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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH CHRISTOPHER SEGADE, Defendant and Appellant.	E039208 (Super.Ct.No. RIF 119978) OPINION

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr. and Lilia E. Garcia, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

Defendant Joseph Christopher Segade appeals from a judgment convicting him of multiple sex crimes against two child victims. The jury found defendant guilty of committing a lewd and lascivious act upon Jane Doe, a child under 14 years of age (count 1).[1] The jury also found defendant guilty of the following eight sex crimes involving a second victim, John Doe: four counts of lewd and lascivious conduct upon a child under 14 years of age (counts 2, 3, 4, and 5);[2] two counts of forcible sodomy (counts 6 and 8);[3] and two counts of oral copulation on a child under 18 years of age (counts 15 and 16).[4]

On appeal, defendant raises the following claims: the crime charged in count 1 was prosecuted after the expiration of the statute of limitations; the trial court erred in failing to instruct the jury on the elements required for the tolling provision in former section 803, subdivision (g); the court erred in instructing the jury with CALJIC No. 10.60 on the requirement of corroboration; there was insufficient evidence that the crime charged in count 1 was committed within the statute of limitations; the court erred in

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[1] Penal Code section 288, subdivision (a). All further statutory references will be to the Penal Code unless otherwise stated.

[2] Section 288, subdivision (a).

[3] Section 286, subdivision (c)(2).

[4] Section 288a, subdivision (b)(1). The district attorney amended the pleadings a number of times. The operative pleading, the fourth amended information (No. RIF 119978), alleged 15 counts, numbered 1 through 16, omitting 7. In addition to the counts mentioned above, the information alleged that defendant participated in six other acts of oral copulation in violation of section 288a, subdivision (b)(1), during the period between September 1993 and September 1996 (counts 9, 10, 11, 12, 13, and 14).

refusing to instruct the jury with CALJIC No. 10.47 on the lesser included offense of sodomy upon a child under 18; the court also erred in refusing to give CALJIC No. 10.65 on consent; the court erred in admitting evidence of defendant's prior sex acts under Evidence Code section 1108; and the court erred in imposing the upper term in count 6 in violation of *Blakely v. Washington* (2004) 542 U.S. 296.

For the reasons provided below, we reject defendant's arguments and affirm the judgment.

2. Factual and Procedural History

A. John Doe

John Doe lived with defendant, his biological uncle, who was six years older. Defendant's parents raised John. Defendant was like an older brother to John.

When John was five years old, in 1983 or 1984, defendant showed him some pornographic magazines in defendant's bedroom and fondled John's penis over his clothes. John did not know what to think about defendant's behavior and did not report the incident to anyone. A couple days later, defendant repeated the same behavior. Defendant then began touching John's penis over his clothes regularly for a couple of years. At some point during these incidents, defendant also had John touch his penis.

When John was about eight years old, in 1986 or 1987, the touching progressed to masturbation. Defendant had John masturbate him, which occurred about twice a week. Defendant also masturbated John, but not often. Around this time, defendant also had John orally copulate him. On about two occasions, defendant orally copulated John.

The sex acts continued when John was nine and defendant was 15. On one occasion, after fondling each other in the bedroom, defendant asked John to put on his shorts and go to the backyard pool. Defendant orally copulated John under water to show him how he wanted it done to him. He then had John orally copulate him under water. The two then returned to the house and went to the bathroom. On the bathroom floor, defendant and John orally copulated each other at the same time. The two stopped when defendant's father saw them and started banging on the door. Afterwards, defendant told John not to say anything because defendant would get into trouble. The sex acts stopped for a couple of years.

They resumed, however, in 1991 or 1992, when John was 12 and defendant was 18. Defendant had John perform oral sex on him a number of times and John complied because he was afraid of defendant. John also went along with the sex acts because defendant threatened to tell the family that he was gay.

The oral copulations continued in 1993 and 1994, but less frequently. John began resisting defendant's advances when he was about 14 or 15 years old. At the time, they were living in an apartment in Victorville.

When John was 15 and defendant was 21, he and defendant went to the bathroom where they engaged in mutual touching and oral copulation. Defendant then asked if he could penetrate John anally and John acquiesced because defendant was verbally abusive when John refused and John did not want to fight with defendant. John was afraid of defendant. When defendant penetrated John's anus, John experienced considerable pain and asked defendant to stop. Although John was crying and in pain, defendant initially

refused to stop. He held John's waist with his hands, using force to keep John in place. John finally was able to push defendant away. Someone had come to the door and John ran to the shower. As he started taking a shower, he noticed a significant amount of blood flowing from his anus. John had to use tissue paper for a couple of days to stop the bleeding. Defendant told John not to say anything about the incident.

In 1995, while still living at the Victorville apartment, defendant had John orally copulate him at least twice a week. Defendant was married at the time and he and his wife shared a bedroom at the apartment. According to defendant's wife, defendant constantly yelled at and belittled John, who was shy, quiet, small, and effeminate.

After living in an apartment in Riverside, the family moved into a house in the same area in 1996. Defendant's wife recalled an incident in Riverside when defendant straddled John on the bed and began punching him repeatedly on the upper body. John was yelling for defendant to stop.

After they had moved into the house, there was another incident involving anal sex. After orally copulating each other, defendant had John get on his knees by the side of the bed. Defendant then took spit and rubbed John's anal area. Defendant penetrated John's anus, causing John pain.

In 1997, when John refused to copulate defendant orally, defendant became violent with John later that day. Defendant followed John into his bedroom, pushed him on the bed, started choking him. Although defendant's wife came into the room and told defendant to stop, defendant continued his attack by hitting John on the face with his closed fist. After this incident, John moved out of the house and stayed with an aunt.

John reported the molestation to the police in December of 2003. Detective Dennis Dodson had John call defendant and recorded the conversation. During the conversation, although defendant was reluctant to admit any specific sexual contact, he admitting "experimenting" with John and "tortur[ing] the hell" out of him.

B. Jane Doe

Jane Doe was defendant's niece, who was about 10 years younger. In 1996, when Jane was about 12 or 13, defendant and Jane were lying on the couch together. Defendant began rubbing Jane's vaginal area over her clothes with his hand. He then touched her under her clothes and inserted his fingers into her vagina. Jane eventually scooted away and defendant got off the couch.

Jane told someone about the incident about a year later. While living in Nevada, Jane frequently ran away from home and was picked up by the police. On one occasion in 1997, she was interviewed by a counselor for the Nevada probation department and, during the interview, Jane disclosed that she had been molested by defendant. Jane later reported the incident to Detective Todd Loveless in California in October of 2004.

3. Statute of Limitations

Defendant contends that his conviction in count 1 for the lewd and lascivious act upon Jane Doe must be reversed because the Riverside County District Attorney prosecuted defendant for the crime after the statute of limitations had expired.

The crime charged in count 1 allegedly occurred in 1996. The statute of limitations for any crime punishable by a prison sentence of eight or more years is six years. (§ 800.) The prosecution filed its complaint for this crime on October 26, 2004.

Section 803, however, extends the statute of limitations under certain circumstances. As relevant here, the 1996 version of section 803, subdivision (g) provided as follows: "Notwithstanding any other limitation of time described in this section, a criminal complaint may be filed within one year of the date of a report to a 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, 289, or 289.5. This subdivision shall apply only if both of the following occur: [¶] (1) The limitation period specified in Section 800 or 801 has expired. [¶] (2) The crime involved substantial sexual conduct, as described in subdivision (b) of Section 1203.066, excluding masturbation which is not mutual, and there is independent evidence that clearly and convincingly corroborates the victim's allegation. . . ." (Former § 803, added by Stats. 1993, ch. 390, § 1, p. 2226.) When read together with section 800, this provision allows the People to prosecute a sex crime involving a child victim within six years of the offense or within one year of the victim reporting the offense, whichever is later. (*People v. Vasquez* (2004) 118 Cal.App.4th 501, 505.)

The 1996 version of the statute provides that the one-year period begins when the victim reports the crime to "a law enforcement agency." (Former § 803, added by Stats. 1993, ch. 390, § 1, p. 2226.) Under the current version of the statute, the one-year period

begins once the victim reports a crime to "a California law enforcement agency," rather than "a law enforcement agency."[5] (§ 803, subd. (f)(1).)

In this case, the victim reported the incident to a Nevada law enforcement agency in May of 1997. Specifically, during her interview with Genny Gestaud, a counselor for the Nevada juvenile probation department, Jane Doe responded to a set of standard questions, one of which asked about prior molestation. In response to that question, Jane disclosed that defendant had molested her. Gestaud followed the usual procedures and prepared a report for the probation department. The report apparently noted that the information would be forwarded to a Riverside law enforcement agency. In October 2004, Jane reported the crime to a California law enforcement agency, the Riverside District Attorney's office.

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[5] The current version of section 803 provides: "(f)(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, [fn. omitted] as enacted by Chapter 293 of the Statutes of 1991 relating to penetration by an unknown object.

"(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.

"(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."

Before trial, defendant filed a motion to dismiss the substantive charges and enhancement allegations concerning the incident with Jane Doe on the ground that the People had failed to prosecute the crime within the statute of limitations. Defendant also argued that the late prosecution violated his rights under the due process and the ex post facto clauses.

During the hearing on defendant's motion, the prosecutor contended that there was no evidence that the Riverside Police Department received Gestaud's report. The prosecutor noted that the district attorney's office previously had not received any information concerning the 1996 incident. The prosecutor argued that the former statute did not bar the current action because the prior disclosure had to be made by the victim to a California law enforcement agency, as required under the current version of section 803.

The trial court found that, even if the California authorities had received the information from another source, the one-year period did not begin until the victim herself reported the incident to the authorities. The court denied defendant's motion.

In challenging the trial court's ruling, defendant argues that the one-year period expired because the victim reported the incident to a law enforcement agency as required under the 1996 version of section 803. The initial question, then, is whether the one-year period begins when the victim reports the incident to any law enforcement agency or when she reports the incident to a *California* law enforcement agency. In other words, did the addition of the word "California" effect a material change in the law?

Based on the language of the statute and legislative intent, it appears that the amendment was merely a clarification of existing law. The federal Constitution prohibits the states from enacting certain laws that apply retroactively, including the statute of limitations for the prosecution of crimes. (U.S. Const., art I, § 10, c. 1; see *Stogner v. California* (2003) 539 U.S. 607, 611.) The ex post facto clause, however, does not apply where the Legislature amends the statute merely to clarify the statute's true meaning. (See *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *People v. Robertson* (2003) 113 Cal.App.4th 389, 393.) "'While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute.' [Citation.]" (*Robertson, supra*, at p. 393.)

That is what occurred here. The 1996 version of section 803 did not specify whether the qualifying law enforcement agency could be an agency from a different jurisdiction. Other language in the statute and the legislative intent, however, suggest that the law enforcement agency could not be from a different state or jurisdiction. Although former section 803, subdivision (g), refers to an unspecified law enforcement agency, subdivision (f) in the same version of the statute contains a similar provision for "a responsible adult or agency." Former subdivision (f) specifically states, "[f]or purposes of this subdivision, a 'responsible adult' or 'agency' means a person or agency required to report pursuant to Section 11166." (Former § 803, added by Stats. 1993, ch. 390, § 1, p. 2226.) In other words, under former section 803, subdivision (f), and section

11166, the person or agency receiving a report of abuse has a statutory obligation to take further action, which ultimately may include criminal prosecution. (See *Thomas v. Chadwick* (1990) 224 Cal.App.3d 813, 821-822.) Presumably adults and agencies in foreign jurisdictions would not be bound by California's child abuse reporting statute and, therefore, would not qualify as a "responsible adult" or "agency" under section 803.

When the Legislature added subdivision (g) to section 803 in 1993, it intended to provide a new exception extending the statute of limitations to allow the People to prosecute defendants who commit sex crimes against children where the requirements of former subdivision (f) could not be met. (Assem. Com. on Public Safety, Bill Analysis of Assem. Bill No. 290 (1992-1993 Reg. Sess.) as proposed April 13, 1993, p. 3.) Under the former statute, subdivision (f)(2) required that the defendant has committed at least one other sex crime against the same victim within the limitations period. (Former § 803, added by Stats. 1993, ch. 390, § 1, p. 2229.) While subdivision (f) refers to any "agency," subdivision (g) refers specifically to a "law enforcement agency." The cross-reference to section 11166 in subdivision (f) narrows the scope of qualifying agencies in that subdivision. Because it is an inherent function of law enforcement agencies to follow up on criminal allegations, such language is unnecessary in subdivision (g). There is nothing in the legislative history that suggests the Legislature intended to broaden the scope of qualifying agencies to all law enforcement agencies in any jurisdiction.

The purpose of section 803, subdivision (g), was to afford greater opportunity to prosecute sex crimes against child victims, not to decrease those opportunities by allowing reports in other jurisdictions to trigger the statute of limitations. (See *People v.*

Maguire (2002) 102 Cal.App.4th 396, 401.) "'"The primary duty of a court when interpreting a statute is to give effect to the intent of the Legislature, so as to effectuate the purpose of the law. [Citation.] . . . Ultimately, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and it must avoid an interpretation leading to absurd consequences. [Citation.]" [Citation.]' [Citation.]" (*People v. Zandrino* (2002) 100 Cal.App.4th 74, 80.) Because the Legislature recognized that child victims of sex crimes often do not report the crimes until they reach adulthood, the purpose of section 803, subdivision (g), was to "preclude child molesters from escaping punishment merely because the molestation was revealed after the victim became an adult and after the limitations period had elapsed." (*Stogner v. Superior Court* (2001) 93 Cal.App.4th 1229, 1237.)

Consistent with this purpose, the change from "a law enforcement agency" to "a California law enforcement agency" was nothing more than a clarification of the original language. In 1997, the Legislature explicitly provided that the victim must report the crime to "a California law enforcement agency." (See Stats. 1997, ch. 29, § 1, p. 241.) At this time, the Legislature was concerned primarily about the statute's retroactive application. (See Sen. Com. on Public Safety Bill Analysis of Assem. Bill No. 700 (1997-1998 Reg. Sess.) as amended June 10, 1997.) The legislative record is silent concerning the addition of the word "California." This lack of discussion indicates that this minor change was not intended as a significant departure from existing law. When read as a whole, the former version of section 803, subdivision (g) implied that the law

enforcement agency, like the individual adult and agency mentioned in former subdivision (f), was duty-bound to take any necessary action to investigate and assist in the prosecution of sex crimes.

We conclude that the Legislature did not effect a change in the law by adding "California" to section 803, subdivision (g). Defendant, therefore, cannot show that application of the criteria that the victim report to a California law enforcement agency violated the guarantee against ex post facto laws.

In this case, Jane Doe initially disclosed the molestation during an interview with a counselor for the Nevada juvenile probation department. The counselor filed an abuse and neglect report, which indicated that the information would be forwarded to the California authorities. The next question, then, is whether the receipt by a California law enforcement agency of a report from the Nevada authorities concerning a sex crime committed against a child was sufficient to trigger the one-year period under section 803.

As held by the court in *Ream v. Superior Court* (1996) 48 Cal.App.4th 1812, the plain language of former section 803, subdivision (g), indicates that the statute of limitations begins once the victim reports the crime to the appropriate agency, not when the agency receives information through another source. In *Ream*, the defendant committed lewd and lascivious acts with a child who was six or seven years old in 1988. The People filed its case against defendant in 1995 after having received Polaroid pictures from defendant's ex-wife. The pictures depicted the child as asleep or unconscious. The child never reported the incident and even told an investigator that the defendant had not molested her.

In contending that the extension in former section 803, subdivision (g), applied, the People argued that it should not have been required to inform the victim, who was still a child of tender years, so that she might make the report herself. In rejecting the People's argument, the appellate court explained: "The relevant language of section 803(g) is clear and unambiguous. A prosecutor may file a complaint charging any of the specified sex offenses within 1 year of the date of 'a report to a 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' the offense. The statute makes no reference to a report by a person who is not a victim." (*Ream v. Superior Court*, *supra*, 48 Cal.App.4th at p. 1818.) The People specifically argued that the Legislature could not have intended to enlarge the statute of limitations to protect a victim who was aware of the molestation and yet not afford the same protection to a victim who was unaware of what had been done to her. The court answered: "We do not agree that application of section 803(g) according to its plain language achieves an absurd result. So applied, section 803(g) does not require the People to inform the victim of the crimes committed against her; it simply requires a report to law enforcement by the victim to remove the bar of the statute of limitations absent which, in this case, prosecution remains time-barred." (*Ream*, *supra*, 48 at p. 1819 [fn. omitted]; see also *People v. Renderos* (2003) 114 Cal.App.4th 961, 966.)

In addressing the specific question of whether the one-year period could be triggered when the law enforcement agency receives a report from a different source, the court, after considering the legislative history, explained that the Legislature anticipated that the law enforcement agency may receive other corroborating evidence of the crime,

but that the extension in former section 803, subdivision (g), applied only where the victim comes forward and files a report. (*Ream v. Superior Court, supra*, 48 Cal.App.4th at pp. 1820-1821.) The statute affords the child victims of sex crimes the opportunity to report crimes committed against them even after the standard statute of limitations has expired on the rationale that child victims may not come forward immediately, but instead may wait until adulthood or until they have overcome the psychological pressures often associated with such crimes. (*Ibid*.) Thus, the exception to the standard statute of limitations apply to reports made by victims only and not by nonvictims. (*Id*. at p. 1821.)

Unlike in *Ream*, the situation in this case is complicated by the fact that the California law enforcement agency may have received information from another law enforcement agency based on a report made by the victim herself. Nevertheless, the criteria in section 803—i.e., that the victim directly report the crime to a qualifying law enforcement agency—was not satisfied. Although the victim told her Nevada probation counselor about the molestation, she did not make the report to the California law enforcement agency as required under the statute. (See *People v. Maguire* (2002) 102 Cal.App.4th 396, 401.)

Furthermore, if we interpret the statute as requiring that the limitations period begins with the victim's disclosure to an out-of-state counselor, our interpretation would not only contradict the plain language of the statute, it also would fail to advance the goal of the statute. Under the statute, the one-year period begins once the victim informs the appropriate agency because, presumably, the agency is under a duty to investigate or prosecute the crime. (See *People v. Lopez* (1997) 52 Cal.App.4th 233, 247-248.) In this

case, there was no evidence in the record that the appropriate authorities knew about the crimes and investigated the matter. If the victim had informed the appropriate authorities in California, then it would be reasonable to impose a one-year limit because the state would be duty-bound to exercise diligence in investigating the matter and bringing charges if necessary. Disclosure to an out-of-state counselor may not have triggered the same response. Although a victim's out-of-state disclosure concerning a crime in California ordinarily may lead to prosecution within the state, imposing a one-year limit effectively would diminish and not enlarge the rights of victims who are now ready to come forward and make a report.

We conclude Jane Doe's disclosure to a probation counselor in Nevada did not trigger the one-year limitations period under former section 803, subdivision (g). Instead, the one-year period began when Jane reported the crime to the California authorities in 2004. The court, therefore, properly found that the prosecution filed its complaint within the one-year period under former section 803, subdivision (g).

4. Instructions on the Statute of Limitations

Defendant claims the trial court failed to instruct the jury on the elements required under former section 803, subdivision (g). Defendant also claims the court erred in giving CALJIC No. 10.60 on corroborating evidence, which contradicted one of the required elements.

A. Requirements of Former Section 803

Defendant specifically argues that there were disputed factual issues as to the element required under former section 803, subdivision (g), and, therefore, the trial court

should have instructed the jury on these elements and allowed the jury to make the necessary factual findings.

It is true that, "[t]he prosecution bears the burden of pleading and proving the charged offense was committed within the applicable period of limitations. [Citation.] 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. [Citations.] However, 'the statute of limitations is not an "element" of the offense insofar as the "definition" of criminal conduct is concerned.' [Citations.]" (See *People v. Linder* (2006) 139 Cal.App.4th 75, 84.)

Although the prosecution bears the burden of proving that the charges were timely filed, the defendant may move to dismiss the charges on the ground that the statute of limitations has expired as a matter of law. (See *People v. Lopez* (1997) 52 Cal.App.4th 233, 250-251; see also *People v. Zamora* (1976) 18 Cal.3d 538, 563-564, fn. 25.) "In such a case, the trial court may then decide the issue. If the court rules that the statute has run and dismisses the information or indictment, then the People may appeal that ruling. [Citation.] On the other hand, if the evidence either establishes that the statute has not run or is conflicting on the question, the court should deny the motion because there has been no proof that the statute has run as a matter of law. 'If the People prevail after such a hearing, then the limitation issue must still be resolved by the jury if it remains disputed by the defendant.' [Citation.]" (*Lopez, supra,* at p. 250.)

Under former section 803, subdivision (g), the required elements include that (1) the victim reported the crime to a law enforcement agency, (2) the crime involved

substantial sexual conduct, (3) independent evidence corroborated the victim's allegation, and (4) the prosecution began within a year of the victim's report. (See *People v. Linder, supra*, 139 Cal.App.4th at p. 81.)

During the hearing on defendant's motion, the court asked for argument as to the required elements for extending the statute of limitations under former section 803, subdivision (g). As to the last element, the prosecutor noted that the victim reported the crime in California in the fall of 2004. As to the third element, the prosecutor briefly argued that the evidence of defendant's sexual molestation of John Doe constituted sufficient corroboration of the victim's report. There appeared to be no dispute as to whether digital penetration constituted substantial sexual conduct. The parties focused primarily on the first element. As discussed above, defendant argued that the statute of limitations had run based on the victim's report to the Nevada authorities. The court rejected defendant's argument and denied the motion.

The pivotal issue, therefore, involved a legal question as to the first element—i.e., whether the limitations period began when the victim reported the crime to the Nevada authorities. At the hearing, defendant did not dispute whether there was sufficient corroborating evidence. "As 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. [Citation.]" (*People v. Smith* (2002) 98 Cal.App.4th 1182, 1192.)

Moreover, this is not a case where the parties did not litigate the statute of limitations issue. Instead, after a contested hearing, the court ruled that the complaint was timely filed based on the tolling provision under former section 803, subdivision (g),

and the victim's report to the California authorities in 2004. After the court's ruling, defendant did not ask to have the other factual issues presented to the jury and did not request an instruction on the required elements. While a criminal defendant may not lose the protection of the statute of limitations accidentally, he "may certainly lose the ability to litigate factual issues such as questions of tolling." (*People v. Williams* (1999) 21 Cal.4th 335, 344; see also *People v. Smith, supra*, 98 Cal.App.4th at p. 1193.)

The record shows that defendant did not place the elements of the tolling statute, including the requirement of corroborating evidence, at issue as a factual matter at trial. We conclude, therefore, that the trial court had no duty to instruct on the required elements of former section 803, subdivision (g).

B. Corroborating Evidence

Defendant argues that, in addition to failing to give an instruction on the requirement of corroborating evidence under former section 803, subdivision (g), the court erred in giving CALJIC No. 10.60. CALJIC No. 10.60 states: "It is not essential to a finding of guilt on a charge of child molestation that the testimony of the witness with whom sexual relations is alleged to have been committed be corroborated by other evidence." Although corroborating evidence was required under section 803, the instruction nevertheless provided a correct statement of law that applied to the jury's determination of guilt on the substantive charges.

As noted by the People, the California Supreme Court in *People v. Gammage* (1992) 2 Cal.4th 693, at pages 700 to 701, affirmed the rule that the conviction of a sex crime may be sustained upon the victim's uncorroborated testimony. The instruction

does not elevate the victim's credibility or otherwise affect the prosecution's burden of proof. (*Id*. at pp. 701-702.) CALJIC No. 10.60 is a correct statement of well-settled law. (See *People v. Adames* (1997) 54 Cal.App.4th 198, 210.) The instruction applied to all the substantive counts, including count 1. The court, therefore, properly instructed the jury with CALJIC No. 10.60.

Although corroborating evidence was required as an element of the tolling provision, the statute of limitations issue was not before the jury. As stated above, none of the elements of the tolling provisions remained at issue after the hearing on defendant's pretrial motion to dismiss count 1. And, even if the statute of limitations issue had been presented to the jury, it was incumbent upon defendant to request a limiting instruction. (See *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711.)

The court's instruction was correct and adequate for the purpose of resolving the issues presented to the jury.

5. Sufficiency of the Evidence

Defendant also argues that the prosecution failed to prove that the crime was committed within the applicable statute of limitations.

The statute of limitations is not an essential element of a crime that must be found by a jury to support a conviction for that offense. (See *People v. Linder*, *supra*, 139 Cal.App.4th at p. 84.) Rather, the statute of limitations issue may be presented to the court and resolved at a pretrial hearing. (See *People v. Zamora, supra,* 18 Cal.3d at pp. 563-564, fn. 25.) "If the People prevail after such a hearing, then the limitation issue must still be resolved by the jury if it remains disputed by the defendant." (*Ibid*.)

As stated above, in this case, the issue did not remain disputed by defendant. At the hearing, the only dispute was over the interpretation of the applicable tolling statute, which was decided adversely to defendant then, and now on appeal. Because the other issues were not disputed by defendant, the court had no occasion to present the issue to the jury and the prosecution had no corresponding duty to prove that the tolling provision applied.

6. CALJIC No. 10.47

Defendant claims the trial court erred in refusing to instruct the jury with CALJIC No. 10.47 on the elements of the crime of sodomy with a minor. Defendant argues that sodomy with a child under the age of 18 (§ 286, subd. (b)(1)), was a lesser-included offense of sodomy by force (§ 286, subd. (c)(2)).

Defendant was charged with two counts of sodomy by force (§ 286, subd. (c)(2)). During the trial, defendant's attorney argued that sodomy with a child was a lesser-included offense of sodomy by force and requested CALJIC No. 10.47 on the elements of sodomy with a child. The trial court disagreed with defendant and denied his request.

"A trial court must instruct the jury on a lesser included offense when the evidence raises a question whether all of the elements of the charged crime are present, and the evidence would support a conviction of the lesser offense. [Citation.] '[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citation.]" (*People v. Wilkinson* (2004) 33 Cal.4th 821, 855.)

Under both the elements test and the accusatory pleading test, sodomy with a child under 18 is not a lesser included offense of sodomy by force. The statutory elements of the greater offense does not include an essential element of the lesser offense, namely, that the victim be a person under 18 years of age. "The nonforcible sex crimes require the perpetrator and victim to be within certain age limits while the forcible sex crimes do not [citation]; thus, the nonforcible crimes are not lesser included offenses of the forcible sex crimes." (*People v. Scott* (2000) 83 Cal.App.4th 784, 794.)

Counts 6 and 8 in the fourth amended information also do not contain an allegation concerning the age of the victim. We reject defendant's suggestion that we should take into consideration the allegations of the victim's age elsewhere in the charging document. In determining whether an offense is necessarily included in a greater offense, we consider each count independently. We cannot piece together elements from crimes charged under separate counts to find a lesser included offense where there is none.

We conclude that the trial court properly found that sodomy with a child under 18 was not a lesser included offense of the crimes charged in counts 6 and 8.

7. CALJIC No. 10.65

Defendant also claims the trial court erred in refusing to instruct the jury with CALJIC No. 10.65 on consent. CALJIC No. 10.65 states, in part, "[t]here is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in . . . [sodomy] . . . ." (CALJIC No. 10.65 (April 2006 ed.).) The trial court denied defendant's request on the mistaken assumption that consent

was not at issue where the crimes involved a child. (See *People v. Anderson* (1983) 144 Cal.App.3d 55, 61-62.) Defendant argues that, because consent would negate the force or fear required for the crime of forcible sodomy, as charged in counts 6 and 8, the trial court should have given the requested instruction.

A trial court must give a requested instruction on a defense theory if it is supported by substantial evidence. (*People v. Panah* (2005) 35 Cal.4th 395, 484.) In particular, CALJIC No. 10.65 is an instruction regarding a mistake of fact and is appropriate when there is some evidence deserving consideration that defendant honestly and reasonably, albeit mistakenly, believed that the victim consented to the sex act. (See *People v. Williams* (1992) 4 Cal.4th 354, citing *People v. Mayberry* (1975) 15 Cal.3d 143, 157.) If supported by substantial evidence, the court should provide an instruction that is requested by the defense even if it is inconsistent with defendant's main theory at trial. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 611-612, 615.)

In this case, defendant's statements during the pretext call may have supported a reasonable and good faith belief that John Doe consented to engage in the acts of sodomy. For example, defendant said, "We could sit and argue all day but you know what, if you [*sic*] sitting down recording this I'm gonna tell you the truth, 'you asked me,' I mean, 'I asked you,' and you said 'sure' and you know like, I mean you even asked me--" Defendant also said, ". . . you act like I forced you every single time you always, [John] I, totally, you were cool with it, you were like, 'you wanna do this?' 'uh, yes sir.'" While these statements also are consistent with a finding that John Doe acquiesced in the acts because of fear, this evidence could have provided an adequate

basis for giving the requested instruction. We conclude that the trial court erred in denying defendant's request.

The error, however, was harmless under any standard. (See *People v. Anderson*, *supra*, 144 Cal.App.3d at p. 62.) In this case, although defendant requested CALJIC No. 10.65, the defense theory was that the incidents of sodomy did not occur and that there was a lack of evidence corroborating John Doe's allegations. Defendant's trial attorney argued that, in addition to a lack of physical evidence, none of the other family members who supposedly caught them in the act or saw them immediately afterward confirmed John's testimony concerning the incidents and his injuries. Defendant's trial attorney attacked John's credibility and pointed out inconsistencies in his testimony. The absence of an instruction on consent did not affect defendant's trial. When the defendant relies on the defense of consent, the defendant admits that the acts occurred, but that the victim consented to participate in the sex acts. (See *People v. Key* (1984) 153 Cal.App.3d 888, 897.) If the defendant denies that the acts occurred, he cannot claim that the victim consented. Consent is inconsistent with the theory that the victim fabricated the allegations.

Furthermore, defendant argues that John consented because he was afraid of him. A violation of section 286, subdivision (c)(2), occurs when the defendant commits the act of sodomy by force, violence, duress, menace or fear. If defendant took advantage of John's fear, John's participation was secured not by consent, but by force or fear within the meaning of the state. When the victim feels compelled to obey out of fear, such

compulsion is inconsistent with a claim of consent. (See generally *People v. Majors* (2004) 33 Cal.4th 321, 326-327.)

Theoretically, the victim may be afraid and the defendant may be unaware of the victim's fear. Nevertheless, defendant's own statements contradict his claim of a reasonable and good faith belief that John consented to the sex acts. Defendant admitted that he experimented on John and "tortured the hell out of [him]." Defendant also did not deny that, during the course of their relationship, defendant occasionally used force, including that he hit John, grabbed him by the throat, and gave him a bloody nose. Therefore, while it may be theoretically possible for defendant to be unaware of John's fear, the evidence shows that defendant either forced John to participate in the sex acts or John acquiesced out of fear of reprisal. Either way, overwhelming evidence contradicted defendant's consent defense.

We conclude that, although the trial court should have given the instruction because there was some evidence that supported it, the evidence in the record overwhelmingly supported the jury's finding that defendant committed the acts by force or fear.

8. *Falsetta*

Defendant raises a due process objection to the trial court's admission of evidence of other uncharged sex acts under Evidence Code section 1108. Defendant, however, acknowledges that the California Supreme Court has rejected the same objection in *People v. Falsetta* (1999) 21 Cal.4th 903. He raises the issue solely for the purpose of preserving the issue for federal review. As anticipated, we are bound by our Supreme

Court's holding in *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

9. *Blakely*

Also for the purpose of preserving the matter for further review, defendant claims the trial court erred by imposing the upper term in count 6 based on facts not found by a jury beyond a reasonable doubt in violation of the rule established in *Blakely v. Washington, supra,* 542 U.S. 296. As defendant acknowledges, the California Supreme Court has rejected this claim and found that the trial court's exercise of judicial discretion to impose the upper term does not violate defendant's constitutional right. (*People v. Black* (2005) 35 Cal.4th 1238, 1244.) As long as *Black* remains good law, we are bound by our Supreme Court's holding. (See *Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at pp. 455-456.)

10. Disposition

We affirm the judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Hollenhorst
Acting P. J.

We concur:

s/Richli
J.

s/Miller
J.