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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.

JULIAN DELGADO GARCIA,

Defendant and Appellant.

E054347

(Super.Ct.No. SWF029035)

OPINION

APPEAL from the Superior Court of Riverside County. Mark E. Petersen, Judge.

Affirmed in part, reversed in part with directions.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Christopher P. Beesley, and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Julian Delgado Garcia was convicted on six counts of various forms of sexual molestation of a child, Jane Doe. He contends that his conviction on count 2, sexual penetration of a child under the age of 10, in violation of Penal Code section 288.7, subdivision (b),¹ must be reversed because the prosecution failed to prove that the single act of digital penetration Doe described occurred after the effective date of the statute.

As we discuss below, we agree. We will also correct clerical errors in the abstract of judgment and sentencing minutes.

PROCEDURAL HISTORY

Defendant was charged, under the alias Susano Delgado Portillo, with one count of committing a lewd act on a child under the age of 14 (§ 288, subd. (a); count 1); one count of sexual penetration of a child under the age of 10 (§ 288.7, subd. (b); count 2); and four counts of rape of a child under the age of 14 and seven or more years younger than the perpetrator (§ 269, subd. (a)(1); counts 3-6). The information also alleged as to count 6 that defendant inflicted great bodily injury within the meaning of section 12022.7, subdivision (a) and of section 1192.7, subdivision (c)(8). (Language in the information that the infliction of great bodily injury was also in violation of section 667.61, subdivision (c)(3), the “One Strike” law, was stricken on motion of the prosecutor.)

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

Defendant was convicted on all counts, and the great bodily injury allegation was found true. The court imposed a total term of 11 years plus 75 years to life.

Defendant filed a timely notice of appeal.

FACTS

Because the issue raised in this appeal pertains only to count 2, we will give only an abbreviated recitation of the facts.

Doe was born in August 1997. Doe and her brother lived with their grandmother since Doe was four years old. Defendant was married to Doe's grandmother.

Doe testified that when she was seven or eight years old, defendant touched her breast area both over and under her clothes. Doe told her grandmother about it, and the next day, defendant installed a lock on the inside of Doe's bedroom door.

Doe testified that defendant continued to molest her until she was 11, when defendant impregnated her. When Doe suspected she was pregnant, she told her grandmother, who called the police. On September 1, 2009, Doe was taken to a hospital for a forensic interview with a child sexual abuse expert. A pregnancy test was administered that day, and it was determined that she was pregnant. Doe and her grandmother agreed that she would have an abortion. The abortion was performed two days later.

After his arrest, a DNA sample was obtained from defendant. Examination of defendant's DNA, Doe's DNA and the DNA taken from the aborted fetus established "a strong probability" that defendant was the father.²

LEGAL ANALYSIS

1.

THE CONVICTION ON COUNT 2 VIOLATES THE CONSTITUTIONAL PROHIBITION ON EX POST FACTO LAWS

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.) In count 2, defendant was charged with violating section 288.7, subdivision (b) (hereafter section 288.7(b)). Section 288.7(b) provides, "Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, 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 15 years to life." Section 288.7 was enacted in 2006 and became effective on September 20, 2006. (Stats. 2006, ch. 337, § 9.) Prior to the effective date of section 288.7, sexual penetration of a minor under the age of

² The DNA expert testified that the results showed that defendant is "210 million to 14 billion times more likely to be the biological father than some random person from the population."

14 by a person more than 10 years older than the was victim punishable by a prison term of three, six, or eight years, pursuant to section 289, subdivision (j).

Defendant contends that his conviction on count 2 violates the ex post facto prohibition because the evidence does not unambiguously establish that the single act of sexual penetration Doe described occurred after the September 20, 2006 effective date of section 288.7. Rather, he contends, the evidence “supports the conclusion” that the act took place before the effective date of the statute, when Doe was seven or eight years old. He notes that the jury was not instructed that in order to find defendant guilty, it must determine that the act occurred after September 20, 2006. Rather, the jury was instructed that it need only find that the penetration occurred “reasonably close” to the time period alleged in the information, i.e., “on or about October of 2006, through and including August of 2007.”

The Attorney General responds that the conviction must be upheld because there is substantial evidence which supports a finding that the penetration took place after September 20, 2006.

The prosecution bears the burden of proving that the charged offense occurred on or after the effective date of the statute under which the defendant is charged or under which he or she will be punished. (*People v. Hiscox, supra*, 136 Cal.App.4th at p. 256.) An ex post facto violation resulting in an unauthorized sentence may be raised on appeal even if the defendant failed to object below. (*Id.* at p. 258.) Review is de novo, under the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v.*

Hiscox, supra, at p. 261.) Where, as in this case, the jury was not asked to make a finding that the offense occurred after the effective date of the statute, “[T]he 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 statute]. [Citation.]” (*Ibid.*, italics added.) “It would be inappropriate for us to review the record and select among acts that occurred before and after that date, or to infer that certain acts probably occurred after that date. [A 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, or what dates might be attached to certain acts based on ambiguous evidence, would amount to ‘judicial impingement upon the traditional role of the jury.’ [Citation.]” (*Ibid.*)³

³ Neither party discusses the standard of review. The Attorney General implies, without citation to authority, that the standard is substantial evidence. Defendant also fails to explicitly state the standard of review, despite his otherwise extensive discussion of *People v. Hiscox, supra*, 136 Cal.App.4th 253.

The standard of review is crucial to the analysis of any issue raised on appeal. “[The standard of review] defines and limits the course the court follows in arriving at its [decision].” (*People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018.) One court has stated that failure to acknowledge the proper standard of review might in and of itself be considered “a concession of lack of merit.” (*James. B. v. Superior Court* (1995) 35 Cal.App.4th 1014, 1021.) We will not go that far, at least not in this case, but the Attorney General’s failure to apply the correct standard of review does cause us to largely disregard her argument because it fails to assist us. Similarly, although we conclude that defendant is correct, his argument might have been more focused if it had explicitly proceeded from a statement of the applicable standard of review.

Doe testified that the single act of digital penetration was committed “just a few months” after the first incident when defendant touched her chest. She was “still” seven or eight years old when the digital penetration took place. Her birth date is August 9, 1997. She was therefore seven from August 9, 2004 through August 8, 2005, and eight from August 9, 2005 through August 8, 2006. When she was interviewed by the child sexual abuse expert, she stated that the digital penetration had occurred when she was “about nine.” She also told the examiner that she was “not sure” if she was nine when the penetration occurred, but it was before she turned 10. She also testified that the act occurred before she was 10. She remembered that it occurred before she was 10 because she went camping shortly before her 10th birthday, and the act occurred before she went camping. She did not state how long before her 10th birthday or how long before the camping trip the act occurred.

Even if this evidence is sufficient to support the conclusion that the act occurred when Doe was nine, rather than when she was seven or eight, it is not sufficient to leave “no reasonable doubt” that the charged act occurred after September 20, 2006. (*People v. Hiscox, supra*, 136 Cal.App.4th at p. 261.) Doe’s ninth birthday was August 9, 2006, approximately six weeks before the effective date of section 288.7. Accordingly, even if Doe was nine when the act took place, the incident could nevertheless have occurred before the effective date of the statute.

The Attorney General contends that if we conclude that the evidence was insufficient to prove that the digital penetration took place before September 20, 2006,

we should remand the cause for resentencing under section 289, subdivision (j) (hereafter section 289(j)). Section 289(j) was enacted in 1999 (Stats. 1999, ch. 706, § 5) and remains in effect. It provides: “Any 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.” Although defendant originally argued that his conviction on count 2 must be reversed, in his reply brief he agrees that resentencing under section 289(j) is appropriate. Neither party provides any authority or analysis which assists us in determining whether resentencing is an available remedy.

In *People v. Hiscox, supra*, 136 Cal.App.4th 253, the court held that the evidence was insufficient to establish that the criminal acts of which the defendant was convicted took place before the effective date of section 667.61. Section 667.61, the One Strike law, is purely a sentencing statute: It provides the punishment to be imposed for acts which violate other substantive statutes, under specified circumstances.⁴ Accordingly, it

⁴ Section 667.61 provides:

“(a) Except as provided in subdivision (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life.

“(b) Except as provided in subdivision (a), (j), (l), or (m), any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 15 years to life.

“(c) This section shall apply to any of the following offenses:

“(1) Rape, in violation of paragraph (2) or (6) of subdivision (a) of Section 261.

“(2) Spousal rape, in violation of paragraph (1) or (4) of subdivision (a) of Section 262.

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“(3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.

“(4) Lewd or lascivious act, in violation of subdivision (b) of Section 288.

“(5) Sexual penetration, in violation of subdivision (a) of Section 289.

“(6) Sodomy, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 286.

“(7) Oral copulation, in violation of paragraph (2) or (3) of subdivision (c), or subdivision (d), of Section 288a.

“(8) Lewd or lascivious act, in violation of subdivision (a) of Section 288.

“(9) Continuous sexual abuse of a child, in violation of Section 288.5.

“(d) The following circumstances shall apply to the offenses specified in subdivision (c):

“(1) The defendant has been previously convicted of an offense specified in subdivision (c), including an offense committed in another jurisdiction that includes all of the elements of an offense specified in subdivision (c).

“(2) The defendant kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c).

“(3) The defendant inflicted aggravated mayhem or torture on the victim or another person in the commission of the present offense in violation of Section 205 or 206.

“(4) The defendant committed the present offense during the commission of a burglary of the first degree, as defined in subdivision (a) of Section 460, with intent to commit an offense specified in subdivision (c).

“(5) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (2), (3), or (4) of this subdivision.

“(6) The defendant personally inflicted great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8.

“(7) The defendant personally inflicted bodily harm on the victim who was under 14 years of age.

“(e) The following circumstances shall apply to the offenses specified in subdivision (c):

“(1) Except as provided in paragraph (2) of subdivision (d), the defendant kidnapped the victim of the present offense in violation of Section 207, 209, or 209.5.

“(2) Except as provided in paragraph (4) of subdivision (d), the defendant committed the present offense during the commission of a burglary in violation of Section 459.

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“(3) The defendant personally used a dangerous or deadly weapon or a firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.

“(4) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim.

“(5) The defendant engaged in the tying or binding of the victim or another person in the commission of the present offense.

“(6) The defendant administered a controlled substance to the victim in the commission of the present offense in violation of Section 12022.75.

“(7) The defendant committed the present offense in violation of Section 264.1, subdivision (d) of Section 286, or subdivision (d) of Section 288a, and, in the commission of that offense, any person committed any act described in paragraph (1), (2), (3), (5), or (6) of this subdivision or paragraph (6) of subdivision (d).

“(f) If only the minimum number of circumstances specified in subdivision (d) or (e) that are required for the punishment provided in subdivision (a), (b), (j), (l), or (m) to apply have been pled and proved, that circumstance or those circumstances shall be used as the basis for imposing the term provided in subdivision (a), (b), (j), (l), or (m) whichever is greater, rather than being used to impose the punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or the punishment under another provision of law can be imposed in addition to the punishment provided by this section. However, if any additional circumstance or circumstances specified in subdivision (d) or (e) have been pled and proved, the minimum number of circumstances shall be used as the basis for imposing the term provided in subdivision (a), (j), or (l) and any other additional circumstance or circumstances shall be used to impose any punishment or enhancement authorized under any other provision of law.

“(g) Notwithstanding Section 1385 or any other provision of law, the court shall not strike any allegation, admission, or finding of any of the circumstances specified in subdivision (d) or (e) for any person who is subject to punishment under this section.

“(h) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person who is subject to punishment under this section.

“(i) For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), or in paragraphs (1) to (6), inclusive, of subdivision (n), the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.

“(j)(1) Any person who is convicted of an offense specified in subdivision (c), with the exception of a violation of subdivision (a) of Section 288, upon a victim who is a child under 14 years of age under one or more of the circumstances specified in

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was appropriate for the court in that case to remand the cause for resentencing under the sentencing provisions in effect prior to the effective date of section 667.61. (*People v.*

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subdivision (d) or under two or more of the circumstances specified in subdivision (e), shall be punished by imprisonment in the state prison for life without the possibility of parole. Where the person was under 18 years of age at the time of the offense, the person shall be punished by imprisonment in the state prison for 25 years to life.

“(2) Any person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e), upon a victim who is a child under 14 years of age, shall be punished by imprisonment in the state prison for 25 years to life.

“(k) As used in this section, “bodily harm” means any substantial physical injury resulting from the use of force that is more than the force necessary to commit an offense specified in subdivision (c).

“(l) Any person who is convicted of an offense specified in subdivision (n) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e), upon a victim who is a minor 14 years of age or older shall be punished by imprisonment in the state prison for life without the possibility of parole. If the person who was convicted was under 18 years of age at the time of the offense, he or she shall be punished by imprisonment in the state prison for 25 years to life.

“(m) Any person who is convicted of an offense specified in subdivision (n) under one of the circumstances specified in subdivision (e) against a minor 14 years of age or older shall be punished by imprisonment in the state prison for 25 years to life.

“(n) Subdivisions (l) and (m) shall apply to any of the following offenses:

“(1) Rape, in violation of paragraph (2) of subdivision (a) of Section 261.

“(2) Spousal rape, in violation of paragraph (1) of subdivision (a) of Section 262.

“(3) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.

“(4) Sexual penetration, in violation of paragraph (1) of subdivision (a) of Section 289.

“(5) Sodomy, in violation of paragraph (2) of subdivision (c) of Section 286, or in violation of subdivision (d) of Section 286.

“(6) Oral copulation, in violation of paragraph (2) of subdivision (c) of Section 288a, or in violation of subdivision (d) of Section 288a.

“(o) The penalties provided in this section shall apply only if the existence of any circumstance specified in subdivision (d) or (e) is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact.”

Hiscox, supra, at p. 262.) However, section 288.7(b) is not solely a sentencing statute. It does not state that sexual penetration in violation of section 289(j) is subject to an enhanced penalty if the victim is under the age of 10. Rather, it establishes a substantive offense of sexual penetration of a child under the age of 10 by a person aged 18 or over: “Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, 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 15 years to life.” (§ 288.7(b).)

Moreover, defendant was charged with and convicted of a violation of section 288.7(b). Although we have the authority to modify a judgment to substitute a necessarily included lesser offense for the charged offense if we find that the evidence was insufficient to support a conviction of the charged offense, we may not modify a judgment to substitute an offense which is *not* a necessarily included lesser offense. (§ 1260; *People v. Adams* (1990) 220 Cal.App.3d 680, 688-689.)

“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.) “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.” (*Ibid.*)

Under the elements test, section 289(j) is not a necessarily included lesser offense of section 288.7(b). A violation of section 288.7(b) can be committed without violating section 289(j) and vice versa. For example, an act of sexual penetration of a nine year old by an 18 year old violates section 288.7(b) but does not violate section 289(j) because the perpetrator is not more than 10 years older than the victim. Sexual penetration of an 11 year old by a 21 year old violates section 289(j) but does not violate section 288.7(b). Sexual penetration of an 11 year old by an 18 year old does not violate either statute. Accordingly, neither statute is a lesser included offense of the other as a matter of law. (*People v. Parson, supra*, 44 Cal.4th at p. 349.) Section 289(j) is also not a necessarily included lesser offense under the accusatory pleading test because the information does not allege that defendant was more than 10 years older than Doe.

For these reasons, we may not either modify the judgment to reflect a conviction of section 289(j) as a lesser included offense or simply substitute the punishment which could have been imposed if defendant had been charged with violating section 289(j) for the greater punishment imposed for his conviction under section 288.7(b). Rather, the only remedy for the ex post facto violation is to reverse defendant’s conviction on count 2.

2.

THE CRIMINAL CONVICTION ASSESSMENT FEE MUST BE CORRECTED

With some exceptions not pertinent here, Government Code section 70373 provides for a \$30 assessment on each misdemeanor or felony conviction. (Gov. Code, § 70373, subd. (a)(1).) Defendant asserts, and the Attorney General agrees, that here, the court imposed a \$40 assessment on each of the six counts of conviction, for a total of \$390. The parties agree that this results in an unauthorized sentence which can be corrected on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 354.) They agree that the total fee imposed pursuant to Government Code section 70373 should be \$180 (or \$150, based on reversal of count 2). We agree that correction is required, but we arrive at a different result.

At sentencing, the court stated that it would impose a court security fee in the amount of \$40 per count of conviction, for a total of \$240. This amount is correct, and is mandatory pursuant to Penal Code section 1465.8, subdivision (a)(1). Next, the court stated, “The criminal conviction assessment fee of \$30 each for a total of \$390.” (*Sic.*) It is not clear whether the court intended the “total of \$390” to mean the total of the two assessments, i.e., \$240 pursuant to Penal Code section 1465.8, subdivision (a)(1), plus \$180 pursuant to Government Code section 70373, or the total of the assessment imposed under Government Code section 70373, but it is incorrect in either event. (Under the first scenario, the correct total is \$420; under the second scenario, the correct total is \$180.) Regardless of the error in arithmetic, however, it is clear that the court imposed the

correct amount per count, pursuant to both Penal Code section 1465.8 and Government Code section 70373. However, neither the sentencing minutes nor the abstract of judgment correctly reflects the oral pronouncement.

The sentencing minutes state, “Pay Court Security fee of \$240.00 [\$40 per convicted charge] [¶] Pay criminal conviction assessment of \$390.00 [\$30 per convicted charge]” The abstract of judgment states that defendant is ordered to pay a court security fee of \$240, but then states that the assessment pursuant to Government Code section 70373 is \$390, or \$40 per conviction.

Where there is a discrepancy between the oral pronouncement of judgment and the sentencing minutes or the abstract of judgment, the oral pronouncement prevails, and an appellate court may order correction of the minutes and the abstract. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-386.) We will direct the trial court to issue amended sentencing minutes and an amended abstract of judgment correctly reflecting imposition of an assessment of \$40 for each of the five remaining counts of conviction, pursuant to Penal Code section 1465.8, subdivision (a)(1), for a total of \$200, and imposition of a criminal conviction assessment in the amount of \$30 for each of the five remaining counts, pursuant to Government Code section 70373, for a total of \$150.

DISPOSITION

The conviction on count 2 is reversed. Within 30 days after finality of this opinion, the superior court shall dismiss count 2 and shall issue an amended abstract of judgment and amended sentencing minutes reflecting the dismissal of count 2 and reflecting imposition of an assessment of \$40 for each of the five remaining counts of conviction, pursuant to Penal Code section 1465.8, subdivision (a)(1), for a total of \$200, and imposition of a criminal conviction assessment in the amount of \$30 for each of the five remaining counts, pursuant to Government Code section 70373, for a total of \$150. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

RICHLI
J.