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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CORNELIO JAIMES,

Defendant and Appellant.

G045054

(Super. Ct. No. 09CF2614)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Judgment affirmed as modified.

Jolene Larimore, 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, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Cornelio Jaimes was charged with burglary (Pen. Code, §§ 459, 460, subd. (a); all further statutory references are to this code), two counts of forcible rape (§ 261, subd. (a)(2)), forcible oral copulation (§ 288a, subd. (c)(2)), and assault with intent to commit a sexual offense in the course of a burglary (§ 220, subd. (b)). The jury acquitted him on the burglary and two forcible rape charges, but found him guilty of two counts of the lesser included offense of simple assault. It also acquitted him on the forcible oral copulation charge and assault with intent to commit a sexual offense, but found him guilty of the lesser included offense of simple assault. In summary, defendant was convicted of three counts of simple assault (§ 240). The court sentenced him to 180 days in the county jail for each assault, for a total of 540 days.

Relying on section 290.006, the court also ordered defendant to register as a sex offender. Defendant, in his opening brief, contends the registration order should be stricken because the court failed to state its reasons for requiring it. But we asked the parties to also brief whether *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 142 L.Ed.2d 435] (*Apprendi*) required that the factual findings supporting such registration and the mandatory lifetime residency restrictions imposed by Proposition 83, the Sexual Predator Punishment and Control Act: Jessica's Law (Prop. 83, as approved by voters, Gen. Elec. (Nov. 7, 2006); Jessica's law) and specifically section 3003.5, subdivision (b), be made by a jury.

We hold that imposing the lifetime residency restrictions applicable to persons required to register as sex offenders under section 290.006 increases the penalty for defendant's crimes beyond the statutory maximum. Hence, the Sixth Amendment of the United States Constitution and the U.S. Supreme Court's decision in *Apprendi* require that a jury must make factual findings beyond a reasonable doubt in support of the imposition of the residency restriction. Because the jury did not do so here, we modify the judgment to include a provision stating that defendant is not subject to a lifetime residency restriction and affirm the judgment as so modified.

This leaves the issue raised in the opening brief, whether the trial court failed to state its reasons for requiring the registration. Here we disagree with defendant; he waived this argument by failing to raise it in the trial court.

FACTS

The victim, Claudia R., and defendant had been living together for six years and had two children. They frequently argued and approximately two weeks before the events constituting the crimes, Claudia told defendant to leave the house because she no longer wanted to live with him. She changed the locks without giving defendant a key.

One night, when Claudia was asleep on the living room sofa, she was awakened when defendant touched her on the shoulder. He picked her up and carried her into a bedroom in the garage. On the way, Claudia protested and kicked him. Once in the garage, defendant threw her on the bed and, while she kicked him and told him “no,” he removed all her clothing and held her down. Defendant first orally copulated Claudia and sodomized her with his finger. He then penetrated her with his penis; he did so twice, ejaculating into her vagina. During this time, Claudia struggled and fought with defendant.

Claudia also testified that some two and a half years earlier, defendant had raped her. She did not call the police after that incident.

DISCUSSION

1. Applicability of Apprendi

a. Sex offender registration results in residency restrictions.

The court ordered defendant to register as a sex offender based on its findings as to his motivation in committing the assaults for which the jury found him

guilty. Section 290, subdivision (c) requires that persons convicted of specified crimes must register as sex offenders. Defendant was not convicted of any of these crimes. But section 290.006 provides that “if the court finds . . . the person committed [an] offense as a result of sexual compulsion or for purposes of sexual gratification” he or she may be ordered by the court to register even though the offense is not included in section 290, subdivision (c). The court made a factual finding defendant had engaged in the crimes for purposes of sexual gratification. Based on Jessica’s Law, a lifetime residency restriction is imposed on persons required to register as sex offenders. (See *In re E.J.* (2010) 47 Cal.4th 1258, 1263.)

The Attorney General takes the position that the residency restriction does not apply to defendant, arguing section 3003.5, subdivision (b) applies only to persons on parole. Because defendant is not a parolee, the Attorney General concludes he is not subject to the residency restrictions. Defendant, on the other hand, contends the restrictions apply to all persons required to register, whether they are on parole or not. We agree with defendant on this issue.

Section 3003.5, subdivision (b) states, “Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.” The Attorney General relies on the fact that subdivision (a) of section 3003.5 expressly only applies to parolees and that the statute was inserted in Chapter 8 of the Penal Code, which deals with the “Length of Term of Imprisonment and Paroles” and the specific article dealing with “General Provisions” relating to parole. (Pen. Code, pt. 3, tit. 1, ch. 8, art. 1, § 3003.5.)

Although the placement of the statute may be awkward, it is clear and we must be guided by the language of the statute itself. Section 3003.5, subdivision (b)

explicitly states it applies “*notwithstanding any other provision of law.*” (Italics added.) And, as defendant notes, where the statute is unambiguous, we need not engage in statutory construction. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.)

b. The statute is punitive.

Apprendi held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.) Here the trial court made factual findings that trigger the residency restrictions of section 290.006. Thus, if these residency restrictions constitute an increase in “the penalty for a crime beyond the prescribed statutory maximum,” they “must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi, supra*, 530 U.S. at p. 490.)

The duty to register is not punitive. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197.) Therefore, the requirement that defendant register does not invoke *Apprendi*. We also note that the imposition of a residency restriction as a condition of parole, and which only lasts during the parole period, does not invoke *Apprendi*. (See *In re E.J., surpa*, 47 Cal.4th at p. 1278.)

Before the jury trial requirement of *Apprendi* applies, the consequence imposed on defendant must (1) be punitive (*People v. Picklesimer* (2010) 48 Cal.4th 330, 344; *People v. Presley* (2007) 156 Cal.App.4th 1027, 1031-1032) and (2) exceed the maximum punishment for the offense prescribed by the statute (*Cunningham v. California* (2007) 549 U.S. 270, 274-275, 289-293 [127 S.Ct. 856, 166 L.Ed.2d 856]). Whether the lifetime residence restriction is punitive is pending before the California Supreme Court in a number of cases, including, e.g., *People v. Hass*, review granted March 14, 2012, S199833 [residency restriction is punitive]; *In re J.L.* (2010) 190 Cal.App.4th 1394, review granted March 2, 2011, S189721 [in accord]; *In re S.W.*,

review granted Jan. 26, 2011, S187897 [residency restriction is not punitive]; and *People v. Mosley* (2010) 188 Cal.App.4th 1090, review granted Jan. 26, 2011, S187965 [residency restriction is punitive]. Pending a decision by our Supreme Court, we conclude that a lifetime residency restriction imposed at sentencing is punitive.

In making this determination, we consider whether the enactors of the provision intended it to be punitive. If not, we must consider whether the provision is punitive in effect because of such factors as whether it imposes what has traditionally been considered to be punitive, creates an affirmative restraint, or is excessive in relation to its non-punitive purpose. (*Smith v. Doe* (2003) 538 U.S. 84, 97 [123 S.Ct. 1140, 155 L.Ed.2d 164]; *People v. Castellanos* (1999) 21 Cal.4th 785, 795.)

1) Intent of Enactors

If we look at the “intent clause” of Jessica’s Law and the ballot pamphlet we find that the residence restriction was intended to control registered sex offenders and create predator-free zones around schools and parks. But, other factors call this intent in question. The proposition provided the residency restriction be placed in the Penal Code and renders registered sex offenders’s residency near schools or parks “unlawful.” A punitive intent may also be inferred from the blanket treatment of all sex offenders, not just those who victimized children, and the authorization of local ordinances “that further restrict the residency of any person for whom registration is required” (§ 3003.5, subd. (c).) The question whether the intent of the actors was punitive is a close one. If these were the only facts we were to consider, we probably would conclude the restriction was not punitive. But we must also look at the effect of the restriction.

2) Punitive Effect of Restriction

We conclude that a lifetime residency restriction is punitive in effect. Such a restriction is analogous to banishment, a traditional punishment. (See *Commonwealth v. Baker* (Ky. 2009) 295 S.W.3d 437, 444-447 [sex offender residency restriction is punitive and ex post facto prohibitions preclude application to defendants whose crimes committed before restriction enacted].) The restriction can disrupt long-established residences, separate families, and affect access to schools, employment, transportation, and medical care. The restriction also threatens persons subject to it with eviction should a school or park open nearby. (*Id.* at p. 445.) In addition, the restriction exceeds the scope of the stated regulatory purpose; it applies whether or not the defendant engaged in predatory conduct and whether defendant's crime victimized children or adults.

DISPOSITION

The judgment is modified to include a provision stating that defendant is not subject to a registration requirement. As so modified, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.