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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALFREDO ALVARADO,

Defendant and Appellant.

2d Crim. No. B272060
(Super. Ct. No. 2012017812)
(Ventura County)

Jose Alfredo Alvarado appeals his conviction by jury of two counts of committing an unlawful act with a child under the age of 10 (counts 1 and 3; Pen. Code, § 288.7, subd. (a))[1] and two counts of forcible lewd act upon a child (counts 2 & 4; § 288, subd. (b)(1)). The trial sentenced him to 50 years to life state prison. Appellant contends there is insufficient evidence of force or duress to support the convictions for forcible lewd conduct. We affirm.

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

Facts

On May 15, 2012, appellant was arrested after his four-year-old niece, A., reported that he sexually abused her more than five times by putting his penis in her vagina. Earlier that day, A. complained about vaginal pain and was examined by a family physician who reported vaginal abnormalities consistent with sexual abuse and vaginal penetration.

A. told Julio Mayo, a social worker for Children and Family Services, that appellant, was hurting her and touching her vagina. Appellant lived at A.'s house, slept on the couch, and babysat when A.'s parents were at work or the gym.

Ventura Police Detective Eric Vazquez took A. to the Safe Harbor Clinic where she was examined and interviewed. In a videotaped interview, A. told the detective that appellant sexually abused her more than five times on her mom's bed. A. said that appellant touched her with "the one he goes pee with" and he "put[] it all in me." Appellant lubricated himself with lotion but it still hurt. "[E]very time [appellant] would put it in me I would kick him and kick him and kick him." When A. kicked and pushed to get away, appellant would grab A.'s feet and bite them. Appellant told A. not to tell anyone which scared A. and made her feel "bad" when her parents left her alone with appellant.

Mara Landa, a sexual assault nurse examiner, testified that A. complained of pain when urinating and some bleeding. Landa's physical findings were consistent with A.'s oral history that her vagina had been penetrated by a penis.

In a *Miranda* interview (*Miranda v. Arizona* (1966) 384 U.S. 436), appellant initially denied touching A.'s vagina. Detective Vasquez told him there would be DNA testing and that

a nurse would take a DNA sample. When Detective Vasquez left the room, appellant licked his hand and reached into his pants to clean his genitals and destroy any DNA evidence. After the nurse swabbed appellant for DNA, Detective Vasquez told appellant that the DNA results showed that his penis entered A.'s vagina. It was a ruse and it worked.

Appellant said that he would tell "the real truth" and would never do it again. Appellant stated that A. pulled down his shorts and jumped on his lap, and that his penis accidentally went inside A.'s vagina. Appellant said that A. "[t]ested it" and that his penis went in "[j]ust like a little bit." Detective Vasquez returned to A.'s house after the interview and found an Avon lotion bottle that matched A.'s description of the lotion appellant used to facilitate the sexual abuse.

At trial, A. testified that appellant put his penis in her vagina on several occasions. Appellant told A. not to tell anybody, a request that A. honored because she was afraid of appellant.

Sufficiency of Evidence: Force or Duress

Appellant argues there is insufficient evidence of force or duress to sustain the conviction for forcible lewd act on a minor (counts 2 & 4). As in any sufficiency of the evidence appeal, we review the record in the light most favorable to the judgment and presume the existence of every fact the jury could reasonably deduce from the evidence in support of the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not reweigh the evidence or reassess the credibility of the witnesses. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

Appellant contends that he did not use physical force substantially different from or in excess of that necessary to

accomplish the lewd act itself. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1027-1028 [degree of force is what distinguishes subdivision (b) from subdivision (a) lewd conduct]; see, e.g., *People v. Pitmon* (1985) 170 Cal.App.3d 38, 47-48 [grabbing/holding victim's hand to rub defendant's genitals constitutes force], overruled in part by *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12.) The jury was instructed that, in order to convict for forcible lewd act on a child, the prosecution had to prove that appellant accomplished the act by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury to . . . someone . . . ." (CALCRIM No. 1111.)

The evidence shows that A. kicked and pushed back every time appellant inserted his penis into her vagina. A. said that appellant would grab her feet and bite them. These acts of restraint and violence support the finding that the force used was substantially greater or different from the force necessary to accomplish the lewd acts. The force required under section 288, subdivision (b) "includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves. [Citations.]" (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.)

Duress

Appellant claims there is insufficient evidence of duress to convict on counts 2 and 4. "'[D]uress,' as used in section 288(b)(1), 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.'" [Citation.] Because duress is measured by a purely objective

standard, a jury [can] find that the defendant used threats or intimidation to commit a lewd act without resolving how the victim subjectively perceived or responded to this behavior." (*People v. Soto* (2011) 51 Cal.4th 229, 246.) The relevant factors include the age and size of the victim, the victim's relationship to the defendant, threats to harm the victim, physical control of 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. Veale* (2008) 160 Cal.App.4th 40, 46.) A rational trier of fact can find duress where there is an "inherent imbalance of power in an encounter between a child and an adult bent on sexual conduct." (*People v. Soto*, *supra*, 51 Cal.4th at pp. 245-246.)

Duress was established by the disparity in size and age of appellant (200 pound, 35-year-old male) and A. (50 pound, four-year-old girl), by the long and trusting relationship, and by appellant's use of an isolated place to commit the lewd acts. (*People v. Superior Court* (*Kneip*) (1990) 219 Cal.App.3d 235, 238-239; *People v. Veale*, *supra*, 160 Cal.App.4th at p. 48; *People v. Cochran* (2002) 103 Cal.App.4th 8, 15, overruled in part by *People v. Soto* (2011) 51 Cal.4th 229, 248, fn. 12; *People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 51.) Appellant babysat A. and used his position of authority to sexually abuse A. on her parent's bed. Appellant grabbed and bit her feet as a means to control A. during the sex acts and told her not to tell anyone. It was damning evidence. "'"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" [are] relevant to the existence of duress.' [Citation.]" (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1320.) Duress

can take the form of physically controlling the victim where the victim attempts to resist the sexual attack. (*People v. Cochran*, *supra*, 103 Cal.App.4th at p. 14.)

Appellant argues that A.'s general sense of fear was based purely on her dislike of the sex acts. Appellant claims that A.'s act of kicking appellant was not evidence of duress and that it only goes to the first incident of sexual abuse (count 2) but not the last incident (count 4). A. stated that she "kick[ed] him and kick[ed] him" every time appellant "put it in me." Appellant responded by grabbing A.'s feet and biting them, which is a form of duress and coercion. (*People v. Espinoza*, *supra*, 95 Cal.App.4th at p. 1320.) Appellant "'took advantage not only of his psychological dominance as an adult authority figure, but also of his physical dominance to overcome [A.'s] resistance to molestation. This qualifies as duress.' [Citation.]" (*Ibid*.)

The record paints a picture of a small and vulnerable four-year-old girl, who by force, duress, and intimidation was compelled to engage in sexual acts by a parental figure. (See, e.g., *People v. Cochran*, *supra*, 103 Cal.App.4th at p. 15 [sexual assault of nine-year-old daughter in family home].) It took no leap in logic for the jury to find that appellant committed a lewd act on a child by force or duress as charged.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Paul S. Thies, Deputy Attorney General, for Plaintiff and Respondent.