

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DUANE PEYTON LINDER,

Defendant and Appellant.

C048803

(Super. Ct. No. 03F08589)

APPEAL from a judgment of the Superior Court of Sacramento County, Talmadge R. Jones, J. Affirmed with directions.

Cara DeVito, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, John G. McLean, Supervising Deputy Attorney General, Harry Joseph Colombo, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts I and III.

Defendant was convicted by a jury of five counts of lewd and lascivious conduct on R.S., a child under the age of 14 (Pen. Code, § 288, subd. (a))¹ (counts 1-5), three counts of lewd and lascivious conduct on J.L., a child under the age of 14 (§ 288, subd. (a)) with findings the allegations extending the statute of limitations under section 803, subdivision (g) (section 803(g))² were true (counts 6-8), one count of lewd and lascivious conduct on M.S., a child under the age of 14 (§ 288, subd. (a)), as a lesser offense of a forcible lewd act (§ 288, subd. (b)) (count 9), three counts of lewd and lascivious conduct on D.E., a child under the age of 14 (§ 288, subd. (a)) (counts 11-13), and one count of aggravated sexual assault (forcible oral copulation) of D.E., a child under the age of 14 and 10 or more years younger than defendant (§ 269, subd. (a)(4)) (count 10). The jury found true an allegation defendant committed offenses against multiple victims under section 667.61. The trial court sentenced defendant to a determinate term of 10 years, plus an indeterminate term of 120 years to life, ordered defendant to pay a \$10,000 restitution fine, ordered defendant to pay a \$10,000 parole revocation fine stayed

¹ Undesignated statutory references are to the Penal Code.

² References in this opinion to section 803(g) are to former subdivision (g), in effect in 2003 and 2004 when the felony complaint and information were filed against defendant. In statutory amendments to section 803 in 2005, subdivisions (f) and (g) were rewritten as subdivision (f) and former subdivision (h) was designated as subdivision (g). (Stats. 2005, ch. 479.)

pending successful completion of parole, and awarded defendant 539 total days of time credit.

Defendant appeals contending (1) his constitutional rights to an impartial jury and to due process were violated when the trial court failed to ask prospective jurors what effect prejudicial statements by other prospective jurors had on them, (2) his constitutional rights to a jury and due process were denied under recent decisions of the United States Supreme Court (*Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*); *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556] (*Ring*); *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*); *United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621] (*Booker*)) by the instruction of the jury that the People could prove extension of the statute of limitations for counts 6 through 8 under section 803(g) by a standard of proof less than beyond a reasonable doubt, and (3) the trial court erred in concluding it did not have discretion to impose concurrent subordinate terms of 15 years to life for counts 1 through 5, count 9, and count 11. We agree only with defendant's last contention. We shall affirm defendant's convictions, but vacate the sentence and remand for resentencing.

FACTUAL BACKGROUND

As defendant's claims on appeal do not require a detailed statement of the underlying facts, we only briefly summarize them, viewing the evidence as a whole, in the light most

favorable to the prosecution. (*People v. Staten* (2000) 24 Cal.4th 434, 460.)

Sometime in 1992 or 1993, when defendant's eight- or-nine-year-old niece J.L. was staying at defendant's house, J.L. and one of defendant's young daughters went into defendant's bedroom. Defendant asked the girls to take off their pants and underpants and lie on their stomachs facing the television, on which a pornographic movie was playing. Defendant stared at their genitalia, then digitally penetrated J.L.'s vagina four or five times. (Counts 6, 7 & 8.) The first time J.L. told anyone in law enforcement about defendant's actions was October 9, 2002. The felony complaint alleging these offenses was filed on October 6, 2003.

In August 1995, 10-year-old D.E. came to Sacramento for a family reunion. D.E. asked to accompany defendant on some errands. Defendant drove D.E. to his house. Inside the house, defendant tickled D.E., pressed his fingers on her stomach, pinned her in a corner and asked to lick her "pussy." D.E. consented only when defendant got angry. Defendant then pushed her onto the bed, removed her pants and underwear, and put her legs over his shoulders. He licked her genitals, despite her kicking and screaming at him to stop. At the same time defendant was squeezing her buttocks and periodically touching her chest. Defendant asked D.E. to orally copulate him, but she refused. (Counts 10-13.)

In March 1996, defendant's six-year-old niece R.S. was spending the night at defendant's apartment. Defendant came

into the bathroom while she was taking a bath to give her a towel. When she had wrapped herself in the towel, R.S. sat on defendant's bed and asked who was going to do her hair. Defendant said he would. Defendant sat behind R.S. and rubbed her vagina and chest. Defendant also rubbed his penis against her vagina. R.S. saw a video camera set up pointing towards the bed. (Count 1.)

In March 1997 or March 1998, when defendant's nephew M.S. (R.S.'s brother) was four or five years old, defendant called M.S. into another room and asked M.S. to touch his (defendant's) penis. Defendant grabbed M.S.'s hand and held it tight, moving it up and down and preventing M.S. from yanking it away from defendant's penis. (Count 9.)

When R.S. was nine or ten years old, she and her siblings moved in with defendant's mother, her grandmother. Defendant and his wife often came over to babysit. R.S. remembered one night her grandmother had to go to the hospital with her grandfather. At about 1:00 a.m. defendant came into R.S.'s room, sat on the edge of the bed, and started touching R.S.'s vagina, first over her clothes and then underneath them.

R.S. testified there were between 15 and 40 other times defendant touched her, mostly when she was at her grandmother's house over a period of two years when she was 10 to 12 years old. The incidents usually occurred at night. R.S. estimated she saw defendant's penis on at least 10 of these occasions. About half the time defendant's penis touched her vagina. R.S. also remembered defendant touching her breasts and vagina when

she was visiting another relative's house. She remembered defendant touched her breasts, rubbed her vagina, and touched her with his penis a few times when they were on camping trips. The last time R.S. remembered defendant touching her was when she was 12 years old. He came into her bedroom and asked for a hug. When he came over to give her a hug, he started rubbing her vagina. She pushed him away and told him to get out.

(Counts 2-5.)

Evidence was admitted regarding uncharged prior bad acts of defendant. Specifically defendant's sister, R.S.'s and M.S.'s mother, testified defendant had molested her from the time she was six years old until she was 15 or 16. Defendant rubbed her vagina with his hand and penis, orally copulated her, put a vibrator against her vagina, and later had sexual intercourse with her. Evidence was admitted that defendant made his stepson orally copulate him on more than 10 occasions when the stepson was nine years old or younger. Evidence was admitted that defendant digitally penetrated one of his daughters and she orally copulated defendant.

Defendant did not testify, but presented evidence of inconsistencies in statements made by D.E., denials by M.S. of being touched by defendant, denials by defendant's sister of any oral copulation or penetration of her by defendant and evidence that other family members were making M.S. and R.S. say untrue things about defendant. At trial defendant's stepson denied he ever orally copulated defendant. Defendant argued J.L., D.E., R.S., and M.S. were lying.

DISCUSSION

I.

Jury Voir Dire

According to defendant, his jury was tainted during voir dire by statements of other prospective jurors indicating they had either been victims of molestation or knew people who had been victims. Defendant claims these statements and other comments were prejudicial to the defense. Defendant complains the trial court did not ask the remaining prospective jurors what effect the prejudicial statements had on them and admonish them what prospective jurors say during voir dire is not evidence. Defendant contends, as a result, his rights to an impartial jury and due process were violated, requiring reversal of his convictions, relying on *Mach v. Stewart* (9th Cir. 1998) 137 F.3d 630 (*Mach*). We disagree.

A. The Proceedings on Voir Dire

The trial court summoned two panels of prospective jurors for this trial.

Prior to commencing voir dire of the first panel, the trial court told the venire the nature of the charges against defendant and explained the role of a jury. The court emphasized it was critically important for jurors to put aside any attitude they might have, to presume defendant innocent, and to "never ever find him guilty until there's evidence in this Court which you and the 11 other jurors believe is true beyond a reasonable doubt." The trial court went on to recognize that people have very strong feelings about this type of case, but

those feelings must be put aside so that the decision as to whether defendant is guilty or not guilty is made "without regard to something you read in the paper, saw on CSI, heard about a relative, or any other conceptions you have about the cases of this kind." The trial court separated the panel into jurors who thought they could set aside their feelings and be fair, who were given questionnaires to fill out and were excused for the day, and those who did not think they could fairly serve as jurors on this type of case. After questioning the jurors who stayed behind, only one juror reconsidered and thought she could be fair, the others were excused.

The trial court called the second panel of prospective jurors and followed the same procedure, explaining the nature of the charges, and the importance of keeping an open mind, putting aside any experiences or attitudes that might be biased in either direction. The trial court emphasized the decision in this case must be by a jury "who did not have any ax to grind, who did not have any strong opinions that got in the way of their objective analysis of the facts, unaffected by attitudes, opinions, or things kicking around in your head that you have read in books or seen on TV." Again, the trial court separated the panel into those who thought they could set aside their feelings and be fair and those who did not think they could fairly serve as jurors on this type of case. The court questioned those who stayed behind because they did not feel they could be fair, excusing all but two of them.

The trial court then began voir dire of the jurors who had filled out questionnaires because they thought they could be fair. Several potential jurors were questioned outside the presence of the other prospective jurors and excused. Other prospective jurors, however, shared personal experiences relating to molestation in front of the remaining prospective and eventual jurors and alternates. We summarize those comments of prospective jurors that we find were made in the presence of other jurors.³

(1) One eventual juror/alternate (No. 2102655) said she and her sister had both been molested. She estimated it happened 30 years earlier and "[i]t's water under the bridge." She had no reservation in her mind that she could put it aside when hearing this case. (2) Prospective juror D.P-S. stated her grandfather had molested her mother as a child. The trial court questioned her as to whether she could keep an open mind and presume innocence. When D.P-S. said it would be difficult, she was excused. (3) Prospective juror G.D. said his wife was molested as a child and he had a cousin who was arrested for a sexual assault arising out of a party. (4) Prospective juror E.M.'s brother-in-law had been accused of molesting two nieces. The matter never went to court. (5) Prospective juror R.K.'s aunt

³ Defendant's opening brief recounts numerous statements by various prospective jurors of molestation incidents. Some of these disclosures were made outside the presence of the other members of the jury panel, while others are repetition or further questioning of the same prospective jurors by defense counsel.

had been sexually assaulted. (6) Eventual Juror No. 2172788 said there had been family disclosures that an older cousin had been molested by another cousin over 30 years ago and another two cousins advised against going with a particular uncle if he invited you to go to a store to buy candy because he had invited them and then fondled their breasts. (7) Prospective juror D.S. was aware of his wife's friend's daughter who was molested by an uncle, but charges were never brought. (8) Prospective juror S.M. had a younger brother molested by an uncle. (9) Defense counsel questioned prospective juror B.P. about her statement originally made outside the presence of other potential jurors that her oldest sister's granddaughter had made an allegation of molest. B.P. said it was a "convoluted mess" in a custody battle and she knew very little about it. (10) Prospective juror S.C.'s sister's ex-husband was convicted of molesting his stepdaughter. She said there was no chance of it interfering with her objectivity in this case. (11) Prospective juror K.K.'s brother had years earlier when he was 12 years old been accused of molesting a stepbrother and there were family rumblings about a cousin supposedly being molested by her stepfather. The court asked K.K. if she could promise not to let anything that happened in her family effect her decision in this case and she said yes. (12) Prospective juror M.B.'s husband's uncle and cousin both served time for molestation. Twenty seven years earlier M.B.'s five-year-old son was molested by a young teenage family member. M.B. kept her son away from this family member after the incident. (13) Prospective juror

J.E. was told that his cousin's friend's daughter was recently molested by her stepfather. It was being investigated.

(14) Prospective juror C.H.'s close friend's son was convicted of molestation. C.H. said her close friend believes his son was wrongly accused, but C.H. did not know the facts and was not sure. Also, C.H.'s best friend was molested by the friend's older brother when she was 10 years old. In response to questioning by the court, C.H. said she felt she could put these things aside, but after further questioning she was excused for cause. (15) Prospective juror E.B. had a friend who was serving time for molestation. The friend felt he was innocent.

(16) Prospective juror V.T. was a pediatrician. She acknowledged some of her patients had been victims of similar crimes, but promised to put aside all of her medical experience and to analyze the evidence in this case fairly and objectively. She asked the court why defendant's health (defendant's mobility was apparently restricted at the time of trial) was irrelevant, according to comments made in court, when "certain acts you have to be physically able to do[.]" The trial court told her that unless it was raised by the parties, "it is a non-issue."

(17) Prospective juror M.C.'s neighbor's daughter had years earlier falsely reported she was raped. M.C. said she could tell the girl was lying. (18) Prospective juror C.M. had a vague memory she might have been inappropriately touched when she was in grammar school. She did not realize it was inappropriate until some time later. She did not think there was any chance it would effect her decision. C.M. also had a

friend and her daughter who believed a coach they knew was falsely accused of sexual misconduct. (19) Prospective juror A.C. said her daughter accused her father, the juror's ex-husband, of molestation, but it was proven not to be true. It may have been a product of their divorce proceedings. A.C. admitted she was a victim of molest. After further questioning outside the presence of the other prospective jurors, she was excused. (20) Prospective juror F.H.'s brother's wife accused the brother of child molest, but the wife dropped everything when her brother agreed to a divorce. F.H.'s brother ended up with custody of their child. F.H. also, however, expressed her concern with being a juror. Among other things, she said she tended to believe children over adults. The court excused her for cause.

At the conclusion of voir dire, the trial court congratulated those chosen for the jury, commenting it was not an easy process and had obviously been a lengthy one. The court stated it was necessary because "we wanted to make sure that no one winds up on the jury that has some kind of ax to grind or attitude that might get in the way of their fairness."

B. Analysis

Defendant contends he was denied his constitutional rights to a fair trial and due process because the prospective jurors were sworn to tell the truth prior to being examined on voir dire and then proceeded to inform each other over and over, as sworn witnesses, "that fathers, stepfathers, uncles and relatives do, indeed, sexually molest and sexually abuse both

boys and girls, ranging from very young children to relatively older teenagers." According to defendant, because his entire defense was based on the credibility of the witnesses, the trial court should have but failed to ask questions of the venire panel to determine if anyone had been influenced by the other prospective jurors' repeated statements. Thus, the trial court may have left one or more jurors on the jury who were inclined to believe child witnesses and did not adhere to the concept of a suspect's innocence until proven guilty. Defendant claims he is entitled to reversal per se of his convictions, but also argues the error is not harmless beyond a reasonable doubt. We disagree with defendant's claims.

First, defendant never objected to the prospective jurors talking about their knowledge of sexual assaults, molestation or accusations of such assaults or molestation, in front of the other prospective jurors. Defense counsel actually questioned prospective juror B.P. in front of the other jurors about her statement, originally made outside the presence of the other potential jurors, that her oldest sister's granddaughter had made an allegation of molest. Defendant never complained to the trial court the quantity of disclosures relating to molest might taint the venire and never objected to the final composition of the jury as tainted by the voir dire proceedings. (Code Civ. Proc., § 225, subd. (a)(1).) Defendant did not ask the trial court to admonish the jury regarding the statements made during voir dire. As a result, defendant has failed to preserve the issue for appeal. (*People v. Cleveland* (2004) 32 Cal.4th 704,

736.) "Defendants cannot proceed with the jury selection before this same panel without objection, gamble on an acquittal, then, after they are convicted, claim for the first time the panel was tainted." (*Ibid.*)

Second, even if we reached defendant's claim, it is clear it lacks merit. Out of two venire panels, a number of prospective jurors had knowledge of sexual assaults, molestation or accusations of such assaults or molestation, involving themselves or others connected to their family or friends. Defendant, however, oversimplifies the jurors' statements when he claims the statements repeatedly informed the other jurors that "fathers, stepfathers, uncles and relatives do, indeed, sexually molest and sexually abuse both boys and girls[.]" In fact, as our somewhat lengthy summary demonstrates, a substantial number of the prospective jurors related knowledge of false or suspicious accusations of sexual assault or molestation where the prospective jurors believed the alleged victims actually lied. Such statements could not have prejudiced defendant and counterbalanced the other statements of molest and abuse. Moreover, much of the prospective jurors' knowledge of these events was from a second or third-hand source and often about events long past. A number of prospective jurors admitted they did not know much about what actually happened. Contrary to defendant's assertion, the statements were not "delivered" with "certainty." Only a few of the prospective jurors related being personally molested. Interestingly, defendant did not challenge juror/alternate

No. 2102655 for cause or exercise a peremptory challenge to her despite her personal molestation experience. Moreover, throughout voir dire the trial court emphasized the requirement that all of these experiences, resulting attitudes and opinions must be put aside and defendant's case determined fairly on the evidence. The venire panel was able to observe that several prospective jurors who did not seem able to do this were excused, including prospective juror F.H. when she stated she would have a tendency to believe children over adults. We fail to see how defendant's jury was tainted by the statements of the prospective jurors taken as a whole.

This case is entirely distinguishable from *Mach, supra*, 137 F.3d 630, the federal case on which defendant relies. In *Mach*, the defendant, charged with a sex offense against a child, argued the jury was tainted after a prospective juror, who was a social worker with the state's child protective services, stated during voir dire that she would have a difficult time being impartial given her line of work and that sexual assault had been confirmed *in every case* in which one of her clients reported such an assault. (*Id.* at p. 632.) The district judge continued to question the prospective juror and elicited at least three more statements "that she had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted." (*Ibid.*) Later the prospective juror stated she had taken psychology courses and had worked extensively with psychologists and psychiatrists. (*Ibid.*) The prospective juror was struck for cause, but the

defendant moved for mistrial arguing the jury had been tainted. (*Ibid.*) The Ninth Circuit Court of Appeals reversed the trial court's denial of defendant's motion for mistrial and held that "[a]t a minimum, when *Mach* moved for a mistrial, the [district] court should have conducted further voir dire to determine whether the panel had in fact been infected by . . . [the prospective juror's] expert-like statements." (*Id.* at p. 633.) Noting the result of the trial was principally dependent on whether the jury chose to believe defendant or the child, the court found there could be no doubt the statements "had to have a tremendous impact on the jury's verdict. The extrinsic evidence was highly inflammatory and directly connected to Mach's guilt." (*Id.* at p. 634.) As a result, the case was remanded for new trial. (*Ibid.*)

In contrast here, defendant made no objection, let alone moved for a mistrial. Moreover, the statements by the prospective jurors, with one exception, were neither expert-like nor highly inflammatory. They did not express any certainty about the credibility of a child making an accusation of molestation or assault. The prospective jurors did not claim any superior basis of knowledge regarding molestation or assault. Indeed, as we have already noted, a fairly large number of the prospective jurors related incidents where they believed the alleged victim/accuser was subsequently determined to be lying. The one pediatrician questioned only said some of her patients had been victims of crimes similar to those with which defendant was charged. However, she never stated or

implied every accusation by a child is true. She expressed no opinion, expert or otherwise, regarding the credibility of children making a claim of molestation.

Defendant was entitled to a fair and impartial jury. (See *Smith v. Phillips* (1982) 455 U.S. 209, 217 [71 L.Ed.2d 78, 86] [due process requires the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it].) There is nothing in this record that establishes defendant did not get one.

II.

Burden of Proof For Statute of Limitations Allegations

Section 803(g) permits prosecution of specified sexual offenses, including a violation of section 288, subdivision (a), after the statute of limitations has expired if (1) the victim reports the abuse to law enforcement, (2) the crime involves substantial sexual conduct, (3) there is independent evidence that clearly and convincingly corroborates the victim's allegation, and (4) prosecution is commenced within one year of the victim's report. Thus, the effect of section 803(g) is to permit prosecution of specified sexual offenses with a juvenile within the statute of limitations set forth in section 800 and 801, or within one year of the victim's report of the offense, whichever is later. (*People v. Vasquez* (2004) 118 Cal.App.4th 501, 505.)

Defendant claims he was deprived of his federal due process and Sixth Amendment right to a jury by the trial court's instruction of the jury that the burdens of proof applicable to

the section 803(g) statute of limitations allegations for counts 6 through 8 were preponderance of the evidence, and, as to the corroboration requirement, clear and convincing evidence.⁴

⁴ The trial court instructed the jury with a modified form of former CALJIC No. 2.50.2, which in pertinent part, stated, "Evidence of defendant's other uncharged sexual offenses, as well as the allegations that the criminal charges involving the minor [J.L.] were timely filed, must be proved by a 'preponderance of the evidence.'" (Italics added.) The instruction then went on to define preponderance of the evidence and to direct the jury to consider all of the evidence bearing upon every issue regardless of who produced it.

The trial court also drafted and gave a special instruction on section 803(g), which stated: "Counts 6-8 (PC 288(a), involving the minor [J.L.]) were filed pursuant to Penal Code Section 803(g) which extends the normal 6-year statute of limitations under which such charges must be filed. The People have the burden of proving 5 factual allegations in order for the Penal Code section 803(g) extension to apply. [¶] If you find the defendant guilty of any of the counts filed pursuant to Penal Code 803(g) (Counts 6, 7, and/or 8), you must further determine, as to each count in which you find the defendant guilty, whether the People have proved all of the following by a 'preponderance of the evidence': [¶] 1. On October 9, 2002, the named victim [J.L.], first reported to a California law enforcement agency that while under the age of 18, she was a victim of child molestation, specifically including digital penetration; [¶] 2. A complaint accusing the defendant of the crimes in Counts 6, 7, and/or 8 was filed on or before October 9, 2003; [¶] 3. The crimes involving [J.L.] involved 'substantial sexual conduct.' Substantial sexual conduct is defined as penetration, however slight of the genitalia of the victim by any foreign object, including the finger or fingers. [¶] 4. The normal 6-year statute of limitations for the crimes alleged in Counts 6, 7 and/or 8 had expired before the complaint in this case was filed; and [¶] 5. There is independent evidence that 'clearly and convincingly' corroborates the conduct described by [J.L.] 'Clear and convincing' evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. 'Clear and convincing

Defendant contends the People were required to prove the allegations extending the statute of limitations under section 803(g), by proof beyond a reasonable doubt because the statute of limitations is either an element of the offense or should be treated as if it were an element under recent decisions by the United States Supreme Court. (*Apprendi, supra*, 530 U.S. 466 [147 L.Ed.2d 435]; *Ring, supra*, 536 U.S. 584 [153 L.Ed.2d 556]; *Blakely, supra*, 542 U.S. 296 [159 L.Ed.2d 403]; *Booker, supra*, 543 U.S. 220 [160 L.Ed.2d 621].) According to defendant, cases in California permitting a jury finding on statute of limitations allegations under any standard less than beyond a reasonable doubt are no longer good authority and are not binding on this court. We disagree.

As a preliminary matter, we note defendant claims to have objected to the statute of limitations instructions given by the trial court. Actually, defense counsel objected only to modified CALJIC No. 2.50.2 as part of defendant's objection to the set of instructions regarding uncharged crimes. As to

evidence' is a higher standard of proof than proof by a 'preponderance of the evidence' (which has been previously defined elsewhere). You should consider all the evidence bearing upon every issue regardless of who produced it. [¶] The People have the burden of proving the truth of the Penal Code Section 803(g) extension by a preponderance of the evidence. 'Preponderance of the evidence' is defined elsewhere in these instructions. [¶] If you find the People have proven the Penal Code Section 803 allegations, then you must find them to be 'True' in your verdicts for Counts 6, 7, and/or 8. [¶] If you find that the People have not proven the truth of the Penal Code Section 803(g) allegations, you must find them to be 'Not True' in your verdicts for Counts 6, 7, and/or 8."

uncharged crimes, defendant argued the instruction improperly lowered the prosecution's burden of proof of his guilt. Defendant never mentioned the portion of the instruction relating to the statute of limitations allegations. Defendant did object to the trial court's special instruction on section 803(g), but never on the grounds he now asserts on appeal, that the burden of proof is unconstitutional. Defendant's lack of objection does not preclude review of the issue on appeal because defendant had the right to correct instructions on the applicable burden of proof and courts may review instructions for errors that affect "the substantial rights of the defendant." (§ 1259; see *People v. Prieto* (2003) 30 Cal.4th 226, 268; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) We turn to the merits of defendant's contentions.

As the United States Supreme Court has explained, the federal Constitution "protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Booker, supra*, 543 U.S. at p. 230 [160 L.Ed.2d at p. 641], quoting *In re Winship* (1970) 397 U.S. 358, 364 [25 L.Ed.2d 368, 375].) Specifically, the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." (*United States v. Gaudin* (1995) 515 U.S. 506, 511 [132 L.Ed.2d 444, 450].)

Based on these principles, the United States Supreme Court in *Apprendi, supra*, 530 U.S. 466 [147 L.Ed.2d 435], set aside an

enhanced sentence imposed by a New Jersey court based on the trial court's finding defendant's conduct in carrying a firearm for an unlawful purpose, to which the defendant pled guilty, also violated New Jersey's "hate crime" law because it was racially motivated. The Court concluded the proper inquiry was not whether a Legislature has chosen to label a fact as an element of the crime or to label it as a separate sentencing factor. The question is not one of form, but effect. (*Id.* at p. 494 [147 L.Ed.2d at p. 457].) "[A] fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone" is the functional equivalent of an element of the crime. (*Id.* at p. 483 [147 L.Ed.2d at p. 450], fn. omitted.) The court held the federal Constitution guarantees a criminal defendant the right to have a jury determine, beyond a reasonable doubt, any fact, other than a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum[.]" (*Id.* at p. 490 [147 L.Ed.2d at p. 455].)

In *Ring, supra*, 536 U.S. 584 [153 L.Ed.2d 556], the United States Supreme Court held it was impermissible for a trial judge to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty. (*Id.* at pp. 588-589 [153 L.Ed.2d at pp. 563-564].) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how

the State labels it -- must be found by a jury beyond a reasonable doubt." (*Id.* at p. 602 [153 L.Ed.2d at p. 572].)

In *Blakely, supra*, 542 U.S. 296 [159 L.Ed.2d 403], the United States Supreme Court concluded an exceptional sentence imposed by a trial judge under Washington's determinate sentencing law violated these principles. The Supreme Court clarified that "the prescribed statutory maximum" sentence "for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (*Id.* at p. 303 [159 L.Ed.2d at p. 413].) In *Booker, supra*, 543 U.S. 220 [160 L.Ed.2d 621], a majority of the United States Supreme Court, in an opinion written by Justice Stevens, found no significant distinction between the mandatory federal sentencing guidelines and the Washington sentencing law at issue in *Blakely* and concluded the federal guidelines violated the Sixth Amendment. (*Id.* at p. 233 [160 L.Ed.2d at p. 643].)

Defendant claims these decisions require a jury to find the facts necessary for a section 803(g) statute of limitations extension based on the "beyond a reasonable doubt" standard of proof. However, the *Apprendi* line of cases we have just summarized all "involve factual determinations that establish the level of punishment for which the defendant is eligible." (*People v. Betts* (2005) 34 Cal.4th 1039, 1054 (*Betts*).)⁵

⁵ In *Betts*, the California Supreme Court held there was no federal constitutional right to jury trial on factual questions

Together with earlier decisions of the United States Supreme Court, these recent decisions make it clear the federal constitution guarantees a criminal defendant the right to a jury determination, based on proof beyond a reasonable doubt, of every element of the crime and every fact, however labeled, that increases the defendant's punishment beyond the prescribed statutory maximum.

In California the statute of limitations constitutes a substantive right. (*Zamora, supra*, 18 Cal.3d 538, 547.) The prosecution bears the burden of pleading and proving the charged offense was committed within the applicable period of limitations. (*People v. Lopez* (1997) 52 Cal.App.4th 233, 245, 248.) Where the pleadings do not show as a matter of law the prosecution is time barred, the statute of limitations becomes an issue for the jury (trier of fact) if disputed by the defendant. (*Zamora, supra*, at pp. 562, 564, fn. 25; see *People v. Smith* (2002) 98 Cal.App.4th 1182, 1192 [trial court need only instruct on statute of limitations when it is placed at issue by the defense as a factual matter at trial].) However, "the statute of limitations is not an 'element' of the offense insofar as the 'definition' of criminal conduct is concerned."

that establish territorial jurisdiction because territorial jurisdiction is a procedural matter relating to the authority of California courts to adjudicate the case and not to the guilt of the accused or the level of authorized punishment. We recognize the statute of limitations is a substantive, not procedural matter. (*People v. Zamora* (1976) 18 Cal.3d 538, 547 (*Zamora*)). However, *Betts* is nevertheless instructive on the scope of the *Apprendi* line of cases.

(*People v. Frazer* (1999) 21 Cal.4th 737, 760, fn. 22 (*Frazer*) overruled on other grounds by *Stogner v. California* (2003) 539 U.S. 607, 609-610, 632-633 [156 L.Ed.2d 544, 550-551, 565] (*Stogner*)). Although the right to maintain the action is an essential part of the final power to pronounce judgment, that right "constitutes no part of the crime itself." (*People v. McGill* (1935) 10 Cal.App.2d 155, 159.)

Defendant cites *Cowan v. Superior Court* (1996) 14 Cal.4th 367 and *People v. Bunn* (1997) 53 Cal.App.4th 227 for the proposition the statute of limitations is an essential element of the offense. In *Cowan* the Supreme Court was concerned with the issue of whether a defendant could waive the statute of limitations. It concluded a defendant could in certain circumstances do so as the statute of limitations was not strictly jurisdictional in the fundamental subject matter sense. (*Cowan v. Superior Court, supra*, at pp. 372-376.) Nowhere in the opinion did the Supreme Court state it considered the statute of limitations an element of the underlying offense. In *Bunn* the court noted other cases had concluded the statute of limitations was an element of the offense, but also stated the rationale of those cases was undercut by *Cowan*. (*People v. Bunn, supra*, at p. 233.) And the court in *Bunn* later stated the statute of limitations is not "an 'element of the offense' in the sense that it defines the actus reus or the mens rea which characterizes the crime." (*Id.* at p. 234.) Subsequently, in *Frazer, supra*, 21 Cal.4th 737, the Supreme Court clearly

rejected the claim the statute of limitations is an actual element of the underlying offense.

Nor are the facts establishing a prosecution has been timely brought facts that effect "the level of punishment for which the defendant is eligible" (*Betts, supra*, 34 Cal.4th at p. 1054), bringing those facts within the *Apprendi* line of cases. Even the facts establishing an extension of the statute of limitations under section 803(g) do not result in an increase of a defendant's punishment. This conclusion is clear from *Stogner, supra*, 539 U.S. 607 [156 L.Ed.2d 544]. In *Stogner* the United States Supreme Court held section 803(g) violated ex post facto principles to the extent it could be applied to *revive* a previously time-barred prosecution. (*Stogner, supra*, at pp. 609-610 [156 L.Ed.2d at pp. 550-551].) The court found: "After (*but not before*) the original statute of limitations had expired, a party such as *Stogner* was not 'liable to any punishment.' California's new statute therefore 'aggravated' *Stogner's* alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability." (*Id.* at p. 613 [156 L.Ed.2d at p. 553], italics added.) That is, only revival of a time-barred prosecution increases the defendant's punishment; extension of the time for prosecution under section 803(g) does not.

As the court stated in *People v. Zandrino* (2002) 100 Cal.App.4th 74, section 803(g) "does not alter the elements of these offenses, or their punishment" (*Id.* at p. 83.)

We conclude the *Apprendi* line of cases does not call into question the clear California case authority holding the prosecution's burden of proof on the statute of limitations issue is a preponderance of the evidence and as to the independent corroboration requirement, clear and convincing evidence. (§ 803(g)(2)(B); *Zamora, supra*, 18 Cal.3d 538, 563, fn. 25, 564, fn. 26; *People v. Lopez, supra*, 52 Cal.App.4th 233, 248; *People v. McGill, supra*, 10 Cal.App.2d 155, 159-160.) The trial court did not err in so instructing the jury here.

As we conclude the trial court did not err in applying the case authorities providing for a lesser burden of proof on the statute of limitations issue, we do not need to reach defendant's additional claim the burden of proof for section 803(g) cannot be less than beyond a reasonable doubt based on analogy to Evidence Code section 1101 et al. (*People v. Zandrino, supra*, 100 Cal.App.4th at p. 84, fn. 6.) As there was no error, we also need not address prejudice.

III.

Sentencing Error

The trial court sentenced defendant to the indeterminate term of 15 years to life for counts 1 through 5 pursuant to section 667.61, subdivision (b), "consecutive as to each count as they are all separate incidents which occurred on separate dates and/or separate locations as found by the jury." The

trial court imposed another term of 15 years to life for count 9 pursuant to section 667.61, subdivision (b), "consecutive as the crime involved a separate victim and occurred on a separate date." The trial imposed another consecutive term of 15 years to life for count 11 under section 667.61 "inasmuch as the minor [D.E.] was a new and separate victim from the others alleged in the Information."

As each of these counts was a conviction of a non-forcible lewd and lascivious act with a child in violation of section 288, subdivision (a), not one of the violent sex offenses defined by section 667.6, subdivision (d) as referenced by rule 4.426 of the California Rules of Court, defendant contends full consecutive terms were not mandated by either section 667.61, subdivision (b) or rule 4.426. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262; *People v. Murphy* (1998) 65 Cal.App.4th 35, 39, 43.) Defendant claims the trial court did not understand it had the discretion to impose any or all of the subordinate terms for counts 1 through 5, 9, and 11 concurrently, rather than consecutively, and therefore, remand for resentencing is necessary.

The People agree the trial court erred by concluding it did not have discretion to impose concurrent terms for these counts, but argue remand is unnecessary as the court indicated it would impose consecutive life terms in any event. The People point to an earlier comment of the trial court describing defendant's case as "a horrendous sexual case involving not one but many children and deserving a very serious response by the court."

In reply defendant contends remand is necessary to allow the trial court to exercise its discretion and provide a statement of reasons for its sentencing choice if it chooses to impose consecutive sentences.

The trial court's comments in imposing the consecutive life sentences for counts 1 through 5, 9 and 11 reference the statutory requirements of section 667.61 for imposing separate life terms, nothing more. It appears the trial court believed consecutive separate terms were mandatory, when they are not. (*People v. Rodriguez, supra*, 130 Cal.App.4th at p. 1262; *People v. Murphy, supra*, 65 Cal.App.4th at pp. 39, 43.) The trial court's earlier comment regarding the nature of defendant's case does not indicate it would certainly have imposed consecutive life sentences for all of the counts if it had realized it had discretion, as a concurrent life sentence for one or more of the counts would still leave a sentence that is a "serious response by the court." We conclude remand for resentencing is the appropriate remedy. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8; *People v. Sherrick* (1993) 19 Cal.App.4th 657, 661.) We shall vacate defendant's sentence and remand for resentencing to allow the court to exercise its discretion to impose concurrent or consecutive life sentences for counts 1 through 5, 9 and 11 and to state its reasons if it chooses to impose consecutive sentences. This opinion should not be read to express any opinion on how that choice should be made.

DISPOSITION

The judgment of conviction is affirmed. The sentence imposed is vacated and the matter remanded to the trial court with directions to resentence defendant, exercising its discretion to impose concurrent or consecutive life sentences for counts 1 through 5, 9 and 11.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

SIMS, J.