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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTOR DIAZ JAIME,

Defendant and Appellant.

F063282

(Super. Ct. No. VCF237696A)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kelly E. LeBel, Deputy Attorneys General, for Plaintiff and Respondent.

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Victor Diaz Jaime molested two of his nieces, one when she was five, the other from when she was six to when she was nine. Both were 22 at the time of trial.¹ A jury

¹ Additional facts, as relevant, are in the discussion (*post*).

found him guilty of three counts of lewd or lascivious acts on a child under the age of 14, found a multiple-victim sex-crime allegation true in each of those counts, and found him guilty of two lesser-included misdemeanors. The court imposed three consecutive One-Strike-Law sentences of 15 years to life.

On appeal, Jaime argues, inter alia, that his prosecution on all five counts was time-barred by the applicable statutes of limitations and that sentencing errors require a remand. We reverse the judgment, order two felony convictions stricken from the judgment as time-barred, and order a remand for a hearing for the superior court to find whether his prosecution on the remaining three counts was time-barred.

BACKGROUND

On January 25, 2011, an information charged Jaime with lewd or lascivious acts on children under the age of 14.² (Former Pen. Code, § 288, subd. (a).)³ He was accused in counts 1 and 2 of committing lewd or lascivious acts on M.J. between January 1, 1994, and January 1, 1995,⁴ and in counts 3-5 of committing lewd or lascivious acts on M.S. between March 1, 1995, and March 1, 1999. The information alleged multiple victims within the meaning of the One Strike Law. (Former § 667.61, subds. (b), (c)(7), (e)(5).)

On June 21, 2011, the jury found Jaime guilty as charged in counts 1-3 (former § 288, subd. (a)), found him guilty of misdemeanor battery in count 4 (§ 242), and found

² The information charged eight counts, but the court granted the prosecutor's request during trial to dismiss count 3 and changed the verdict forms to show former counts 4-8 as counts 3-7. The jury found him guilty as charged in counts 1-3, guilty of lesser included offenses in counts 4-5, and not guilty in counts 6-7. For brevity, we refer later only to counts on which he was found guilty and only by the numbering in the verdicts, not by the numbering in the information.

³ Later statutory references are to the Penal Code.

⁴ The court granted the prosecutor's request during trial to conform to proof that the conduct in those two counts occurred between August 27, 1993, and August 26, 1994. The verdict forms for those two counts show that the jury found Jaime guilty of conduct occurring between January 1, 1993, and December 31, 1994.

him guilty of misdemeanor assault in count 5 (§ 240). In counts 1-3, the jury found the multiple-victim allegations true. (Former § 667.61, subs. (b), (c)(7), (e)(5)). The court sentenced him to a term of 15 years to life on count 1, to a consecutive term of 15 years to life on count 2, to a consecutive term of 15 years to life on count 3, and to time deemed served on counts 4 and 5.

DISCUSSION

1. Statute of Limitations: Counts 1 and 2

Jaime argues that the statute of limitations bars his prosecution on counts 1 and 2. With thoughtful analysis and commendable candor, the Attorney General agrees. We concur and order the convictions in counts 1 and 2 stricken from the judgment as time-barred. (See, e.g., *People v. Superior Court (Maldonado)* (2007) 157 Cal.App.4th 694, 697; § 805, subd. (a); former §§ 288, subd. (a), 800.)

2. Statute of Limitations: Count 3

Jaime argues that the statute of limitations bars his prosecution on count 3 and that his attorney's failure to request dismissal of count 3 after the jury found him not guilty on counts 6 and 7 constituted ineffective assistance of counsel. The Attorney General argues that Jaime's prosecution on count 3 is permissible. We remand for a hearing on the issue.

Count 3 of the information charged Jaime with committing a lewd or lascivious act on M.S. "between March 1, 1995, and March 1, 1999." Born on March 1, 1989, M.S. testified that Jaime molested her three times – the first time when she was six or seven years old, the second time when she was seven or eight years old, and the third time when she was eight or nine years old. After the first molestation, she told a "little girl across the street" who told her to tell her mother,⁵ but she did not do so, as she thought everyone would be angry with her if she did. She "finally broke down" after the third molestation and told her mother when she was eight or nine years old because she "just was tired of

⁵ All references to "her mother" are to M.S.'s mother.

holding it in.” Neither she nor her mother told the police at that time. She testified her mother “just kept [her] away from him” and that he never molested her again.

M.S.’s mother testified that M.S. was nine when M.S. told her for the first time that Jaime had molested her. That was the day when M.S. started to cry, and her mother asked her, “Baby, what’s wrong?,” and M.S. “just blurted out, ‘[Jaime] touched me.’” M.S. said that during an overnight stay at his house three days earlier Jaime had “stuck his hand in her panties” and that he had touched her only that one time. Her mother told M.S., “I’m going to protect you,” but did not make a report to the police. She thought her husband would “kill [Jaime]” and “end up in jail” if he found out.

M.S. testified that she first made a report to the police on April 6, 2007, when she was 18 years old. After dropping off a letter at Jaime’s house saying how she “was hurt by everything,” she went straight to the police. She felt nervous about his grandchildren and “didn’t want anyone else to have to go through” what she went through.

Since count 3 charged Jaime with committing a lewd or lascivious act on M.S. between March 1, 1995, and March 1, 1999, the six-year statute of limitations in effect throughout that time expired between March 1, 2001, and March 1, 2005. (Former § 800, as added by Stats. 1984, ch. 1270, § 2; see former § 288, subd. (a), as amended by Stats. 1993-1994, 1st Ex. Sess., Ch. 60, § 1, eff. Nov. 30, 1994, by Stats. 1995, ch. 890, § 1, and by Stats. 1998, ch. 925, § 2.) Before the six-year statute of limitations ran here, a 10-year statute of limitations took effect on January 1, 2001, extending the statute of limitations to between March 1, 2005, and March 1, 2009. (Former § 803, subd. (h)(1)), as amended by Stats. 2000, ch. 235, § 1; see former § 290, subd. (a)(2)(A).)⁶ A new law extending the statute of limitations with reference to a victim under age 18 to “any time prior to the

⁶ The Legislature later codified the 10-year statute of limitations in section 803, subd. (i)(1) (Stats. 2001, ch. 235, § 1), then in section 801.1 (Stats. 2004, ch. 368, § 1), and then in section 801.1, subd. (b) (Stats. 2005, ch. 479, § 2).

victim's 28th birthday" took effect on January 1, 2006. (§ 801.1, subd. (a), as amended by Stats. 2005, ch. 479, § 2.) By that time, the 10-year statute of limitations had already run as to the period from March 1, 1995, through December 31, 1995.

On June 14, 2010, a warrant for Jaime's arrest issued. On the record before us, that denotes the date on which his prosecution commenced. (*People v. Robinson* (2010) 47 Cal.4th 1104, 1112 (*Robinson*); § 804, subd. (d).) If the statute of limitations for an offense runs before the commencement of prosecution, prosecution for that offense is forever time-barred. (*Robinson, supra*, at p. 1112, citing *Stogner v. California* (2003) 539 U.S. 607, 615-616 (*Stogner*).) Our task is to determine whether that is the state of the record here.

The parties agree, and we concur, that any lewd or lascivious act Jaime committed from March 1, 1995, when the 10-year statute of limitations began to run, to December 31, 1995, the last day on which the 10-year statute of limitations applied, is time-barred. (Former § 803, subd. (h)(1).) The statute of limitations supplanting the 10-year statute of limitations by authorizing prosecution any time before the victim's 28th birthday took effect on January 1, 2006. (§ 801.1, subd. (a), as amended by Stats. 2005, ch. 479, § 2; *Robinson, supra*, 47 Cal.4th at p. 1112, citing *Stogner, supra*, 539 U.S. at pp. 615-616.) Additionally, the parties agree, and we concur, that the prosecutor had the duty not only to "plead and prove ... the statutorily prescribed time period" but also to prove that the act charged in count 3 "could only have occurred within the applicable period." (*People v. Angel* (1999) 70 Cal.App.4th 1141, 1146-1147, 1150 (*Angel*).)

First, count 3 of the information fails to plead the statutorily prescribed time period. (See, e.g., *People v. Smith* (2002) 98 Cal.App.4th 1182, 1191; *Angel, supra*, 70 Cal.App.4th at pp. 1146-1147.) Second, the count 3 verdict form fails to request a jury finding on the time frame within which the crime was committed. (*People v. Hiscox* (2006) 136 Cal.App.4th 253, 261.) So, on that state of the record, the parties rely on, and

draw inferences from, contradictory evidence to argue opposing positions on whether the act charged in count 3 occurred in 1995 or afterward.

Jaime emphasizes M.S.'s testimony that she was born on March 1, 1989, that Jaime molested her when she was about "six or seven" years old, and that she told the police he molested her in 1995 when she was six years old. So he argues that the act charged in count 3 occurred as early as March 1, 1995. The Attorney General focuses on Jaime's testimony that he lived on El Monte Way from 1997 until sometime in 1999 or 2000 and on M.S.'s testimony that he molested her in his house on El Monte Way. So she argues that the act charged in count 3 occurred no earlier than 1997. Characterizing M.S.'s testimony as not specific enough, Jaime argues a "reasonable possibility" that she "referred to count 5, not count 3."

In *People v. Williams* (1999) 21 Cal.4th 335 (*Williams*), the issue was whether a statute of limitations in a criminal case is an affirmative defense that is forfeited if not raised before or during trial. (*Id.* at p. 339.) Our Supreme Court relied on the settled rule "that if the charging document indicates on its face that the charge is untimely, absent an express waiver, a defendant convicted of that charge may raise the statute of limitations at any time" and held "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." (*Id.* at pp. 337, 341.)

Our review of the evidence persuades us that we cannot "determine from the available record whether the action is barred." (*Williams, supra*, 21 Cal.4th at p. 341.) Our duty, then, is to "remand for a hearing." (*Ibid.*) Here, as in *Williams*, "The silent record is partly the defendant's fault for not raising the issue at trial. It was, however, the prosecution's fault in the first instance for filing an information that, on its face, was

untimely. In that situation, the fairest solution is to remand the matter to determine whether the action is, in fact, timely.” (*Id.* at pp. 341, 345.)

Finally, with reference to Jaime’s ancillary argument that his convictions on the lesser-included misdemeanors in counts 4 and 5 are time-barred by the applicable statute of limitations, the scope of the hearing on remand shall include those issues. (See *People v. Statum* (2002) 28 Cal.4th 682, 699, citing, e.g., § 805, subd. (b) [“The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense.”].)⁷

3. *One-Strike-Law Sentence: Count 3*

Jaime argues, the Attorney General agrees, and we concur that the court’s imposition of a One-Strike-Law sentence of 15 years to life on count 3 cannot stand. Since we ordered stricken from the judgment Jaime’s convictions in counts 1 and 2 as time-barred by the applicable statute of limitations (*ante*, part 1), the true findings on the multiple-victim sex-crime allegations in those two counts likewise are stricken from the judgment as a matter of law. So as a matter of statutory construction, the One-Strike-Law sentence of 15 years to life on count 3 is not authorized by law.⁸ (Former § 667.61, subds. (b), (c)(7), (e)(5); Added Stats. 1993-1994, 1st Ex. Sess., ch. 14, § 1, eff. Nov. 30, 1994; Amended Stats. 1997, ch. 817, § 6; Amended Stats. 1998, ch. 936, § 9, eff. Sept. 28, 1998.)

4. *Suitability for Probation: Counts 1-3*

Jaime argues that a resentencing remand is imperative for the court to obtain a psychiatrist’s or psychologist’s report and consider a grant of probation on counts 1-3. The Attorney General argues the contrary.

⁷ Our holding moots Jaime’s ineffective-assistance-of-counsel argument.

⁸ Our holding moots Jaime’s ex-post-facto clause challenge to the sentence.

Preliminarily, our holding that the statute of limitations bars his prosecution on counts 1 and 2 moots Jaime’s argument as to both of those counts. (*Ante*, part 1.) As to count 3, our holding that the One-Strike-Law sentence of 15 years to life on count 3 is not authorized by law moots his argument insofar as he bases that argument in the One Strike Law. (Former § 667.61, subds. (b), (c)(7), (e)(5); Added Stats. 1993-1994, 1st Ex. Sess., ch. 14, § 1, eff. Nov. 30, 1994; Amended Stats. 1997, ch. 817, § 6; Amended Stats. 1998, ch. 936, § 9, eff. Sept. 28, 1998.)

Additionally, Jaime bases his argument in the statute that prohibits a grant of probation to any person who, in committing a lewd or lascivious act on a child under the age of 14, had “substantial sexual conduct” with the child. (§ 1203.066, subds. (a)(8), (b).) As to that aspect of his argument, the information alleged parole ineligibility due to substantial sexual contact, but the court did not so instruct the jury, and the verdict forms made no reference to those allegations.

Even so, the statute provides that if substantial sexual conduct is “not pled or proven” the court has the authority to grant probation, but “only if [enumerated] terms and conditions are met.” (§ 1203.066, subds. (d)(1), (d)(2), (d)(3), citing § 288.1.) In light of our holding requiring a hearing on remand at which the court is to determine if Jaime’s prosecution on count 3 is time-barred, the issue of a grant of probation on that count is not yet ripe. (*Ante*, part 3.) “The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions.” (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) “The law neither does nor requires idle acts.” (Civ. Code, § 3532.) Whether the issue will be ripe after remand is purely speculative. The parties shall have the right to argue the issue if and only if the issue ripens after remand. (Cf. Cal. Rules of Court, rule 1.5(a) [“The rules and standards of the California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern.”].)

DISPOSITION

The judgment is reversed. The count 1 and 2 convictions are stricken from the judgment as time-barred. On counts 3-5, the matter is remanded with the directions to the superior court to hold a hearing, to make findings whether prosecution was time-barred by the applicable statutes of limitations, and to enter judgment accordingly. On count 3, the One-Strike-Law sentence is vacated with the directions to impose a lawful sentence if and only if the superior court were to find, after the hearing on remand, that prosecution was *not* barred by the applicable statute of limitations. Finally, the superior court is directed to amend the abstract of judgment appropriately and to send a certified copy to the Department of Corrections and Rehabilitation.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Kane, J.