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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO C. ZECENA, Defendant and Appellant.	B276221 (Los Angeles County Super. Ct. No. BA435142)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert C. Vanderet, Judge. Affirmed in part and remanded with direction.

David M. Thompson, 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, Margaret E. Maxwell and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Fernando Zecena of sexual penetration of a child 10 years or younger (Pen. Code, § 288.7, subd. (b)) and lewd act upon a child (Pen. Code, § 288, subd. (a)).[1] After conviction, appellant admitted a prior felony conviction for which he served a prison term. (§ 667.5, subd. (b)). The trial court sentenced appellant to 15 years to life in prison for the sexual penetration conviction, and imposed but stayed, pursuant to section 654, the six-year mid-term for the lewd act conviction. The court also struck the one-year enhancement for the prison prior found true.

On appeal, appellant raises two issues: (1) the evidence is insufficient to support the jury's finding that he penetrated the victim's genital opening, which is an element of section 288.7, subdivision (b); and (2) that he is entitled to one extra day of presentence credit. With respect to the first issue, we disagree with appellant and affirm the trial court. With respect to the second, the People concede and the case is remanded with instructions to correct the abstract of judgment to reflect an additional day of presentence credit.

STATEMENT OF FACTS

A. The Sexual Assault of L.A.

On April 4, 2015, Claudia A. took her seven-year-old daughter L.A. and her two other children to her sister Cecilia C.'s house. L.A. was wearing a skirt with an elastic waist and a blouse. When Claudia arrived at the location, her sister-in-law's husband, Walter Batres, was washing a car in the driveway. Friends of Batres were also in the driveway with him, including appellant. The men were all drinking beer.

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1 All undesignated statutory references are to the Penal Code.

A number of other children, including L.A.'s cousins, were present at the house as well. While the children were playing outside the house, appellant began playing with them with a "gun that shot little balls."

Batres eventually finished washing the car. The men with him, including appellant, left. Appellant, however, returned shortly thereafter. Juan P., Cecilia C.'s husband, saw appellant standing at the front gate and invited him back onto the property. After entering his house, Juan P. saw appellant outside the house, staring at Juan P. through a living room window.

Meanwhile, Claudia was watching L.A. playing in the dirt near the driveway. Claudia realized that she had lost track of her three-year-old son J.A, and left L.A. where she was playing to look for him. After finding J.A., she returned to the driveway, but L.A. was gone. She began searching for L.A. She called her name, walked to the front gate, and looked up and down the street, but could not find her.

Claudia then walked towards the yard area where a green trash can was located. As she approached that area, she saw appellant squatting down on his knees, with his arms extended forward, slightly bent at the elbows. She could not see his arms from the elbows forward. She could not see her daughter, either, but was suspicious of appellant. She decided to pretend to be throwing something in the trash can and approach appellant to see if her daughter was also there.

Initially, appellant did not see Claudia approaching. When he did see her, he acted surprised and dropped his hands very quickly. As Claudia continued to approach, she saw L.A. behind

the adjacent water heater, facing appellant. L.A. was shaking and biting her nails.

Claudia asked L.A. whether appellant had done anything to her. L.A. said appellant put his hand under her panties, and then demonstrated by touching her vagina over her clothes. Appellant ran away and jumped over a fence. Claudia told a boy who had been playing in the driveway with L.A. to get Batres and his wife.

L.A. testified at trial and described what happened in the yard near the water heater. She was at her aunt "Cece's" house. She was playing outside with the other children who were at the house. The other children got "bored" and stopped playing. L.A. sat down by a palm tree by herself.

A man approached her and whispered "come here" in Spanish about three times.[2] The man led her to the back, where another child, Justin, was. Justin asked L.A. for a toy gun she was holding, and after she gave it to him, he left. The man led her further towards the back. The man then got down on his knees and told L.A., in Spanish, to take down her skirt. When L.A. told him she didn't want to, he put his hand inside her skirt, went to the top of her underwear, and then slid his hand inside her underwear and touched her skin to skin.

The man used his finger to touch her "M.P." or "middle part," which is where "you go to the bathroom and you do peepee." The very middle of the "M.P." is the "line," and the man used his finger to rub her "line" up and down more than once.

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[2] Although L.A. initially described the person who approached her only as "somebody", she did not correct the prosecutor when he later referred to her assailant as "he," and she thereafter described her assailant as "he" and "the man."

While he rubbed her "line," he put his finger in the "line" "a little bit." She knew he put his finger inside the line because she "felt it" and it felt "kind of weird."

L.A.'s mother appeared, and the man pulled his hand out and placed it on the wall. L.A.'s mother told her to come with her, and the man jumped over the fence and escaped. L.A. told her mother that the man touched her "M.P."

Claudia took L.A. in the house to a bedroom so she could examine her. Claudia put L.A. on the bed, took off her underwear, and examined her to "see if [appellant] had raped her." Claudia did not see any injury, and asked L.A. to show her how appellant had touched her. L.A. told Claudia that appellant placed his hand under her underwear and "touched [her] like this." L.A. demonstrated by moving her hand from her clitoris to "the center of the line." When L.A. demonstrated how appellant had touched her at "the beginning of the line," she pressed in with her fingers towards the inside of the line. When asked by Claudia whether appellant had placed his hand inside her vagina, L.A. said "no."

Claudia called the police and then met the others outside the house to wait for the police. Appellant appeared, walking towards the house on the sidewalk. Appellant's car was parked across the street from the house. When Batres told appellant that the police had been called, appellant kept walking fast towards Main Street.

A neighbor, Hugo Zamora, observed appellant in his front yard, about three feet from his daughter. He chased him into the backyard and called the police. The police later arrived and arrested appellant at gunpoint.

B. DNA Corroboration

Los Angeles Police Officer Kaspian took custody of appellant after his arrest a few blocks from the scene of the sexual assault. He took appellant first to 77th Street Station, and then later to the Santa Monica Rape Treatment Center. Nurse Karen Ross took swabs from both appellant's mouth and hands. With respect to the hands, Ross swabbed both appellant's palms, his fingers, and the tips of his fingers at the nails. Ross also swabbed appellant's genital area. After the examination, Kaspian left while the swabs were being dried.

Los Angeles Police Officers Sandoval and Olivarez drove L.A. to the Santa Monica Rape Treatment Center where she was examined by Nurse Sharilyn Clark. After the examination was complete, Clark gave Sandoval L.A.'s "sexual assault kit." A second nurse, Ross, gave Sandoval a separate second sexual assault kit for appellant. Sandoval booked both kits into evidence at the Los Angeles Police Department Property Division.

Los Angeles Police Department DNA Analyst Jennifer Sanchez both inventoried and analyzed the samples from L.A.'s sexual assault kit. L.A.'s kit contained two vestibule and two vulvar swabs, which are external genital swabs. Her kit also contained two oral swabs and one buccal swab. The buccal swab is a reference swab from the inside of the mouth, so that a known contributor's DNA profile can be determined. The vestibule, vulvar, and oral swabs were tested for the presence of male DNA. Sanchez detected no male DNA from these samples and thus conducted no further testing on these samples. A DNA profile from L.A.'s buccal reference sample was generated separately from the analysis of her swabs to avoid contamination.

Los Angeles Police Department DNA Analyst Annajo Lopez inventoried and analyzed appellant's sexual assault kit. Appellant's kit contained two penile swabs, two scrotal swabs, two right palm swabs, two left palm swabs, one right fingernail swab, one left fingernail swab, and a reference (buccal) swab. With the exception of a right palm swab and the left fingernail swab, all of the detected DNA belonged to appellant. The right palm swab was a mixture of three people, but the quantities were too low to identify donors. The left fingernail swab was a DNA mixture of two people, one of whom was appellant, while the other was L.A.. The amounts of male and female DNA in this sample were equal.

DNA can only be obtained from nucleated cells. Cells on the surface of the skin do not have nuclei. Areas that contain large amounts of nucleated epithelial cells, which are likely to contain high levels of DNA, are the body's orifices, such as the mouth, the anus, and the lining of the external genital area. The quantity of L.A.'s DNA in appellant's left fingernail sample was consistent with the interior of the female labia majora – inside where the lips meet – because that is where large amounts of nucleated epithelial cells are located. The outside portion of the labia majora consists of non-nucleated skin cells, which would not show large amounts of DNA. Lopez could not determine, with any certainty, whether the source of L.A.'s DNA on appellant's left fingernail swab was L.A.'s mouth, anus, vaginal area, or any other source containing nucleated epithelial cells.

DISCUSSION

A. Substantial Evidence Supports Appellant's Conviction for Sexual Penetration

Appellant first contends that the evidence presented at trial is insufficient to support the jury's finding of "sexual penetration" as required by section 288.7, subdivision (b). We disagree.

1. Standard of Review

The standard of review on a sufficiency of the evidence challenge is well established: evidence is sufficient to support a criminal conviction when the record below reasonably supports a finding of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318.) A trial record reasonably supports a finding of guilt when, upon review, and drawing all reasonable inferences in favor of the judgment below, it discloses evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 562.) When reviewing the record, the appellate court resolves neither credibility issues nor conflicts in the evidence. Such determinations belong exclusively to the trier of fact. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Unless it is physically impossible or inherently improbable, the testimony of a single witness is sufficient to support a conviction. (*Ibid.*)

2. Definition of "Sexual Penetration"

Section 288.7, subdivision (b), in pertinent part, prohibits sexual penetration, "as defined in section 289," with a child 10 years old or younger. Section 289, subdivision (k)(1) defines sexual penetration as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another

person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." Section 289, subdivision (k)(2), defines "foreign object" to include "any part of the body."

Appellant does not challenge the sufficiency of the evidence with respect to the intent underlying the penetration, but only whether the evidence sufficiently establishes the physical act of penetration. In *People v. Karsai* (1982) 131 Cal.App.3d 224, 232 (disapproved on another ground in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8), the court defined the degree of penetration required for rape under section 263: "[p]enetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina." In *People v. Quintana* (2001) 89 Cal.App.4th 1362, the appellant argued that rape and sexual penetration were different and that *Karsai's* definition of penetration should not be applied to section 289. (*Id.* at p. 1366.) The *Quintana* court rejected appellant's arguments, holding that "there are a host of reasons, ranging from statutory language and case precedent to considerations of anatomy and policy, supporting the conclusion we reach here that the degree of penetration required to commit these crimes [rape pursuant to section 263 and sexual penetration pursuant to section 289] is the same." (*Ibid.*) In support of its holding, the *Quintana* court observed that "a 'genital' opening is not synonymous with a 'vaginal' opening', and that the "vagina is only one part of the female genitalia, which also include inter alia the labia majora, labia minora, and the clitoris. [Citation]." (*Id.* at p. 1367.)

We agree with the *Quintana* court, and find no sound reason which would justify differentiating the penetration required under section 289 and that required for rape under section 263.

3. Analysis

With "sexual penetration" thus defined, the trial record clearly supports the jury's guilty verdict. L.A. testified that appellant rubbed "her line" more than once, that he pressed his finger inside "a little bit," and that it felt "weird." That testimony alone is sufficient to support a finding beyond a reasonable doubt that appellant penetrated L.A.'s labia majora while rubbing her "line."

L.A.'s direct testimony of what occurred is corroborated by other evidence. When she demonstrated for her mother, Claudia, what appellant had done to her, L.A. started with her finger at the top of her "line," and applied pressure towards the center, suggesting at least some penetration of the labia majora. The DNA evidence further corroborated L.A.'s description of penetration. Based on DNA Analyst Lopez's testimony, the amount of L.A.'s DNA on appellant's left fingernail swab was consistent with penetrating the labia majora, where large quantities of nucleated epithelial cells exist, but not consistent with simply rubbing the outside of the labia majora, where only non-nucleated skin cells are found. This evidence reinforces and supports L.A.'s own testimony which, by itself, is sufficient to support the jury's verdict.

Appellant argues that L.A.'s description of penetration was "equivocal," because she initially told her mother that appellant did not put his fingers inside her vagina. This is not entirely accurate: Claudia testified that L.A. denied that appellant put

his "hand" inside her vagina. In any event, to the extent L.A. made conflicting statements about what occurred, that evidence was presented to the jury which, as was within its authority to do, rejected it. It is not the job of a reviewing court to second guess the jury's resolution of conflicts in the evidence or to evaluate the credibility of witnesses. (See *People v. Young, supra,* 34 Cal.4th at p. 1181.)

Appellant next argues that the DNA evidence was equivocal because Analyst Lopez could not determine whether the DNA in appellant's left fingernail swab came from L.A.'s mouth, anus, or vaginal area. Again, resolution of such an issue belongs exclusively to the jury, which could have reasonably concluded – and obviously did – that since there was absolutely no testimony or other evidence that suggested contact between appellant's finger and L.A.'s mouth or anus, that the only reasonable source was the area inside L.A.'s labia majora, which was corroborated and fully supported by L.A.'s own testimony.

Finally, appellant argues that the evidence against him does not approach the quantity of evidence present in *Karsai* and *Quintana*. Neither of those cases was a sufficiency of the evidence case. Both were cases that defined the legal standard for penetration and then used their particular facts for illustrative purposes only. Neither case sought to quantify the evidence required to establish sexual penetration. In any event, for the reasons stated above, the testimony of L.A., along with the corroborative DNA evidence, was more than sufficient to support the jury's verdict.

B. Appellant Is Entitled to an Extra Day of Presentence Credit

Appellant contends that he is entitled to an extra day of presentence custody credit. The People concede that he is correct.

The case is remanded to the trial court to correct the abstract of judgment to reflect 468 days of actual credit, plus 15 percent or 70 additional days of conduct credits for a total of 538 days. (See *People v. Culp* (2002) 100 Cal.App.4th 1278, 1285.)

DISPOSITION

The case is remanded to the trial court to modify the abstract of judgment to reflect 468 days of actual credit, plus 70 additional days of conduct credit, for a total of 538 days. The modified abstract should be forwarded to the Department of Corrections by the Clerk. In all other respects, the judgment is affirmed.

SORTINO, J.*

WE CONCUR:

BIGELOW, P. J.

FLIER, J.

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