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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.

ANTHONY TYRONE MCCOMB,

Defendant and Appellant.

E054913

(Super.Ct.No. RIF154559)

OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan,
Judge. Affirmed.

Sharon M. Jones, 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, Charles Ragland, and Scott C.
Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Anthony Tyrone McComb molested his stepdaughter, Jane Doe (Doe), from the time she was nine years old, until she was 17 years old. Defendant appeals from judgment entered following jury convictions for committing a lewd act upon a child under the age of 14 years (count 1; Pen. Code, § 288, subd. (a)),¹ committing lewd acts upon a child under the age of 14 years, with force, violence, or duress (counts 2 and 3; § 288, subd. (b)(1)), and forcible oral copulation upon a child under the age of 14 years, with a child 10 years younger than defendant (count 4; §§ 269, subd. (a)(4), 288a). The trial court dismissed count five, rape of a child (§ 269, subd. (a)(1), 261, subd. (a)(2)) under section 1118.1. Defendant was sentenced to an indeterminate prison term of 15 years to life, plus a consecutive determinate 12-year prison term.

Defendant contends count 1 is barred by the statute of limitations. Defendant also asserts that the trial court failed to exercise its sentencing discretion when it imposed a full consecutive term on count 3 under section 667.6, subdivision (c), without considering imposing a less harsh, subordinate term under section 1170.1, subdivision (a), and without providing a statement of the court's reasons for imposing the harsher sentence.

We conclude that under section 803, subdivision (f), count 1 is not barred by the statute of limitations. We also conclude the trial court properly sentenced defendant to a full consecutive prison term on count 3 under section 667.6, subdivision (d), not

¹ Unless otherwise noted, all statutory references are to the Penal Code.

subdivision (c). Because imposition of the sentence under section 667.6, subdivision (d) was mandatory, the trial court was not required to state reasons for imposing the sentence. We affirm the judgment.

II

FACTS

Doe was born in 1984. Her mother married defendant in October 1990, when Doe was six years old. Doe's mother and defendant were associate pastors of their church. Defendant adopted Doe and assumed the role of Doe's father. Defendant disciplined her by spanking her, taking things away from her, and requiring her to write out scriptures from the Bible.

Shortly after defendant married Doe's mother, the family moved from Virginia to defendant's mother's home in Moreno Valley, in California. Doe and her mother moved out when defendant was deployed to Iraq.

When defendant returned from Iraq, defendant, Doe, and her mother lived in a house on California Street, in Riverside. Doe testified that this was where defendant first sexually abused her. Doe was seven or eight years old, and in third or fourth grade. The first time, defendant entered Doe's bedroom at night and started rubbing her back and kissed her on the mouth, which he had never done before. Defendant did this a couple more times while she lived at the California Street house. He also rubbed her breasts.

When Doe was nine or 10 years old, and in the fifth and sixth grades, defendant, Doe, and her mother lived in a home on Andover Street, in Riverside. Doe shared her bedroom with her younger half-sister, who was nine years younger than Doe and was

defendant's biological daughter. When defendant molested Doe at night, he would remove Doe from the top bunk bed, put Doe's half-sister in the top bed, and put Doe on the lower bed so that he could more easily molest her.

The touching got progressively worse. Defendant touched Doe's breasts under her clothing, and touched her vagina with his hand.² He removed her pajamas and underwear, got on top of her, and rubbed her genital area with his penis. Doe pretended she was asleep. Defendant also usually put Doe's hand on his penis and guided her hand, moving it back and forth. He then pushed her pajama top up and ejaculated on Doe's stomach. Doe felt scared because she knew something was not right. This all happened "very often" when she was nine and 10 years old. It happened "way more than once a week." Defendant started putting his penis in her mouth when she was 10. Doe resisted by clenching her teeth but defendant pushed it into her mouth.

Doe did not tell her mother about defendant touching her or talking about sex because Doe did not trust her. Mother yelled at her and ignored her. When Doe had welts on her body from defendant spanking her with a belt, her mother did not do anything to stop it. Her mother never did anything to protect Doe from defendant.

Doe and her family moved from the Andover home, to a home in Moreno Valley when Doe was 12 years old and in the seventh grade. Defendant continued to sexually

² Doe used the word "vagina" but probably meant the external genital area because she describes external touching or rubbing, not any kind of internal penetration. The vagina is an internal organ, defined as "a canal in a female mammal that leads from the uterus to the external orifice of the genital canal." (Webster's Collegiate Dict. (10th ed. 1996) p. 1304.)

abuse Doe, as he had before. He also started rubbing his body against hers while she was lying down at night in a full-size bed. Defendant took Doe's clothes off from the waist down. He also took his pants off. He put his penis on her genital area and in her mouth. Doe was scared and pretended to be asleep.

Defendant's spankings with a belt increased in frequency, even though Doe did not do anything wrong. This made her scared of defendant. When she was 12, her mother screamed at her and punched her. Mother and defendant continually punished her. One night, Doe's mother punished her by telling her to take her clothes off and defendant entered her room, got on top of her, and rubbed his penis on her. He told her, "Is this what you want boys to do to you?" Afterwards, Doe's mother forced Doe to sleep outside in a chair.

In May 1997, Doe and her family moved from the Moreno Valley home, to a home on Monroe Street, in Riverside. Doe was 13 years old and finishing the seventh grade. Defendant started putting his mouth on Doe's genital area, and when she was around 14, and in the eighth grade, he started trying to put his penis in her vagina. Defendant continued molesting Doe when she was in the ninth grade. He also started slapping her face when he molested her. One night, when he did this during the summer, Doe followed him into his bedroom and told mother she wanted defendant to stop touching her. Doe's mother asked defendant if it was true. Defendant started crying and said "yes." Doe was 16 years old.

The next day, defendant, Doe, and her mother went to the senior pastor's home. Doe told the pastor defendant had been sexually abusing her. The pastor said not to

disclose the information to anyone outside the family but, instead, pray about it, and let God handle it. The pastor also immediately sent defendant away to Texas for counseling. He was gone for less than six months. The day after defendant returned home, he started molesting Doe again. When Doe was about 17 years old, defendant stopped molesting her.

In October 2009, when Doe was 24 years old, she went to a psychologist and a psychiatrist because she was suffering from insomnia and anxiety. Doe eventually told the psychologist and police that defendant had sexually abused her. On December 1, 2009, Doe made a police-assisted, recorded call to defendant, in which defendant said he was dead and the person who molested Doe was dead. Defendant also said he had been out of his mind and his conduct was inexcusable. He described what he had done to Doe as “despicable and disgusting.” In response to Doe telling defendant he had taken away her virginity and caused her not to trust men, defendant said he felt unbearable guilt. Defendant said “there’s just not enough apology in this world that I can give for what has happened to you.”

III

STATUTE OF LIMITATIONS

Defendant contends count 1 is barred by the six-year statute of limitations under section 800. Defendant argues the statute of limitations ran in 1999. The People argue the statute of limitations was extended by statutory extensions of the six-year statute of limitations under section 803, subdivisions (f) and (g).

The People filed a criminal complaint against defendant on December 21, 2009, charging him with four counts of molesting Doe, from 1992 through 1997. Count 1 alleges that, on or about 1993, defendant violated section 288, subdivision (a), by committing a lewd act upon Doe, who was under the age of 14 years. Count 1 is governed by section 800, which establishes a six-year statute of limitations. (§ 800.) The complaint was not brought within six years of commission of the crime alleged in count 1. But section 803, subdivision (f), extends the statute of limitations in the instant case.

We look to the version of the statute of limitations in effect when the criminal complaint was filed in December 2009. That version of section 803, subdivision (f),³ which is the same as the current statute for all relevant purposes, states:

“(f)(1) Notwithstanding any other limitation of time described in this chapter, 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 261, 286, 288, 288a, 288.5, or 289, or Section 289.5,[] as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object. [¶] (2) This subdivision applies only if all of the following occur: [¶] (A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired. [¶] (B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that

³ Stats.2005, c. 479 (S.B.111), rewrote subdivisions (f) and (g) as subdivision (f); designated former subdivision (h) as subdivision (g); designated former subdivision (i) as subdivision (h); and deleted subdivisions (j) and (k).

is not mutual. [¶] (C) There is independent evidence that corroborates the victim’s allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim’s allegation.” (Former § 803, added by Stats.2007, c. 579 (S.B.172), § 41, eff. Oct. 13, 2007; italics added.)

When read together with section 800, this provision allows the People to prosecute a sex crime involving a child victim within six years of the offense or within one year of the victim reporting the offense, whichever is later. (*People v. Vasquez* (2004) 118 Cal.App.4th 501, 505.)

Defendant argues the statute of limitations extension under section 803, subdivision (f), does not apply because the face of the accusatory pleading did not allege any facts showing that count 1 was not barred by the statute of limitations. Although count 1 does not allege facts showing that the statute of limitations extension under section 803, subdivision (f), applies, this is not fatal to the prosecution. “Although the prosecution has the burden of proving the crimes occurred within the applicable statute of limitations, the statute of limitations is not an element of the offense. [Citation.] Therefore, the prosecutor need only demonstrate that the crime occurred within the applicable statute of limitations by a preponderance of the evidence. [Citation.]” (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1187 (*Smith*)). The extension requirements enumerated in section 803, subdivision (f), are satisfied if they have been established by available evidence in the record, by a preponderance of the evidence. (*Smith*, at p. 1187.)

In *People v. Williams* (1999) 21 Cal.4th 335, 341 (*Williams*), the court concluded that “when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time. If the court cannot determine from the available record whether the action is barred, it should hold a hearing or, if it is an appellate court, it should remand for a hearing.[]” (*Ibid.*; see also *Smith, supra*, 98 Cal.App.4th at p. 1189.) “[I]f on remand, the trial court determines the action is not time-barred, the conviction will stand despite the prosecution’s error in filing an information that appeared time-barred” (*Williams*, at p. 346.)

Relying on *Williams, supra*, 21 Cal.4th 335, the court in *Smith, supra*, 98 Cal.App.4th 1182, concluded there was no need to remand the case to the trial court for a determination of whether the action was barred by the statute of limitations because there was sufficient evidence in the record on appeal to refute that the charged offense was time-barred. The *Smith* court explained: “By analogy to *Williams*, we are convinced that, when the trial court determines that certain counts are not time-barred, defendant’s convictions as to those charged offenses will stand if the reviewing court can determine from the available record, including both the trial record and the preliminary hearing transcript, that the action is not time-barred despite the prosecution’s error in filing an information in which those counts appeared to be time-barred.” (*Smith, supra*, 98 Cal.App.4th at p. 1189.)

Consistent with *Williams, supra*, 21 Cal.4th at page 341, and *Smith, supra*, 98 Cal.App.4th at page 1192, we conclude that the proper method for evaluating defendant’s

statute of limitations defense, raised for the first time on appeal, is to review the record on appeal to determine whether, based on the record, the action is time-barred. Having undertaken such a review, we conclude that count 1 is not time-barred, because it falls within the statute of limitations extension set forth in section 803, subdivision (f). There is undisputed evidence establishing each of the conditions required for extending the limitations period under section 803, subdivision (f)(1), Doe reported defendant's sexual abuse to the police in 2009, and a criminal complaint was filed within the same year, on December 21, 2009, after the general six-year limitations period had expired. Doe was the victim of defendant's lewd acts in 1993, and was under the age of 18 at the time.

Defendant argues the section 803, subdivision (f)(1) exception to the statute of limitations does not apply because there was no evidence of substantial sexual conduct or any corroborating evidence. Section 803, subdivision (f)(2)(B), requires that "[t]he crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual." Section 1203.066, subdivision (b), defines substantial sexual conduct as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or *masturbation* of either the victim or the offender." (Italics added.) Doe testified several times at trial that, in addition to defendant touching her breasts, kissing her, and touching her genital area with his penis and hand, defendant also made her masturbate him when she was nine and 10 years old. Doe testified this all happened "very often" when she was nine and 10 years old; "way more than once a week." Doe was nine years old from February 1993 to February 1994. There is no need to remand this matter for a

determination of whether the section 803, subdivision (f), exception to the statute of limitations applies, since Doe's unrefuted testimony that defendant made her masturbate him when she was nine years old was sufficient to establish by a preponderance of the evidence that count 1 involved substantial sexual conduct under sections 803, subdivision (f), and 1203.066, subdivision (b).

We also reject defendant's argument that there was no corroborating evidence of the count 1 allegations. To the contrary, there was very strong, compelling corroborating evidence, consisting of Doe's recorded pretext telephone conversation, during which defendant said he felt dead and the person who molested Doe was dead. It can be easily inferred defendant was talking about himself molesting Doe. Defendant further said he was out of his mind, referring to when he molested Doe, and conceded his conduct was inexcusable. He described what he had done to Doe as "despicable and disgusting." In response to Doe telling defendant he had taken away her virginity and caused her not to trust men, defendant said he felt unbearable guilt. Defendant said "there's just not enough apology in this world that I can give for what has happened to you."

Because there is overwhelming evidence establishing that the extended limitations period under section 803, subdivision (f), applies, this matter need not be remanded to the trial court for a determination as to whether the statute of limitations exception applies. We conclude, based on the record, that count 1 is not barred by the statute of limitations.

IV

SENTENCING

Defendant contends the trial court erred in sentencing him on count 3 to a full, consecutive term of six years, without properly exercising its discretion in considering whether to impose a less harsh sentence under section 1170.1, instead of imposing the harsher penalties under section 667.6, subdivision (c).

During sentencing, the trial court designated count 2 (§ 288, subd. (b)) as the principal term. As to count 3, the court stated that it involved a separate act on a separate occasion, and therefore the court selected the preferred midterm of six years in prison, to run consecutive to count 2. The court did not state the applicable sentencing statute.

Defendant incorrectly assumes the trial court sentenced defendant under subdivision (c) of section 667.6. But subdivision (c) is inapplicable because it applies “if the crimes involve the same victim on the same occasion.” (§ 667.6, subd. (c).) The trial court found the crime alleged in count 3 involved a separate act on a separate occasion. The trial court therefore sentenced defendant on count 3 under section 667.6, subdivision (d), which requires imposition of a consecutive full term on convictions of specified sex offenses involving “the same victim on separate occasions.” (§ 667.6, subd. (d).) As explained in *People v. Delgado* (2010) 181 Cal.App.4th 839, 854, section 667.6, subdivision (d) “is mandatorily applicable to cases within its terms, supplanting to that extent the generally applicable consecutive sentencing scheme of section 1170.1.”

The trial court in the instant case appropriately imposed a mandatory full, consecutive term on count 3, under section 667.6, subdivision (d), based on a finding

defendant committed the count 3 offense against Doe on a separate occasion from the other charged offenses. Because the full term was mandatory under section 667.6, subdivision (d), the trial court was not required to state its reasons for imposing a full consecutive term.

V

DISPOSITION

The judgment is affirmed.

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CODRINGTON

J.

We concur:

McKINSTER

Acting P. J.

KING

J.