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Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Julio GUZMAN, Defendant and Appellant.

No. H028326.

(Santa Clara County Superior Court No. CC314057).

March 13, 2006.

As Modified March 22, 2006.

#### Attorneys and Law Firms

Bridget Billeter, Office of the Attorney General, San Francisco, CA, for Plaintiff-Respondent.

Daniel L. Barton, Nolan & Armstrong, Palo Alto, CA, for Defendant-Appellant.

#### Opinion

MIHARA, J.

\*1 Defendant Julio Guzman appeals from a judgment of conviction entered after he pleaded no contest to one count of lewd and lascivious conduct on a child by force, violence or duress (Pen.Code, § 288, subdivision (b)-count 1) and six counts of lewd or lascivious conduct on a child under 14 (Pen.Code, § 288, subd. (a)-counts 2-7).<sup>1</sup> The trial court sentenced defendant to 20 years in state prison. We conclude that counts 3 through 7 were barred by the statute of limitations and reverse the judgment

<sup>1</sup> All further statutory references are to the Penal Code.

#### I. Statement of Facts

A. was born in June 1978. Defendant is her maternal uncle. While defendant lived with A.'s family, he served as her babysitter. Defendant sexually molested A. from the time she was five until she was ten years old.

#### II. Statement of the Case

On August 28, 2002, A. reported the sexual abuse to the police. On May 20, 2003, the district attorney filed a felony complaint, which charged defendant with committing six counts of child molestation between 1983 and 1989. Pursuant to *Stogner v. California* (2003) 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544, all but two counts were later dismissed as barred by the statute of limitations.

On October 20, 2003, the matter proceeded to preliminary hearing on the two remaining counts, which alleged violations of section 288, subdivision (b) against A.A. testified that defendant had sex with her at least twice a week between January 1, 1988 and June 1989. At the conclusion of the hearing, the trial court found probable cause for a holding order on the two counts, which were amended from violations of section 288, subdivision (b) to violations of section 288, subdivision (a).

The information was filed on October 31, 2003. It alleged four counts of section 288, subdivision (a), which occurred between 1985 and 1989. On April 7, 2004, the prosecution moved to amend the information to delete the two counts relating to the period before January 1, 1988, to amend the two remaining counts to violations of section 288, subdivision (b), and to add 18 violations of section 288, subdivision (b). The trial court granted the motion to amend.

On October 13, 2004, defendant entered a plea of no contest to one violation of section 288, subdivision (b) and six violations of section 288, subdivision (a). The trial court granted the prosecutor's motion to dismiss the remaining counts.

#### III. Discussion

Defendant contends that the prosecution of counts 3 through 7 was barred by the statute of limitations.

Counts 3 through 7 charged sexual abuse that occurred between January 1, 1988 and December 31, 1988. The statute of limitations for those offenses is six years. (§ 800.) The

complaint was filed in 2003. The prosecution of counts 3 through 7 would be barred by the statute of limitations unless the limitations period was extended under former section 803, subdivision (g).

Former section 803, subdivision (g) provided in relevant part: “Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section ... 288.... This subdivision applies only if both of the following occur: [¶] (A) The limitation period specified in Section 800 or 801 has expired. [¶] (B) The crime involved substantial sexual conduct....”

\*2 Here A. reported defendant's conduct to law enforcement on August 28, 2002. Thus, in order to qualify under section 803, subdivision (g), counts that would have otherwise been barred by the statute of limitations had to be filed by August 23, 2002. Defendant concedes that counts 1 and 2, which were originally filed in the felony complaint on May 20, 2003, met this requirement. He argues that since counts 3 through 7 were not charged until April 7, 2004, these counts were barred by the statute of limitations.

The People contend that the offenses charged in counts 3 through 7 related back to the complaint for statute of limitations purposes. They rely on section 803, subdivision (b), which tolls the statute of limitations from the time of the filing of the complaint for the “same conduct” by the “same person.”<sup>2</sup>

<sup>2</sup> Section 803, subdivision (b) states: “No time during which prosecution of the same person for the same conduct is pending in a court of this state is a part of a limitation of time prescribed in this chapter.”

In *People v. Terry* (2005) 127 Cal.App.4th 750, 26 Cal.Rptr.3d 71, the complaint, which charged the defendant with three counts of lewd acts upon a child, was filed within one year after the victim reported the crimes. (*Id.* at p. 757, 26 Cal.Rptr.3d 71.) After the preliminary hearing, the prosecution filed an information charging six additional lewd acts. (*Ibid.*) This court held that the separate lewd acts did not constitute the “same conduct” under section 803, subdivision (b), and thus the statute of limitations was not tolled for the counts charging the six additional lewd acts. (*Id.* at p. 769, 26 Cal.Rptr.3d 71.) This court stated: “Nothing in the language or the legislative history of section 803, subdivision (b), suggests

that it was intended to function as a categorical exception to the running of the applicable limitation period for the entire class of same or similar criminal acts allegedly committed by a defendant against the same victim during the same time frame as an offense charged in a pending prosecution. *The tolling provision suspends the running of the statute of limitation only for the conduct underlying a charged offense but does not stop the running of the statute of limitation on completely separate instances of criminal conduct, even when acts were proven by ‘generic’ testimony.*” (*Id.* at p. 769, 26 Cal.Rptr.3d 71, emphasis added.) We agree with this analysis. Thus, the prosecution of counts 3 through 7 was barred by the statute of limitations.

The People, however, urge this court to follow *People v. Bell* (1996) 45 Cal.App.4th 1030, 53 Cal.Rptr.2d 156 (*Bell*) and *People v. Greenberger* (1997) 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61 (*Greenberger*).

In *Bell, supra*, 45 Cal.App.4th 1030, 53 Cal.Rptr.2d 156, the defendants were charged with rent skimming, which involved acquiring property, receiving rent, and not applying the rent to payment on the encumbrances on the property. (*Id.* at pp. 1040-1041, 53 Cal.Rptr.2d 156.) As part of their scheme, the defendant falsely filed for bankruptcy. (*Id.* at p. 1060, 53 Cal.Rptr.2d 156.) The prosecutor charged the defendants with rent skimming, and later amended the information to charge forgery and false filing of claims. (*Id.* at p. 1063, 53 Cal.Rptr.2d 156.) In considering whether the latter charges fell within the ambit of section 803, subdivision (b), the court stated that “the forgery and false filings were merely aspects of [the defendants'] rent skimming scheme. We conclude, therefore, both offenses arose from the same conduct and the running of the statute of limitations as to the forgery and false filing offense was tolled by the issuance of the arrest warrant for the rent skimming offenses.” (*Id.* at p. 1064, 53 Cal.Rptr.2d 156.)

\*3 In *Greenberger, supra*, 58 Cal.App.4th 298, 68 Cal.Rptr.2d 61, the defendants kidnapped the victim and then killed him. (*Id.* at p. 318, 68 Cal.Rptr.2d 61.) The prosecutor initially charged the defendants only with murder, and then charged them with kidnapping after the statute of limitations had run on that offense. (*Id.* at p. 369, 68 Cal.Rptr.2d 61.) The reviewing court found that the issuance of the arrest warrant was sufficient to toll the statute of limitations on the kidnapping charge, because “the kidnapping was part of the same conduct that resulted in [the victim's] murder.” (*Ibid.*)

*Bell* and *Greenberger* are distinguishable from the present case. Those cases involved offenses that were part of an indivisible course of conduct, or as the People have observed, “the charges the defendants initially faced—rent skimming and murder—were inextricably connected to the subsequent charges—forgery and kidnapping—and the evidence presented to prove the initial charges necessarily involve testimony about the subsequent charges.” In contrast to *Bell* and *Greenberger*, here counts 3 through 7 were “completely separate instances of criminal conduct” (*Terry*, *supra*, 127 Cal.App.4th at p. 769, 26 Cal.Rptr.3d 71) that occurred on different occasions, and each act underlying a given count was not necessary to prove the other acts.

The People also argue that the difficulties involved in the prosecution of sexual molestation cases require a broad definition of “same conduct.” They note that victims are often unable to give the specific date on which the molestation occurred, that the details of incidents of molestation are frequently not developed until the preliminary hearing, that requiring the prosecution to charge all molestation counts when the complaint is filed would limit its ability to enter into plea agreements with the defendant, and that the defendant would be able to control the prosecutor's charging decision. While we recognize these difficulties, they are not insurmountable. Moreover, the People overlook that section 803, subdivision (g) permits prosecution of certain offenses long after the expiration of the statute of limitations. “[A]

statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable.” (*Stogner v. California*, *supra*, 539 U.S. at p. 615.) These public policy issues were acknowledged in the Law Revision Commission Comment to section 803, which explains that “[t]he test of the ‘same conduct,’ involving as it does some flexibility of definition, states a principle that should meet the reasonable needs of the prosecution, while affording the defendant fair protection against an enlargement of the charges after running of the statute.” In our view, the *Terry* court's interpretation of the statute recognizes the competing needs of the parties.

#### IV. Disposition

\*4 Counts 3 through 7 are barred by the statute of limitations. Thus, the judgment is reversed.

WE CONCUR: ELIA, Acting P.J., and McADAMS, J.

#### All Citations

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