Filed 4/28/09 In re A.G. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re A.G., a Person Coming Under the Juvenile Court Law. _____ THE PEOPLE, Plaintiff and Respondent, v. A.G., Defendant and Appellant.	B200748 (Los Angeles County Super. Ct. No. FJ37215)

APPEAL from an order of the Superior Court of Los Angeles County, Shep A. Zebberman, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

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A.G., a minor, appeals from the order of wardship (Welf. & Inst. Code, § 602) entered following a determination that he committed a forcible lewd act upon a child (Pen. Code, § 288, subd. (b)(1)). The court ordered appellant committed to the Division of Juvenile Justice for a maximum theoretical period of confinement of eight years. We affirm the order of wardship.

FACTUAL SUMMARY

1. *The People's Evidence*.

a. *The Present Offense*.

1) *The First Incident*.

Appellant was born on January 5, 1985.[1] G.M., who was born in December 1992, was appellant's niece. In 2000, G.M., appellant, and other relatives lived at the house of G.M.'s grandmother. G.M. testified about an incident which occurred at the house in 2000, and which, according to her, must have occurred in the fall because the days were cloudy. The first incident occurred when she was seven years old, and perhaps was about to turn eight years old. She testified the incident must have occurred in November, but she also indicated that she was not sure about the month. The first incident occurred during a weekend.

As to this first incident, G.M. and appellant were sitting together in the garage and playing hide and seek. Appellant was 15 years old, and G.M. was 7 years old. At one point while the two were in the garage, appellant kissed G.M.'s lips. He had her sit on his lap, but she got off because she felt uncomfortable.

G.M. sat next to appellant. He took out his penis, grabbed G.M.'s hand, and put it on his penis. G.M. resisted somewhat and was somewhat afraid, but she did not know why she was afraid. When asked whether appellant used force when appellant grabbed her hand, G.M. testified appellant used "somewhat of force[,]" meaning "if I didn't want my hand to be placed there and he grabbed my hand and placed it there . . . ." (*Sic*.)

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[1] There is no dispute that this was appellant's birth date. We note that, in appellant's opening brief, his statement of the case and statement of facts reflect the above date as his birth date.

When asked what she meant by saying appellant "somewhat grabbed [her] hand," she replied she meant she resisted but did not resist "as much."

Appellant eventually stopped what he was doing, put his finger to his lips, and told her not to tell anyone what had happened. G.M. thought this meant that what had happened was a secret, and she told no one about the incident.[2] Appellant was heavier, taller, and stronger than G.M.

2) *The Second Incident*.

G.M. testified that a second incident occurred after school during early spring. She was about the same age then as she was during the first incident. At the time of the second incident, appellant was 16 years old and G.M. was 8 years old. G.M. testified there were perhaps a couple of weeks to a month between the first and second incidents, and she was the same age during both.

During the second incident, appellant approached G.M. behind the garage, kissed her, then French-kissed her. G.M. pushed appellant away and said no. Appellant took out his penis and told her to put her mouth on it. G.M. told him no, but he eventually convinced her to do it. She put her mouth on appellant's penis but quickly took her mouth off and pushed him away. Appellant looked upset and escorted her from behind the garage.

3) *The Third Incident*.

G.M. testified a third incident occurred when she was around nine years old. The incident occurred near the hot or warm days, i.e., around spring. G.M. testified that nearly two months had passed between the second and third incidents. She also testified there were four or five months between the second and third incidents. She further testified the third incident occurred during the beginning of the year. G.M. testified she was nine years old, or about nine years old, when the third incident occurred. She later testified she was eight years old at the time of the third incident.

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[2] G.M. erroneously told police that appellant pulled down her pants during this incident. She had confused the multiple incidents which had occurred. G.M. had received therapy, and believed her memory was more clear at the adjudication.

G.M. testified as follows concerning the third incident. The adults were gone and G.M. was told that appellant was in charge. Appellant and G.M. entered the garage, and appellant kissed her. He took out his penis and pulled down G.M.'s jeans and underwear. She did not resist. She did not know whether what was occurring was good or bad.

Appellant tried to have G.M. sit on his hard penis, but he did not penetrate her. G.M. cried because it hurt, and appellant stopped. Appellant told her to bend over a wardrobe, then he separated her buttocks and looked at them. His hands tickled her and she felt uncomfortable. Her pants and underwear were around her ankles. Appellant suddenly stopped, told her to put her clothes on, and later told her to keep quiet about what had happened. G.M. thought appellant would be mad at her if she did not keep quiet. She thought there was nothing she could do to stop appellant's abuse, and she did not feel that she could protect herself. G.M. considered appellant to be somewhat of an adult because he was the eldest.

As to each of the three incidents, G.M. felt that the fact that she considered appellant to be somewhat of an adult impacted her responses to him. If G.M.'s mother or grandmother came home and appellant said that G.M. had been bad, she would be punished. P.G., G.M.'s mother, was very violent and would whip G.M. with a belt. G.M. did not tell P.G. what had occurred because she never listened to G.M. and never bothered to ask what was wrong. G.M. was afraid to tell her grandmother about the abuse because G.M. thought her grandmother would become angry with P.G. G.M. and P.G. were staying with G.M.'s grandmother and had nowhere else to go.

b. *Appellant's Uncharged Offense Against M.M.*

M.M., who was born in July 1995, testified she was five years old when she lived with, inter alia, her grandmother, G.M., and appellant. M.M. moved out of the house when she was six years old. Appellant abused M.M. The first incident occurred in appellant's room. Appellant told M.M. to lie on his bed, then he pulled off her pants and underwear. Appellant, whose clothes were off, inserted his penis inside her. Appellant's penis was erect and it hurt M.M. M.M. cried and told appellant to get off of her. He did not then comply, but eventually did.

2. *Defense Evidence*.

In defense, V.G., appellant's sister, testified that in about 1999 or 2000, she lived with G.M. and appellant. V.G. denied seeing inappropriate sexual conduct between appellant and anyone. However, V.G. also testified that M.M. had never lied to V.G. G.M. had emotional problems and had not always been truthful with V.G. P.G. was occasionally violent towards G.M.

M.G., another sister of appellant, lived at the residence from 1996 through 2000. She denied that appellant was left in charge of the children. She never saw appellant do anything sexually inappropriate. According to M.G., G.M. had a reputation for lying, and G.M. and M.M. had lied to M.G. On one occasion, G.M. lied and said a man had followed her home. There were occasions when P.G. was not the most responsible mother, and M.G. and P.G. occasionally argued about the latter being violent towards her children.

CONTENTIONS

Appellant claims (1) the trial court erroneously admitted evidence of appellant's sexual act involving M.M., (2) there was insufficient evidence of force, duress, fear, and menace, (3) there was insufficient evidence appellant was 16 years old at the time of the offense, (4) the trial court erroneously committed appellant to DJJ, (5) the referee lacked authority to conduct appellant's dispositional hearing, (6) appellant was entitled to a jury trial, (7) imposition of the sex registration requirement violated his right to equal protection, and (8) imposition of the residence restriction violated the Ex Post Facto Clause of the federal Constitution.[3]

DISCUSSION

1. *The Trial Court Properly Admitted Evidence of Appellant's Sexual Act Involving M.M.*

a. *Pertinent Facts*.

During trial, M.M. testified, in pertinent part, that appellant began touching her when she was five years old. Appellant objected the testimony was irrelevant, excludable

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[3] Appellant's first and second claims are contained in his opening brief. His third, fourth, and fifth claims are contained in his supplemental opening brief. His last three claims are contained in his second supplemental opening brief.

under Evidence Code section 352, and violative of his right to due process. Appellant argued that the district attorney's office had considered and had rejected for prosecution any allegations of sexual offenses by appellant against M.M. The prosecutor indicated the evidence was admissible under Evidence Code section 1108. The court overruled appellant's objection. M.M. testified as indicated in the Factual Summary.

b. *Analysis*.

Appellant claims the trial court erred by refusing to exclude, under Evidence Code section 352, M.M.'s testimony and the testimony was irrelevant. We disagree. An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including a ruling concerning relevance or Evidence Code section 352. (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 723-725.) As to the relevance issue, our Supreme Court observed in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), "evidence of a defendant's other sex offenses constitutes *relevant* circumstantial evidence that he committed the charged sex offenses." (*Id.* at p. 920, italics added.) The trial court did not abuse its discretion by admitting into evidence as relevant the challenged evidence.

As propensity evidence under Evidence Code section 1108, appellant's rape of M.M.[4] was highly probative of his propensity to engage in sexual misconduct with his female relatives. (Cf. *People v. Soto* (1998) 64 Cal.App.4th 966, 991.) Notwithstanding appellant's argument to the contrary, the evidence of the rape came from an independent source--M.M.--since appellant's sexual act towards her appears to have occurred in 2000, but, as discussed later, two of the sexual acts appellant committed against G.M. appear to have occurred in 2001.

Appellant claims evidence of his rape of M.M. was more serious and inflammatory than the present offense, he was not convicted of the rape, and this increased the prejudice which resulted from the trial court receiving M.M.'s testimony. Faced with a similar claim, the court in *People v. Frazier* (2001) 89 Cal.App.4th 30, observed, "The charged and uncharged crimes need not be sufficiently similar that

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[4] Appellant concedes M.M. testified that appellant put his penis in her vagina.

evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108. [Fn. omitted.]" (*People v. Frazier*, *supra*, at pp. 40-41.) In the present case, the charged offense and the uncharged rape are sex offenses as defined in Evidence Code section 1108, subdivisions (a), and (d)(1)(A).

The fact that appellant was not convicted of the rape of M.M. arguably may have increased the risk that a jury would convict him of the present offense to punish him for the prior one. However, the present case involved a court trial. It is presumed the trial court knew and followed applicable law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) This includes the legal principles that the People had the burden to prove each element of the present offense beyond a reasonable doubt, and that the court could not convict appellant of any crime with which he was not charged.

The 2000 rape was not too remote in time (cf. *People v. Ewoldt*, (1994), 7 Cal.4th 380, 405; *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285), and usually any remoteness of evidence goes to weight, not admissibility. (*People v. Archerd* (1970) 3 Cal.3d 615, 639.) The introduction of M.M.'s testimony did not result in an undue consumption of time. (Cf. *People v. Frazier*, *supra*, 89 Cal.App.4th at p. 42.) Further, this is not a case in which the evidence of the rape of M.M. was "cumulative regarding an issue that was not reasonably subject to dispute." (*People v. Ewoldt*, *supra*, at p. 406.) Appellant's defense placed G.M.'s credibility in issue. Notwithstanding appellant's suggestion to the contrary, whether the People brought, or should have brought, charges against appellant based on the evidence of his rape of M.M. was irrelevant.

On this record, we believe the trial court understood and fulfilled its responsibilities under Evidence Code section 352, and the trial court did not abuse its discretion by refusing to exclude, under that section, evidence of appellant's 2000 rape of M.M. as propensity evidence.

2. *There Was Sufficient Evidence that Appellant Committed the Present Offense.*

Appellant does not dispute there was sufficient evidence that he committed a lewd or lascivious act in violation of Penal Code section 288, subdivision (a). He claims only

that there was insufficient evidence that he committed said act(s) by use of the requisite force, violence, duress, menace, or fear for purposes of Penal Code section 288, subdivision (b)(1). We reject his claim.

Penal Code section 288, states, in relevant part, "(a) Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . . . [¶] (b)(1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony. . . ."

" 'Force' as used in [the context of Penal Code section 288, subdivision (b)(1)] means 'physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474 . . . .)" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.)

" 'Duress' as used in this context means 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 . . . ; [citation].)" (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 13.)

Moreover, " 'The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' (*People v. Pitmon*, [170 Cal.App.3d 38,] 51.) Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. (*People v. Senior* [(1992)] 3 Cal.App.4th 765, 775; *People v. Schulz* [(1992)] 2 Cal.App.4th 999, 1005.)" (*People v. Cochran*, *supra*, 103 Cal.App.4th at pp. 13-14.)

"[I]n *People v. Pitmon*, *supra*, 170 Cal.App.3d 38, 47-48, 51, the court found sufficient evidence of duress despite the victim's testimony the defendant did not use force or violence and never threatened to hurt her. The court stated that 'at the time of the offenses, [the victim] was eight years old, an age at which adults are commonly viewed as authority figures. The disparity in physical size between an eight-year-old and an adult also contributes to a youngster's sense of [her] relative physical vulnerability.' (*Id.* at p. 51; see also *People v. Sanchez* (1989) 208 Cal.App.3d 721, 747-748 . . . [duress found where defendant molested eight-year-old granddaughter repeatedly over a three-year period and victim viewed defendant as a father figure]; *People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 239 . . . ['Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim' is relevant to determining duress].)" (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 14.)

In the present case, G.M. testified concerning three incidents. As to the first incident, and the issue of force, appellant did not merely cause G.M.'s hand to touch his penis. He grabbed her hand and put it on his penis, used force somewhat, and she resisted his efforts to put her hand there. As to duress, G.M. was seven years old, and appellant was her 15-year-old uncle. She resisted appellant somewhat, but stopped because she was afraid. The two were in a secluded location, and he told her not to tell anyone what had happened. Appellant was heavier, much taller, and stronger than G.M. The trial court reasonably could have concluded that this contributed to G.M.'s sense of relative physical vulnerability.

As to the second incident and the issue of duress, the second incident, like the first incident, occurred in a secluded location: behind the garage. G.M. was eight years old, and appellant was her now 16-year-old uncle. After appellant French-kissed G.M., she resisted appellant, pushing him away, and said no. Nonetheless, appellant took out his penis, told her to put her mouth on it, and she did so. Again, the trial court reasonably could have concluded that because appellant was heavier, much taller, and stronger than G.M., this contributed to her sense of vulnerability.

As to the third incident, the issue of duress, and the issue of fear of immediate bodily injury, that incident occurred in the secluded location of the garage. G.M. was nine years old, and appellant was 16 years old. When appellant had G.M. sit on his penis, she cried, indicating she did not like what was happening.

G.M. thought nothing could be done to stop appellant's abuse, which evidenced appellant's dominance and continuous exploitation of G.M. G.M. feared that if she revealed what had been happening, she and her mother would have to leave the home, thus jeopardizing the family.

The adults were gone, G.M. was told appellant was in charge, and she considered him to be somewhat of an adult. Again, his superior physical stature increased her sense of vulnerability, and the trial court reasonably could have concluded that G.M. viewed appellant as somewhat of an authority figure. Appellant told her to be quiet about what had happened. G.M. thought appellant would be angry with her if she did not keep quiet.

As to each of the three incidents, G.M. felt that the fact that she considered appellant to be somewhat of an adult impacted her responses to him. If G.M.'s mother or grandmother came home and appellant said that G.M. had been bad, she would be punished. P.G., G.M.'s mother, was very violent and would whip G.M. with a belt. G.M. did not tell P.G. what had occurred because she never listened to G.M. and never bothered to ask what was wrong. G.M. was afraid to tell her grandmother about the abuse because G.M. thought her grandmother would become angry with P.G. G.M. and P.G. were staying with G.M.'s grandmother and had nowhere else to go.

We conclude there was sufficient evidence that appellant committed a forcible lewd act upon a child, including sufficient evidence of the requisite "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim" within the meaning of Penal Code section 288, subdivision (b)(1). (Cf. *People v. Cochran, supra,* 103 Cal.App.4th at pp. 13-16, fn. 6; *People v. Bolander* (1994) 23 Cal.App.4th 155, 158-161; *People v. Knox* (1988) 204 Cal.App.3d 197, 203; *People v. Pitmon, supra,* 170 Cal.App.3d at pp. 45, 47-51.)

3. *There Was Sufficient Evidence That Appellant Was 16 Years Old When He Committed the Offense.*

Appellant claims the present offense cannot in the future be used as a prior felony conviction for purposes of the "Three Strikes" law because, according to appellant, he was not 16 years old at the time of the present offense.[5] Assuming without deciding that the issue is ripe for review, we reject appellant's claim.

For purposes of appellant's present claim, there is no dispute as to the sufficiency of the evidence that, during each of the three incidents to which G.M. testified, appellant committed an act which violated Penal Code section 288, subdivision (b)(1). Nor is there any dispute that appellant was 16 years old on January 5, 2001, and that if any one of the above mentioned three acts occurred after that date, there is sufficient evidence that the present offense could qualify as a "prior juvenile adjudication" and a "prior felony conviction" for purposes of the Three Strikes law. Appellant argues there is insufficient evidence that the present offense could qualify as a prior felony conviction because he may have committed all three acts prior to January 5, 2001, i.e., before he was 16 years old.

Our power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the trial court's finding. (Cf. *People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.)

G.M. testified the second incident occurred in early spring, she was eight years old, and appellant was 16 years old. According to this testimony, the second sexual incident would have occurred in the spring of 2001, i.e., after appellant became 16 years old on January 5, 2001. The third incident, of course, occurred later. We conclude there

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[5] Penal Code section 667, subdivision (d)(3)(A) states "A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense." Appellant does not claim that, after the court in the present case found that he committed the present offense, he was convicted of a later offense. We assume without deciding that appellant's claim that the present offense does not qualify as a prior felony conviction is not premature.

was sufficient evidence that appellant's present offense could qualify as a "prior juvenile adjudication" and thus a "prior felony conviction" for purposes of the Three Strikes law, including sufficient evidence that appellant was 16 years of age or older when he committed the present offense.

4. *The Court Properly Committed Appellant to the Division of Juvenile Justice*.

a. *Pertinent Facts*.

The probation report dated November 30, 2005, reflects that when appellant was 16 years old, he was arrested for vandalism. In January 2002, the court sustained a petition alleging this offense, and the court ordered appellant placed home on probation. When appellant was 19 years old, he was arrested for possession of a controlled substance. The court ordered him placed on deferred entry of judgment.

The probation officer indicated, in pertinent part, as follows. The present allegations against appellant were extremely serious. Although appellant did not have an extensive arrest record, he had associated with gangs. The abuse against G.M. caused irreversible harm to her. Appellant was participating in a counseling program, as well as other rehabilitative services, when he abused G.M.

The probation officer also indicated as follows. Neither G.M.'s mother nor appellant's mother provided adequate supervision. Appellant was entrusted to babysit G.M., and used his age and size to abuse her. Appellant was now 20 years old and might still be residing with his mother. The probation officer was extremely concerned that appellant's mother had a five-year-old daughter, and appellant's mother had not asked the daughter whether appellant had molested her. The daughter and appellant's three-year-old nephew could become potential victims.

The probation officer opined appellant was a threat to younger children in his mother's residence and in the community. Moreover, because appellant's then-current whereabouts were unknown, he had failed to report to the probation officer as directed and appellant was a flight risk. Because appellant was 20 years old, the probation officer could not recommend juvenile rehabilitation services. The court previously had placed appellant home on probation. The probation officer recommended that appellant be

committed to the Division of Juvenile Justice (DJJ).[6] At DJJ, appellant would be provided with an intensive sex offender treatment program which could address his sexual deviance. He would also be provided educational and vocational training to help him transition back to the community.

A probation report dated April 12, 2007, reflects appellant was on formal adult probation for possessing a controlled substance. The probation officer referred to the previous probation report and recommended that appellant be placed in DJJ.

In a 10-page report dated June 1, 2007, and prepared by defense psychologist Robert Anderson, he indicated as follows. Appellant was not a threat to the community; therefore, a DJJ commitment could not be justified on the ground that appellant was such a threat. Treatment outside DJJ would be more effective. Appellant could receive more specialized treatment outside DJJ since his girlfriend might be involved in the treatment and he would be in an adult treatment group and not in a juvenile treatment group. Anderson did not recommend that appellant be placed in DJJ.

At the June 25, 2007 dispositional hearing, the court indicated it had read the November 2005 probation report and Anderson's report, and noted the probation report recommended that appellant be committed to DJJ. Appellant argued his codefendant George G.[7] had committed similar offenses, appellant was similar situated to him, and George G. had been suitably placed. Appellant suggested that appellant similarly deserved suitable placement or camp placement. Appellant noted he was 22 years old and the court should not punish him for that fact by placing him in DJJ which could require him to register as a sex offender. Appellant indicated there was no evidence he would receive at DJJ the counseling recommended by Anderson, no evidence appellant would benefit from a DJJ commitment, and such a commitment was punitive. Appellant recommended that the court order appellant to serve time in county jail prior to disposition.

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[6] In July 2005, the California Youth Authority was renamed the Division of Juvenile Justice of the Department of Corrections and Rehabilitation (DJJ). Hereafter, we use the term DJJ.

[7] George G. is not a party to this appeal.

The court indicated as follows. The court had considered not only the reports but the evidence in the present case. Releasing appellant would not be appropriate. If appellant were committed to DJJ, he would have an opportunity to receive sexual offender counseling, an option he would not have if he were sent to county jail. The court found, inter alia, that the mental and physical condition and qualifications of appellant rendered it probable that he would benefit from the reformatory discipline or other treatment provided by DJJ. The court ordered appellant committed to DJJ.

b. *Analysis*.

The record reflects the court was familiar with the original offense, read the various reports, and heard argument of counsel. In the absence of any contrary indication, the court is presumed to have considered all relevant factors and was not required to state reasons for its placement. (Cf. *In re John H.* (1978) 21 Cal.3d 18, 27; *People v. Moran* (1970) 1 Cal.3d 755, 762.) We conclude the juvenile court below considered and rejected less restrictive alternatives and, based on the totality of the circumstances, substantial evidence supported the decision to commit appellant to DJJ. The dispositional choice was well within the discretion of the court. (Cf. *In re Ricky H.* (1981) 30 Cal.3d 176, 182-184; *In re Pedro M.* (2000) 81 Cal.App.4th 550, 553, 555-556; *In re Asean D.* (1993) 14 Cal.App.4th 467, 473; *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395-1397; *In re James H.* (1985) 165 Cal.App.3d 911, 922-923.)

5. *Appellant Stipulated to the Referee Acting As Temporary Judge at the Dispositional Hearing.*

a. *Pertinent Facts*.

On November 30, 2005, the parties filed a "Stipulation for Appointment of Referee as Temporary Judge (Article VI, Section 21, California Constitution)."[8] The stipulation stated, in pertinent part, that "Shep Zebberman . . . may, as Temporary Judge, try the jurisdiction hearing in said cause." On the written form, Judge Zebberman signed his consent to act as Temporary Judge, and the presiding judge signed a statement which

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[8] That constitutional provision states, "On stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause."

said, "Pursuant to Rule 244, California Rules of Court, the foregoing selection of the above named Referee as Temporary Judge in the above entitled cause is hereby approved, and it is ordered that the jurisdiction hearing is [*sic*] said cause be tried by such Temporary Judge."

On March 27, 2007, at the conclusion of the adjudication, the court (that is, the referee acting as temporary judge) found true the allegation that appellant committed a violation of Penal Code section 288, subdivision (b)(1), and the court found the offense to be a felony. The court then asked if the parties were ready for disposition. The prosecutor said yes. Appellant indicated there was no current probation report. Appellant did not then expressly state whether he wanted a current probation report or whether he was ready for disposition.

The court indicated that if appellant wanted a current probation report, the court would order one, but the court intended to detain appellant pending disposition. Appellant still did not expressly state whether he wanted a current probation report or whether he was ready for disposition. Instead, appellant's counsel asked what the court's indicated disposition was.

The court indicated the original probation report recommended a DJJ commitment, and the court asked if appellant was 22 years old. Appellant replied yes. The court indicated it had multiple dispositional options including DJJ, home on probation, and county jail. Appellant indicated the prosecutor had made a pretrial offer of county jail. The People objected and asked the court not to consider the offer.

The court said it thought home on probation was inappropriate, and the court indicated it would either order appellant committed to DJJ or order him to serve time in county jail. The court asked what the People's position was, and the prosecutor indicated appellant deserved commitment to DJJ. Appellant asked the court to consider county jail time.

The court asked if appellant wanted to do the disposition that day or wanted a supplemental report. Appellant did not answer the question. Instead, appellant's counsel said he wanted an indicated disposition from the court, and noted the People's offer had

been 180 days in county jail. The People again objected and indicated the court should not consider the offer.

The court said it would not consider the People's previous offer. The court indicated it thought commitment to DJJ was an appropriate disposition and if appellant wanted to get a supplemental report or additional information, the court would review it. Appellant agreed that the court review same.

The court ordered appellant detained pending disposition. Appellant asked for a dispositional hearing date of April 12, 2007. The prosecutor indicated he preferred that the disposition occur that same week. The court said the present case was a DJJ case and the court needed a current report. The court ordered the matter continued to April 12, 2007, for the dispositional hearing. The court indicated the statutory time was waived, and the court ordered the probation department to prepare a supplemental probation report. The March 27, 2007 minute order reflects the case was continued for disposition.

On April 11, 2007, appellant filed a motion for a new adjudication and/or motion for reconsideration on the ground the sustaining of the petition was contrary to the law and evidence because there was insufficient evidence that appellant violated Penal Code section 288, subdivision (b)(1).

A probation report dated April 12, 2007, indicated the matter was on calendar for disposition and for a recommendation from the probation officer. The report recommended that appellant be placed in DJJ.

On April 12, 2007, the court called the case for disposition and acknowledged the court had a motion for a new adjudication. Appellant asked that the court set the motion for hearing. The court scheduled the hearing for May 4, 2007. The court asked if May 4, 2007, was the date for disposition as well in the event the motion for a new adjudication was denied. Appellant said he would do his best to be prepared to go forward with the disposition, but depending on the outcome of an ex parte application he had made, and whether he obtained related material, he might have to continue the disposition. However, appellant said he would do his best to have everything together by that date. The court indicated it would set the disposition for May 4, 2007 and address the contingencies on that date.

On May 4, 2007, the court called the case for disposition and asked if the parties were ready. Appellant indicated he was not and said that, on the previous Monday, he had filed a motion to continue. Appellant indicated he had not received the defense psychologist's report.

The court indicated it would continue the cases of appellant and the codefendant. The court asked the codefendant if he were ready to proceed with disposition, and the codefendant indicated he was ready. Appellant indicated he had scheduled a motion as well as a disposition. He said he had no objection to doing the motion and had no objection to proceeding if the motion was not granted. The court continued the matter to May 25, 2007, and appellant waived time to that date for disposition. The May 4, 2007 minute order reflects the case was continued to May 25, 2007, for disposition and motion for reconsideration. On May 23, 2007, appellant filed a motion to continue to permit him to obtain the psychologist's report.

On May 25, 2007, the court called the case for disposition and to rule on appellant's continuance motion. The court asked if it could hear the motion for a new adjudication, but appellant indicated that, given his continuance motion, he was not prepared to argue the motion for a new adjudication. The court continued the matter to June 13, 2007, for hearing on the motion for a new adjudication and for possible disposition. Appellant waived time for the disposition to June 13, 2007. The May 25, 2007 minute order reflects the matter was continued to June 13, 2007, for disposition and a motion.

On June 13, 2007, the court called the case for a hearing on the motion for a new adjudication. After argument, the court denied the motion. Appellant then requested to file with the court an application for rehearing, purportedly pursuant to Welfare and Institutions Code section 252.[9] He also asked under that section that the present matter be heard by a judge.

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[9] The section states, in pertinent part, that "At any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee, a minor . . . may apply to the juvenile court for a rehearing." It appears that appellant's premise for any filing of an application for rehearing was that the previous proceedings had been

Appellant later indicated he did not know whether the court's clerk was supposed to accept the application or whether appellant had to file it in the clerk's office, but the application would be filed that same day and appellant was requesting that the court stay proceedings pending a rehearing by a judge. Appellant argued he was concerned that the court had indicated that DJJ was the only available dispositional option, appellant had intended to argue the issue but the court already had indicated its position, and if appellant were committed to DJJ, he would have to register as a sex offender for the rest of his life.

At no time during the above proceedings did appellant (1) state he had not stipulated to the referee acting as a temporary judge to conduct dispositional proceedings or the dispositional hearing, or (2) object to the referee acting as a temporary judge to handle such dispositional matters. The court later denied without prejudice the request for a stay, indicating appellant could request a stay before the rehearing judge.

Appellant then, for the first time, objected to the present court conducting the dispositional hearing. Appellant argued the parties had stipulated that the court could conduct only the jurisdictional hearing. Appellant said the stipulation did not mention the dispositional hearing, and that the stipulation was ambiguous. After discussing pertinent authority, the court continued the matter to June 25, 2007, for a hearing on whether it could hear the disposition.

On June 25, 2007, the court indicated it had reviewed pertinent authority, the court believed it had authority to issue dispositional orders, and the court intended to do so. Appellant objected but indicated there was an ambiguity in the stipulation. The court began to conduct the disposition hearing.

Appellant later indicated that on June 12, 2007, he had submitted an application for rehearing, the application was stamped and dated received, but he had never filed it with the court. The court indicated that such an application had been stamped received on June 13, 2007. The court denied the application without prejudice in light of appellant's stipulation filed on November 30, 2005. The court denied the application

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conducted only by a referee, and not by a referee acting as a temporary judge. We express no opinion as to the validity of any application for rehearing filed by appellant.

without prejudice on the ground the court did not think it should be ruling on the application. Appellant appeared to request a stay of proceedings pending appellant's filing of the application, and the court denied the request. The court continued appellant's matter for disposition to June 25, 2007, and the dispositional hearing was conducted on that date.

On June 28, 2007, appellant filed an application for a rehearing with respect to the adjudication and disposition. By letter dated July 9, 2007, the superior court rehearing supervisor notified appellant that his application for rehearing was placed in the case file without further action because appellant, on November 30, 2005, had stipulated to the appointment of the referee as temporary judge.

b. *Analysis*.

Appellant claims the court lacked authority to conduct the dispositional hearing because appellant did not stipulate to the referee acting as a temporary judge to conduct the hearing. We disagree.

The written stipulation filed on November 30, 2005, expressly authorized the referee to act as a temporary judge with respect to the jurisdictional hearing, but did not expressly state whether the referee was to act as temporary judge with respect to dispositional matters. However, we have recited the pertinent facts. We believe the record, fairly read, reflects that, after the adjudication, but before appellant objected on June 13, 2007, to the court's conducting the dispositional hearing, the court, without objection, conducted post-adjudication proceedings and repeatedly discussed dispositional matters.

We note appellant appeared to base his request for a stay on the grounds the court had indicated DJJ was the only dispositional choice available, a DJJ commitment would implicate sex offender registration issues, appellant had intended to argue the matter, but did not do so because the court had indicated its position. However, it was appellant who had pressed the court for an indicated disposition. Moreover, the court, on March 27, 2007, said it thought the present matter was a DJJ case. Nonetheless, after that date, but before appellant's June 13, 2007 objection, appellant repeatedly indicated his willingness that the court conduct disposition proceedings and hear any dispositional argument by

appellant. The record suggests gamesmanship on appellant's part and that he was willing for the temporary judge to conduct the dispositional hearing as long as appellant would not be committed to DJJ.

We conclude that, even if the parties' written stipulation did not expressly authorize the referee to act as a temporary judge during the disposition hearing, the record demonstrates that, after the adjudication, but before appellant objected on June 13, 2007, to the court's conducting the dispositional hearing, appellant already had impliedly stipulated to the referee acting as a temporary judge with respect to all post-adjudication matters, including the dispositional hearing. (Cf. *In re Horton* (1991) 54 Cal.3d 82, 86, 97-98; *In Re Mark L.* (1983) 34 Cal.3d 171, 178-179; *In re Brittany K.* (2002) 96 Cal.App.4th 805, 813; *In re P.I.* (1989) 207 Cal.App.3d 316, 320-322.) Finally, California Rules of Court, rule 2.831(f), applicable at the time of the above proceedings, required appellant to file a written motion to withdraw a stipulation for the appointment of a temporary judge.[10] Appellant filed no such motion. We reject appellant's claim for this reason as well.

6. *Appellant Was Not Entitled to a Jury Trial, and No Violation of Equal Protection or Ex Post Facto Principles Occurred.*

a. *Pertinent Facts.*

As mentioned, appellant committed the present offense in about 2001. In 2005, the California Youth Authority was renamed the Division of Juvenile Justice of the Department of Corrections and Rehabilitation (DJJ).

On November 7, 2006, voters approved Proposition 83, The Sexual Predator Punishment and Control Act (SPPCA) commonly known as Jessica's Law. The law went into effect on November 8, 2006. (Cal. Const., art. II, § 10(a).) The SPPCA, inter alia,

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[10] The rule stated, in pertinent part, "A motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation, and must be heard by the presiding judge or a judge designated by the presiding judge. A declaration that a ruling is based on error of fact or law does not establish good cause for withdrawing a stipulation. Notice of the motion must be served and filed, and the moving party must mail or deliver a copy to the temporary judge."

added subdivision (b), to Penal Code section 3003.5. Penal Code section 3003.5, subdivision (b), states: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."

On March 27, 2007, appellant's adjudication concluded and the court sustained the petition which alleged that appellant violated Penal Code section 288, subdivision (b)(1). At appellant's June 25, 2007 dispositional hearing, the court declared appellant a ward of the court and ordered him committed to the DJJ. The court also ordered that appellant register as a sex offender.

At the time of appellant's June 25, 2007 dispositional hearing, former Penal Code section 290, subdivision (a)(1)(A), contained provisions imposing lifetime registration requirements. (See former Pen. Code, § 290, subd. (a)(1)(A) & (D).)[11] Moreover, at the time of appellant's dispositional hearing, former Penal Code section 290, subdivision (d)(1) and (3)(B), stated, in relevant part, "(d)(1) Any person who, on or after January 1, 1986, is discharged or paroled from the Department of Corrections and Rehabilitation to

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[11] Penal Code section 290 was repealed and replaced by the Sex Offender Registration Act (Act) (Pen. Code, § 290, et seq.), effective October 13, 2007. (Stats. 2007, ch. 579, § 8.) The Act, inter alia, redesignated various registration provisions.

Former Penal Code section 290, subdivisions (a)(1)(A) and (D), in effect at the time of appellant's June 25, 2007 dispositional hearing, provided, in relevant part, "(a)(1)(A) Every person described in paragraph (2), for the rest of his or her life while residing in California, or while attending school or working in California, as described in subparagraph (G), shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, and, additionally, with the chief of police of a campus of the University of California, the California State University, or community college if he or she is residing upon the campus or in any of its facilities, within five working days of coming into, or changing his or her residence within, any city, county, or city and county, or campus in which he or she temporarily resides. [¶] . . . [¶] (D) Beginning on his or her first birthday following registration or change of address, the person shall be required to register annually, within five working days of his or her birthday, to update his or her registration with the entities described in subparagraph (A). At the annual update, the person shall provide current information as required on the Department of Justice annual update form, including the information described in subparagraphs (A) to (C), inclusive, of paragraph (2) of subdivision (e)."

the custody of which he or she was committed after having been adjudicated a ward of the juvenile court pursuant to Section 602 of the Welfare and Institutions Code because of the commission . . . of any offense described in paragraph (3) shall be subject to registration under the procedures of this section. [¶] . . . [¶] (3) Any person described in this subdivision who committed an offense in violation of any of the following provisions shall be required to register pursuant to this section: [¶] . . . [¶] (B) Any offense defined in . . . Section 288[.]"[12]

b. *Analysis.*

Appellant makes related claims that he was entitled to a jury trial, he was denied equal protection of the law because he was not afforded a jury trial, and imposition of the Penal Code section 3003.5, subdivision (b) residency restriction violated the Ex Post Facto Clause.

As to appellant's claim that his right to a jury trial was violated, he argues "the lifelong registration requirement, combined with Penal Code section 3003.5's broad residency restriction, [is] sufficiently severe and open-ended in scope as to become punishment" with the result that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], and its progeny, he was entitled to a jury trial on the issue of whether he committed the present offense, or, if he was not entitled to a jury trial on that issue, he was entitled to a jury trial on the dispositional issue of whether he should have been committed to DJJ. We reject appellant's claim.

The premise of appellant's claim is that the residency restriction of Penal Code section 3003.5, subdivision (b), which went into effect on November 8, 2006, as part of the SPPCA, applied retroactively to appellant's offense which occurred in about 2001. However, the subdivision is not retroactive and therefore appellant is not subject to Penal

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[12] Former Penal Code section 290, subdivisions (a)(1)(A) and (D), in effect at the time of the June 25, 2007 dispositional hearing, have been redesignated by the Sex Offender Registration Act as Penal Code section 290, subdivision (b), and Penal Code section 290.012, subdivision (a), respectively. Former Penal Code section 290, subdivision (d)(1) and (3)(B), in effect at the dispositional hearing, have been redesignated by the Act as Penal Code section 290.008, subdivisions (a) and (c)(2), respectively.

Code section 3003.5, subdivision (b). As the court stated in *Doe v. Schwarzenegger* (E.D.Cal. 2007) 476 F.Supp.2d 1178, "The SPPCA does not expressly address the issue of retroactivity, but it is well-established in California that statutes operate prospectively unless there is clear evidence of intent to the contrary. *See Evangelatos v. Superior Court of Los Angeles County* [(1988)] 44 Cal.3d 1188, 1207 . . . ('[S]tatutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent.') (internal quotation marks and citation omitted). This principle has been characterized as a 'time-honored principle,' *id.* at 1208, . . . that is 'familiar to every law student,' *id.* at 1207 . . . (quoting *United States v. Sec. Indus. Bank,* 459 U.S. 70, 79, 103 S. Ct. 407, 74 L.Ed.2d 235 (1982) (Rehnquist, J.)).

"Indeed, the principle is expressly codified in the California Penal Code: 'No part of [this code] is retroactive, unless expressly so declared.' Cal. Penal Code § 3; *see also* Cal. Civ. Code § 3. To infer retroactivity is no small feat. '[A] statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature or the voters must have intended a retroactive application.' *Evangelatos,* 44 Cal.3d at 1208 . . . . Formulated differently, a law may be given retroactive effect only by 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' *Id.* at 1207 . . . (internal quotation marks and citations omitted).

"Here, the SPPCA is silent on the issue of retroactivity, and it is not 'very clear' from extrinsic sources that the intent of the voters was to make it retroactive. *See Tapia v. Superior Court,* 53 Cal.3d 282, 287 . . . (1991) (interpreting voter-approved proposition as operating only prospectively where proposition was silent on issue of retroactivity). To determine the intent of a voter-approved initiative, the plain meaning of the law is typically most instructive, *Davis v. City of Berkeley*, 51 Cal.3d 227, 234, . . . (1990), but the SPPCA evinces no textual intent of retroactivity." (*Doe v. Schwarzenegger, supra,* 476 F.Supp.2d at pp. 1181-1182; see *People v. Presley* (2007) 156 Cal.App.4th 1027, 1033 (*Presley*).)

Appellant offers no extrinsic source evidence indicating the SPPCA applies retroactively. Respondent concedes the SPPCA, and the residency requirement of Penal Code section 3003.5, subdivision (b), in particular, are not retroactive. We reject

appellant's claim that he was entitled to a jury trial, because his premise, that the residency restriction applied retroactively, is erroneous.

Moreover, in *Presley*, the appellate court, after reviewing pertinent United States Supreme Court and California Supreme Court authority, concluded that, at least absent consideration of the residency restriction, "our federal and state courts have established that a requirement to register as a sex offender is not per se punishment for purposes of the federal Constitution." (*Presley, supra*, 156 Cal.App.4th at p. 1033.) In *Presley*, the trial court, as it was entitled to do, ordered registration based on the court's finding that the offense at issue "was committed and motivated by sexual compulsion or for purposes of sexual gratification."[13] (*Id*. at p. 1030) The appellate court, considering public notification requirements (see current Pen. Code, § 290.46) and the Penal Code section 3003.5, subdivision (b) residency restriction, concluded the consequences of registration were not punishment for purposes of the Sixth Amendment; therefore, the defendant had no right to a jury trial on the issue concerning which the trial court had made a factual finding. (*Presley, supra*, at pp. 1031-1035.)

We similarly conclude appellant has failed to demonstrate the requisite punishment for purposes of the Sixth Amendment; therefore, appellant was not entitled to a jury trial on the issues of whether he committed a violation of Penal Code section 288, subdivision (b)(1), or whether the trial court should have committed him to DJJ.[14]

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[13] In 2006, when the offense at issue in *Presley* was committed, former Penal Code section 290, subdivision (a)(2)(E), provided, "The following persons shall be required to register pursuant to paragraph (1): [¶] . . . [¶] (E) Any person ordered by any court to register pursuant to this section for any offense not included specifically in this section if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."

[14] The issue of whether the Sixth Amendment mandates that facts required to impose the Penal Code section 3003.5, subdivision (b) residency restriction be found by a jury beyond a reasonable doubt is pending before our Supreme Court in *People v. Mosley*, review granted Mar. 12, 2009, S169411.

Appellant's related claim that the Penal Code section 3003.5, subdivision (b) residency restriction violated ex post facto principles is without merit. "[T]he ex post facto clause prohibits only those laws which 'retroactively alter the definition of crimes or *increase the punishment for criminal acts*.' [Citations.]" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1171.) As discussed previously, the residency restriction is not retroactive and the registration requirement, considered with the residency restriction, does not constitute punishment; therefore, no violation of ex post facto principles occurred.[15]

Finally, appellant claims he was denied equal protection by not having a jury trial as discussed above since, he claims, he is similarly situated with respect to adults who are charged with a violation of Penal Code section 288, subdivision (b)(1), and who are subject to the residency restriction. However, as discussed, the residency restriction does not apply to appellant. Moreover, an adult is entitled to a jury trial on a criminal charge whether or not the Penal Code section 3003.5, subdivision (b) residency restriction applies, and the fact minors are not entitled to a jury trial in juvenile proceedings does violate equal protection principles. (Cf. *In re Anthony J.* (1978) 86 Cal.App.3d 164, 173-174; see *In re Scott K.* (1979) 24 Cal.3d 395, 402; *People v. Superior Court (Carl W.)* (1975) 15 Cal.3d 271, 274.)[16]

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[15] The issue of whether retroactive application of Penal Code section 3003.5, subdivision (b), violates ex post facto principles is pending before our Supreme Court in the case of *In re E.J.* (S156933).

[16] In light of our resolution of appellant's right to a jury trial, equal protection, and ex post facto claims on their merits, there is no need for us to address respondent's arguments that appellant's claims are not ripe for review or that we should defer deciding this case pending a decision by our Supreme Court in the case of *In re E.J.*

DISPOSITION

The order of wardship is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J