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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.

JONATHAN JOSEPH GARCIA,

Defendant and Appellant.

G045741

(Super. Ct. No. 09NF2218)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.
Michael Hayes, Judge. Affirmed in part, reversed in part.

Jonathan Joseph Garcia; in pro. per; and William D. Farber, under
appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, and Kelley Johnson, Deputy Attorney
General, for Plaintiff and Respondent.

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A jury convicted defendant Jonathan Joseph Garcia of four counts of committing a lewd act upon a child under the age of 14 years in violation of Penal Code section 288, subdivision (a).¹ With respect to each count, the jury also found true an allegation that defendant committed the charged offenses on more than one victim under section 1203.066, subdivision (a)(7). The court sentenced defendant to a 12-year prison term, comprised of the six-year middle term on count 1, and consecutive terms of two years (one-third the middle term) on counts 2 through 4.

Defendant timely filed a notice of appeal, and we appointed counsel to represent him. Counsel did not argue against defendant, but advised the court he was unable to find an issue to argue on defendant's behalf. Defendant was given 30 days to file written argument on his own behalf. Sixty-six days later, defendant submitted a handwritten supplemental letter brief, which was 36 days late. We nevertheless accepted defendant's brief for filing and we have considered his arguments, which essentially amount to defendant disagreeing with the jury's view of the evidence. We have examined the entire record and, with the exception of certain minor sentencing issues, have not found an arguable issue. (See *People v. Wende* (1979) 25 Cal.3d 436.) Accordingly, with certain minor sentencing issues excepted, we affirm the judgment. In doing so, we provide a brief description of the procedural history of the case, the facts as established by evidence at trial, and the punishment imposed upon defendant. (See *People v. Kelly* (2006) 40 Cal.4th 106, 123-124.)

¹ All further statutory references are to the Penal Code.

FACTS

Testimony of Jane Doe No. 1

Jane Doe No. 1 (22 years old at the time of her trial testimony) was born in September 1988. Jane Doe No. 1's mother and father divorced when Jane Doe No. 1 was two years old. Following the divorce, Jane Doe No. 1 lived with her father, but visited her mother on weekends.

After the divorce, mother married defendant. Mother and defendant had three other children, including daughter Jane Doe No. 2. From about age seven to age 11, Jane Doe No. 1 visited her mother, defendant, and her half-siblings every other weekend at their apartment in Anaheim, California.

There were times when Jane Doe No. 1 and her half-siblings were home alone with defendant for a "few hours" at a time. Defendant would say, "Let's play house and I'll be the dad and one of you will be the mom." Defendant would invite the girls to sit on his lap; Jane Doe No. 1 noticed defendant's penis was erect when she did so. Both defendant and Jane Doe No. 1 had their clothes on when this occurred.

Defendant also touched Jane Doe No. 1 on her breasts and vagina. Defendant used his hands to touch Jane Doe No. 1's breasts and vagina, both over and under her clothing. Jane Doe No. 1 could feel skin-to-skin contact. Defendant did not insert his fingers inside of Jane Doe No. 1's vagina. This conduct occurred from when Jane Doe No. 1 was seven years old and continued "a lot" (more than five times) for several years.

Defendant also showed Jane Doe No. 1 and Jane Doe No. 2 pornographic magazines. This occurred when Jane Doe No. 1 was approximately nine or 10 years old.

Jane Doe No. 1 never talked to anyone about these events while they were occurring because she was scared. Jane Doe No. 1 told a friend when she was in seventh grade. When she was 18 years old, Jane Doe No. 1 told her mother the day before

mother was planning to reunite with defendant in Oregon. Jane Doe No.1 asked mother how she could move back with someone who had “molested us.”

In July 2009, Jane Doe No. 1 reported her allegations to the police. This was after a phone conversation with her grandmother, who accompanied Jane Doe No.1.

Testimony of Jane Doe No. 2

Jane Doe No. 2 was born July 1991 and was 19 years old on the date of her testimony. There were times her father, defendant, touched her in a way that made her feel uncomfortable. Defendant touched Jane Doe No. 2 on her vagina with his hand; the touching occurred on top of her clothes. Defendant did not touch Jane Doe No. 2 on any other parts of her body or ask Jane Doe No. 2 to touch him. Jane Doe No. 2 does not remember how long the touching lasted. She only remembers it happening one time. Jane Doe No. 1 was not present. Jane Doe No. 2 believes she was six or seven years old when the incident occurred.

Testimony of Mother

The victims' mother confirmed in her testimony that defendant was home alone with the victims on occasion.

Other Evidence

Some witnesses' testimony called into question the truth of the victims' allegations. Defendant's mother testified that Jane Doe No. 2 told her defendant did not do anything to Jane Doe No. 2. Jane Doe No. 2 reportedly said, “It's not so much what [he] did to me. [He] didn't do anything to me. It's for what he did to my mom.” Defendant took the stand and denied any wrongdoing. Other evidence (such as police officer testimony describing the statements of the victims at their police interviews, as well as the testimony of mother and a sibling of the victims) suggested there were

inconsistencies between the versions of events told by victims at various times, but confirmed that the two victims had described lewd touching incidents at various times prior to trial.

PROCEDURAL HISTORY

On August 11, 2009, a felony complaint was filed charging defendant with four counts of lewd conduct upon a child under 14 years of age between January 1, 1997 and December 31, 2001. It was further alleged that defendant committed the offenses on more than one victim as set forth in section 1203.066, subdivision (a)(7). On September 11, 2009, defendant pleaded not guilty to all charges. A preliminary hearing was held June 9, 2010; the court found sufficient and probable cause to believe defendant committed the charged felonies and held defendant to answer at trial. An information, filed June 21, 2010, accused defendant of four counts of lewd conduct (three with regard to Jane Doe No. 1, one with regard to Jane Doe No. 2).²

On January 12, 2011, the court conducted a *Marsden*³ hearing, at the conclusion of which the court ruled that it was “satisfied [defendant was] receiving appropriate representation of counsel” and therefore denied defendant’s motion. Trial commenced on January 25, 2011. The jury convicted defendant of all four counts with which he was charged (as to two victims). After trial, but before sentencing, the court conducted another *Marsden* hearing, at which time the court again denied defendant’s motion to replace appointed counsel.

² The information actually included five counts of lewd conduct, but the prosecutor dismissed count 5 prior to trial.

³ *People v. Marsden* (1970) 2 Cal.3d 118.

Defendant moved for a new trial on July 20, 2011, on the grounds: (1) the court wrongly excluded a copy of a phone call purporting to show Jane Doe No. 2 could speak Spanish fluently (a fact that would tangentially impeach Jane Doe No. 2 because Jane Doe No. 2 claimed never to have had a conversation with her grandmother about her allegations because of Jane Doe No. 2's limited Spanish abilities); and (2) there was new material evidence in the form of records showing defendant's brother repeatedly contacted an investigating police officer, allegedly (according to the brother) with information about a conversation between Jane Doe No. 2 and her grandmother in which Jane Doe No. 2 admitted she had fabricated her allegations. The court denied the motion.

The court sentenced defendant to 12 years in prison: six years for count 1 and three consecutive two-year terms for counts 2 through 4. The court initially awarded 852 days of presentence custody credits; appellate counsel successfully moved pursuant to section 1237.1 to correct this award to provide two additional days of credit. The court also: (1) imposed a restitution fine of \$10,000 pursuant to section 1202.4; (2) imposed but suspended a parole revocation fine of \$10,000 pursuant to section 1202.45; (3) imposed a \$160 court security assessment pursuant to section 1465.8, subdivision (a)(1); (4) imposed a \$120 criminal conviction assessment fee pursuant to Government Code section 70373, subdivision (a)(1); (5) imposed a \$200 sex offense fine pursuant to section 290.3; (6) ordered defendant to comply with DNA and fingerprint requirements in sections 296 and 296.1; (7) ordered defendant to register as a sex offender pursuant to section 290; (8) reserved jurisdiction with regard to the issue of victim restitution; (9) ordered defendant to stay away from and not contact the victims pursuant to section 1203.1, subdivision (i)(2); (10) ordered all visitation between defendant and his victims to be prohibited pursuant to section 1202.05; and (11) ordered defendant to undergo Acquired Immune Deficiency Syndrome testing pursuant to section 1202.1, subdivisions (a) and (e)(6)(A).

DISCUSSION

We have examined the entire record and, with the exception of certain minor sentencing issues discussed below, found no arguable issue. There is substantial evidence supporting the jury's findings of guilt. The jury was entitled to rely on the testimony of the victims and discount any apparent inconsistencies between their trial testimony and out-of-court statements. (*People v. Jones* (1990) 51 Cal.3d 294, 316; *People v. Harlan* (1990) 222 Cal.App.3d 439, 454.) The jury was also entitled to reject the testimony of defendant and his mother.

There was no valid statute of limitations defense to the prosecution, despite the delay between the criminal conduct (as early as January 1, 1997) and the commencement of the prosecution (in 2009). The Legislature extended the limitations period for defendant's crimes before the initially applicable limitations periods expired. (See § 800 [standard six-year limitations period]; § 801.1, subd. (b) [prior version of substantively identical statute was effective January 1, 2001; limitations period for § 288 violations extended to 10 years]; § 801.1, subd. (a) [effective January 1, 2006, limitations period for § 288 offenses extended to victim's 28th birthday]; see also *In re White* (2008) 163 Cal.App.4th 1576, 1580 [discussing these provisions].)

Our review discloses no error with regard to evidentiary rulings or jury instructions. The court provided defendant with thorough *Marsden* hearings upon request and properly denied defendant's motions. The court did not err in denying defendant's motion for new trial.

Defendant's sentence to 12 years in prison is proper based on four lewd conduct counts for which defendant was sentenced to consecutive prison terms. (§ 288, subd. (a) [conviction results in "imprisonment in the state prison for three, six, or eight years"]; § 1170.1, subd. (a) ["The subordinate term for each consecutive offense shall

consist of one-third of the middle term of imprisonment prescribed for each other felony conviction”].)

But our review of the record revealed the possibility of several minor sentencing errors. We therefore asked the parties to brief these issues. Having considered the parties’ briefs, we find the court committed three errors as discussed below.

Human Immunodeficiency Virus (HIV) Transmission Probable Cause Finding

Pursuant to section 1202.1, subdivision (e)(6)(A), a court may order HIV testing and the transfer of test results to victims of lewd conduct and other parties if “there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (*Ibid.*; see *People v. Butler* (2003) 31 Cal.4th 1119, 1125-1126 (*Butler*); *People v. Stowell* (2003) 31 Cal.4th 1107, 1112-1113; *People v. Caird* (1998) 63 Cal.App.4th 578, 590.) The court included such an order at sentencing. But there is insufficient evidence in the record to support a finding of probable cause, i.e., “whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (See *Butler*, at p. 1127.) Defendant touched his victims with his hands and defendant’s erect penis contacted one of the victims through clothing while she sat on his lap. There is no evidence that blood, semen, or any other bodily fluid capable of transmitting HIV was transferred from defendant to either of the victims. For instance, it would amount to mere speculation to suggest defendant had an open wound on his hands at the time of relevant conduct, which could plausibly support a probable cause determination.

This issue is not necessarily moot. (See *Butler*, *supra*, 31 Cal.4th at pp. 1128-1129 [rejecting contention that case was moot based on Attorney General’s

supposition that testing had occurred and results already had been transmitted to victim].) The parties' letter briefs were silent with regard to whether defendant's testing had been completed and the results of the testing. We do not foreclose the possibility that this issue is moot if defendant's test indicated he is not infected by the HIV virus. For now, the proper remedy under the circumstances of the case is to remand the matter to permit an additional probable cause hearing. (*Id.* at pp. 1129-1130.)

Order Prohibiting Visitation Pursuant to Section 1202.05

The court prohibited visitation between defendant and the victims pursuant to section 1202.05. This statute applies “[w]henver a person is sentenced . . . for violating Section . . . 288 . . . , and the victim . . . *is a child under the age of 18 years . . .*” (Pen. Code, § 1202.05, subd. (a), italics added; see *People v. Scott* (2012) 203 Cal.App.4th 1303.) The victims in this case were children when the crimes occurred, but they are now adults. Section 1202.05 applies “only to victims who are under the age of 18 at the time of the contemplated visitation.” (*Scott*, at p. 1323.) As the Attorney General concedes, the court erred by issuing an order prohibiting visitation pursuant to section 1202.05.

No Contact Order Pursuant to Section 1203.1

The court, applying section 1203.1, subdivision (i)(2), ordered defendant to stay away from and not contact the victims. Section 1203.1, subdivision (i)(2), authorizes courts to “order as a condition of probation . . . that the defendant stay away from the victim, and . . . have no contact with the victim” Defendant was sentenced to 12 years in prison and was not given probation. As the Attorney General concedes, this order was in error because defendant was not sentenced to probation. (See *People v. Scott, supra*, 203 Cal.App.4th at p. 1325.)

DISPOSITION

The judgment is reversed with regard to the following sentencing orders: (1) defendant to stay away from and not contact the victims pursuant to section 1203.1, subdivision (i)(2); (2) all visitation between defendant and his victims to be prohibited pursuant to section 1202.05; and (3) defendant to undergo HIV testing and processing pursuant to section 1202.1, subdivisions (a) and (e)(6)(A). The no contact and no visitation orders are stricken. The case is remanded to the trial court for further proceedings consistent with this opinion, including a determination whether the prosecution has additional evidence that may establish probable cause under section 1202.1, subdivision (e)(6)(A) (*Butler, supra*, 21 Cal.4th at p. 1129), and whether the HIV testing order is moot if it is established that defendant is not infected with HIV. The trial court is directed to prepare an amended abstract of judgment reflecting the foregoing modifications to the judgment. In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.