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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.

ALIBABA MAPUATULI,

Defendant and Appellant.

E060168

(Super.Ct.No. RIF1203809)

OPINION

APPEAL from the Superior Court of Riverside County. Richard T. Fields, Judge.

Affirmed.

Ronda G. Norris, 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, Julie L. Garland, Scott C. Taylor and Laura Baggett, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alibaba Mapuatuli, was charged with molesting three of his wife's nieces (Jane Does 1 through 3) when they were of elementary school age, including several acts of intercourse committed against Jane Doe 1. Defendant was charged with five counts of aggravated sexual assault of a child under the age of 14, more than seven years younger than the defendant against Jane Doe 1 (Pen. Code, § 269, subd. (a)(1)),¹ lewd acts (§ 288, subd. (a)) committed against each of the victims, and allegations relating to his prior convictions. After the court granted his motion for acquittal of one of the aggravated sexual assault counts, a jury convicted defendant on all the remaining counts. Defendant eventually admitted the priors, resulting in an aggregate sentence of 180 years to life, and appealed.

On appeal, defendant challenges the trial court's ruling allowing the People to amend the information relating to the date range during which the offenses were committed, asserting that the order, (a) violated his due process right to notice and opportunity to prepare a defense where he had previously established an alibi for a significant portion of the time originally alleged, and (b) constituted an abuse of discretion. We affirm.

BACKGROUND

Defendant was married to Tua Fanene between 1999 and 2010. Defendant was in and out of custody four or five times during their marriage. Tua worked two jobs: she

¹ All further statutory references are to the Penal Code, unless otherwise specified.

worked at the first job from 4:00 a.m. to 12:00 p.m., and she worked the second job from 2:00 p.m. until 10:00 p.m. Jane Does 1, 2, and 3 are Tua's nieces.

Jane Doe 1 is the daughter of Tua's brother. Jane Doe 1 was born in 1997, and spent her first four or five years in Arizona, living with her maternal grandmother. Jane Doe 1's mother was incarcerated between 2001 and 2004, when she was reunited with her daughter. Jane Doe 1 lived in San Bernardino between the ages of six and nine, and spent a lot of time with her paternal relatives, although she lived with her mother during this period. Between the ages of six and nine, while she was in elementary school, she spent school breaks and holidays with her Aunt Tua, her godmother. Although she never lived with Aunt Tua, she had visited on weekends from the time she was an infant. Tua lived with her sister at the time Jane Doe 1 visited, so Jane Doe 1 visited both aunts when she came.

Commencing when she was six or seven, defendant began molesting Jane Doe 1. The first occasion occurred while her Aunt Tua was at work. Defendant came up behind her and put his hand in her pants, touching her vagina with his finger. The second incident occurred when Jane Doe 1 was seven or eight. While her Aunt Tua was in the shower, defendant pulled down her pants and orally copulated her. He stopped when he heard the shower stop, and left.

When Jane Doe 1 was eight, defendant forcibly had intercourse with her for the first time, while Aunt Tua was at work. This happened four or five times. Defendant told Jane Doe 1 that if she ever told her mother, he would kill her and her mother, and she

would not be able to see her younger brother any more. He also threatened to hurt Aunt Tua. Defendant also made Jane Doe 1 “jack him off” once, and told her that he owned her vagina.

The acts of molestation stopped when Jane Doe 1 moved to Rialto, when she was nine years old, in 2006. Jane Doe 1 did not tell anyone about the sexual abuse until she was 12 or 13, when she told her mother. However, Aunt Tua frequently asked her if defendant or anyone else touched her inappropriately between 2000 and 2002,² due to allegations made by Jane Does 2 and 3, but Jane Doe 1 always denied that anything happened. Jane Doe 1 did not disclose the abuse to her cousins, Jane Does 2 and 3, until she learned they had been molested by defendant, in 2004.

Jane Does 2 and 3 are the daughters of Tua’s sister. Jane Doe 2 was born in 1993. She lived with her Aunt Tua and defendant sometime between second grade and third grade. One day, while she stayed with Aunt Tua and defendant, she, her cousin Andrew, and defendant went out for donuts and brought them back to the house. Defendant sent Andrew into the house with the donuts, but asked Jane Doe 2 if she wanted to take some donuts to Aunt Tua at work, to which Jane Doe 2 agreed.

However, they drove past Aunt Tua’s work place and ended up in Long Beach, where they went into a motel. At the motel, defendant told Jane Doe 2 to take a shower, which she did. When she was done, she put her clothes back on, and her uncle told her to

² On direct examination, Tua indicated that Jane Does 2 and 3 made their disclosures in 2006. However, the two nieces would have been 11 and 13 in 2006, so on cross-examination she corrected her testimony.

sit on the bed with him. Jane Doe 2 came over to the bed, where defendant covered her with a blanket and told her to watch the television, where a program showed people having sex. Then defendant touched her vagina with his hand. Jane Doe 2 started crying, so defendant stopped and they left. This incident occurred in approximately December 2000.

Before returning home, defendant took her to the home of one of his relatives in Long Beach, and later they returned home. She was afraid to tell anyone what happened. However, she eventually talked to her sister, Jane Doe 3, and her Aunt Tua about it.

Jane Doe 3 was born in 1995. Her parents split up when Jane Doe 3 was in first grade, so she went to live with Aunt Tua and her husband, the defendant, along with her two sisters, one of whom was Jane Doe 2. One day, while Aunt Tua was at work at one of her two jobs, defendant asked Jane Doe 3 if she wanted to go for a ride with him, and took her to Long Beach. They visited defendant's mother, and then went to the home of defendant's brother, where there was a party going on. It was dark when they left defendant's brother's house, so they went to a motel.

At the motel, defendant suggested she take a shower, and when she complied, he got into the shower with her, naked, which frightened her. Jane Doe 3 got out of the shower, put her clothes on, and lay on the bed, where defendant lay beside her. Defendant had turned on the television, where a program depicting people having sexual intercourse was playing.

As Jane Doe 3 lay on her side facing away from defendant, she felt his penis pressed against her lower back and butt area. Jane Doe 3 cried and told him she wanted to go home. Defendant told her to wake him up at 3:00 a.m. so they could beat the traffic.

Jane Doe 3 did not tell anyone about the incident right away because the defendant threatened to kill her. The first time she mentioned it to anyone was when she walked in on a conversation between Jane Doe 2 and their older sister, as Jane Doe 2 described what had happened to her. The disclosure possibly took place in 2001 or 2002. After this conversation, Jane Does 2 and 3 told their Aunt Tua, who became angry and fought with defendant. This happened when Jane Doe 3 was in first grade.

Tua confronted defendant about the allegations after learning of the molestation of Jane Does 2 and 3 in 2006. Defendant denied any wrongdoing, but Tua took her nieces to her other sister's house to keep them away from defendant. After that, Jane Doe 1 only came to the house when Tua was present. The parties stipulated that defendant was incarcerated at various times for committing various crimes, including the period from November 27, 1999 through December 23, 2001, and again from September 15, 2003 through November 7, 2005.

Defendant was charged with five counts of aggravated sexual assault (rape) of a child under 14 years of age and ten³ or more years younger than the perpetrator (§ 269,

³ The first amended information alleged that the child was under the age of 14 and *seven* or more years younger than the defendant. However, during in limine discussions, the People made an oral motion to amend the information to change the “seven” to “ten
[footnote continued on next page]

subd. (a)(1), counts 1-5) as to Jane Doe 1, and three counts of lewd or lascivious acts on a child under the age of 14 years (§ 288, subd. (a), counts 6 (as to Jane Doe 1), 7 (Jane Doe 2), and 8 (Jane Doe 3). All of the crimes were initially alleged to have occurred between January 2000 and December 2002. It was further alleged that there was more than one victim within the meaning of section 667.61, subd.(e)(4), that defendant had previously been convicted and imprisoned on two occasions within the meaning of section 667.5, subdivision (b) (prison priors); and that these two convictions were also alleged to be serious or violent felonies within the meaning of the Strikes law. (§§ 667, subds. (c), and (e)(2), 1170.12, subd. (c)(2)(A)).

At the outset of trial, the court granted the People’s oral motion to dismiss the allegations relating to the second “prior” conviction, because the conviction occurred in 2011, well after the dates of the crimes, leaving one conviction alleged as both a prison prior and a Strike.. At the close of the People’s case in chief, the court granted defendant’s motion for acquittal (§ 1118.1) as to count 5. Over defendant’s objection, the court also granted the People’s oral motion to amend counts 1 through 6 of the information to reflect that the crimes were committed between January 2003 through December 2007; to amend count 7 to reflect that the crimes were committed between January 1999 through December 31, 2003; and to amend count 8 to reflect that the crimes

[footnote continued from previous page]

years younger” in order to conform with the statutory provisions in existence at the time of the crimes.

were committed between January 1, 2000 through December 31, 2003, based on the testimony of the three Jane Does.

The jury convicted defendant of all remaining counts and made a true finding as to the allegation pursuant to section 667.61, that there were more than one victim. Defendant subsequently admitted the 1989 prison prior (§ 667.5, subd. (b)), and the Strike prior relating to the same conviction.

Defendant was sentenced to an aggregate term of 180 years to life (consecutive terms of 15 years to life, doubled under Strikes law, for counts 1—4, 6, and 7, with a concurrent term imposed for count 8) after striking the prison priors pursuant to section 1385.

Defendant appealed.

DISCUSSION

On appeal, defendant challenges the trial court's ruling permitting amendment of the information, which changed the dates of the offenses. He argues that the amendment, made after the defendant had rested and produced an alibi for a significant portion of the time alleged in the information, violated his due process right to notice, and that the ruling constituted an abuse of discretion. We disagree.

Section 1009 provides, in pertinent part, that the court may order or permit an amendment of an information at any stage of the proceedings. The questions of whether the prosecution should be permitted to amend the information and whether a continuance should be granted to prevent prejudice to the defendant's substantial rights are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal

absent a clear abuse of discretion. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1005 (*Winters*.)

The pre-eminent due process principle is that the accused must be informed of the nature and cause of the accusation. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15; *People v. Torres* (2011) 198 Cal.App.4th 1131, 1139-1140.) In child molestation cases, the function of the accusatory pleading is to give notice to the defendant of the nature of the offense charged and whether it occurred within the applicable limitations period. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 555 (*Fernandez*.) But the information need not provide a defendant notice of the specific time or place of an offense, so long as it occurred within the applicable limitation period. (*People v. Jones* (1990) 51 Cal.3d 294, 317 (*Jones*); *People v. Graff* (2009) 170 Cal.App.4th 345, 365 (*Graff*.)

A defendant's due process rights are not prejudiced by amendment of the information, and the trial court may permit amendment of the accusatory pleading "at any stage of the proceeding, up to and including the close of trial," so long as the defendant's substantial rights are not prejudiced. (*Graff, supra*, 170 Cal.App.4th at p. 361.) An indictment may not be amended to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. (§ 1009; *Winters, supra*, 221 Cal.App.3d at p. 1003.) In other words, an amendment adding a charge not shown by the evidence at the preliminary hearing, or changing the nature of an offense charged, implicates a defendant's due process rights. However, an

amendment which merely changes the alleged dates of the crimes does not have the effect of charging different offenses. (*In re Application of Davis* (1936) 13 Cal.App.2d 109, 112.)

Due process requires that a criminal defendant be advised of the charges against him so that he has a reasonable opportunity to prepare and present a defense and not be taken by surprise by evidence offered against him at trial. (*Fernandez, supra*, 216 Cal.App.4th at p. 554.) “[A]t a minimum, a defendant must be prepared to defend against all offenses *of the kind* alleged in the information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.’ [Citations.]” (*Jones, supra*, 51 Cal.3d 294, 317, italics added.) A correction of the date of the charged offense does not amount to an allegation of a new or different crime from the one disclosed at the preliminary hearing. (*People v. McQuiston* (1968) 264 Cal.App.2d 410, 417.) “Here the timely correction of the mistake did not change the nature of the offense charged, only the date [citations] and place of the conviction [citations].” (*Ibid.*)

The amendment at issue in the present case did not add any new offense, nor did it change the nature of the crimes alleged in the information. Instead, it merely corrected the dates of the offense to conform to proof, based on the testimony of the victims. The amendment did not impair defendant’s ability to present an alibi defense because his time in prison was never a complete alibi, even before the amendment. The ruling did not

violate the defendant's right to due process, relating to notice of the nature and cause of the accusation.

The amendment changing the dates of the offenses was a proper exercise of discretion.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

KING
J.