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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. FREDRICK WAYNE KOOK, Defendant and Appellant.	B269823 (Los Angeles County Super. Ct. No. NA079985)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Fredrick Wayne Kook appeals from a postconviction order denying his petition for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36 or the Act) (Pen. Code, § 1170.126).[1] The trial court denied the petition on the ground Kook committed a sexually violent offense, an enumerated exclusion under Proposition 36, making him ineligible for relief. Kook argues that because he was convicted for lewd or lascivious acts and not a sexually violent offense, the court erred by reviewing the trial transcript to make its finding that he committed a sexually violent offense. Kook also contends the trial court applied the wrong standard of proof and the evidence did not support the court's conclusion. None of the arguments have merit. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Act*

In November 2012, California voters enacted Proposition 36, which revised the three strikes law to preclude indeterminate life sentences unless the current offense (i.e., the third strike) is a serious or violent felony or is a disqualifying offense. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) Proposition 36 also authorized individuals to file petitions for the recall of previously imposed third strike sentences on the ground that they would not

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of their sentencing. (§ 1170.126, subd. (b).)

"The Act applies both prospectively and to defendants already sentenced under the prereform version of the Three Strikes law. A defendant with two prior strikes convicted of a nonserious, nonviolent felony cannot be sentenced to a third strike term unless the prosecution 'pleads and proves' that one of the Act's exceptions applies. (§ 1170.12, subd. (c)(2)(C).) For those sentenced under the scheme previously in force, the Act establishes procedures for convicted individuals to seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including [a sexually violent offense]. Second, an inmate must be suitable for resentencing. Even if eligible, a defendant is unsuitable for resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).) If an inmate is found both eligible and suitable, the inmate's third strike sentence is recalled, and the inmate is resentenced to a second-strike sentence. (*Ibid.*; § 1170.12, subd. (c)(1).)" (*People v. Estrada* (2017) 3 Cal.5th 661, 667 (*Estrada*).)

B. *Commitment Offenses*

On September 18, 2008, Long Beach police officers searched Kook's residence pursuant to a warrant. They found firearms and ammunition in a gun safe in the corner of his garage. Kook was in jail at the time the search was conducted.

Kook was convicted of possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)) and possession of ammunition (former § 12316, subd. (b)(1), now § 30305, subd. (a)(1)). The court found true the allegations Kook had two prior strike convictions of robbery (§§ 211, 667, subds. (b)-(i), 1170.12) and one prior conviction of lewd or lascivious acts with a child over the age of 14 where Kook was at least 10 years older than the child (§ 288, subd. (c)(1)). The court sentenced Kook to concurrent three strikes terms of 25 years to life.

C. *The Disqualifying Prior Offense of Lewd or Lascivious Acts*

In 2001, Kook was charged with three felony counts of lewd or lascivious acts on a 14-year-old, in violation of section 288, subdivision (c)(1). On October 11, 2001, after a court trial, the judge found Kook guilty of all three counts. On November 9, 2001, the court exercised its discretion and reduced counts 1 and 2 to misdemeanors, but count 3 remained a felony. Kook was sentenced to four years in state prison.

The evidence at trial established that in March 2000, Kook was married to Jeannie, the older sister of 14-year-old Lacey L. Lacey lived at her father's house. One day in March, Kook drove to Lacey's house and told her he was going to bring her back to his house because her sister wanted her to babysit. They stopped along the way at a drug store to get some medicine for Jeannie,

who was feeling ill. After leaving the drug store, Kook drove to the parking lot of a park next to a baseball field. Kook asked Lacey if she wanted to drive the car so she could learn to parallel park. Lacey had driven his truck once before and enjoyed it. Kook had Lacey scoot over next to him. When she started to drive, he began stroking the inner and outer portions of her thighs all the way up to her vagina. He made soft noises as he did so. She told him she didn't like it, and he took his hand away. Kook "tried to play it off as if nothing had happened."

After Lacey finished driving, they parked on the street under a large tree, and Kook scooted Lacey close to him again and began rubbing her thigh area again. Lacey started crying and told him to take her home. Kook took Lacey to his house instead. No one else was home. Kook showed Lacey his computer and took a picture of her with his web-cam. Kook tried to get her to pose by touching her in different places. He took more pictures of her and told her she had "an awesome body and . . . should do modeling work."

The next morning, Kook drove Lacey to school. Lacey took the bus home after school. She returned to Kook's house that night to babysit because her sister needed to go to the doctor. Lacey spent the night at Kook's house.

The next day, Kook drove Lacey to school. They were early, and Kook drove past the school. Lacey asked if they were going to the school, and Kook said he thought they would go for a ride first. Lacey testified that Kook backed into an alley, "[a]nd he locked the doors and he told me to scoot over, and so I was scared so I did what he told me to." Kook then pulled Lacey close to him. He pulled up her skirt and started rubbing her thighs; she kept trying to pull her skirt down. Kook put his other hand under her

bra and began touching her breast. Kook did not say anything, just moaned. Lacey was crying and told him she felt uncomfortable and wanted to go home or to school. Kook took her to school.

Lacey did not tell her sister what Kook had done because Lacey was afraid of what might happen to her sister if she did. She was afraid that her sister would get a divorce like their parents or be traumatized. Lacey waited until June to tell an adult friend of her father's what Kook had done to her.

D. *Proposition 36 Petition*

On February 27, 2013, Kook filed a petition for recall of the sentence under Proposition 36, requesting that he be resentenced as a second strike offender. Kook claimed that neither his commitment offenses nor his two prior strikes rendered him ineligible for the recall of his sentence. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126, subd. (e).) On March 26, 2013, the trial court issued an order to show cause why the petition should not be granted.

The People submitted opposition to the petition, asserting Kook was ineligible for resentencing under section 1170.126, subdivision (e)(2), because "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) In response, Kook argued he was not ineligible for resentencing on this basis, because he was not present when the firearms and ammunition were found in his garage and therefore, he was not armed during the commission of the offenses.

The People filed supplemental opposition to the petition, claiming Kook was ineligible for resentencing because he had a prior conviction for a sexually violent offense within the meaning of Welfare and Institutions Code section 6600, subdivision (b). (§§ 667, subd. (e)(2)(C)(iv)(I), 1170.12, subd. (c)(2)(C)(iv)(I), 1170.126, subd. (e)(3).) They argued the evidence was sufficient to support a finding the lewd or lascivious acts against Lacey were committed by means of duress, making the offense a sexually violent one. Kook denied there was evidence of duress and argued he was entitled to a jury trial on the question whether he committed a sexually violent offense.

Following a hearing, the trial court found Kook ineligible for resentencing under Proposition 36 because he had committed a sexually violent offense. The court explained "[t]he totality of the record demonstrates that [Kook] asserted physical control over Lacey by driving her to a dead end in an alley, locking the vehicle doors, ordering her to 'scott' [*sic*] closer to him, and pulling Lacey closer to him with one hand while he groped her using his other hand. Lacey was scared and she cried throughout the incident. Lacey repeatedly pulled her skirt down, which implied she did not want her upper thighs to be exposed. Lacey expressly told [Kook] that "'I don't like that'" and "'please don't do that[.'"] [Kook] also maintained physical control over Lacey because she had no realistic means of escape." The court noted, relying on *People v. Schulz* (1992) 2 Cal.App.4th 999, 1005, that "physical control can create 'duress' without constituting 'force.'"

The court added that "Lacey was particularly vulnerable because [Kook] was her brother[-]in[-]law, he was 37 years older than Lacey, Lacey was concerned that reporting [Kook's] actions could result in a divorce between [Kook] and her sister, and she

relied on [Kook] for a ride to school." (See *People v. Schulz*, *supra*, 2 Cal.App.4th at p. 1005.) Moreover, "[f]rom the perspective of a 14[-]year[-]old girl, [Kook] created a coercive atmosphere such that Lacey's liberty was being controlled by [Kook's] words, acts and authority against her will." (See *People v. Arnold* (1992) 6 Cal.App.4th 18, 31.) The court found it "clear that Lacey was pressured to endure [Kook's] inappropriate acts because she was in fear of danger, as evidence by her repeated testimony that she was scared. (*People v. Perez* (2010) 182 Cal.App.4th 231, 243 . . . .) [¶] On this record, the court ha[d] no trouble in concluding that the prior conviction was committed by duress, making i[t] a violen[t] sexual offense within the meaning of Welfare and Institutions Code section 6600, subdivision (b)." (Fn. omitted.)

The court therefore found by a preponderance of the evidence that Kook was ineligible for resentencing under Proposition 36. It discharged the order to show cause and denied Kook's petition. It did not decide whether Kook was also ineligible for resentencing because he was armed with a firearm in the commission of the offenses.

DISCUSSION

Kook contends the trial court erred in finding he was ineligible for resentencing under Proposition 36 for three reasons. First, he claims the trial court erred by reviewing the record outside of what was necessary to establish the count of conviction and making its own eligibility findings. Second, he claims the trial court applied the incorrect standard of proof. Finally, he claims the record does not support a finding he committed a

sexually violent offense. For the reasons set forth below, we reject these claims and find no error in the determination of ineligibility.

A. *Trial Court Did Not Err By Reviewing the Record and Making Factual Findings*

Kook argues the trial court erred by reviewing the record and making findings beyond those established by the elements of the crime of conviction. Because he was convicted of lewd or lascivious acts, Kook contends "the only things that the verdict and evidence reflect are that [he] briefly touched [Lacey's] breast." According to Kook, the court was precluded from looking beyond these specific facts to make its eligibility finding.

Recently, the California Supreme Court in *Estrada*, *supra*, 3 Cal.5th 661, determined that a trial court may deny resentencing under Proposition 36 based on facts developed from the preliminary hearing transcripts related to dismissed counts. Challenging the trial court's denial of his resentencing, the defendant in *Estrada* made the very argument Kook makes here: "Proposition 36 . . . precludes courts reviewing a petition to recall a sentence from making a factual finding" beyond those encompassed in the count of conviction. (*Id*. at p. 668.)

In 1996, Estrada pled guilty to one count of grand theft. Under the plea agreement, the prosecution dismissed a firearm use allegation related to the count of conviction, and robbery, burglary and false imprisonment based upon the same incident that led to the conviction. Estrada argued the trial court impermissibly based its finding of ineligibility for resentencing on conduct tied to the robbery count and firearm use, which were dismissed pursuant to the plea agreement. The trial court found

that Estrada was armed with a firearm or deadly weapon during the commission of the offense. "To make this determination, the court considered more than just the facts established by Estrada's guilty plea. It also considered transcripts of Estrada's preliminary hearing, during which the employee testified that Estrada was armed when he stole from a Radio Shack. What is more, the trial court considered this testimony even though it was also connected to a robbery count and a firearm use allegation that the prosecution dismissed pursuant to the plea agreement." (*Estrada*, *supra*, 3 Cal.5th at pp. 667-668.)

The Supreme Court framed the issue as follows: "The trial court's decision to consider this testimony raised the question we must now resolve: whether a court may rely on facts connected to a dismissed count to find that 'the defendant . . . was armed with a firearm or deadly weapon' during the commission of a third strike offense, which renders an inmate ineligible for Proposition 36 recall of sentence. [Citations.] To answer this question, we must first resolve whether a court may consider facts beyond those encompassed by the judgment when making an eligibility determination under section 1170.12, subdivision (c)(2)(C)(iii). If the answer is yes, we must then decide whether a court may consider the subset of those facts connected to dismissed counts when making that determination." (*Estrada*, *supra*, 3 Cal.5th at p. 668.)

The court ruled that a court considering a recall petition may consider facts beyond those encompassed in the judgment and may also consider the subset of facts connected to dismissed counts. The court found no error with the trial court's review of the preliminary hearing transcript to determine that Estrada

was armed with a firearm during the commission of the offense. (*Estrada*, *supra*, 3 Cal.5th at p. 676.)

Given the California Supreme Court's ruling in *Estrada*, Kook's argument that a trial court cannot consider facts beyond the count of conviction is foreclosed.[2] Consequently, the trial court did not err by considering the underlying facts in determining the conviction constituted a sexually violent offense within the meaning of section 1170.12, subdivision (c)(2)(C)(IV).[3]

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[2] In support of his argument that the court's inquiry is limited to review of the facts related to the essential elements of the conviction, Kook relies upon *People v. Guerrero* (1988) 44 Cal.3d 343 and *People v. Berry* (2015) 235 Cal.App.4th 1417, disapproved in *Estrada*, *supra*, 3 Cal.5th at page 675. In *Estrada*, the Supreme Court addressed both cases and rejected this argument. With respect to *Guerrero*, the court observed that nothing in Proposition 36 suggested the court is limited to a consideration of the facts established by the judgment of conviction. (*Estrada*, *supra*, 3 Cal.5th at p. 672; see also *People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110 [citing *Estrada*, "*Guerrero* does not preclude a Proposition 36 court from considering facts not encompassed within the judgment of conviction"].) The *Estrada* court disapproved *Berry* "to the extent it holds that a court is precluded from considering facts demonstrating that an inmate was armed *during* a third strike offense, simply because those facts also support a count the court dismissed." (*Estrada*, *supra*, at p. 675.)

[3] Prior to the Supreme Court's ruling in *Estrada* numerous cases had reached the same conclusion. (See *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063 ["a trial court determining eligibility for resentencing under the Act is not limited to a consideration of the elements of the current offense and the evidence that was presented at the trial (or plea proceedings) at which the defendant was convicted" but "may examine relevant,

B. *The Trial Court Properly Applied the Preponderance of the Evidence Standard of Proof*

The trial court found by a preponderance of the evidence that Kook committed a disqualifying sexually violent offense. Kook contends the trial court applied the wrong standard of proof in determining his eligibility. When the trial court made its ruling in this case in January of 2016, there was no dispute over the standard to be applied, The standard to be used was preponderance of the evidence. (*People v. Blakely*, *supra*, 225 Cal.App.4th at pp. 1061-1062 [preponderance of the evidence standard applies to determination of eligibility for resentencing]; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [same]; see *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1305 [preponderance of the evidence standard applies to finding of dangerousness under Proposition 36].) However, in March of 2016, the court in *People v. Arevalo* (2016) 244 Cal.App.4th 836 (*Arevalo*) found otherwise and determined "the correct standard of proof is beyond a reasonable doubt." (*Id*. at p. 848.)[4] Kook

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reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors"]; see also *People v. Perez* (2016) 3 Cal.App.5th 812, 832 [same], review granted Jan. 11, 2017, S238354; *People v. Newman* (2016) 2 Cal.App.5th 718, 725-726 [same], review granted Nov. 22, 2016, S237491; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 800-801 [court may rely on record of conviction including transcripts and prior appellate opinion]; *People v. White* (2014) 223 Cal.App.4th 512, 524-527 [proof of disqualification may be made based on the evidence, not the elements of the offense].)

[4] While the court in *People v. Bradford* (2014) 227 Cal.App.4th 1322 did not reach the issue concerning the appropriate standard of proof, one justice, in his concurring

contends, based upon *Arevalo*, that the trial court erred by applying the preponderance of the evidence standard.

The issue concerning the correct standard of proof is currently before the California Supreme Court in *People v. Frierson* (2016) 1 Cal.App.5th 788, review granted October 19, 2016, S236728.[5] In *Frierson*, Division Four of this district observed that once a defendant makes a prima facie showing that a conviction qualifies for resentencing under the Act, the burden shifts to the prosecutor to prove disqualification, and it has generally been accepted that the standard of proof is by a preponderance of the evidence. (*Id.* at p. 793.) The court explained that "[p]reponderance is the general standard under California law, and there is no showing that trial courts will be unable to apply it fairly and with due consideration. Nor is there a showing that they have failed to do so. We do not believe that a higher standard, let alone proof beyond a reasonable doubt, the highest standard possible, is constitutionally required." (*Id.* at p. 794).

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opinion, discussed the three standards of proof (preponderance, clear and convincing, and beyond a reasonable doubt) and expressed his view that "a heightened burden of proof by clear and convincing evidence" (*id.* at p. 1346, conc. opn. of Raye, J.) appeared to be appropriate in light of the important rights at stake. (*Id.* at pp. 1350-1351.)

[5] In its grant of review, the Supreme Court stated, "The issue to be briefed and argued is limited to the following: What is the standard of proof for a finding of ineligibility for resentencing under Proposition 36?" (*People v. Frierson* (2016) 2016 Cal. LEXIS 8793.)

Since *Arevalo*, appellate courts have continued to affirm the use of the preponderance of the evidence standard. "[T]he battle lines have been drawn with beyond a reasonable doubt, on one side, and preponderance of the evidence, on the other. The published appellate court opinions espousing a standard of proof thus far have all come down on the side of preponderance of the evidence, except for one, *Arevalo* . . . , in which the court embraced the beyond a reasonable doubt standard of proof." (*People v. Newman*, *supra*, 2 Cal.App.5th at p. 728; see *People v. Valdez* (2017) 10 Cal.App.5th 1338, 1346, review granted Aug. 9, 2017, S242240.[6]

Until the Supreme Court decides this issue, we believe the appropriate standard to be applied is preponderance of the evidence. The beyond a reasonable doubt standard is not statutorily nor constitutionally required. Proposition 36 does not include within its language the applicable standard of proof. "As a *statutory* matter, preponderance of the evidence therefore is the appropriate standard. Evidence Code section 115 provides in pertinent part: 'Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.'" (*People v. Newman*, *supra*, 2 Cal.App.5th at pp. 728-729.) Nor is such a standard constitutionally required. "As a general matter, beyond a reasonable doubt, the highest standard of proof, implicates issues regarding guilt or innocence of a charged crime but not sentencing." (*Id*. at p. 731.) Citing the United States

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[6] The order granting the petition for review stated, "Further action is this matter is deferred pending consideration and disposition of a related issue in [*Frierson*] . . . , or pending further order of the court." (*People v. Valdez* (2017) 2017 Cal. LEXIS 6196.)

Supreme Court's opinion in *United States v. Watts* (1997) 519 U.S. 148 [117 S.Ct. 633, 136 L.Ed.2d 554], the *Newman* court observed the "'application of the preponderance standard at sentencing *generally* satisfies due process.'" (*Newman*, *supra*, at p. 732; see also *People v. Towne* (2008) 44 Cal.4th 63, 86 ["'constitutional requirement of a jury trial and proof beyond a reasonable doubt applies only to a fact that is "legally essential to the punishment,"'" but "[f]acts relevant to sentencing need be proved only by a preponderance of the evidence"].) Moreover, because Proposition 36 operates to decrease a defendant's punishment, not to increase the penalty for a crime beyond the prescribed statutory maximum, the Sixth Amendment does not require that findings be made by a jury or that they be determined beyond a reasonable doubt.[7] (*Newman*, *supra*, at p. 732; accord, *People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1040 ["Because a determination of eligibility under section 1170.126 does not implicate the Sixth Amendment, a trial court need only find the existence of a disqualifying factor by a preponderance of the evidence"]; see also *People v. Frierson*, *supra*, 1 Cal.App.5th at p. 793, ["there is no right to a jury trial on issues going to the defendant's entitlement to a sentence reduction"].)

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[7] Under federal constitutional law, any finding which increases a penalty beyond the statutory maximum must be proven beyond a reasonable doubt. (See *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]; *Blakely v. Washington* (2004) 542 U.S 296 [124 S.Ct. 2531, 159 L.Ed.2d 403]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].) Proposition 36 reduces rather than increases criminal penalties. Thus, federal constitutional law does not require findings on a Proposition 36 petition to be proved beyond a reasonable doubt.

Based on the foregoing, and consistent with the majority of the decisions on the issue, we conclude the trial court correctly employed the preponderance of the evidence standard of proof.

C. *Substantial Evidence Supports the Trial Court's Finding of Ineligibility*

"We review the factual basis for the trial court's finding of resentencing ineligibility under the substantial evidence test. We review the whole record in a light most favorable to the order to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find ineligibility by a preponderance of the evidence. [Citations.]" (*People v. Valdez*, *supra*, 10 Cal.App.5th at p. 1346; accord, *People v. Perez*, *supra*, 3 Cal.App.5th at pp. 821-822; see *People v. Osuna*, *supra*, 225 Cal.App.4th at p. 1040.)

For purposes of Proposition 36, a sexually violent offense is one "committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person." (Welf. & Inst. Code, § 6600, subd. (b).) In *People v. Schulz*, *supra*, 2 Cal.App.4th at page 1005, the court explained that "[p]hysical control can create 'duress' without constituting 'force.' 'Duress' would be redundant in the cited statute[] if its meaning were no different than 'force,' 'violence,' 'menace,' or 'fear of immediate and unlawful bodily injury.' [Citation.] 'Duress' has been defined as '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.] . . . [D]uress involves psychological coercion. [Citation.] Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] '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' is relevant to the existence of duress. [Citation.]" In determining the existence of duress, we look at the totality of the circumstances, including the victim's age, her relationship to the defendant, and physical control over the victim if she attempts to resist. (*People v. Veale* (2008) 160 Cal.App.4th 40, 46.)

In *Schulz*, "[t]he victim, then nine years old, was crying while defendant, her adult uncle, restrained and fondled her. On this occasion he took advantage not only of his psychological dominance as an adult authority figure, but also of his physical dominance to overcome her resistance to molestation. This qualifies as duress. [Citations.]" (*People v. Schulz*, *supra*, 2 Cal.App.4th at p. 1005.) In *People v. Veale*, *supra*, 160 Cal.App.4th 40, the seven-year-old victim was molested by her stepfather, an authority figure in the household, when they were alone together in a locked room. The victim was afraid of the defendant and afraid that if she told anyone about the molestation, he would kill her or her mother. The court found this constituted sufficient evidence of duress. (*Id*. at pp. 46-47.)

The situation here is similar. Kook, who was 37 years older than Lacey and Lacey's brother-in-law, drove Lacey to his house and along the way took advantage of the situation to touch Lacey's thighs. She told him she did not like it; nonetheless, a short time later, he did it again. She started crying and asked to

go home. Instead he took her to his house, where he complimented her appearance, told her she should be a model, and physically positioned her body while he photographed her.

Two days later, Kook drove Lacey to school after she again babysat for her sister. He took her for a ride, backed into an alley, locked the doors and told her to move closer to him. She was scared and complied out of fear. He pulled her closer, raised her skirt and touched her thighs, and touched her breast under her bra. Lacey tried to pull her skirt down. She was crying and told him she felt uncomfortable and wanted to go. Lacey did not report these incidents because she was afraid her sister would get a divorce or be traumatized if she did.[8]

Kook took advantage of his psychological dominance as an adult authority figure married to Lacey's sister, who was sick and

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[8] We note that Kook does not dispute the facts, but merely whether, as a matter of law, they constitute duress. For example, Kook argues that after he parked the truck and locked the car by pressing the automatic lock button, Lacey "admitted that she could have still gotten out had she so chosen." On cross-examination, Lacey was asked:

"Q And by locking the doors, you're talking about he hit the automatic lock on his side?

"A Yes.

"Q So the knob next to you went down?

"A Yes.

"Q Such that you could have picked it up and opened it up if you wanted to?

"A Yes, that's true."

The proposition that she could have physically pulled open the pin of the locked door misses the operative point that she did not do so because she was alone in Kook's truck, tucked away in an alley, scared and afraid.

needed Lacey to babysit. Kook placed her in situations where he was alone with her and could take advantage of her. In the incident in question, Kook isolated Lacey in an alley and locked the doors to his truck, taking advantage of his physical dominance, age, and family relationship to commit the crime. As in *Schulz*, "[t]his qualifies as duress." (*People v. Schulz*, *supra*, 2 Cal.App.4th at p. 1005; see also *People v. Perez*, *supra*, 182 Cal.App.4th at p. 243 [substantial evidence of coercion where the victim was afraid the defendant, who lived with her and her grandmother, would report an incident to her grandmother]; *People v. Veale*, *supra*, 160 Cal.App.4th at pp. 48-49 [substantial evidence of duress based on victim's relationship to defendant, disparity in their sizes, and her fear he would kill her or her mother if she reported the molestation]; *People v. Arnold*, *supra*, 6 Cal.App.4th at p. 31 [psychological coercion where teacher blocked door and isolated student victim].)

DISPOSITION

The order is affirmed.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

ZELON, 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.