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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN R. HERNANDEZ,

Defendant and Appellant.

B231900

(Los Angeles County
Super. Ct. No. NA 085009)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Gary J. Ferrari, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and
Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Juan R. Hernandez was found guilty by a jury of one count of sexual penetration of a child 10 years of age or younger and of four counts of forcible lewd acts upon a child. The jury also found that two of the four counts of lewd acts involved multiple victims. Appellant was sentenced to consecutive terms of 15 years to life on the sexual penetration count and two of the four lewd act counts for a total of 45 years to life. The remaining two counts were ordered to run concurrently. The court imposed various fines and fees and awarded 435 days of presentence custody credit. The appeal is from the judgment.

Appellant's sole contention is limited to the count of sexual penetration of a child 10 years old or younger; specifically, the contention is that there is insufficient evidence that the victim was under the age of 10. In light of this circumstance, we will not summarize the evidence that supports the four lewd act convictions. We state the family relationships and briefly note the evidence that supports the sexual penetration conviction.

FACTS

Appellant committed these crimes on his three nieces, who were born in 1998, 1999 and 2001; appellant's brother-in-law is the father of these children. Appellant is married and has three children with his wife, who brought five children with her into the marriage. Appellant and his family lived in the same duplex as appellant's brother-in-law and his family.

A., born in 1998, was the victim of the sexual penetration. A. was playing with another child at appellant's house when appellant told her to come to him. Appellant took off A.'s pants and underpants and made her kneel on the bed. He then inserted his finger in her vagina more than once. A. was shocked and scared. She got off the bed, put her clothes back on and went downstairs where she told her aunt what had happened. She also told her mother. A. did not remember when the foregoing occurred.

A.'s mother testified that A. was nine years old when she told her that appellant had touched her. A.'s family moved out of the duplex in 2007; A.'s statement to her mother was made before they moved out of the duplex.

DISCUSSION

Penal Code section 288.7 provides in relevant part that the sexual penetration of a "child who is 10 years of age or younger" is a felony punishable by imprisonment for a term of 15 years to life. Does "10 years of age or younger" include children who have passed their 10th birthday and are still 10 years old? We are informed that this question is before the California Supreme Court in *People v. Cornett* (Apr. 30, 2012, S189733) ___ Cal.4th ___ [2012 Cal. LEXIS 3982].

We need not become embroiled with this issue. We are required to view the evidence in a light most favorable to respondent (*People v. Rayford* (1994) 9 Cal.4th 1, 23), which, in this case and on this issue, is A.'s mother's testimony -- clear, direct and unambiguous -- that A. was nine years old when she told her mother that appellant had touched her. That it is *possible* that this crime was committed at a later time is of no moment at this stage of the case. That is, that A. made comments to an investigator and a nurse that suggest that the crime was committed when A. was 10 years old is beside the point. In any event, one would think that the best authority on a child's age is the child's mother.

Given that the rule on which we rely is one of the most fundamental principles of appellate procedure,¹ we find appellant's lengthy exposition of the *People v.*

¹ "We think it sufficient to reaffirm the basic principles which govern judicial review of a criminal conviction challenged as lacking evidentiary support: the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Cornett issue essentially a waste of time and effort. While capably executed, this is not the forum for what is essentially a purely academic discussion.

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.