Filed 10/8/02

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E029720
v.	(Super.Ct.No. RIF 089681)
JOHN PAUL BETTS,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. William R. Bailey, Jr. Judge. Affirmed.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Robert M. Foster and Garrett Beaumont, Supervising Deputy Attorneys General, and Warren P. Robinson, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts 3., 4., 5., 6., and 7.

A jury convicted defendant of four counts of committing a lewd act upon the body of a child under the age of 14 years involving victim Nichole. (Pen. Code, § 288, subd. (a)).[1] The jury also convicted defendant of one count of committing a lewd act by use of force or menace (§ 288, subd. (b)(1)), one count of attempted commission of a lewd act without use of force (§§ 664 & 288, subd. (a)), and one count of committing a lewd act without use of force (§ 288, subd. (a)), involving victim Breanna. After defendant waived his right to a jury trial on a section 667.61 multiple victim allegation, the court found this allegation true. The court then reduced the forcible lewd act conviction to a lesser violation of section 288, subdivision (a).

The court sentenced defendant to 15 years to life for count 1, to be served consecutively to a determinate sentence of six years for count 2. Sentences for the other counts were ordered to be served concurrently.

Defendant contends that the trial court erred in the following respects: (1) failing to provide defendant with advisory counsel when he requested to represent himself; (2) failing to instruct the jury regarding jurisdiction; (3) instructing the jury with CALJIC No. 2.50.01; (4) admitting evidence of defendant's prior molestation offenses; and (5) imposing the section 667.61 punishment. Defendant also contends that there is insufficient evidence to support the convictions and venue was improper on two counts.

We find no prejudicial error. Accordingly, we affirm.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

FACTS AND PROCEDURAL HISTORY

In June 1999, defendant married Linda. Linda and defendant were both long-haul truck drivers. When they were not on the road, defendant and Linda often stayed in Hemet, sometimes staying at the home of Linda's daughter, Shellie. Shellie had four daughters: Nichole, Breanna, Christina and Tammy. Shortly after their marriage, defendant invited Nichole to accompany him and Linda on a trucking trip to North Carolina. Nichole was 11 years old at the time. The truck had a sleeping area with two bunk beds. Defendant drove during the day and Linda drove at night.

While Linda was driving the truck at night in New Mexico, defendant got into the bottom bunk where Nichole was sleeping. Defendant put his fingers underneath Nichole's shorts and began to move them up her leg. After Nichole moved, defendant removed his hand. Nichole attempted to get away from defendant by moving closer to the wall, but he moved closer to her. Nichole then reached behind her and felt a damp spot which was warm and sticky. Nichole also felt defendant's erect penis. Then Nichole left the bed and joined Linda in the driver's area of the truck.

Linda observed Nichole rubbing her hand on her leg and on the seat and appearing very upset. When Linda asked Nichole if something was wrong, she said she did not like sleeping with defendant. Linda asked Nichole if defendant had touched her. Nichole responded she did not like being touched by defendant. She later described an inappropriate touching. As a result, Linda pulled the top bunk down so Nichole could sleep there. Defendant protested that it was illegal for Nichole to sleep in the top bunk

while the truck was moving.

Although defendant did not touch Nichole again during the trip while she was sleeping, he did press against her after which she felt a wet, warm, sticky spot near her on approximately five occasions. Nichole also felt defendant's penis behind her while she was sleeping approximately three times on this trip. It is unknown where these incidents happened, although they apparently occurred somewhere between New Mexico and North Carolina, not in California.

When Linda and defendant returned to Hemet after their trip to North Carolina, they left on another trip to Oregon the same day. This time both Nichole and Breanna accompanied them. This was Breanna's idea. Breanna was nine years old at the time. Somewhere on their way to Oregon, Breanna was left sleeping in the bottom bunk bed while Linda and Nichole left the truck at a rest stop. Defendant then entered the sleeping area, took off his pants, leaving his boxer shorts on, and lay down on the bed with Breanna. Breanna woke up and told defendant she had to go to the bathroom. Defendant told Breanna he would hurt her if she was not quiet, and he put his leg over her. When Breanna attempted to escape, the defendant tried to grab her leg, which caused Breanna to jump off the bed and fall. Breanna does not know if this incident occurred in California or Oregon. Defendant did not touch Nichole on this trip.

When they arrived in Oregon, Nichole stayed with Shellie's sister in Bend, Oregon, for two more weeks, and she came back on an airplane because she did not want to get back into the truck with defendant. On the trip back from Oregon, Breanna was

sick with bronchitis. Breanna eventually called Shellie from the Frazier Park area in California, and Shellie picked her up.

On October 31, 1999, defendant took Breanna and Christina on an overnight trucking trip to Los Angeles without Linda. Breanna went on the trip because she wanted to protect her younger sister. When she was in bed, Breanna heard defendant tell Christina to go to the sleeping area and take Breanna's pants off. When Christina tried to do so, Breanna hit her. Later that evening, defendant succeeded in getting Breanna's pants halfway to her knees, but Breanna pulled them back up and told defendant she did not want him touching her. Later on, when Breanna was in the bunk bed, defendant put his hand down her pants between her underwear and her sweat pants. Breanna removed defendant's hand and went up front with Christina. At the end of this trip, defendant gave Breanna $5 and told her not to tell anyone what had happened.

Sometime around Christmas, Breanna told a counselor whom she had been seeing that defendant had molested her. After this, Nichole was questioned and revealed that defendant molested her also. After the girls reported the allegations, defendant had a telephone conversation with Linda in which he stated, "How much money do you want to keep quiet about the kids? You know I didn't do it anyway, but how much?" The disclosures by Breanna and Nichole tore the family apart.

On December 23, 1999, an officer with the Hemet Police Department interviewed Nichole and Breanna about the incidents. On January 14, 2000, a case worker with the Riverside County Child Protective Services interviewed both girls and her reports were

consistent with the prior police interview. Later in January, Nichole recanted her accusations against defendant because of pressure from Linda and family members.

Nichole was reinterviewed by a police detective on January 25, 2000. She reaffirmed her original accusation that defendant rubbed her leg and put his hands inside her shorts. However, she recanted all the rest of her allegations. During Breanna's second interview with the detective, she also recanted one of her allegations against defendant, but reaffirmed the others.

The day before the start of trial, Nichole confessed to her mother that all of her molestation allegations were true. She stated that her prior recantation was a lie because she felt her allegations were responsible for breaking the family up and she wanted her family back together. Both girls testified at trial consistently with their initial reports.

At a hearing on September 29, 2000, defendant informed the court that he was dissatisfied with his representation by the deputy public defender and wished to represent himself with advisory counsel. After a hearing on the matter, the court denied defendant's request for advisory counsel, but granted his request that the deputy public defender be replaced by new counsel.

At trial, the prosecution offered evidence of prior sex crimes defendant had committed. Witness Kendra K. testified that in 1982 to 1983, when she was nine years old, defendant inappropriately touched her in the area of her vagina and her breasts. At the time, defendant was Kendra's mother's boyfriend and resided with her. Witness Brandy T. testified that when she was nine years old, defendant took her to his bedroom

on two occasions when she spent the night at Kendra's home. Defendant had Brandy take off her clothes and he touched her in her genital area. A deputy, who had investigated these prior incidents, also testified that defendant admitted he had "accidental" sexual contact with both victims.

DISCUSSION

1. *Subject Matter Jurisdiction*

Defendant contends that the trial court lacked jurisdiction to prosecute him for all the molestation counts involving Nichole and one molestation count involving Breanna, which occurred outside the State of California. Defendant also asserts he was erroneously denied a jury determination of jurisdiction. We disagree.

It is presumed that a court has acted within its jurisdiction, and therefore it is defendant's burden to overcome such a presumption. (Evid. Code, § 666; *Branson v. Martin* (1997) 56 Cal.App.4th 300, 306.) The jurisdictional power of a court to act is comprised of territorial and subject matter jurisdiction. (*People v. Gbadebo-Soda* (1995) 38 Cal.App.4th 160, 169-170.) Territorial jurisdiction, or venue, refers to the county within the state in which the offense or part of the offense occurred. (*Ibid*.) Criminal subject matter jurisdiction has two elements. First, the crime must be punishable under a valid law of the State of California, which entails, among other requirements, that the crime must not be one over which federal courts have exclusive jurisdiction. Second, the crime must be considered to have been committed within this state. (See Pen. Code, § 777; *People v. Remington* (1990) 217 Cal.App.3d 423, 428-429; 4 Witkin & Epstein,

Cal. Criminal Law (3d ed. 2000) Jurisdiction and Venue, §§ 19-21, pp.108-111.) It is this second element with which we are concerned in this case.[2] It has long been held that a court has jurisdiction to decide its own jurisdiction. (*Rescue Army v. Municipal Court* (1946) 28 Cal.2d 460, 464.)

The scope of California's jurisdiction is expressed in sections 27 and 778a of the Penal Code. Section 27, enacted in 1872, establishes California jurisdiction for all persons who commit any crime in this state in whole or in part. In construing section 27, it has long been held that where some act is committed in California that is an ingredient of the crime, a conviction may be sustained in this state, even though the final consummation of the offense takes place outside the state. (*People v. Chapman* (1921) 55 Cal.App. 192, 197; *People v. MacDonald* (1938) 24 Cal.App.2d 702, 709; see also *People v. Harden* (1936) 14 Cal.App.2d 489, 492 [when money actually transferred in Mexico, the acts leading up to taking money performed in California established California's jurisdiction for theft offense].)

Section 778a, subdivision (a), enacted in 1905, provides that: "Whenever a person, with intent to commit a crime, does any act within this state in execution or part

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[2] California courts' use of the terms "jurisdiction," "subject matter jurisdiction," and "territorial jurisdiction" has been inconsistent and notoriously subject to confusion. (See *People v. Simon* (2001) 25 Cal.4th 1082, 1096, fn. 7 (*Simon*).) Adding to the confusion is the fact that other states use the term "territorial jurisdiction" to describe what California refers to as subject matter jurisdiction. For purposes of this opinion, we use the terms "subject matter jurisdiction" or "state jurisdiction" for the concept of

[footnote continued on next page]

execution of that intent, which culminates in the commission of a crime, either within or without this state, the person is punishable for that crime in this state in the same manner as if the crime had been committed entirely within this state." In interpreting this section, our Supreme Court has held that California's jurisdiction to prosecute a crime completed elsewhere is not dependent on the commission in this state of an attempt to commit the offense. Jurisdiction exists, rather, when the defendant in this state engages in non de minimis preparatory acts with the intent of aiding the completion of a crime. (*People v. Morante* (1999) 20 Cal.4th 403, 436 (*Morante*).)[3] For example, in *People v. Brown* (2001) 91 Cal.App.4th 256, the defendant, who was not a licensed physician, made preparations in California to amputate the victim's leg, including meeting the victim here. However, the amputation was actually performed in Mexico. The victim returned to California for postoperative treatment, and shortly thereafter died from gas gangrene as a result of the surgery. The court held that the defendant's actions in California constituted non de minimis preparations such that California had jurisdiction to prosecute the defendant for murder. (*Id*. at pp. 266-267.)

Our research reveals no California authority on whether the judge or the jury

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[footnote continued from previous page]
whether the offense was committed within the geographic boundaries of the state such that a criminal offense may be tried in the state.

[3] In *Morante*, the Supreme Court overturned its prior decision in *People v. Buffum* (1953) 40 Cal.2d 709, 715-718 (*Buffum*), in which it held that no jurisdiction in California existed to prosecute a charge of conspiracy unless acts in this state amount to an attempt to commit the underlying offense.

should determine contested jurisdictional facts. Defendant fails to cite any authority for his assertion that a jury determination of this issue is required. None of the cases defendant cites, *People v. Chapman, supra,* 55 Cal.App. 192, *People v. Botkin* (1908) 9 Cal.App. 244, or *People v. MacDonald, supra,* 24 Cal.App.2d 702, hold that subject matter jurisdiction is an issue only the jury can decide. While the court in *People v. Cavanaugh* (1955) 44 Cal.2d 252 submitted the subject matter jurisdiction issue to the jury, the Supreme Court did not address whether this was appropriate. In *People v. Chapman* (1977) 72 Cal.App.3d 6, the trial court initially instructed the jury on the elements of section 778a. However, when the jury asked a question about the defendant's intent, the court improperly told it that the defendant could be found guilty even though his intent to commit the offense had not been formed in California. The court's response effectively removed a requisite element of section 778a from consideration, which was held to be prejudicial error. (*People v. Chapman, supra,* 72 Cal.App.3d at p. 6.) This case, however, never directly addressed whether the jurisdictional facts pursuant to section 778a should be determined by the judge or the jury in the first instance. Thus, in the absence of previous decisions in California on this issue, we look to other authority for guidance to determine the rule for resolving subject matter jurisdictional facts in criminal cases.

There is a pronounced split of authority as to whether a state's jurisdiction is a question for the court or for the jury. Most states have held that if the facts on which jurisdiction depends are controverted, resolution of those disputed facts must be left to

the jury. (See *State v. Willoughby* (Ariz. 1995) 892 P.2d 1319, 1325; *People v. Cullen* (Colo.Ct.App. 1984) 695 P.2d 750, 751; *Sheeran v. State* (Del. 1987) 526 A.2d 886, 890; *Lane v. State* (Fla. 1980) 388 So.2d 1022, 1028; *McKinney v. State* (Ind.Ct.App. 1990) 553 N.E.2d 860, 863-864; *State v. Liggins* (Iowa 1994) 524 N.W.2d 181, 184-185; *State v. Collin* (Me. 1997) 687 A.2d 962, 964; *State v. Butler* (Md. 1999) 724 A.2d 657, 663; *People v. McLaughlin* (N.Y.Ct.App. 1992) 606 N.E.2d 1357, 1359-1360; *State v. Batdorf* (N.C. 1977) 238 S.E.2d 497, 502-503; *Commonwealth v. Bighum* (Pa. 1973) 307 A.2d 255, 258, receded from on other grounds in *Commonwealth v. Randall* (Pa. 1987) 528 A.2d 1326; *State v. Beall* (Tenn.Crim.App. 1986) 729 S.W.2d 270, 271.)

A minority of jurisdictions have held that the issue is not for the jury but for the court. (*State v. Beverly* (Conn. 1993) 618 A.2d 1335, 1338 (*Beverly*); *Mitchell v. U.S.* (D.C.Ct.App. 1990) 569 A.2d 177, 180, cert. den., 498 U.S. 986 [111 S.Ct. 521, 112 L.Ed.2d 532]; *Adair v. United States* (D.C.Ct.App. 1978) 391 A.2d 288, 290; *State v. Reldan* (N.J.Super.Ct.App.Div. 1982) 449 A.2d 1317; but see *State v. Bragg* (N.J.Super.Ct.App.Div. 1996) 685 A.2d 488, 491-492; *State v. Belloli* (R.I. 2001) 766 A.2d 928, 932; *State v. Halstead* (R.I. 1980) 414 A.2d 1138, 1144.)

A review of the cases following the majority rule indicates there are two fundamental rationales for submitting disputed jurisdictional facts to the jury. In these states, subject matter jurisdiction is considered an element of the crime (*Sheeran v. State*, *supra*, 526 A.2d at p. 890; *State v. Liggins*, *supra*, 524 N.W.2d at p. 184; *McKinney v. State, supra*, 553 N.E.2d at p. 863), or subject matter jurisdiction is required to be proven

beyond a reasonable doubt (*State v. Willoughby, supra,* 892 P.2d at p. 1327; *Lane v. State, supra*, 388 So.2d at p. 1029; *State v. Collin, supra,* 687 A.2d at p. 964; *State v. Baldwin* (Me. 1973) 305 A.2d 555, 561; *State v. Butler, supra,* 724 A.2d at p. 665; *People v. McLaughlin, supra,* 606 N.E.2d at p. 1358; *State v. Batdorf, supra,* 238 S.E.2d at pp. 502-503; *State v. Beall, supra,* 729 S.W.2d at p. 271). In states where subject matter jurisdiction is considered an element of the crime itself, a jury must determine jurisdictional facts since the defendant's constitutional right to a jury trial is implicated. The states requiring a heightened standard of proof for subject matter jurisdiction do so because they reason that this issue involves a vital fundamental right. (See *People v. McLaughlin, supra,* 606 N.E.2d at p. 1359.) Subject matter jurisdiction relates to the very authority of the tribunal because, without it, the case cannot proceed and the judgment cannot be enforced. Thus, they reason that employing the highest standard of proof on this issue insures that when a court acts, it does so with authority. (See *State v. Butler, supra,* 724 A.2d at p. 664; *State v. Baldwin, supra,* 305 A.2d at p. 559; *State v. Batdorf, supra,* at p. 502.) The courts in these cases, however, seem to conclude without analysis that disputed jurisdictional facts must be submitted to a jury merely because the burden of proof is elevated.

Unlike these states, subject matter jurisdiction is required to be proven only by a preponderance of the evidence in California, not beyond reasonable doubt. (*People v.*

Cavanaugh,[4] *supra,* 44 Cal.2d at p. 262 [whether murder occurred in San Diego County or Mexico]; *People v. Barthel* (1962) 204 Cal.App.2d 776, 779 [whether bookmaking occurred in San Diego County or over Mexican border].) California's lower burden of proof therefore distinguishes it from the states following the majority rule and implies that a jury trial on this issue may not be required. California criminal statutes do not define subject matter jurisdiction as an element of a crime. We have found no authority holding that subject matter jurisdiction is an element of a crime. (See *People v. Sering* (1991) 232 Cal.App.3d 677, 688 (*Sering*) [location of the crime is not an essential

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[4] Betts contends that *Cavanaugh* was overruled by *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *Ring v. Arizona* (2002) __ U.S. __ [122 S.Ct. 2428] (*Ring*). We disagree. *Apprendi* held that the true findings necessary to a hate-crime enhancement must be submitted to a jury and proven beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 476.) The Supreme Court declared that the circumstances of a crime and the intent of the perpetrator, the factors addressed by the enhancement, are essential elements of the offense. (*Id*. at p. 480.) The Supreme Court added, "[C]riminal law 'is concerned . . . with the degree of criminal culpability.'" (*Id*. at p. 485.) Later, in *Ring*, the Supreme Court said of its holding in *Apprendi*, "If a State makes an increase in a defendant's . . . 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." (*Ring*, *supra*, ___ U.S. at p. ___ [122 S.Ct. at p. 2439].)

Not surprisingly, *Ring* held that the existence of aggravating factors justifying the imposition of the death penalty must be made by the jury. The Court noted that a jury trial is required "o[n] any fact on which the legislature conditions an increase in . . . maximum punishment." (*Ring*, *supra*, ___ U.S. at p. ___ [122 S.Ct. at p. 2432].) Echoing the sentiments expressed in *Apprendi*, *Ring* commented that no matter what you call it, if a factor is an essential element of an offense, it must be proven to a jury beyond a reasonable doubt. (*Id*. at p. 2441.)

Neither of these cases addresses subject matter jurisdiction. Neither can they be read as inferring that such is an essential element of a crime, subject to the requirements of proof beyond a reasonable doubt and a jury determination.

element of a charged offense in case where venue challenged].) Indeed, our Supreme Court has noted that the location of the crime is a type of procedural legal issue analogous to other procedural issues unrelated to the guilt or innocence of the accused that should be determined by the court and resolved prior to trial. (*Simon, supra,* 25 Cal.4th at p. 1110, fn. 18.) We therefore find the reasoning for the majority rule inapplicable and unpersuasive here.

Instead, we find *Beverly, supra,* 618 A.2d 1335, instructive. In *Beverly*, a murder victim's decomposed body was found in Connecticut. The victim, who was a resident of Massachusetts, had last been seen alive three months earlier when she was barhopping with the defendant and traveling in his automobile in Massachusetts. The defendant claimed Connecticut lacked jurisdiction to adjudicate a murder charge against him, and that the jury, not the trial court, should have decided the jurisdictional facts to prove the victim was murdered in Connecticut. The *Beverly* court reasoned that courts have inherent authority to determine their own jurisdiction and the Sixth Amendment entitles an accused to a jury of his peers only on factual issues central to the statutory elements of an offense. (*Id.* at p. 1338.) The elements of a crime are spelled out in the statute defining the crime, and the Connecticut murder statute did not state that the physical location of the murder is part of the offense. The court reasoned that since the defendant's right to a jury trial does not extend beyond the factual issues of ultimate guilt or innocence under the relevant statute, the trial court properly determined whether Connecticut had jurisdiction over the offense. The *Beverly* court also astutely recognized

the practical difficulties in having a jury determine jurisdiction, namely that a "defendant would be put through the expense, anxiety and uncertainty of a trial to resolve an issue of jurisdiction that could be resolved in a pretrial hearing." (*Id*. at p. 1339.)

We agree with *Beverly's* reasoning that a defendant's right to a jury trial does not extend beyond the factual issues of ultimate guilt or innocence under the relevant statute. Subject matter jurisdiction simply does not concern the factual guilt or innocence of the accused. Rather, it concerns the authority of the state to proceed with the case. We believe there is a distinction between facts which establish criminality and those which merely satisfy procedural requirements. Thus, jurisdictional defects are analogous to other defects which do not relate to the factual guilt or innocence of the accused and which are properly resolved by the trial court. (See *People v. McGee* (1977) 19 Cal.3d 948, 967-968, superseded by statute on other grounds as stated in *People v. Preston* (1996) 43 Cal.App.4th 450 [whether state had sought the requisite restitution prior to instituting criminal welfare fraud prosecution properly resolved by the court prior to trial]; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 293, fn. 4, superseded by statute on other grounds as stated in *People v. Superior Court (Baez)* (2000) 79 Cal.App.4th 1177 [defense of discriminatory prosecution based upon union affiliation is constitutional defect in institution of prosecution properly resolved by court prior to trial].) While subject matter jurisdiction is a fundamental, nonwaivable right (*People v. Williams* (1999) 21 Cal.4th 335, 340), that does not necessarily mean that a defendant is entitled to a jury determination of the issue. Because jurisdiction is not one of the facts essential to

establishing the criminality of a defendant's conduct, we find that such a determination is not compelled. Most importantly, in light of the long-standing rule that a court has jurisdiction to decide its own jurisdiction (*Rescue Army v. Municipal Court, supra,* 28 Cal.2d at p. 464), we find it anomalous to allow a jury to tell the court whether it has jurisdiction or not. We therefore agree with the minority view and conclude that resolution of jurisdictional facts falls within the province of the court, not the jury.

Several practical and procedural considerations also support the minority rule. First, a challenge to a court's fundamental subject matter jurisdiction strikes at the very foundation of the court's authority and therefore should be determined pretrial by the court as a matter of law. Treating subject matter jurisdiction as a threshold matter that should be challenged prior to trial affords substantial procedural safeguards for the defendant and serves the interests of judicial efficiency and economy. If only a jury could determine subject matter jurisdiction, a defendant would always be put through the expense, anxiety, and uncertainty of a trial and the only mechanism to challenge jurisdiction would be an appeal after the conclusion of trial. If this issue is resolved by the court, a defendant can challenge subject matter jurisdiction in a pretrial hearing and obtain immediate review via a writ proceeding. Moreover, requiring a jury to decide subject matter jurisdiction under the preponderance of evidence standard while simultaneously deciding guilt for the offense under a reasonable doubt standard will, no doubt, lead to jury confusion. Resolution of this issue by the court, pretrial, avoids this potential confusion.

The fact that subject matter jurisdiction under section 778a involves an analysis of the facts does not alter our conclusion. In this case, all the offenses involving Nichole and one offense involving Breanna indisputably occurred outside California and only acts of preparation allegedly took place in California. To convict defendant for molestation in California, the People had to prove that he had the intent to commit the offense, coupled with an act, while he remained in California. Courts routinely consider contested facts when deciding legal issues in pretrial matters, even when the issues concern a defendant's constitutional rights, such as whether physical evidence or a defendant's statement were legally obtained. We see no reason why subject matter jurisdiction should be handled differently.

Additionally, unlike in *State v. Willoughby, supra,* 892 P.2d 1319, a case representing the majority view, the jurisdictional facts are not the same as the substantive facts here. Arizona law, unlike California, requires that an *element of the charged offense* be committed within the state for it to assert jurisdiction. (A.R.S. § 13-108(A)(1).) In *Willoughby*, the defendant's premeditation in Arizona was necessary to establish its jurisdiction to prosecute him for first degree murder where the victim had been killed in Mexico. Premeditation is also a substantive element of the crime of first degree murder in Arizona. California, in contrast, does not require that an element of the offense occur in the state in order to assert jurisdiction, only that a non de minimis act occur with intent to commit the offense. (*Morante, supra,* 20 Cal.4th at p. 436.) The jurisdictional facts here (intent to commit the offense and any act in furtherance of it) are different from the

substantive elements of the crime (lewd or lascivious act upon the body of a child under 14 years old). It therefore follows that a jury determination is not mandated.

For the foregoing reasons we conclude that subject matter jurisdiction is a matter for the court to determine when the jurisdictional facts are controverted. Thus, it was appropriate for the trial court, at the outset, to determine jurisdiction here pretrial.

The preponderance of the evidence shows that non de minimis preparatory acts to commit the molestations were done in California in this case. The truck trips themselves facilitated defendant's crimes because they placed the victims in close sleeping quarters with him, isolated the victims from their mother, and prevented the grandmother's supervision since she always drove at night. Indeed, defendant knew the victims would have to sleep in the lower bunk with him because it was illegal for anyone to be in the upper bunk while the truck was moving. Thus, the crimes here were made possible by defendant inviting the two victims on truck trips which commenced in California.

Defendant's intent to molest the victims can be inferred from his predisposition to molest young girls when they slept near him. Defendant had previously molested Brandy when she was on a sleepover in his residence, and he had also molested his girlfriend's daughter when she slept in his house. Defendant's intent to molest is also evidenced by his endeavors to lay the groundwork for the molestations by selecting the victims and getting them into a vulnerable position. He gave the victims gifts and showed them affection in California prior to the trips in order to gain their confidence and their family's trust. Defendant's intent while in California to molest Breanna during the

Oregon trip is even more evident because he had molested Nichole just days before on the North Carolina trip under identical circumstances. Hence, the facts here fit squarely within the purview of section 778a. Therefore, we find no error in the court's determination that California had jurisdiction over the molestation offenses here.

Defendant correctly notes that the decision in *Morante, supra*, 20 Cal.4th 403, was not final until July 21, 1999, which is after the trips to North Carolina and Oregon had occurred. (Cal. Rules of Court, rule 24(a).) He argues that since *Morante* did not exist at the time he committed the out-of-state crimes and cannot be applied retroactively, the *Buffum*[5] attempt rule applies. In *Buffum*, *supra*, 40 Cal.2d at pp. 715-717, the California Supreme Court held that California lacks jurisdiction to prosecute for conspiracy where the object crime of the conspiracy was committed outside the state. Defendant asserts that his conduct in California did not amount to an attempt to molest either victim. However, our Supreme Court noted in *Morante* that the *Buffum* attempt rule had never been announced nor consistently applied by it to any crime or theory of liability except conspiracy. (*Morante, supra,* 20 Cal.4th at p. 438.) In *Morante,* the court held that the *Buffum* attempt rule did not apply to the defendant's drug offense convictions. (*Morante, supra,* at pp. 437-438.) The court had earlier declined to extend the rule to another non-conspiracy crime. (*People v. Burt* (1955) 45 Cal.2d 311, 313-315.) Thus, prior to *Morante*, the *Buffum* attempt rule had only been applied to charges of conspiracy. (*People v. Brown, supra,* 91 Cal.App.4th at pp. 264-265, 267.) We accordingly reject

defendant's assertion that the *Buffum* attempt rule applies to his molestation charges here.

We also reject defendant's Sixth Amendment challenge. The Sixth Amendment provides that the accused shall have a trial by an impartial jury in the state where the crime is committed. California has jurisdiction where preparatory action taken here, coupled with the requisite intent, constitutes more than de minimis acts toward completion of the offense. (*Morante, supra*, 20 Cal.4th at p. 436.) We find nothing in the Sixth Amendment that prevents California from punishing an offense when part of the crime is in fact committed within this state. (See *People v. Botkin, supra,* 9 Cal.App. at p. 251; see also *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 [vicinage clause of Sixth Amendment not applicable in a state criminal trial].)

We therefore conclude that defendant has not met his burden to overcome the presumption of proper subject matter jurisdiction.

2. *Venue*

Defendant contends that Riverside County was an improper venue for trying him on two of the molestation counts which allegedly occurred in Los Angeles County. Defendant also contends that the jury should have been instructed on the issue of venue. Again, we disagree.

We first address defendant's contention that the trial court erred in failing to allow the jury to determine venue. Unlike subject matter jurisdiction, territorial jurisdiction is a nonfundamental aspect of jurisdiction which may be waived. (*Simon, supra,* 25 Cal.4th

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[footnote continued from previous page]

[5] *People v. Buffum* (1953) 40 Cal.2d 709 (*Buffum*).

at p. 1109; *Sering, supra,* 232 Cal.App.3d at pp. 684-685; *People v. Campbell* (1991) 230 Cal.App.3d 1432, 1443.) Failure to timely tender a proposed instruction waives a defendant's right to have the question of venue submitted to the jury. (*Simon, supra,* 25 Cal.4th at pp. 1109-1110.) Defendant's failure to request a venue instruction waived his right to a jury determination of the matter. (*Ibid*.)

While resolution of this case does not require us to directly confront the rule that venue is a jury question, we nevertheless address it because it is an important issue. We recognize the lengthy and uniform line of cases which hold that venue is a question of fact to be determined by the jury. (*People v. More* (1886) 68 Cal. 500, 504; *People v. Jackson* (1983) 150 Cal.App.3d Supp. 1, 16; *People v. Witt* (1975) 53 Cal.App.3d 154, 167; *People v. Jones* (1964) 228 Cal.App.2d 74, 86-87.) However, recent decisions have criticized this rule, stating it is outmoded and should be reconsidered. Recent cases strongly opine that pretrial resolution of a venue question is eminently superior to disposition of the issue by jury verdict. (See *Simon, supra*, 25 Cal.4th at pp. 1100-1109; *Sering, supra,* 232 Cal.App.3d at p. 684, fn. 3.) We agree.

To begin with, it is well settled that venue is not an essential element of a charged offense. (*Id.* at p. 688; *People v. Remington, supra,* 217 Cal.App.3d at p. 430.) Therefore, for the same reasons enumerated in the subject matter jurisdiction section above, we do not find that a jury determination of venue is constitutionally compelled.

Additionally, as explained in *Simon,* the principal purpose of venue provisions, from the defendant's perspective, is to safeguard the defendant from being required to

stand trial in an unrelated and potentially burdensome location. (*Simon, supra,* 25 Cal.4th at p. 1110, fn. 18.) This protection can be meaningfully ensured to a defendant only if the venue question can be determined *before* the trial proceeds. If a venue challenge is determined and sustained by the court, the trial can then be conducted in the proper location, before the defendant, the witnesses, and the court have incurred the burden and expense of a trial in an improper venue. If venue is a jury question, a defendant is powerless to challenge it until after the trial in the improper venue is completed.

Moreover, double jeopardy does not bar reprosecution of a defendant in the proper venue when a conviction is overturned for lack of venue. (See *Sering, supra,* 232 Cal.App.3d at pp. 689-691 [insufficient proof of venue does not mandate acquittal of substantive charge]; *People v. Garcia* (1953) 122 Cal.App.2d Supp. 962 [conviction reversed for lack of venue and remanded for new trial]; see also *U.S. v. Douglas* (N.D.Cal. 1998) 996 F.Supp. 969, 975 [double jeopardy does not bar reprosecution where charges are dismissed for lack of venue because venue does not go to guilt or innocence; the double jeopardy clause does not preclude a second prosecution where proceedings against a defendant are terminated on a basis unrelated to factual guilt or innocence].) The result of requiring a jury finding on venue is that a defendant could conceivably be subjected to multiple trials for the same crime.

Finally, since venue need only be proven by a preponderance of the evidence (*Sering, supra,* 232 Cal.App.3d at p. 688), requiring a jury to decide venue creates the

identical jury confusion problem that we discussed previously regarding subject matter jurisdiction.

For the foregoing reasons, we believe pretrial resolution of a venue question by the court is both proper and superior to disposition of the issue by jury verdict. Even if we were to conclude otherwise, defendant's failure to request instructions permitting the jury to determine venue would prevent us from overturning his conviction on this basis. (See *Sering, supra,* 232 Cal.App.3d at p. 684, fn. 3.)

Venue here is governed by sections 783 and 781. Section 783 provides that when a public offense is committed in this state in a motor vehicle during the course of a trip, jurisdiction vests in the area, among others, where the trip terminates. Additionally, section 781 provides that when an offense is committed partly in one jurisdiction and partly in another, or the acts requisite to the consummation of the offense occur in two or more jurisdictional areas, jurisdiction to try the offense lies in either area. Pursuant to this section, venue can be fixed where preliminary arrangements have been committed which are requisite to the achievement of an offense, even if the acts are not essential elements of the offense charged. (*People v. Douglas* (1990) 50 Cal.3d 468, 493, abrogated on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907; *People v. Campbell, supra,* 230 Cal.App.3d at p. 1444; *People v. Tolbert* (1986) 176 Cal.App.3d 685, 691.) "[S]ection 781 must be given a liberal interpretation to permit trial in a county where only preparatory acts have occurred." (*Simon, supra,* 25 Cal.4th at p. 1109.) For example, in *People v. Malloy* (1962) 199 Cal.App.2d 219, 225-226, preliminary

arrangements included the defendant gathering up children for a visit to his cabin in another county and initiating the transportation of them to his cabin, where he molested them. (See also *People v. Ortez* (1953) 120 Cal.App.2d 469, 472 [when a defendant invited the victim into his car in one county, jurisdiction vested in that county even though the act of rape occurred in another county].)

Here, it is undisputed that defendant committed two offenses against Breanna in the truck during the trip from Riverside County to Los Angeles County and back. Since this trip terminated in Riverside County, it was a proper venue pursuant to section 783. Additionally, Riverside County is where defendant invited Breanna into his truck and instigated the trip to Los Angeles so that he could have access to her outside the presence of her mother and grandmother. Thus, the requisite preliminary arrangements for the molestation occurred in Riverside County. The record therefore demonstrates sufficient facts to apply both sections 781 and 783, vesting venue in Riverside County. Thus, the trial court's determination of venue was correct here.

Defendant's reliance on *People v. Bradford* (1976) 17 Cal.3d 8 is misplaced. In *Bradford*, section 783 was held inapplicable because the vehicle was stopped and the offenses were committed outside the vehicle at an identifiable spot along the highway. Unlike *Bradford*, the location of the molestations is not readily identifiable here. Breanna could not identify exactly where she was molested. She only knew that it was somewhere inside the truck on the trip between Hemet and Los Angeles.

We therefore conclude that Riverside County was a proper venue for the two

molestations involving Breanna on the Los Angeles trip, even though their locations were not readily identifiable.

3. *Advisory Counsel*

Defendant contends that the trial court erred in denying his right to self-representation with advisory counsel. We disagree.

A defendant in propria persona has no constitutional right to an advisory counsel. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1368.) Rather, the decision whether to appoint advisory counsel is entrusted to the discretion of the trial court. (*People v. Crandell* (1988) 46 Cal.3d 833, 861-862 (*Crandell*).) "The factors which a court may consider in exercising its discretion on a motion for advisory counsel include the defendant's demonstrated legal abilities and the reasons for seeking appointment of advisory counsel." (*Id.* at p. 863.) "'As with all actions by a trial court within the exercise of its discretion, as long as there exists "a reasonable or even fairly debatable justification, under the law, for the action taken,"'" the action should not be set aside on appeal. (*Ibid*.) Such a determination is subject to the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818. (*Crandell, supra,* 46 Cal.3d at pp. 864-865.)

Here, defendant requested to represent himself only if he could have "assistance of counsel." The record demonstrates that the reason defendant wanted to represent himself with advisory counsel was because he was dissatisfied with his appointed counsel's representation. He initially requested different counsel be appointed. Months later, defendant stated that if the court did not appoint advisory counsel, he did not want to

represent himself but wanted his deputy public defender replaced with another attorney. Since the reason defendant wanted advisory counsel was his dissatisfaction with the deputy public defender, the trial court adequately resolved this issue by appointing new counsel from the conflicts panel. It is apparent from the trial court's actions here that it considered the reasons for defendant's request, and remedied defendant's concerns. (*Crandell, supra,* 46 Cal.3d at p. 863.) The trial court's appointment of new counsel justified its denial of defendant's request for advisory counsel. Indeed, similar efforts by a defendant infer a manipulative purpose to obtain appointment of private counsel without the requisite showing, which justifies denial of advisory counsel. (*Ibid*.) Therefore, we find no abuse of discretion.

Defendant's reliance on *People v. Bigelow* (1984) 37 Cal.3d 731 (*Bigelow*) is misplaced. In that capital case, the trial court erroneously ruled that California law did not permit the appointment of advisory counsel. Accordingly, the trial court failed to exercise its discretion. (*Id.* at pp. 742-743.) Here, unlike *Bigelow*, the trial court did not state that it had no power to appoint advisory counsel. Although the trial court denied defendant's request without much explanation, there is no indication in the record that the trial court believed that it did not have discretion to appoint advisory counsel, or that it was not exercising its discretion.

People v. Joseph (1983) 34 Cal.3d 936 (*Joseph*) is also inapplicable. In *Joseph*, the defendant made an unequivocal request to represent himself. (*Id.* at p. 939.) Here, however, defendant made clear that he wanted assistance of counsel. Unlike *Joseph*,

defendant's request to proceed in propria persona was expressly contingent on receiving advisory counsel. It is apparent from this record that defendant did not really want self-representation. He wanted new counsel. For this reason, we reject defendant's claim of *Faretta*[6] error as well.

We therefore conclude that the court did not abuse its discretion in denying defendant's request for appointment of advisory counsel.

4. *CALJIC No. 2.50.01*

Defendant contends that the jury was improperly instructed with CALJIC No. 2.50.01. Defendant argues that the use of his prior offenses as propensity evidence violated his federal due process rights. We disagree.

Defendant's argument that Evidence Code section 1108 does not authorize a propensity instruction such as CALJIC No. 2.50.01 was rejected in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*). This authority is controlling. Our Supreme Court in *Falsetta* stated that CALJIC No. 2.50.01, as revised in 1999, adequately sets forth the controlling principles under Evidence Code section 1108. (*Id.* at p. 924.) It explained that the 1999 amendment to CALJIC No. 2.50.01, which admonishes the jury not to convict the defendant solely in reliance on the evidence that he committed prior sex offenses, helped assure that the defendant would be tried and convicted for his present, not his past, offenses. (See also *People v. Waples* (2000) 79 Cal.App.4th 1389, 1396-

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[6] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].

1398 (*Waples*) [pre-1999 version of CALJIC No. 2.50.01 is constitutional because it was given to the jury together with other standard instructions which, when read together, clearly apprised the jury that it could not convict absent proof of every element of the crime beyond a reasonable doubt].)

In the present case, the trial court read the 2000 version of CALJIC No. 2.50.01 to the jury, which contains similar language to the 1999 version. It states, "if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes." Contrary to defendant's suggestion, this instruction does not equate to "once a child molester, always a child molester." Rather, the version of CALJIC No. 2.50.01 given here instructed the jury that defendant's propensity to molest children was not sufficient by itself to prove beyond a reasonable doubt that he committed the charged current crimes. The plain language of this instruction defeats defendant's challenge.

We therefore conclude that the 2000 version of CALJIC No. 2.50.01, which the trial court read to the jury in this case, clearly apprised the jury that defendant could only be convicted on proof beyond a reasonable doubt of the charged offense, and that it could not rest a verdict of guilt solely upon propensity evidence which was subject to a lesser burden of proof. Accordingly, we reject defendant's due process challenge to the 2000 version of CALJIC No 2.50.01.

5. *Evidence of Prior Sexual Offenses*

Defendant asserts that the trial court abused its discretion in allowing evidence of

his prior child molestations, which occurred 17 years earlier, because: (1) it was not relevant; and (2) even if it had de minimis relevance, it was outweighed by the prejudice to him. We disagree.

Evidence Code section 1108 expressly permits admission of evidence of the defendant's commission of another sexual offense when the defendant is accused of a sexual offense, provided the evidence is not inadmissible pursuant to Evidence Code section 352. In the Evidence Code section 352 analysis of prior sexual offense evidence, the following factors should be considered: (1) the inflammatory nature of the evidence; (2) the probability of confusion; (3) remoteness; (4) consumption of time; and (5) probative value. (*People v. Harris* (1998) 60 Cal.App.4th 727, 737-739 (*Harris*).)

On appeal, the trial court's determination of this issue is reviewed for abuse of discretion. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.) We do not substitute our judgment for that of the trial court on appeal. We only grant relief where an abuse of discretion amounts to a miscarriage of justice. (*Wanland v. Los Gatos Lodge, Inc*. (1991) 230 Cal.App.3d 1507, 1523.) In this context, a miscarriage of justice occurs when it is reasonably probable that the jury would have reached a result more favorable to defendant, absent the erroneously admitted evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

"Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense." (*People v. Fitch, supra,* 55 Cal.App.4th at p. 179.) Indeed, it is too relevant. (*Ibid*.) Propensity evidence is also highly relevant to dispute a defendant's

attempt to paint current victims of sexual offenses as liars or mistaken in their claims of molestation. (*Waples, supra,* 79 Cal.App.4th at p. 1395.) Here, as in *Waples*, defendant claims the victims' allegations are lies. Thus, contrary to defendant's unsupported contention, evidence of his prior sexual offenses was relevant.[7]

Since this evidence was relevant under Evidence Code section 1108, the trial court properly considered its admission under Evidence Code section 352. Defendant's challenge to the court's Evidence Code section 352 analysis is that the 17-year-old crimes were too remote to be probative. However, 30-year-old crimes were not too remote to preclude admission in *People v. Branch* (2001) 91 Cal.App.4th 274. (See also *Waples, supra,* 79 Cal.App.4th 1389 [18- to 30-year-old crimes]; *People v. Soto* (1998) 64 Cal.App.4th 966 [21- to 30-year-old crimes].) Given these authorities, we reject defendant's argument that his 17-year-old crimes have limited probative value. We find these prior crimes were highly probative, since defendant's sexual attraction to and repeated molestation of young girls refutes his claim that the victims lied in this case. (See *People v. Fitch, supra,* 55 Cal.App.4th at p. 179 [evidence of prior sexual offenses "'is objectionable not because it has no appreciable probative value, but because it has too much'"].)

The trial court properly considered the inflammatory nature of defendant's prior sexual offenses here. Defendant had attempted to penetrate Kendra's vagina. Defendant

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[footnote continued on next page]

orally copulated and anally penetrated Brandy. The court ameliorated the prejudice to defendant by excluding those inflammatory details and limiting Kendra's and Brandy's testimony to pertinent facts -- that defendant fondled them when they were nine years old. The record establishes that the trial court also thoroughly considered the other *Harris* factors. Therefore, we find that the court did not abuse its discretion in concluding that the potential for prejudice was outweighed by the probative value of this evidence.

Harris, supra, 60 Cal.App.4th 727, in which the court found that a 23-year-old prior offense was improperly admitted, is distinguishable. In *Harris*, the defendant was charged with using a position of trust as a mental health nurse to engage in sex with two patients. His prior offense was a brutal rape in which he tore open the victim's vagina and stabbed her with an ice pick. The *Harris* court noted that the prior offense was dissimilar and too inflammatory. Here, by contrast, the prior and current offenses are similar. Defendant first molested his girlfriend's daughter and her friend and then molested two stepgranddaughters. The victims were similar ages: three 9 year olds and one 11 year old. Defendant took advantage of the fact that each victim was sleeping nearby to molest them. Thus, the facts here are more analogous to *People v. Branch, supra,* 91 Cal.App.4th 274, in which defendant's molestation of his stepdaughter 30 years earlier was admissible when defendant was accused of molesting his

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[footnote continued from previous page]

[7] Based on these authorities, we also reject defendant's contention that the court failed to determine the relevancy of this propensity evidence.

stepgreatgranddaughter.

Even if we were to assume the trial court erred in admitting the prior sex offense evidence, we find the error harmless, since there was abundant other evidence to prove the current molestation offenses. Here, regardless of the prior crimes testimony, the jurors heard testimony from Nichole, Breanna, Christina, Shellie, and Linda to support the molestation convictions. Their testimony was mutually corroborated, in that the circumstances of each molestation were similar. Defendant invited both victims on truck trips and touched them on the same parts of their bodies at night in the truck's bunk bed while on the trips. Although Nichole's pretrial recantation of her allegations may have diminished her credibility, the record sufficiently shows that Nichole recanted due to pressure from her family, not because her allegations were false. Defendant's offer of money to Breanna and Linda to keep quiet about the incidents established a compelling inference he committed the offenses. Given the strength of this evidence, the jury could reasonably have concluded that defendant molested the victims absent the prior sexual offense evidence. Thus, there was no reasonable probability that an outcome more favorable to defendant would have resulted had the prior crime evidence been excluded.

6. *Insufficiency of Evidence*

Defendant contends that the evidence is insufficient to support any of the convictions. We disagree.

In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record "in the light most

favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Hill* (1998) 17 Cal.4th 800, 848-849.)

If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Hale* (1999) 75 Cal.App.4th 94, 105.)

Defendant here argues that the evidence is insufficient to support his molestation convictions because the two victims are liars. However, we may only reject statements given by witnesses who have been believed by the jury when there is a physical impossibility that they are true. The testimony "must be inherently improbable and such inherent improbability must plainly appear." (*People v. Ozene* (1972) 27 Cal.App.3d 905, 910, disapproved on other grounds in *People v. Gainer* (1977) 19 Cal.3d 835, 847-851.)

We find nothing inherently improbable in the victims' testimony here. Nichole's partial recantation of her allegations was sufficiently explained. Nichole testified she recanted only because her allegations were responsible for tearing apart her otherwise

happy family. This may have raised a credibility issue for the jury to resolve, but it does not make her testimony improbable. The victims' delayed reporting does not make their testimony impossible. Most importantly, the victims' testimony was uncontradicted by any other witness. Since it is not our province to determine the credibility of witnesses, the record discloses ample evidence to support the jury's verdicts.

We also reject defendant's argument that the jury speculated in finding that he molested Nichole three additional times after the first molestation on the North Carolina trip. Contrary to defendant's suggestion, this number is not arbitrary. Nichole testified that after the first molestation, she felt a wet spot near her approximately five different times and felt defendant's penis behind her two or three times. Nichole told the police officer that she felt a wet, slimy spot approximately three times on the trip after the first incident. This testimony was uncontradicted. Nichole's and the police officer's testimony amply supports the jury's finding that defendant molested Nichole at least three additional times after the first incident.

Therefore, viewing the evidence as we must in a light most favorable to the judgment, we believe any reasonable trier of fact could have found defendant guilty under these facts.

7. *Section 667.61 Punishment*

Defendant contends that the "one-strike" punishment is erroneous because he was not convicted of one qualifying crime identified in the amended information, although he was convicted of another qualifying offense. We disagree.

Section 667.61 provides, in pertinent part:

"(b) [A] person who is convicted of an offense specified in subdivision (c) under one of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 15 years except as provided in subdivision (j). [¶] . . . [¶]

"(c) This section shall apply to any of the following offenses: [¶] . . . [¶]

"(4) A violation of subdivision (b) of Section 288. [¶] . . . [¶]

"(7) A violation of subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066. [¶] . . . [¶]

"(e) The following circumstances shall apply to the offenses specified in subdivision (c): [¶] . . . [¶]

"(5) The defendant has been convicted in the present case or cases of committing an offense specified in subdivision (c) against more than one victim."

In this case, defendant was found guilty of section 288, subdivision (a), against more than one victim, and the court found he was ineligible for probation under subdivision (c) of section 1203.066. Hence, the trial court imposed a sentence of 15 years to life under section 667.61, subdivision (b).

Due process requires that defendant be placed on notice of the charged allegations. (*People v. Valladoli* (1996) 13 Cal.4th 590, 606-607.) We reject defendant's argument that the district attorney specified only section 288, subdivision (b), in the amended information, of which he was not convicted. The amended information states as follows:

"The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the offenses hereinabove set forth in the information, the said defendant . . . has been convicted in the present case of committing an offense specified in [section] 667.61 [, subdivision] (b) of the Penal Code, to wit, section 288, subdivision (b) of the Penal Code, under the circumstance as specified in [section] 667.61, subdivision (e), subsection (5) of the Penal Code." Thus, the amended information expressly referenced section 667.61, subdivisions (b) and (e)(5). Defendant's reply brief ignores the simple fact that the multiple victim circumstance was "pleaded" by noting the multiple victim provision of the statute itself -- subdivision (e)(5). Subdivision (c) of section 667.61 includes section 288, subdivision (a), as well as section 288, subdivision (b). Therefore, it was proper to impose the section 667.61 enhancement to the multiple victim qualifying crime of section 288, subdivision (a).

Defendant's argument that his jury trial waiver was limited solely to a finding on the section 288, subdivision (b), qualifying crime is not supported by the record. Through counsel, defendant waived a jury trial on the special allegation as to all potential qualifying crimes, not just the section 288, subdivision (b), count as follows:

"[Defense counsel]: I have discussed with [defendant] the special allegation as it pertains to . . . [section] 667 of the Penal Code, .61. And I have explained to [defendant] that if in fact the jury finds him guilty of one count of the felony charge on both victims, it's probably a pro forma thing for the jury to make that determination. In other words, if they find at least one count on each, that's sufficient. In any event, [defendant] is

agreeable to have the Court make that determination at the conclusion of the trial through a court trial if it becomes necessary.

"The court: If it becomes necessary by reason of the jury's verdicts on Counts 1 through 5 and 11, 12, and 13.

"[Defense counsel]: Yes. . . ."

Indeed, the record shows that defendant's counsel specifically mentioned the multiple victim special allegation when informing the court of defendant's waiver.

We also reject defendant's argument that the prosecutor's failure to request a jury instruction or verdict on the multiple victim circumstance indicates this circumstance had not been invoked. The prosecutor requested no instruction or verdict because defendant waived a jury trial on the section 667.61 punishment.

We therefore conclude that the court did not err in imposing the section 667.61 punishment.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

GAUT
J.