Filed 9/20/12 P. v. Hernandez CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS HERNANDEZ, Defendant and Appellant.	2d Crim. No. B235022 (Super. Ct. No. 2009026055) (Ventura County)

Jose Luis Hernandez appeals from the judgment following his conviction by jury of four counts of aggravated sexual assault of a child (Pen. Code, § 269, subd. (a)(1)),[1] and four counts of lewd act upon a child (§ 288, subd. (a)). The trial court sentenced appellant to an indeterminate term of 60 years to life (four consecutive 15-year-to-life terms with the possibility of parole for the aggravated sexual assault offenses, with four 8-year upper terms for the charges of lewd act upon a child stayed pursuant to § 654).[2] It awarded him 739 days of presentence custody credit, with no presentence conduct credit. Appellant challenges the sufficiency of the evidence to support the aggravated sexual assaults of a child. He

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

[2] Each of the counts charging section 288, subdivision (a) refers to the facts and circumstances charged under section 269, subdivision (a)(1).

also argues, and respondent agrees, that the trial court erred by failing to award him a 15 percent presentence conduct credit pursuant to sections 4019 and 2933.1. We modify the sentencing order to grant appellant 110 days of presentence conduct credit and remand to the trial court directions to amend the abstract of judgment. In all other respects, we affirm the judgment.

BACKGROUND

During 2008 and 2009, the victim, A.C., who was born in 1996, lived with her half-sister, four-year-old A., their mother, L., and appellant, A.'s father. A. slept on the top bunk of their bunk bed and A.C. slept on the bottom bunk.

Because L. worked day and night, appellant frequently cared for A. and A.C., and attended functions at A.C.'s school. A.C. viewed appellant as her stepfather and talked with him about events in her life. At some point, appellant started to ask A.C. whether she was interested in anyone and whether she wished to experiment sexually. Eventually, he started to sexually assault her. The assaults occurred in A.C.'s lower bunk, while A. slept in the upper bunk of their bed, and always when L. was at work.

Count 1 (August 2008 Aggravated Sexual Assault)

One night in August 2008, A.C. and A. were asleep in their room. A.C. awoke and found appellant lying beside her in her bottom bunk bed. He scratched A.C.'s head, as he regularly did with her, L. and A. Then he placed his hand under A.C.'s shirt and touched her breast, which upset her. She asked him to stop and he left the room.

Later that night, A.C. awoke and found appellant pulling off her pajama pants and underwear. She tried to pull them back on, but could not do so. Appellant then got on top of her, "put his hands on [her] knees and pulled [her] legs apart." She tried to keep her legs together but she was unable to do so. Appellant then "put his penis in [A.C.'s] vagina." She felt a "sharp pain" and asked appellant to stop. Appellant refused to stop and said that "it would be all right because it was

[her] first time and that that was normal." A.C. tried to push him away, but "he was too strong." He said that he preferred that A.C.'s first time be with him rather than with someone else. Before leaving her room, appellant told A.C. that she "couldn't tell anyone." A.C. did not cry out when appellant was assaulting her because she "didn't want [A.] to see anything" and A. "was only four at that time."

Count 3 (December 2008, Aggravated Sexual Assault)

One evening in December 2008, A. and A.C. were asleep. A.C. woke up when appellant entered the room and lay down next to her. He told her that "it would be okay because it wasn't the first time and it wouldn't hurt." Although A.C. said, "no," appellant removed her pajama pants and underwear. A.C. tried, without success, to pull them back on. Appellant pulled A.C.'s legs apart; she tried to close them, but could not; and he "put his penis in [her] vagina." She continued struggling to push him away, or move away herself, but she could not. As she tried to escape, appellant moved closer to her. The upper bunk blocked her escape. A.C. was menstruating, and the sex was especially painful. After withdrawing from her, appellant wiped his penis with his shirt. L. found that shirt and asked A.C. if anything was going on between her and appellant. A.C. responded "no" because appellant meant so much to L. and she feared that L. would not believe her. She also did not want her sister A., like herself, to be without her father.

Count 5 (First 2009 Aggravated Sexual Assault)

Several months after December 2008, on one evening, A.C. asked appellant if she could go outside. After he said "no," she went to her room to do schoolwork. Later, appellant entered her room and said that "if [she] let him have sex with [her, she] would be able to go outside." She refused, appellant "kept insisting," and she continued refusing. Still later, appellant told A.C. that if she did not have sex with him, he would show her bad test grade to L. That night, after A. and A.C. were asleep, appellant again entered A.C.'s bed. He pulled her legs apart to remove her pajama pants. Once again, she tried without success to close her legs.

Appellant "put his penis in [her] vagina," and she "asked him to stop," and let her go, but he refused. Again, she could not escape. After he "ejaculated on himself," appellant stopped assaulting A.C. and used a sock to clean himself.

Count 7 (July 14, 2009 Aggravated Sexual Assault)

On July 14, 2009, the night after her birthday, A.C. lay awake in bed as A. slept on the top bunk. Appellant entered the bedroom, approached A.C., and removed her pajama pants and underwear. She tried but could not put them back on. Using his hand, appellant opened A.C.'s legs, and resisted her efforts to close them. Appellant then "had sex with [her] again." A.C. told him that she was menstruating and that she was "uncomfortable." He nonetheless continued having sex with her. A.C. asked appellant to stop. When he did not stop, she struggled and tried to "push . . . him away like before" but that did not work. After appellant finally did stop, A.C. noticed that she had bled from her vagina. Appellant "took his sock off and he wiped his penis." L. found that sock two days later and took A.C. to the hospital. She asked if anyone was harming A.C. This time A.C. admitted that appellant was harming her. Earlier L. and appellant had argued, and L. had told A.C. that appellant was leaving.

DISCUSSION

Substantial Evidence

Appellant first contends that the evidence presented at trial was not sufficient to support his convictions for aggravated sexual assault of a child because the prosecution failed to prove that the acts of sexual intercourse were accomplished by means of force or duress. We disagree.

In reviewing claims of insufficient evidence, """. . . we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]""" (*People v. Wilson* (2008) 44 Cal.4th

758, 806.) "'. . . [W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*Ibid.*) Reversal is warranted only where it appears "'that upon no hypothesis what[so]ever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

An aggravated sexual assault of a child by forcible rape requires sexual intercourse with a child under the age of 14 by an assailant who is 7 or more years older than the child. (§ 269, subd. (a)(1); *In re Asencio* (2008) 166 Cal.App.4th 1195, 1203.) It further requires that the sexual intercourse was against the child's will and was accomplished "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2); *People v. Lee* (2011) 51 Cal.4th 620, 633.)

Citing *People v. Elam* (2001) 91 Cal.App.4th 298, 306, appellant argues that the force necessary in sexual offense cases is physical force substantially different from or substantially in excess of that required for the commission of the sexual act. However, as our Supreme Court explained in *People v. Griffin* (2004) 33 Cal.4th 1015, "in a forcible rape prosecution, the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, not whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker." (*Id*. at p. 1027.) "[T]he Legislature did not intend the term 'force,' as used in the rape statute, to be given any specialized legal definition. [Citation.]" (*Id*. at p. 1023.) Here the record contains sufficient evidence that appellant used force to rape A.C. She testified that she tried to push appellant away when he raped her, but could not because he was too strong, and he blocked her escape by moving closer to her in her lower bunk, which left her trapped from above by the upper bunk and on both sides by appellant and the wall.

Moreover, there is substantial evidence from which a reasonable juror could find that that appellant used duress to rape A.C. "'Duress' includes ""a direct or implied threat of . . . hardship or retribution sufficient to coerce a reasonable person of ordinarily sensibilities to . . . perform an act which otherwise would not have been performed. . . .'" [Citation.]' [Citations.] '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.]' [Citation.]" (*People v. Hale* (2012) 204 Cal.App.4th 961, 979.) Appellant exercised parental authority over A.C. and resorted to denying her privileges and threatening to disclose negative information about her to L. In addition, A.C. told L. that nothing was going on between her and appellant because appellant meant so much to L. and she feared that L. would not believe her. She also did not want her sister A., like herself, to be without her father. She told L. that appellant was harming her as soon as she learned that appellant was leaving.

Conduct Credits

Appellant served 738 days of presentence custody, beginning on July 9, 2009, through and including July 22, 2011 sentencing date. Appellant contends, and respondent agrees, that the trial court erroneously denied him a 15 percent presentence conduct credit of 110 days, pursuant to sections 2933.1 and 4019. We agree that appellant is entitled to 110 days of conduct credits. (*People v. Brewer* (2011) 192 Cal.App.4th 457, 462.) We thus modify the July 22, 2011 sentencing order and remand the case to the trial court with directions.

DISPOSITION

The order of the trial court dated July 22, 2011, is modified to award appellant 738 days of actual presentence custody and 110 days of conduct credits under sections 4019 and 2933.1. On remand, we direct the sentencing court to

amend the abstract of judgment to reflect that appellant received 738 days of actual presentence custody and 110 conducts credits, and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James P. Cloninger, Judge

Superior Court County of Ventura

Jeffrey J. Douglas, 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, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Jonathan M. Krauss, Deputy Attorney General, for Plaintiff and Respondent.