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

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP ARELLANO,

Defendant and Appellant.

F067909

(Super. Ct. No. F08900642)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, 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, Catherine Chatman and Michael Dolida, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

In 2010, a jury convicted appellant Phillip Arellano of two counts of committing a forcible lewd act on a child under the age of 14 sometime between August 27, 2001, and

April 15, 2002. The same jury acquitted appellant of one count of continuous sexual abuse allegedly occurring between April 15, 2003, and May 15, 2004. We reversed both convictions in a prior appeal. (See *People v. Arellano* (Jan. 19, 2012, F060881) [nonpub. opn.] (*Arellano I*.)

On remand, the prosecutor filed a first amended information charging appellant with two counts of committing a forcible lewd act on a child: with one allegedly occurring on or about April 15, 2003, and the other occurring on or about April 15, 2003, through April 15, 2005. The jury convicted appellant on both counts.

Appellant now claims, and respondent concedes, that his counsel was ineffective for failing to advise him to plead once in jeopardy to the charges in the amended information. Under the holding of *Brown v. Superior Court* (2010) 187 Cal.App.4th 1511 (*Brown*), we agree and reverse the judgment. As a result, we do not reach appellant's second claim of evidentiary error.

## FACTS

### *Background*

Appellant and the victim in this case, A., were stepbrother and stepsister at the time of the charged incidents, residing with appellant's mother and A.'s father, who were married at the time. Appellant was born in August 1987, A. in April 1992, five years later. (*Arellano I, supra*, F060881.)

### *First Trial*

In 2008, appellant was charged with three<sup>1</sup> counts of committing a forcible lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (b)(1))<sup>2</sup> and one count of continuous sexual abuse (§ 288.5). The forcible lewd acts allegedly occurred between August 27, 2001, and April 15, 2002. Appellant was 14 years old at the time, A. was

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<sup>1</sup> One of the forcible lewd act counts was dismissed at the prosecution's request on the first day of trial.

<sup>2</sup> All further statutory references are to the Penal Code unless noted otherwise.

nine years old. The continuous sexual abuse allegedly occurred between April 15, 2003, and May 15, 2004, when appellant was 16 years old and A. was 11 years old. (*Arellano I, supra*, F060881.)

At appellant's first trial in 2010, the alleged victim, A., testified to several incidents of abuse:<sup>3</sup>

"In the year after A.'s ninth birthday in April of 2001, according to her testimony, appellant had forced sexual intercourse with her on more than three but less than five occasions. She recalled that these events did not take place in the summer, because her stepmother was at home. Instead, they occurred after she went to a new school." (*Arellano I, supra*, F060881.) These acts formed the basis for the two counts of violating section 288, subdivision (b), for which appellant was convicted.

"When A. was 11, between April 2003 and April 2004, her grandmother moved in with the family for six months. On the day the grandmother was in the process of moving in, when she left to get another load of belongings, appellant again forced A. into sexual intercourse. While that was occurring, A. saw her younger sister, Q., in the doorway watching them. A. testified that the next time appellant 'assaulted' her, her grandmother had moved out. Appellant 'assaulted' A. on two more occasions, months

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<sup>3</sup> Several of the alleged incidents were uncharged because they allegedly occurred before appellant's 14th birthday:

"According to A.'s testimony, appellant first touched her inappropriately when A. was six years old—sometime between April 1998 and April 1999. He touched her on her vaginal area underneath her clothing and told her not to tell anyone about it. This act was not charged against appellant.

"A. also testified that appellant touched her inappropriately when she was eight years old, which would have been between April of 2000 and April of 2001. At that time, according to A., appellant was babysitting and the two were under a blanket together. Appellant got on top of A., pinned her down, and had sexual intercourse with her. A. was 'too afraid' to tell her father. Neither was this act charged against appellant." (*Arellano I, supra*, F060881.)

apart, but stopped after A. began her menstrual cycles at the age of 12.” (*Arellano I, supra*, F060881.) These acts formed the basis for one count of continuous sexual abuse of a child in violation of section 288.5, for which appellant was acquitted.

Appellant denied A.’s accusations.

On June 10, 2010, the jury convicted appellant of both counts of forcible lewd acts on a child, but acquitted him of the continuous abuse charge. (*Arellano I, supra*, F060881.) “The trial court sentenced appellant to the midterm of six years in state prison.” (*Ibid.*)

On January 19, 2012, we reversed appellant’s two convictions on evidentiary grounds. (See *Arellano I, supra*, F060881.) On remand, the trial court ordered a new trial.

### *Second Trial*

The new trial began on July 9, 2013. During a break in jury selection, the district attorney filed a first amended information, charging appellant with two counts of committing a forcible lewd act upon a child. (§ 288, subd. (b)(1).) The new information alleged that the specific act underlying count one occurred on or about April 15, 2003, “in the house when [A.’s] grandmother was moving in.” The specific act underlying count two occurred “[o]n or about April 15, 2003” (i.e., when A.’s grandmother was moving in) “through April 15, 2005” (i.e., when A. had her first period when she was 12 years old.) The new information did not reallege the 2001-2002 acts underlying appellant’s 2010 convictions. Appellant pled not guilty to all charges.

After the second trial,<sup>4</sup> the jury convicted appellant of both charges. The court sentenced appellant to an aggregate term of six years in prison.

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<sup>4</sup> We do not set forth the evidence adduced at the second trial. In analyzing double jeopardy claims, our consideration of evidence is “‘confined’” to the points in controversy at “‘the former trial.’” (See *Yeager v. United States* (2009) 557 U.S. 110, 122.)

## DISCUSSION

Appellant claims he received ineffective assistance of counsel because he was not advised to plead once in jeopardy to the charges in the second information.

“In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was “deficient” because his “representation fell below an objective standard of reasonableness ... under prevailing professional norms.”

[Citation.]” (*In re Harris* (1993) 5 Cal.4th 813, 832.) The defendant must also show there is a reasonable probability that the result of the proceeding would have been different without counsel’s unprofessional errors. (*Id.* at p. 833.) Consequently, in order to resolve appellant’s ineffective assistance claim, we must consider the underlying substantive issue of whether the doctrine of double jeopardy precluded appellant’s second trial.

“The double jeopardy provisions of the federal and state Constitutions protect against successive prosecutions for the same offense after acquittal or conviction, and against multiple punishment for the same offense. [Citations.] Double jeopardy includes an issue preclusion component: once an issue of ultimate fact has been resolved in a criminal proceeding, it cannot be relitigated in a subsequent prosecution or retrial.” (*Brown, supra*, 187 Cal.App.4th at p. 1524.)

“To decipher what a jury has necessarily decided, ... courts should “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” [Citation.]” (*Brown, supra*, 187 Cal.App.4th at p. 1524, quoting *Yeager v. United States, supra*, 557 U.S. at pp. 119-120.)

In *Brown*, the defendant was charged with four counts of committing a forcible lewd act upon a child (§ 288, subd. (b)(1)) on or between April 15, 2005, and March 2, 2007, and one count of continuous sexual abuse (§ 288.5, subd. (a)) during the same

timeframe.<sup>5</sup> (*Brown, supra*, 187 Cal.App.4th at p. 1514.) The jury acquitted defendant of the continuous abuse charge and could not reach a verdict on the forcible lewd act charges. (*Id.* at p. 1523.) The court declared a mistrial and ultimately ruled that the individual forcible lewd act charges could be retried. (*Ibid.*) The Court of Appeal disagreed, and concluded that United States Supreme Court precedent precluded retrial of the forcible lewd act charges. (See *Id.* at p. 1532.)

The Court of Appeal framed the relevant inquiry as “whether the commission of a lewd or lascivious act ... was an ultimate fact” for the continuous sexual abuse charge. (*Brown, supra*, 187 Cal.App.4th at p. 1532.) The court held that the acquittal on the continuous sexual abuse charge, “viewed in the absence of speculation”, showed the jury had concluded defendant had not committed a lewd act against the victim during the applicable date range. (*Ibid.*) In other words, the “acquittal embrace[d] every type of act that potentially supported conviction” of the continuous sexual abuse act, including the acts charged in the second information. (See *ibid.*)

There is no material basis on which to distinguish *Brown*. The specific acts alleged in the amended information, for which appellant was tried in the second trial, represent two of the three acts which formed the basis for the continuous sexual abuse charge of the original information, for which he was acquitted. Applying *Brown*’s reasoning to the present case means that appellant’s acquittal on the continuous sexual abuse charge “embrace[d] every type of act that potentially supported” the charge. (See *Brown, supra*, 187 Cal.App.4th at p. 1532.) There is no dispute between the parties that counts 1 and 2 of the amended information “potentially supported” the continuous sexual abuse charge from the first trial. As a result, the latter charges were precluded by the

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<sup>5</sup> The *Brown* defendant was also charged with several other counts including forcible oral copulation, sodomy by force, assault with intent to commit a felony, and attempted sodomy by force. (*Brown, supra*, 187 Cal.App.4th at p. 1514.)

double jeopardy clause pursuant to *Brown*, and appellant’s convictions must be reversed.<sup>6</sup>  
(See *id.* at p. 1532.)

**DISPOSITION**

The judgment is reversed.

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Franson, J.

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Poochigian, Acting P.J.

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Peña, J.

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<sup>6</sup> The parties agree that there was no relevant tactical reason to refrain from pleading once in jeopardy. When there ““simply could be no satisfactory explanation”” for counsel’s conduct, we may reverse a conviction on direct appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)