



TRAINING BULLETIN: LEGAL UPDATE

The Importance of Proving Force in Child Molest Cases

M. McKay-McCoy, J.D.

If you believe that probation for child molesters actually works, you can probably stop reading now. If, however, you believe that sexual preferences don't change, and that incarceration is the most appropriate response for convicted child molesters, it would be worth your while to get out your trusty Penal Code and follow along as we examine the difference that force makes in charging and sentencing for child molest crimes.

Forcible Touching of a Child Under the Age of 14 Years

Penal Code section 288(a) makes it crime to commit a "lewd and lascivious act" on the body of a child under age 14 with the specific intent of "arousing, appealing to, or gratifying the lust, passions or sexual desires of that person or of the child." Subsection (b) makes it a crime to do the same act "by use of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person."

These two crimes are both punishable by 3, 6, or 8 years in prison. Both are "strike" priors which can be used to bring the defendant under the "Three Strikes and You're Out" law for any future felony conviction (Penal Code sections 1170.12 and 1192.7). Both are "habitual sex offender" priors which can bring a defendant under the "one strike" law and send him to prison for 25 years to life for any future felony for child molesting, rape, or any of the forcible sex offenses (Penal Code section 667.71).

Probation

However, a non-forcible child molest conviction under Penal Code section 288(a) means the defendant is probation eligible if the trial judge finds that defendant is a member of the defendant's household, probation will work, and probation is in the best interests of the victim (Penal Code section 1203.066). The only way to take the non-forcible child molester out of the probation eligible category is to plead and prove one of the circumstances listed in Penal Code section 1203.066(a). Take a look at those circumstances and you will recognize the ones we see most often: bodily injury (not great bodily injury), multiple victims, and substantial sexual conduct (masturbation and any sort of penetration). As of January 1 of this year, if a jury comes back with a finding of "true" on any of these circumstances, that finding is binding on the trial judge. A judge can no longer ignore the jury's findings and give the defendant probation anyway.

Note that Penal Code section 288(b) automatically makes the defendant probation ineligible and does *not* need to be pled and proved, according to Penal Code section 1203.066 (a)(1) and (c)(1).

Consecutive v. Concurrent Sentences

As you know from investigating your own cases, child molesting is rarely an isolated event. It's usually a pattern of conduct extending over weeks, months or years by a person the child knows and trusts. A jury either believes the victim or not, and when there is a conviction there are often several counts.

Non-forcible child molesting counts of Penal Code section 288(a) get the sentencing scheme of Penal Code section 1170.1, which essentially gives a volume discount for multiple crimes.

Forcible child molesting counts of Penal Code section 288(b) fall under Penal Code section 667.6 (c), and *may* stack, that is, run consecutively. The counts *must* stack under Penal Code section 667.6(d) "if the crimes involve separate victims or involve the same victim on separate occasions." The statute gives us a definition of "separate occasions." "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."

It would be unrealistic to expect child molest victims to articulate separate occasions by identifying separate calendar dates (April 22 and 24, 2005 for example). Fortunately, they don't have to. According to the California Supreme Court in People v. Jones (1990) 51 Cal.3d 294, due process requirements are satisfied if the child can describe the kind of acts committed, the number of acts, and the general time period. Separate occasions could be identified by the child's testimony about different locations (in the car, in my bedroom, in his bedroom), about different concurrent events (when Mom and my brother were at his baseball game, around Christmas time, just before my birthday) or about different activities (fondling only, fondling and intercourse, the first time a particular act occurred, the last time it occurred).

Life Sentences

Still not convinced? Penal Code section 288(b) is automatically within the life sentence possibilities of Penal Code section 667.61; Penal Code section 288(a) is excluded if the defendant gets probation. Like Penal Code section 1203.066 and the probation ineligibility factors, these particular circumstances need to be pled and proved, and found

true by the jury before they apply. The jury's findings are binding on the trial judge. The circumstances can be divided into the (d) list and the (e) list. One circumstance from the (d) list or two or more from the (e) list will get the defendant 25 years to life. One circumstance from the (e) list will earn 15 years to life.

The (d) list includes 1) a previous conviction for Penal Code section 288(b) or another forcible sex crime, 2) kidnapping which substantially increases the risk of harm, 3) mayhem or torture in the commission of the present offense or 4) first degree burglary (burglary of a residence) with the intent to commit Penal Code section 288(b) or one of the other forcible sex offenses.

The (e) list includes 1) simple kidnapping, 2) first degree burglary with the intent to commit theft or any felony, 3) great bodily injury, 4) use of a deadly or dangerous weapon, 5) more than one victim, 6) tying or binding the victim or 7) administering a controlled substance by force.

OK, so I'm simplifying this a lot here, but the circumstance we are most likely to see is a Penal Code section 288(b) prior. The best thing you can do to protect future victims is to make sure you get a Penal Code section 288(b) conviction for this victim.

Forcible Penetration of a Child Under the Age of 14 Years

Penal Code section 288 forbids touching the body of a child with a specific sexual intent. Penal Code section 269, aggravated sexual assault of a child, takes all of the forcible sex offenses (rape, rape in concert, sodomy, oral copulation, and penetration with a foreign object) and imposes a sentence of 15 years to life when the victim is under 14 years of age, and is at least ten years younger than the defendant. Rape and all of the other forcible sex offenses are general intent crimes. Unlike touching, rape is an inherently sexual act, so a specific sexual intent requirement is unnecessary.

In a typical case, if the crime involved some sort of forcible penetration of a child under 14, you would also have lewd and lascivious touching before the actual penetration, with the latter act providing persuasive evidence of the specific intent required for the former. (See People v. Benavides [2005] 35 Cal.4th 69, 97.)

When you look at the adult victim sex offenses as a group (Penal Code section 261, 286, 288a, and 289) you can see parallel language. The absence of consent, not the presence of force, is the central issue. That's why a victim who is drunk, drugged, disabled or otherwise unconscious of the nature of the act, and unable to give or withhold informed consent, can be raped.

By contrast, Penal Code section 269 limits its application to penetration which is committed by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." This is the same language used in Penal Code section 288(b), but it does *not* have the same meaning. (Don't shoot the messenger.) We'll see what the difference is, and how to prove force, in the next online article.

About the Author: Michele McKay-McCoy is a veteran prosecutor who now teaches criminal law as an instructor for POST and as adjunct faculty for three colleges and one law school.

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