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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL T.,

Defendant and Appellant.

B188514

(Los Angeles County
Super. Ct. No. YA060900)

APPEAL from a judgment of the Superior Court of Los Angeles County, Francis J. Hourigan III, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Ana R. Duarte, Supervising Deputy Attorney General, and Dawn S. Mortazavi, Deputy Attorney General, for Plaintiff and Respondent.

Manuel T. appeals from the judgment entered following a jury trial in which he was convicted of continuous sexual abuse of a child from July 1990 to July 1996 (the information further alleged that the statute of limitations had been tolled) and a postverdict plea of guilty to possession of methamphetamine. Defendant contends that the trial court should have instructed, sua sponte, on the statute of limitations or alternatively that such instructions should have been requested by trial counsel, and that an upper term sentence was erroneously imposed. We affirm.

BACKGROUND

Defendant and Linda T. were husband and wife. At the time of trial they had six children, ranging from 5 to 19 years of age. Kimberly T., the 19-year-old, was born in 1986. She had been placed with defendant and Mrs. T. as a foster child about July 1990, and they adopted her four years later. Soon after Kimberly's arrival in the home, defendant began to sexually abuse her, primarily by committing acts of sodomy. The sexual abuse continued for several years.

At one point during the 1995–1996 school year, Kimberly told a friend about being molested. Kimberly testified that not long afterward her fifth grade teacher, Jeffrey Siler, asked Kimberly if her father had been touching her. She said he had not. Mrs. T. testified that she attended a meeting with defendant, Kimberly, Siler, and a school representative. Kimberly was asked if defendant had been touching her and responded in the negative. Siler told Kimberly that she had to apologize in front of the class for making up a story.

In May 2004, Mrs. T. overheard an argument between Kimberly and defendant in which Kimberly asked defendant if he remembered what he used to do to her and accused him of being a child molester. Soon afterward, in response to Mrs. T.'s questioning, defendant admitted, ““Yes, I touched [Kimberly].”” Mrs. T. also heard defendant say to Kimberly, ““I'm sorry for what I did. I guess you're going to be happy, because now your mom is going to leave me.””

Mrs. T. soon moved out of the home with the children and filed for divorce. She did not immediately notify the police. Kimberly ultimately filed a complaint in

December 2004. In investigating Kimberly’s allegations, a detective arranged to tape record a telephone conversation between Kimberly and defendant. During the conversation, defendant admitted that he had had sex with Kimberly and apologized for his conduct.

In defense, defendant testified that he never had any sexual contact with Kimberly. He asserted that Kimberly had a history of lying and blaming others and that Mrs. T.’s testimony was untruthful. During the telephone conversation with Kimberly, defendant lied about having molested Kimberly because Mrs. T. had advised beforehand “just to play along with [Kimberly], then we can get on with our life when she goes to college.” Teacher Siler testified that he did not recall either questioning Kimberly about improper touching or meeting with her family on the subject.

DISCUSSION

1. Statute of Limitations

Defendant contends that the trial court prejudicially erred in failing to instruct, sua sponte, and alternatively that trial counsel rendered ineffective assistance in failing to request instructions, on the tolling of the statute of limitations under former Penal Code section 803, subdivision (g) (further section references are to the Penal Code).¹ We disagree.

¹ “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). [Citation.]” (*People v. Linder* (2006) 139 Cal.App.4th 75, 78, fn. 2.)

Former section 803, subdivision (g), which is now set forth in subdivision (f), provided in pertinent part: “(1) Notwithstanding any other limitation of time described in this chapter, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under the age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, or 289, or Section 289.5

“(2) This subdivision applies only if all of the following occur:

“(A) The limitation period specified in Section 800, 801, or 801.1, whichever is later, has expired.

(footnote continued on next page)

As noted, Kimberly was born in July 1986, defendant was convicted of having molested her between July 1990 and July 1996, and Kimberly first reported defendant to the authorities in December 2004. Other than the allegation in the information of tolling under former section 803, subdivision (g), the record contains no reference to the statute of limitations.

The Attorney General argues that defendant has forfeited the statute of limitations issue on appeal because he failed to raise it in the trial court. As stated in *People v. Williams* (1999) 21 Cal.4th 335, 344, where, as here, the information contains tolling allegations, a defendant may lose the ability to litigate this factual issue. Defendant counters that *Williams* is inapplicable because *Williams* specifically left to “future courts” “the rules to apply when the defendant does assert the statute of limitations at trial.” (*Id.* at p. 345, fn. 3.) Defendant continues that he should be considered to have raised the statute of limitations issue because tolling requires corroboration of the victim (former section 803, subdivision (g)(2)(C)), and his trial defense included challenges to the corroborating evidence.

Defendant has presented no authority to support his position that, by raising a defense on the merits to the evidence presented against him, he should be credited with a sub silentio challenge to a statute of limitations allegation. To the contrary, “[a]s a general rule, the trial court need only instruct on the statute of limitations when it is placed at issue by the defense as a factual matter in the trial. [Citations.]” (*People v.*

(footnote continued from previous page)

“(B) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation that is not mutual.

“(C) There is independent evidence that corroborates the victim’s allegation. If the victim was 21 years of age or older at the time of the report, the independent evidence shall clearly and convincingly corroborate the victim’s allegation.

“(3) No evidence may be used to corroborate the victim’s allegation that otherwise would be inadmissible during trial. Independent evidence does not include the opinions of mental health professionals.”

Smith (2002) 98 Cal.App.4th 1182, 1192.) Because defendant did not raise a statute of limitations issue at trial, his argument of sua sponte instructional duty must fail. We therefore proceed to defendant's alternative claim of ineffective counsel.

"To establish constitutionally ineffective assistance of counsel under either the state or federal constitutional right to counsel, appellant must demonstrate (1) that his attorney's performance fell below an objective level of reasonableness, i.e., that counsel's performance was not within an objective level of reasonableness and thus did not meet the standard to be expected of a reasonably competent attorney, and (2) that he suffered prejudice as a result of that failure. . . .

"In addition, however, when the reason for counsel's action or inaction is apparent on the record, the court will determine whether that reason reflects reasonably competent performance by an attorney acting as a conscientious and diligent advocate. If no explanation appears, an ineffective counsel claim will be rejected unless the attorney was asked for and did not offer an explanation, or there can be no satisfactory explanation. [Citation.] In other cases the appellant is left to his remedy on habeas corpus where evidence outside the record may shed light on the reason for the attorney's action." (*People v. Coddington* (2000) 23 Cal.4th 529, 651–652, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069.)

Defendant's ineffective counsel claim fails under both prongs of this test. As noted by defendant, the only aspect of tolling requirement that could possibly be in issue was the existence of independent corroboration of Kimberly's accusations. But had a statute of limitations defense been raised, the jury would be instructed to find corroboration by a standard less than reasonable doubt. (See *People v. Linder, supra*, 139 Cal.App.4th at p. 85 ["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"].) A reasonably competent attorney trying this case could well elect to forego a statute of limitations defense because the resulting instructions would not only draw the jury's attention to the strong corroborating evidence

of the pretext telephone call, and do so under a standard of proof less than required for conviction.

Nor did defendant suffer prejudice based on the lack of statute of limitations instructions. “The failure to instruct on the need for corroboration is harmless where the record contains substantial corroborative evidence. [Citation.]” (*People v. Marquez* (1993) 16 Cal.App.4th 115, 122, disapproved on another point in *People v. Cuevas* (1995) 12 Cal.4th 252, 275, fn. 5.) The pretext telephone call afforded such strong corroboration here, defeating any claim of prejudice.

In addition, it is inconceivable defendant would have been convicted had the jury doubted that the telephone call provided corroboration. Given the manner in which the case was presented, the jury was required to determine that either Kimberly or defendant was lying. If the jury had entertained a reasonable doubt that defendant was just playing along during the telephone conversation as he claimed, he would have surely been acquitted. That he was not cannot be blamed on the lack of instruction regarding the statute of limitations. (See *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1406 [“The verdict demonstrates the jury disbelieved defendant’s entire testimony”].)

2. Sentencing

Defendant was sentenced to the upper term for continuous sexual abuse, the court citing as factors in aggravation Kimberly’s vulnerability, defendant having taken advantage of a position of trust, and defendant’s planning. Defendant argues that notwithstanding the California Supreme Court’s opinion in *People v. Black* (2005) 35 Cal.4th 1238, judicial imposition of the upper term infringed his federal constitutional jury trial right under *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531]. We recognize that *Black* will not be the final word on this issue. (See *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.] cert. granted Feb. 21, 2006, No. 05-6551, *sub nom. Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329, ___ L.Ed.2d ___].) But for the time being, *Black* is the controlling authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, defendant’s contention must be rejected.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

MALLANO,, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.