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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. FIDEL A. FLORES, Defendant and Appellant.	B294096 (Los Angeles County Super. Ct. No. VA146103)

APPEAL from a judgment of the Superior Court of Los Angeles County, Yvonne T. Sanchez, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Wyatt E. Bloomfield and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Fidel Flores appeals from a trial court judgment entered after a jury convicted him of three counts of lewd act upon a child under Penal Code section 288, subdivision (a) and two counts of forcible lewd act upon a child under section 288, subdivision (b)(1).[1] Flores contends that the evidence is insufficient to support his two convictions for forcible lewd act upon a child because the amount of force the parties agree he used to commit the acts does not rise to the level of force required to constitute a conviction under section 288, subdivision (b)(1).[2] We disagree with Flores's contention and affirm the judgment.

Flores began molesting his wife's granddaughter when the girl was about seven years old and continued until she was about 11. Among other incidents for which he was charged and convicted, Flores grabbed the girl's wrist while the two of them were watching a movie and put her hand on his erect penis. After she pulled away, he again grabbed her wrist and pulled her hand toward his penis. She formed a fist, hit Flores in the penis, and left the room.

Section 288, subdivision (a) provides that "a person who willfully and lewdly commits any lewd or lascivious act . . . 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

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[1] Further statutory references are to the Penal Code.

[2] Flores presents the question as one of sufficiency of the evidence, but challenges whether the evidence the parties agree is in the record satisfies a statutory element. We view his question as one of statutory interpretation, and review it under the de novo standard of review. (Cf. *People v. Riley* (2015) 240 Cal.App.4th 1152, 1162.)

person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." Subdivision (b)(1) states that a "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 and shall be punished by imprisonment in the state prison for 5, 8, or 10 years."

Citing *People v. Soto* (2011) 51 Cal.4th 229, 242, Flores asks us to reduce his sentences on his two (b)(1) counts because the force he used was not "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." Flores contends that the "only physical contact between [Flores] and [the girl] was the physical contact 'inherent in the prohibited act.' " (Quoting *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1024.) We disagree.

No use of force was necessary to accomplish a lewd act, as evidenced by Flores's other convictions under section 288, subdivision (a) for repeatedly molesting his wife's granddaughter. "[A] 'defendant may fondle a child's genitals without having to grab the child by the arm and hold the crying victim in order to accomplish the act. Likewise, an assailant may achieve oral copulation without having to grab the victim's head to prevent the victim from resisting.' [Citation.] Lewd conduct of this sort is punishable in and of itself. (§ 288, subd. (a).) Therefore, it stands to reason that the force requirement will be deemed satisfied when the defendant uses any force that is 'different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim's consent.' " (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1004-1005.) Grabbing the girl's hand and

pulling it to his penis was force "substantially different from or substantially greater than" not grabbing the girl's wrist and pulling it to his penis. (*People v. Babcock* (1993) 14 Cal.App.4th 383, 388; *People v. Pitmon* (1985) 170 Cal.App.3d 38, 48, disapproved on another ground in *People v. Soto*, *supra*, 51 Cal.4th at p. 248, fn. 12.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

CHANEY, Acting P. J.

We concur:

BENDIX, J.

WEINGART, J.*

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