximum sentence of 15 years to life

on each of counts 5 through 8 *only* as to those acts that the evidence proves beyond a reasonable doubt occurred on or after the law's effective date. Any application of the One Strike law to an act committed before the effective date violates the ex post facto clauses of the state and federal constitutions. (*People v. Alvarez* (2002) 100 Cal.App.4th 1170, 1178.)

Similarly, defendant argues the charge in count 9 should be dismissed altogether. Section 269, aggravated sexual assault of a child under age 14, was created as a new offense with an enhanced penalty of 15 years to life. As with the One Strike law at issue in counts 5 through 8, section 269 became effective November 30, 1994. (Stats. 1994, 1st Ex. Sess. 1993-1994, ch. 48, § 1.) Defendant contends the evidence does not prove beyond a reasonable doubt that the actions comprising count 9 took place on or after that date.

The information alleged that each of the acts involving A. in counts 5 through 9 occurred between October 31, 1992 and October 31, 1996. The jury was not called upon to and did not provide a date for each of the five crimes involving A.

In *People v. Hiscox* (2006) 136 Cal.App.4th 253, the appellate court held, “[I]t is the prosecutor’s responsibility to prove to the jury that the charged offenses occurred on or after the effective date of the statute providing for the defendant’s punishment. When evidence at trial does not establish that fact, the defendant is entitled to be sentenced under the formerly applicable statutes . . . .” (*Id.* at p. 256) Because the jury instruction allowed the jury to convict the defendant by “agreeing that [he] committed all the acts described by the victims[,] . . . the jury could have returned guilty verdicts without

considering when any particular offense occurred. [¶] 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 November 30, 1994*. [Citation.] It would be inappropriate for us to review the record and select among acts that occurred before and after that date, . . . [The defendant] has a constitutional right to be sentenced under the terms of the laws in effect when he committed his offenses. For a court to hypothesize which acts the jury may have based its verdicts on . . . would amount to ‘judicial impingement upon the traditional role of the jury.’ [Citation.]” (*Id.* at pp. 261, fns. omitted.)

Here, A.’s testimony describes five separate incidents,<sup>5</sup> two of which—counts 8 and 9—leave no reasonable doubt that the underlying charges pertained to events occurring after November 30, 1994. As the People concede, the evidence regarding counts 5 and 6 does leave reasonable doubt that these charges took place after November 30, 1994. In addition, we conclude that the evidence allows for reasonable doubt as to count 7. We now discuss A.’s testimony as to the time frame of each incident and explain how we arrive at a determination whether the evidence shows beyond a reasonable doubt that the crime took place on or after November 30, 1994.

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<sup>5</sup> In closing arguments, the prosecutor told the jury “you heard that [A.] had at least five different incidents that she could clearly recall with salient details.”

Count 5—Forcible Lewd Act at Jurupa Park—As Early As 1992

A. testified that defendant first touched her when she was playing at “a park around Jurupa,” “when I was in kindergarten. Five-years-old, I remember.” On cross-examination, when defense counsel asked A. if she had testified that she was, “what, eight or something like that, or nine?” A. testified, “I was five years old.” More to the point, A. answered, “yes,” on cross-examination when asked if she was born in 1987. A. stated that she was 18 years old in 2006. During her testimony on February 22, 2011, A. stated that she was 23 years old, which would put her earliest birth date at February 23, 1987, and her latest birth date at December 31, 1987, if we credit her answer that she was born in 1987. So, the record indicates that A. was born in 1987 and, thus, this first incident that took place when she was five years old would have happened in 1992 (1987 birth date plus five years old), before the effective date of section 667.61. The 15-year-to-life sentence on count 5 should be vacated and remanded for resentencing.

Count 6—Forcible Lewd Act in the Bedroom of Defendant’s Apartment—As Early As 1993

A. testified that the second incident<sup>6</sup> took place, “Around the same age, six, seven. I can’t remember.” It took place at defendant’s apartment when A. and her father were visiting. Thus, the record shows that this incident took place between 1993 (1987 birth

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<sup>6</sup> A. did say, when asked how old she was during the incident that occurred after the one at Jurupa Park, “It was continuously afterwards. It was continuously. It was all the time.” She then began to describe the “next incident” that occurred in the bedroom of defendant’s apartment. Later, the prosecutor and A. clarified in a back-and-forth exchange that defendant had touched her many times, but she was testifying as to the incidents that she remembered clearly.

date plus six years old) and 1994 (1987 birth date plus seven years old), which is not evidence beyond a reasonable doubt that it took place after the effective date of section 667.61. The 15-year-to-life sentence on count 6 should be vacated and remanded for sentencing.

Count 7—Forcible Lewd Act at Fairmont Park—As Early As 1994

A. testified that the next incident happened at Fairmont Park when she was in the third or fourth grade. She answered, “Yeah,” when the prosecutor asked if she was then seven or eight years old. Although the People argue on appeal that this conduct must have taken place in 1995 or after, based on A.’s testimony that she was in third or fourth grade (five years old in kindergarten, so eight years old in third grade, plus 1987 birth date, equals 1995 or later), we cannot say that this was proven to the jury beyond a reasonable doubt. This is because, based on A.’s answer to the prosecutor that she could have been as young as seven years old at the time of this incident, it could have taken place sometime in 1994 (1987 birth date plus seven years old), prior to the effective date of section 667.61. The 15-year-to-life sentence on count 7 should be vacated and remanded for sentencing.

Count 8—Forcible Lewd Act in the Garage at A.’s Home on Harrison Street—  
1996 or Later

A. testified that the last time defendant touched her inappropriately was in the garage of her home on Harrison Street, after her mother had kicked defendant out of their home. Defendant attempted to have intercourse with A., but A.’s mother called her name while looking for her and defendant allowed A. to get up and leave. A. testified that she

was nine or 10 years old and in the fifth or sixth grade. This would put the incident at 1996 or later (1987 birth date plus nine years old), and so the 15-year-to-life sentence under section 667.61 stands.

Count 9—Aggravated Sexual Assault in A’s Bed at Her Home on Harrison Street—1995 or Later

A. testified about an incident, after the one at Fairmont Park. It happened while she and her sister were asleep in her bed, at her home on Harrison Street, while defendant was living with A.’s family. Defendant woke A. up and put his penis in her mouth. A. testified that defendant later did this exact same thing on other occasions, but that the first time he did it she was eight or nine years old and in the fifth grade. We found the testimony confusing as to whether the incident A. described was the first time he came into her room and performed this act, or not the first time. However, based on A.’s testimony that she was at least eight years old the first time defendant committed this aggravated sexual assault, we conclude that the evidence shows beyond a reasonable doubt that this took place no earlier than 1995 (1987 birth date plus eight years old), which would put it after the effective date of section 667.61. This conviction stands.

**DISPOSITION**

The sentences for counts 5, 6 and 7 are reversed and the matter is remanded for the trial court to resentence defendant on those counts according to the terms provided by section 288, subdivision (b).

In all other respects, the judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

RICHLI  
J.

CODRINGTON  
J.