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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARK CHRISTOPHER ACOSTA, Defendant and Appellant.	B271641 (Los Angeles County Super. Ct. No. KA104800)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

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

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William H. Shin and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Mark Christopher Acosta (defendant) appeals from the judgment entered following a jury trial that resulted in his conviction of three counts of lewd acts on a child (Pen. Code, § 288, subd. (a); counts 1, 2 & 8),[1] four counts of oral copulation or sexual penetration of a child 10 years or younger (§ 288.7, subd. (b); counts 3, 4, 5 & 6), one count of continuous sexual abuse of a child (§ 288.5, subd. (a); count 7), and one misdemeanor count of child molestation (§ 647.6, subd (a); count 9). The jury found true the allegation that the crimes were committed against more than one victim within the meaning of section 667.61, subdivisions (b) and (e). The two victims were defendant's stepdaughter Chanel, and Chanel's cousin Destiny. The trial court sentenced defendant to five consecutive terms of 15 years to life pursuant to section 667.61.

Defendant's only claim on appeal is that there is insufficient evidence to support his count 8 conviction for lewd acts on a child, the sole felony conviction involving Chanel.[2] There is substantial evidence to support the conviction and so we affirm the judgment.

BACKGROUND

Chanel was born in April 1993, and was 21 years old at the time of the trial of this matter. Chanel had known defendant since she was two years old. In 1998, when Chanel was about five years old, her mother Yvonne had a son, Noah, with defendant. After the birth, defendant started living with Yvonne, Chanel and Noah in a new apartment in Azusa.

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

[2] The trial court dismissed the count 9 misdemeanor child molestation conviction involving Chanel in the interests of justice.

Soon after the family moved into the apartment, Chanel began waking up in the middle of the night with her pajama bottoms and underwear down around her knees. At the time, she had no idea how this was happening, but it made her uncomfortable. She did not tell anyone about it.

Around this same time, Chanel noticed defendant walking around the house naked. This occurred before he took a shower. Defendant would ask her to look at his penis, saying "How does it look?" and "Is it big?" This happened more than one time, but she did not remember how many more times. On at least one occasion, defendant made Chanel measure his penis with a ruler.

Chanel also remembered that defendant would come into the bathroom while she was in the shower and take her underwear, but none of her other clothes. This took place over several years. Chanel did not tell anyone. She was afraid of her mother's reaction.

Defendant continued some or all of the above-described behavior until Chanel went to middle school when she was 12 or 13 years old. At that time, Chanel started getting into trouble with boys. Chanel's mother and her aunts kept asking her what was going on. Yvonne was not living with defendant at that point, and so Chanel told her mother, her aunt Dolores, and her biological father Henry that defendant had been sexually abusing her. She did not remember whom she told first.

According to Henry, Chanel told him that defendant "had been exposing himself to her and asking her to measure his private parts, as well as that she always found her pants down in the morning when he would—apparently he would carry her to bed and that her pants were always down and—when she would wake up in the morning."

Henry told Yvonne what Chanel said defendant was doing, and told Yvonne she needed to take Chanel to the police department. Yvonne agreed. Yvonne acknowledged Henry told her that defendant would remove Chanel's pants. Yvonne believed "that was because she was still young enough for [defendant] to carry her from the car when she would fall asleep into her bedroom; and so he would remove her pants to make her more comfortable while she slept, but it wasn't her panties."

According to Chanel, Yvonne did not believe her and took her to confront defendant at his workplace. Defendant said that he did not remember doing any of the things Chanel described. He also said he was not going to be there for Noah, Chanel or Yvonne anymore.

Yvonne took Chanel to the police station, but told her that defendant would no longer be helping them out financially. Yvonne said defendant might go to prison. Inside the police station, Yvonne told police that defendant had been sexually abusing Chanel. When a police officer asked Chanel what had happened, however, she replied, "Nothing." She told the officer that she did not know why her mother brought her to the police station. She was afraid and so did not tell the truth.

In 2014, Yvonne told Chanel that defendant had been doing the same "uncomfortable" things to Chanel's cousin Destiny. Destiny lived upstairs from Yvonne, Chanel and Noah. Destiny was five years younger than Chanel, which made Destiny the same age as Noah.

The abuse started when Destiny was in third grade (about 2006). Defendant would pick up Destiny and Noah from school and take them back to the apartment he was sharing with Yvonne, Chanel and Noah. One day, defendant took Destiny into Chanel's bedroom and tried to take off her pants. Destiny said, "No." Defendant replied that it was okay because he did it to

Chanel. He took off Destiny's underwear and started touching the inside of her vagina with his fingers. Destiny started crying and eventually defendant stopped. A few days later, defendant did the same thing to Destiny, again in Chanel's room. The sexual abuse continued until Destiny changed schools in sixth grade and went to a different school than Noah. Destiny revealed the abuse in 2014.

Los Angeles County Sheriff's Deputy Judith Luera helped investigate the allegations against defendant in 2014. As part of the investigation, Deputy Luera interviewed Chanel. Chanel told the deputy that her mother questioned her about not having any underwear on, and then questioned defendant about removing the underwear, which defendant said was normal.

In his defense, defendant presented the testimony of his son Noah. Noah remembered that defendant would pick him and Destiny up after school, but did not remember defendant ever being alone with Destiny when Noah was in the apartment. Noah sometimes went to his grandparents' house, however, leaving Destiny alone with defendant.

DISCUSSION

Defendant's conviction for lewd acts on Chanel was based on her testimony that she would awaken in the night to find her pajamas and underwear down around her knees.[3] Defendant contends there is no evidence showing who lowered Chanel's clothing or why and so there is insufficient evidence to support his conviction. He contends that such a conviction violates his state and federal constitutional rights to due process.

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[3] Defendant was convicted of misdemeanor child molestation for his other sexual acts involving Chanel.

A. Section 288 requirements

"[A]ny touching of an underage child is 'lewd and lascivious' within the meaning of section 288 where it is committed for the purpose of sexual arousal." (*People v. Martinez* (1995) 11 Cal.4th 434, 445, italics omitted.) Whether a particular touching is considered lewd depends on the totality of the circumstances, including the nature of the act; any statements by the defendant; other acts of lewd conduct admitted or charged; the relationship of the parties and any "coercion, bribery or deceit" used by the defendant to obtain the victim's cooperation or silence. (*Ibid.*) "[A]ctual or constructive disrobing" of a child can constitute a lewd act if it is committed for "a sexually exploitative purpose." (*People v. Mickle* (1991) 54 Cal.3d 140, 176.)

B. Sufficiency of the evidence standard of review

"'In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]'" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

The testimony of a single witness is sufficient for the proof of any fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

C. Analysis

Defendant argues that there is insufficient evidence to support his conviction because Chanel did not testify that she ever saw defendant in her room at night or that defendant ever undressed her; defendant never admitted removing or partially removing Chanel's clothing; and no one saw Chanel partially undressed during the night or in the morning. Defendant paints an incomplete picture of the evidence.

Chanel testified that she would awaken in the night to find her pajama bottoms and panties down around her knees. No further evidence is needed to show that she was partially undressed during the night. (See *People v. Geonzelis* (1930) 106 Cal.App. 434, 435 [victim's testimony need not be corroborated and is sufficient to prove elements of a lewd and lascivious acts charge].)

Chanel did not observe who lowered her pajama bottoms and underwear, but there were only three possibilities: Chanel, her mother or defendant. Something about the incidents made Chanel emotionally uncomfortable, which supports an inference that Chanel herself did not lower the clothing herself in her sleep. Her statements and behavior constituted an implicit denial that she did the lowering. Chanel linked the lowered pajama bottoms to times when defendant would carry her to bed. Defendant

implicitly acknowledged that he removed Chanel's underwear when he told Yvonne that it was normal. This evidence is sufficient to support an inference that defendant was the one who lowered Chanel's pajama bottoms and underwear.

Circumstantial evidence supports an inference that defendant had a lewd intent when he lowered Chanel's pajama bottoms and underwear. Defendant walked around naked in front of Chanel and directed her attention to his penis. It is more than reasonable to infer from this conduct that he was sexually aroused by being in Chanel's presence. Defendant would sneak into the bathroom and remove Chanel's underwear, thereby displaying an unusual and abnormal interest in her underwear. A jury could reasonably infer that defendant lowered Chanel's bottoms and underwear for purposes of sexual arousal. This is particularly the case since defendant's proffered innocent motivation of making Chanel more comfortable is implausible: lowering Chanel's bottoms to her knees would restrict her leg movement and make her less comfortable, not more comfortable.

Defendant complains that Chanel waited until she was 10 years old and reunited with her biological father to reveal the pajama lowering incidents, and that Yvonne stated that Chanel only complained that her pajama bottoms were lowered, and not also her underwear. A reasonable jury could have chosen to disbelieve Chanel's testimony for these and other reasons, but was not required to reject her testimony. (See *People v. Maury, supra*, 51 Cal.4th at p. 403.) Defendant similarly complains that parents routinely undress sleeping children and put them to bed with no improper purpose. A reasonable jury could have found that defendant acted innocently, but the jury was not required to reach such a conclusion. (See *People v. Nelson, supra*, 51 Cal.4th at p. 210.) It was the jury's task to

evaluate Chanel's credibility and to determine reasonable inferences from the circumstantial evidence. (*Ibid.*)

D. Constitutional claim

Because we have determined that "a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation], as is the due process clause of article I, section 15, of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

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