Filed 10/2/12 P. v. Palencia CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CRUZ HUMBERTO PALENCIA, SR.,<br><br>Defendant and Appellant. | B235555<br><br>(Los Angeles County<br>Super. Ct. No. KA090977) |

APPEAL from an order of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Frank A. Weiser, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

---

Defendant Cruz Humberto Palencia, Sr. appeals from the judgment entered following a jury trial in which he was convicted of four counts of committing a lewd act upon a child under 14 years old and two counts of continuous sexual abuse of a child under 14 years old. He contends the action on three counts was barred by the statute of limitations, the trial court erred in admitting evidence of an uncharged sexual offense, and no substantial evidence supported the convictions. We affirm.

## BACKGROUND

In 2009, defendant's granddaughter, Jane Doe 3, who was then thirty years old, was at a family gathering when her uncle, defendant's son, asked her why she did not like defendant. She revealed that when she was five or six years old, defendant had lain down with her on blankets on the floor of their house, removed her clothes, fondled her vagina for 10 to 15 minutes, and pressed his erect penis against her back.

The extended family planned a meeting to discuss the issue at the house where Jane Doe 2, defendant's stepgranddaughter, who was then 20 years old, lived with her parents. Jane Doe 2 told her mother she felt uncomfortable having the meeting at their house. When asked why, she told her parents that several times a week when she was nine years old until she was eleven, defendant would remove her clothing or tell her to remove it, fondle her vagina, force her to orally copulate him, and have vaginal intercourse with her.

When Jane Doe 1, Jane Doe 2's sister, heard what had happened to her sister and cousin, she told her high school counselor that defendant had molested her as well.

The Los Angeles County District Attorney filed an information against defendant on September 14, 2010. The information charged defendant with committing lewd acts upon Jane Doe 2 from December 1, 1996 to January 31, 1997 and June 2, 1997 to July 1, 1998 (Penal Code section 288, subd. (a); counts 1 and 3);[1] engaging in continuous sexual abuse of Jane Doe 2 (§ 288.5, subd. (a); count 2); committing lewd acts upon Jane Doe 1

---

[1] Undesignated statutory references are to the Penal Code.

(counts 4 and 5); and continuous sexual abuse of Jane Doe 1 (count 6). Defendant pleaded not guilty to all counts.

At trial, Jane Doe 2 testified defendant had intercourse with her a total of more than 100 times from 1996 to 1999. Jane Doe 1 testified that on several occasions beginning in 2003, when she was about nine years old, defendant would remove her clothing and fondle her vagina for 20 or 30 minutes. Jane Does 1, 2 and 3 all testified defendant fondled their vaginas and obtained an erection while they were in his house, away from their parents, under his supervision and control.

Defendant's evidence was that two of Jane Doe 1's cousins who lived with defendant and Jane Doe 1 never saw Jane Doe 1 go into defendant's bedroom and never saw any inappropriate contact between them.

The jury deliberated one hour and twenty minutes before finding defendant guilty on all counts. The trial court sentenced him to a total prison term of 16 years. Defendant filed a timely notice of appeal.

## DISCUSSION

### A. Statute of Limitations

The Los Angeles County District Attorney filed the information on September 14, 2010, when Jane Doe 3 was approximately 31 years old, Jane Doe 2 was 23, and Jane Doe 1 was sixteen. Defendant contends counts 1, 2 and 3, which named Jane Doe 2 as the victim, were time barred. We disagree.

The pertinent limitations period is set forth in section 801.1, which provides that prosecution for a felony offense described in section 288 or 288.5 "that is alleged to have been committed when the victim was under the age of 18 years, may be commenced any time prior to the victim's 28th birthday." (§ 801.1, subd. (a).) Here, defendant molested Jane Doe 2 when she was under the age of 18. The prosecution for violation of sections 288 and 288.5 commenced when she was 23. It was therefore timely.

Defendant argues application of the limitations period set forth in section 801.1 violates the constitutional prohibition against ex post facto laws. He is incorrect.

"No state shall . . . pass any . . . ex post facto law . . . ." (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. 1, § 9.) The ex post facto clause of the federal Constitution "protects liberty by preventing governments from enacting statutes with 'manifestly unjust and oppressive' retroactive effects. [Citation.]" (*Stogner v. California* (2003) 539 U.S. 607, 611 [123 S.Ct. 2446; 156 L.Ed.2d 544], italics omitted.) While a "law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution," "'where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws.'" (*Id*. at pp. 632–633, 618-619, italics omitted; *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1273.)

On December 1, 1996, the earliest alleged date for the offenses proven at trial, the period of limitations then in effect was "six years after commission of the offense." (Former § 800, added by Stats. 1984, ch. 1270, § 2, p. 4335.) But a series of subsequent statutory amendments beginning in 2001 extended the limitations period from six to 10 years for violation of sections 288 and 288.5. "Effective January 1, 2001, a chaptered statute added a new subdivision (h)(1) to former section 803, extending from six years to 10 years the statute of limitations applicable to [violation of sections 288 and 288.5.]" (*In re White* (2008) 163 Cal.App.4th 1576, 1580.) That subdivision provided that "Notwithstanding the limitation of time described in Section 800, the limitations period for commencing prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of [former] Section 290 [which included §§ 288 and 288.5], where the limitations period set forth in Section 800 has not expired as of January 1, 2001 . . . shall be 10 years from the commission of the offense . . . ." (Former § 803, subd. (h)(1), Stats. 2000, ch. 235, § 1, p. 2342.)[2] Pursuant to section 803, the limitations

---

[2] In 2001, subdivision (a)(2)(A) of former section 290 provided in pertinent part: "The following persons shall be required to register pursuant to paragraph (1): [¶] (A) Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state . . . of a violation of . . . Section . . . 288, 288a, 288.5 . . . or any person who since

period for a violation of section 288 or 288.5 committed in December 1996 would therefore not expire until December 2006.

Effective January 1, 2005, the limitations period for violation of sections 288 and 288.5 was transferred to former section 801.1, with minor changes. (Stats. 2004, ch. 368, § 1, p. 3470.) Former section 801.1 thereafter provided: "Notwithstanding any other limitation of time described in this chapter, prosecution for a felony offense described in subparagraph (A) of paragraph (2) of subdivision (a) of [former] Section 290 shall be commenced within 10 years after commission of the offense." (See *People v. Hollie, supra,* 180 Cal.App.4th at p. 1272.)

Effective January 1, 2006, section 801.1 was amended to extend the limitations period as described above.

"As a result of the sequence of revisions in the law, the six-year statute of limitations in section 800 had not expired when the 10-year statute of limitations became effective January 1, 2001, and was continuously in effect thereafter." (*People v. Hollie, supra,* 180 Cal.App.4th at p. 1273.) Because the prosecution of defendant for violation of sections 288 and 288.5 was never time-barred, the ultimate extension of the limitations period for violation of sections 288 and 288.5 to its present form was not ex post facto. (*Stogner v. California*, *supra,* 539 U.S. at pp. 618-619.)

**B. Evidence of an Uncharged Offense Against Jane Doe 3**

On June 14, 2011, the prosecution moved to admit evidence that defendant committed an uncharged sexual offense against Jane Doe 3. Defendant objected that the evidence would be unduly prejudicial under Evidence Code section 352. The trial court reserved making a ruling, but indicated it would entertain a later hearing to determine if Jane Doe 3 should be permitted to testify. Jane Doe 3 ultimately appeared at trial and testified, without objection, that defendant molested her on one occasion for 10 to 15 minutes when she was five or six years old.

---

that date has been or is hereafter convicted of the attempt to commit any of the above-mentioned offenses." (Stats. 1998, ch. 930, § 1, p. 6326.)

Defendant contends the trial court erred in admitting Jane Doe 3's testimony. We disagree.

Evidence Code section 1108, subdivision (a), provides, "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101[ prohibiting evidence of a defendant's character, or a trait of his character, to prove conduct on a specified occasion], if the evidence is not inadmissible pursuant to Section 352." Evidence Code section 1108 "allows evidence of the defendant's uncharged sex crimes to be introduced in a sex offense prosecution to demonstrate the defendant's disposition to commit such crimes." (*People v. Reliford* (2003) 29 Cal.4th 1007, 1009.) Under section 1108, trial courts may not "deem such evidence unduly prejudicial per se, but must instead engage in a careful weighing process under Evidence Code section 352." (*Id*. at pp. 1012-1013.)

"In exercising this discretion [under Evidence Code section 352] as to a sexual offense, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offenses, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.] The court's ruling under section 1108 is subject to review for abuse of discretion. [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 61.) """"[E]vidence offered under [section] 1108 [sh]ould not be excluded on the basis of [section] 352 unless "the probability that its admission will . . . create substantial danger of undue prejudice" . . . substantially outweigh[s] its probative value concerning the defendant's disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other

forms of relevant evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission.'" [Citation.]' [Citation.]" (*Id*. at p. 62.)

The evidence regarding defendant's prior sexual offense against Jane Doe 3 was not unduly prejudicial. "As the legislative history indicates, the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes." (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.)

The credibility of Jane Does 1 and 2 was the trial's central issue: Why had they waited so long to come forward and could they accurately interpret events that occurred when they were very young. Admission of evidence of defendant's prior sexual offense against Jane Doe 3 assisted the jury in assessing the credibility of Jane Does 1 and 2 by providing the jury with an opportunity to learn of defendant's possible disposition to commit sex crimes. The incident involving Jane Doe 3 and the offenses against Jane Does 1 and 2 were similar in many respects. They each involved sexual acts against defendant's very young granddaughters, in his house, while their parents were away. And each woman testified defendant fondled her vagina and obtained an erection. This evidence demonstrated defendant's propensity to sexually molest his granddaughters.

Moreover, the evidence was presented with only one witness and did not consume undue time at trial, and the court instructed the jury to consider the evidence only for the purpose of showing defendant "was disposed or inclined to commit sexual offenses," and was admonished not to consider it for any other purpose.[3]

---

[3] The trial court instructed the jury under CALCRIM No. 1191 on the preponderance-of-the-evidence standard of proof necessary for the prior sexual offenses and the limitations on use of the evidence: "The People presented evidence that the defendant committed the crime of lewd act upon a child that was not charged in this case. This

### C. Accusations that Jane Doe 2 had an Affair with her Stepfather

At a pretrial hearing defendant's counsel represented that there was evidence of "some family dispute" about whether Jane Doe 2 was engaged in a sexual relationship with her stepfather, defendant's son. Counsel contended the evidence would show that Jane Doe 2's accusation against defendant was an attempt to deflect attention from her relationship with her stepfather. The court stated it would reserve ruling on the issue to give defense counsel a chance to get the facts. However, it does not appear defense counsel revisited the matter.

Defendant contends "The People's [Evidence Code section] 402 motion to exclude testimony" regarding family accusations of an affair between Jane Doe 2 and her stepfather "was in err [sic] as the evidence was more probative than prejudicial." We presume defendant means the trial court erred in excluding the evidence. The contention is without merit because the trial court did not exclude evidence of a sexual relationship between Jane Doe 2 and her stepfather, but rather reserved ruling on its admissibility until defense counsel could develop such evidence. Defense counsel never did.

---

crime is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit lewd act upon a child, as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of lewd act upon a child. The People must still prove each charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."

**D. Sufficiency of the Evidence**

Defendant contends the evidence was insufficient to support the jury's verdict because Jane Does 1 and 2 lacked credibility.

At the preliminary hearing, Jane Doe 2 testified defendant had intercourse with her 8 to 10 times. At trial, she first testified it was "20-plus times," then that it was over one hundred times. Jane Doe 1 admitted that when her mother first asked her whether defendant had molested her, she lied and said he had not. Furthermore, her testimony that defendant took her into his bedroom where he molested her contradicted the testimony of some of her cousins, who were in the house at the time and said they noticed nothing.

Defendant argues these inconsistencies demonstrate the testimony of Jane Does 1 and 2 was not credible or of solid value. He also notes that the prosecution lacked "specific dates, notes, diaries, written documentary evidence, medical exams or statements to third parties" to support Jane Doe 2's claims. The arguments are meritless.

"'When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) "When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment." (*People v. Hill* (1998) 17 Cal.4th 800, 849.)

The Penal Code defines lewd or lascivious acts involving children as "any of the acts constituting [sexual crimes committed] upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." (§ 288, subd. (a).) It defines continuous abuse of a child as engaging in three or more acts of substantial sexual conduct with a child under the age of 14 years with whom the perpetrator resides or to whom the perpetrator has recurring access. (§ 288.5, subd. (a).)

Evidence of guilt included the testimony of three by-then mature women who were able to relate in some detail sexual experiences with defendant that occurred years earlier and were strikingly similar. Jane Doe 2 testified she was abused from the time she was nine years old until she was eleven. Several times a week defendant would remove her clothing, fondle her vagina, force her to orally copulate him, and have vaginal intercourse with her. Jane Doe 2 testified defendant had intercourse with her more than 100 times from 1996 to 1999. Jane Doe 1 testified defendant several times removed her clothing and fondled her vagina for 20 or 30 minutes. Both women testified defendant obtained an erection and the abuse occurred while they were in his house, away from their parents, and under his supervision and control. This evidence supported the convictions. The inconsistencies and deficiencies to which defendant alludes were considered by the jury and resolved against defendant. That the evidence could also have been consistent with defendant's innocence is irrelevant.

**E. The Length of Jury Deliberation did not Violate Due Process**

Defendant asserts without elaboration or citation to apposite authority that the jury's short deliberation—one hour and twenty minutes—shocks the conscience and raises an inference that his rights to due process and an impartial jury were violated. We see no reason in this case why the testimony and evidence produced at trail necessitated more than 80 minutes of deliberation by the jury. There only were two main witnesses, and their testimony was neither complex nor lengthy. The defense evidence was equally simple and brief, and jury instructions were uncomplicated. The only real task was to decide whom to believe. Under these circumstances, we cannot conclude the jury's deliberations were overly brief.

## DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.