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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.

DEMETRIUS GIBSON,

Defendant and Appellant.

E055160

(Super.Ct.No. SWF10001412)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Edward J. Haggerty, 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, Peter Quon, Jr., and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION¹

Defendant Demetrius Gibson molested his two nieces between 2005 and 2010. A jury convicted defendant of 17 sex offenses against children: one count of forcible lewd act on a child (§ 288, subd. (b)(1)); six counts of sexual intercourse/sodomy with a child 10 years or younger (§ 288.7, subd. (a)); eight counts of aggravated sexual assault on a child [forcible sodomy] (§ 269, subd. (a)(3)); one count of aggravated sexual assault on a child [rape] (§ 269, subd. (a)(1)); and one count of attempted aggravated sexual assault (§§ 664/288.7, subd. (a)) involving two complaining witnesses (Jane Doe 1 [counts 1-2] and Jane Doe 2 [counts 3-17]). The jury found true the multiple victim allegations attached to each count.

The court sentenced defendant to an aggregate prison term of 290 years to life consisting of five consecutive terms of 25 years to life on counts 3, 4, 5, 6 and 7 (§ 288.7, subd. (a)) and 11 consecutive terms of 15 years to life on counts 2 and 8 through 17 (§§ 288, subd. (b)(1) and 269, subds. (a)(1) and (a)(3)). The court stayed an upper term of nine years on the attempted aggravated sexual assault (count 1) pursuant to section 654. The trial court imposed a fine under section 288, subdivision (e), in the maximum sum of \$10,000, as well as a fine of \$8,300 under section 290.3.

On appeal, defendant argues there was insufficient evidence to support defendant's convictions on counts 3 through 17 because Jane Doe 2's testimony was

¹ All statutory references are to the Penal Code unless stated otherwise.

inherently improbable. Defendant maintains the trial court should have granted his new trial motion for the same reason. Defendant asserts that five convictions under section 288.7 (counts 3 through 7) should be reversed on ex post facto grounds. Challenging all the convictions, defendant contends it was prejudicial error to instruct the jury on unanimity, using CALCRIM No. 3500 instead of CALCRIM No. 3501. He further argues the trial court abused its discretion and violated his rights of due process and confrontation in restricting the cross-examination of Jane Doe 2 on the issue of ejaculation. Defendant also challenges his sentence of 15 years to life on count 2 and the fines imposed under sections 288, subdivision (e), and 290.3, and seeks to modify the abstract of judgment.

After reviewing the record, we conclude Jane Doe 2's testimony was not inherently improbable and sufficient evidence supports the convictions on counts 3 through 17. The unanimity instructions were proper and the issue about ejaculation was irrelevant. The \$10,000 fine was correctly imposed.

As for counts 3 through 7, the ex post facto argument is well-taken but the case may be remanded for resentencing under the sodomy statute, section 286, and for recalculation of the fines under section 290.3. The trial court should also sentence defendant again for count 2, imposing a determinate consecutive sentence. (§ 667.6, subd. (d).)

II

FACTUAL BACKGROUND

Defendant's sister is Jane Doe 1 and Jane Doe 2's mother. Between 2005 and

2010, defendant lived intermittently with his sister's family in Hemet. Beginning in 2005, the family lived in a five-bedroom house on for several years before moving briefly to a smaller house. In the summer of 2008, the family moved into a two-bedroom apartment on Acacia. Defendant lived with the family in the five-bedroom house and the Acacia apartment. Defendant slept in the living room in the Acacia apartment.

A. Jane Doe 2

Jane Doe 2 was born in August 1997. She was eight years old in 2005 when the family started living in the five-bedroom house, where she shared a bedroom with Jane Doe 1. They slept in bunk beds with Jane Doe 1 on the top bunk and Jane Doe 2 on the bottom bunk.

On one occasion, defendant awoke Jane Doe 2 in the middle of the night, took her out of bed and placed her on the floor on her hands and knees. After pulling down her pajama bottoms and underwear, he pushed his penis between her buttocks, moving back and forth while Jane Doe 2 was crying and praying. Defendant asked if Jane Doe 2 liked what he was doing but she did not respond. Jane Doe 1 was in the bedroom but Jane Doe 2 was too scared to scream. She did not know if defendant ejaculated. Defendant's penetration of her buttocks was painful and it hurt the next day when she defecated. On cross-examination, she described the pain as being 10 on a scale of zero to 10.

Jane Doe 2 estimated the same sexual conduct involving anal sodomy occurred five times at the five-bedroom house and 10 to 20 times at the Acacia apartment until the summer of 2010. At the Acacia apartment, defendant also inserted his penis into Jane Doe 2's vagina three or four times, causing vaginal pain and pain while urinating.

Defendant also fondled her breasts. Jane Doe 2 was always too afraid to protest because of what defendant might do, such as hitting her.

In June 2010, Jane Doe 2 was visiting her father in 29 Palms when her mother telephoned and asked if defendant had touched her genitalia. Jane Doe 2 eventually responded, “Yes, mom. Yes. Why? He tried [Jane Doe 1]?”

B. Jane Doe 1

Jane Doe 1 was born in August 2000. In the Acacia apartment, Jane Doe 1 shared a bedroom with her sister and their brother. On June 26, 2010, Jane Doe 1 was sleeping in her mother’s bedroom when defendant carried Jane Doe 1 to the couch in the living room. Defendant pulled down her pajama pants and underwear. He tried three times to insert his penis between her buttocks, causing mild discomfort. The pressure caused Jane Doe 1 to awaken and ask for the keys to her mother’s bedroom. She unlocked her mother’s bedroom door, woke her up, and told her defendant had tried “to put his private part in [her] bottom.” Jane Doe 1 cried and told her brother about defendant molesting her.

The mother recalled being awakened by Jane Doe 1 who was crying and said that she had found herself on the living room couch with her pants down and defendant’s pants down. The mother was angry and began yelling and screaming. The mother checked Jane Doe 1 to see if she had been injured but she did not notice anything unusual. The mother confronted defendant who denied touching Jane Doe 1 and left the apartment.

C. Defense Evidence

Defendant admitted sharing a residence with his sister's family and contributing to household expenses. He helped the children with their homework and drove them to school and appointments. He disciplined them by hitting them with his hand and a belt.

Defendant spent the evening of June 26, 2010, drinking with some friends. Later he was watching television in the Acacia living room and applying lotion to his face. Jane Doe 1 was on the couch on her side with her face turned toward the back of the couch. Her pants were halfway down her buttocks. As defendant tried to pull up her pants, he lost his balance and slipped, jamming his ribs on the couch and accidentally squeezing lotion into his eye. Jane Doe 1 woke up and asked for her mother. Defendant said she was in her bedroom and he went into the bathroom. The mother began screaming and yelling, accusing him of molesting Jane Doe 1. Defendant left the apartment.

Defendant emphatically denied engaging in any sexual conduct whatsoever with Jane Doe 1 or Jane Doe 2. He claimed he once discovered the girls watching pornographic material.

Defendant's mother, the girls' grandmother, testified that Jane Doe 2 had "some attitude" against defendant and her but Jane Doe 2 was not afraid of defendant.

III

INSUFFICIENT EVIDENCE

Defendant asserts that the convictions involving Jane Doe 2 are based on insufficient evidence because her claims of being raped and sodomized while others were

sleeping nearby in the same room were inherently improbable. Jane Doe 2 described the pain she endured as rating as 10 on a scale of zero to 10 but she never made any sounds that awoke her brother or sister. Defendant contends her testimony cannot qualify as the type of credible evidence required to sustain a criminal conviction.

Defendant passionately urges this court to “apply common sense to the testimony of Jane Doe 2 and . . . reach the only rational conclusion, which is that her testimony is inherently unbelievable. As in *People v. Carvalho* (1952) 112 Cal.App.2d 482 and *People v. Headlee* (1941) 18 Cal.2d 266, 267, the testimony in this case simply defies logic and reason. That a young girl repeatedly could undergo the trauma of forcible sodomy and rape, which she herself described as excruciatingly painful, without emitting sounds sufficient to wake others sleeping nearby is simply incredible. No deductions or inferences are required – simply the application of common sense and experience. No one suffering the brutality described by Jane Doe 2 could endure it without emitting a sound, and no one sleeping nearby could have failed to have heard something. Thus, Jane Doe 2’s version of events simply fails the test of basic plausibility. It is simply inconceivable.”

We reject defendant’s claim of inherent improbability. Defendant is asking this court to reweigh the evidence and independently appraise the credibility of the witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) As fully discussed in *People v. Ennis* (2010) 190 Cal.App.4th 721, 728, claims of insufficiency based on inherent improbability are so rare as to be almost nonexistent and must demonstrate either physical impossibility or apparent falsity without resort to inference or deduction. By proposing that Jane Doe 2

necessarily would have screamed or otherwise reacted audibly, defendant relies on impermissible inferences and deductions. Additionally, it was not physically impossible for defendant to have molested Jane Doe 2, as she described it, without waking her brother and sister. Other evidence showed that the siblings were heavy sleepers. Furthermore, Jane Doe 2 explained that she was afraid to make any noise to expose defendant.

The present case differs materially from *Carvalho* and *Headlee*, in which the appellate courts accepted the victims' stories but concluded they were nevertheless insufficient to satisfy the elements of the charged crimes of kidnapping and rape. This case is much closer to *Ennis*, also involving claims of sexual molestation, in which the reviewing court stated: "Ennis is making just that sort of 'inferences and deductions' argument. He does not claim it would be impossible for him to have committed the acts of sexual abuse attributed to him, but instead suggests the jury should have inferred or deduced from the circumstances in which these allegations arose, or the other evidence admitted in the case, that each of these witnesses was lying." (*People v. Ennis, supra*, 190 Cal.App.4th at p. 730.) Here defendant is also attempting to suggest, not that it was impossible for defendant to have molested Jane Doe 2, but that the jury should have inferred from the circumstances of her siblings sleeping in the same room that Jane Doe 2 was lying. Like the *Ennis* court, we cannot *disbelieve* Jane Doe 2's claims about what happened, "on the ground that the surrounding circumstances, or other evidence adduced in the case, makes those claims seem unworthy of belief." (*Id.* at p. 732.)

IV

MOTION FOR NEW TRIAL

Defendant next contends the trial court applied the wrong legal standard and abused its discretion in denying his new trial motion. He again argues that the testimony of Jane Doe 2, as well as the testimony of Jane Doe 1, was inherently improbable.

The parties agree that, in determining whether a new trial should be granted on the basis of the jury's verdict being contrary to the evidence (§ 1181, subd. (6)), the trial court has the power to evaluate the weight and sufficiency of the evidence (*People v. Borchers* (1958) 50 Cal.2d 321, 328), as well as its credibility (*People v. Veitch* (1982) 128 Cal.App.3d 460, 467), and is to act effectively as a "13th juror." (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038.) The trial court's determination in deciding whether the verdict was contrary to the evidence rests upon a determination about whether sufficient credible evidence supports the jury's verdict. (*People v. Robarge* (1953) 41 Cal.2d 628, 633.)

We have already rejected defendant's position that Jane Doe 2's testimony was inherently improbable and thereby lacking in the credibility necessary to uphold the jury's verdicts on counts 3 through 17. We reject the same argument, as made by defendant, that the attempted sodomy was physically improbable, if not impossible. We do not agree Jane Doe 1's testimony regarding the positioning of the bodies was wholly implausible.

In summary, because the testimony offered by the complaining witnesses was not inherently improbable, the trial court did not abuse its discretion by denying the motion

for new trial.

V

SECTION 288.7 CONVICTIONS (COUNTS 3 THROUGH 7)

The People concedes that the record does not establish that five of defendant's violations of section 288.7, subdivision (a), (counts 3 through 7) occurred after September 20, 2006, the effective date of section 288.7 and should be vacated under state and federal ex post facto clauses. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 260-261.) The People recommends the matter should be remanded for resentencing under section 286, relying on the disposition in *Hiscox*.

Defendant counters that, rather than this court remanding the case for sentencing under the section 286 sodomy statute, the proper disposition is reversal because defendant was neither charged nor convicted of sodomy under section 286. Defendant claims that substitution of the sodomy offense for the violation of section 288.7, subdivision (a), would deprive defendant of his state and federal due process rights. (*People v. Mancebo* (2002) 27 Cal.4th 735,743.) Defendant proposes that, if respondent can establish that defendant violated the sodomy statute or committed some other sexual offense based on the actions alleged in counts 3 through 7, it may refile those charges and seek to obtain convictions.

Section 288.7 applies to an adult who engages in sodomy with a child who is 10 years of age or younger. Jane Doe 2 testified that defendant anally sodomized her at least five times while they were living at the five-bedroom house when she was 10 years old or younger. Section 286 defines sodomy as "sexual conduct consisting of contact between

the penis of one person and the anus of another person.” As such, sufficient evidence supported defendant’s convictions under section 286, instead of section 288.7.

Accordingly, we modify the judgment to reflect five convictions of section 286 and remand the matter for resentencing. (§ 1186, subd. (6); *People v. Navarro* (2007) 40 Cal.4th 668, 675-675, 681.)

We also vacate the fines under section 290.3 and remand for recalculation of these fines at \$300 each on counts 3 through 7, so that the total fines imposed under section 290.3 total \$7,300. (*People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.)

VI

UNANIMITY INSTRUCTION

Both parties agreed without any objections on the instructions to be given to the jury. The court gave the jury two instructions addressing the issue of unanimity. The court gave an instruction based on CALCRIM No. 3550: “Your verdict on each count and any special findings must be unanimous.” Additionally, based on CALCRIM No. 3500, the court instructed:

“The defendant is charged with intercourse with a child 10 years of age or younger in Counts 3 through 7 sometime during the period of August 29, 2006, and August 28, 2008, and aggravated sexual assault in Counts 8 through 17 sometime during the period of August 29, 2009, to June 2010.

“The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you

all agree that the People have proved that defendant committed at least one of these acts and you all agree on which act [h]e committed.”

In spite of his previous agreement with the instructions given at trial, defendant now contends on appeal that the instruction based on CALCRIM No. 3500 constituted prejudicial error because, unlike CALCRIM No. 3501, it did not inform the jurors that they had to agree on which act defendant committed for each of the 17 charged offenses. The People counters that any error in the instruction was forfeited because defendant did not object to the unanimity instruction nor did he request a clarifying or amplifying instruction. On the merits, the People claims there was no error because the unanimity instruction, when read in conjunction with CALCRIM No. 3550, made clear to the jurors that they had to agree unanimously on what act defendant performed in committing each offense.

Even if defendant did not forfeit the issue of unanimity, his argument on this issue fails because CALCRIM No. 3501 was not the correct instruction. Jane Doe 2’s testimony was generic in her descriptions of 1) the type or kind of acts committed, 2) the number or frequency of the acts, and 3) the general time period in which the acts occurred. (*People v. Jones* (1990) 51 Cal.3d 294, 316; *People v. Matute* (2002) 103 Cal.App.4th 1437, 1448.) In describing what occurred, however, Jane Doe 2 testified that defendant molested her in the same manner each time. The evidence supported that defendant had similarly sodomized Jane Doe 2 at least five times during the first time period and sexually penetrated her at least 10 times during the second time period.

CALCRIM No. 3501 was not necessary because no more specific findings by the jury were required than those identified by CALCRIM Nos. 3500 and 3550.

VII

TESTIMONY CONCERNING EJACULATION

Jane Doe 2 testified that she did not know whether defendant ever ejaculated. During cross-examination, the court sustained any additional questions about Jane Doe 2's knowledge of sperm. Defendant contends that whether Jane Doe 2 felt defendant ejaculate was pertinent to the credibility of her allegations.

We agree with the People that whether defendant ejaculated was not relevant because ejaculation is not an element of the charged crimes. Furthermore, whether Jane Doe 2 perceived an ejaculation was not probative of any issue, including her credibility.

The standard of review is abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166, 1167.) "Evidence is relevant if it has any tendency in reason to prove or disprove any undisputed fact of consequence, including evidence relevant to the credibility of a witness." (*People v. Kennedy* (2005) 36 Cal.4th 595, 615.)

Defendant argues that the issue of ejaculation is relevant to disprove that he engaged in vaginal or anal intercourse with Jane Doe 2 at least 15 times. Defendant again bases his argument on what he terms the lack of credibility for Jane Doe 2's "highly implausible claims of numerous penetrative assaults in the presence of others." We have rejected defendant's theory of inherent implausibility. The trial court precluding questions about sperm was not an abuse of discretion. In any event, Jane Doe

2 testified she did not know whether defendant ejaculated. Therefore, defendant's proposed line of questioning was irrelevant.

VIII

THE INDETERMINATE TERM ON THE FORCIBLE LEWD ACT (COUNT 2)

Both parties agree that the trial court erred by imposing an indeterminate sentence of 15 years to life under section 667.61, subdivision (b), on the forcible lewd act conviction (count 2) because none of the other offenses in this case – sexual intercourse or sodomy with a person 10 years of age or younger (§ 288.7, subd. (a)) and sodomy/rape of a child under 14 (§ 269, subd. (a)) – are offenses listed in section 667.61, subdivision (c). Because there was only one count of forcible lewd act charged involving a single victim, the circumstance of committing enumerated offenses against multiple victims was not established. The matter should be remanded so the trial court can properly sentence defendant for count 2, imposing a determinate consecutive sentence. (§ 667.6, subd. (d).)

IX

THE MAXIMUM SECTION 288, SUBDIVISION (E), FINE

The parties disagree about whether imposition of the maximum fine of \$10,000 under section 288, subdivision (e), was an abuse of discretion.

Defendant was convicted of one count of forcible lewd act under section 288, subdivision (b). He argues the record does not show that the trial court evaluated the seriousness and gravity of the offense, the circumstances of its commission, whether the defendant derived any economic gain as a result of the crime, and the extent to which the victim suffered economic losses as a result of the crime. (§ 288, subd. (e).)

The People counters that defendant forfeited his challenge to the section 288, subdivision (e), fine by failing to object to it in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 852-853.) The People also contends that defendant failed to establish an abuse of discretion and the single, forcible lewd act on Jane Doe 1 was sufficient to warrant the fine since it occurred after several years of defendant's ongoing abuse of Jane Doe 2.

The California Supreme Court in *People v. Smith, supra*, 24 Cal.4th at page 849 and *People v. Scott* (1994) 9 Cal.4th 331, 353, held that challenges to discretionary sentencing choices are forfeited unless objections are raised in the trial court if the defendant has been given a meaningful opportunity to object. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 754-755; *People v. Scott, supra*, 9 Cal.4th 331 at p. 356.) A meaningful opportunity to object is "the opportunity to address the court on the matter of sentence and to object to any sentence or condition thereof imposed by the court." (*People v. Zuniga* (1996) 46 Cal.App.4th 81, 84.)

Defendant protests there was no meaningful opportunity to object provided by the trial court when, in quick succession, the trial court stated the sentence, determined defendant's presentence custody credits and immediately imposed the \$10,000, the section 1202.4 restitution fine, and actual restitution, before promptly advising defendant of his appeal rights. Thus, the court deprived defendant and his counsel of any reasonable opportunity to challenge the sentence. We observe, however, that nothing prevented defense counsel from speaking up and objecting, even if it meant interrupting the court's recitations. Had defendant objected, the trial court could have then expressly

stated its reasons for imposing the maximum fine. We conclude defendant forfeited this issue.

Additionally, the maximum fine was justified in view of defendant's long history of sexually abusing Jane Doe 2 before molesting Jane Doe 1, a circumstance which added to the seriousness of the offense and its commission under section 288, subdivision (e). The trial court properly exercised its discretion in imposing the maximum fine.

X

DISPOSITION

Jane Doe 2's testimony was not inherently improbable and sufficient evidence supports the convictions on counts 3 through 17. We reject defendant's arguments about the unanimity instruction, the issue about ejaculation, and the \$10,000 fine.

We reverse the convictions on counts 3 through 7 on ex post facto grounds but we remand for resentencing under the sodomy statute, section 286, and for recalculation of the fines under section 290.3. The trial court should also sentence defendant on count 2, imposing a determinate consecutive sentence. (§ 667.6, subd. (d).) Otherwise, we affirm the judgment.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

KING

J.