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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.

MIGUE CUMES,

Defendant and Appellant.

2d Crim. No. B236135
(Super. Ct. No. BA345801)
(Los Angeles County)

Miguel Yaxon Cumes appeals his conviction, by jury, of sexual penetration of a child (count 3, Pen. Code, § 288.7, subd. (b))¹, two counts of committing lewd act upon a child (counts 4 and 6, § 288, subd. (a)), and one count of misdemeanor battery (count 5, § 242), a lesser included offense of the charged offense, committing a lewd act upon a child. The trial court sentenced appellant to a term of 30 years to life in state prison. Appellant contends his conviction on one of the lewd acts counts must be reversed because it is not supported by substantial evidence. We affirm.

Facts

This case involves two victims: Chyenne T. and Rosalinda B. Appellant does not challenge the convictions relating to Chyenne T., so we will not discuss them here.

¹ All statutory references are to the Penal Code unless otherwise stated.

Five-year-old Rosalinda B. went to the Inner City Market in Los Angeles with her mother. While they were shopping, Rosalinda went alone to get some juice. Appellant, who worked at the market, motioned for Rosalinda to come to him. She thought he was going to tell her something, so she went over to him. He took her by the hand and pulled her into a refrigerated storage area at the back of the store. After he closed the door, appellant put his hand inside Rosalinda's underwear, touched her vagina and inserted his finger inside her twice. Rosalinda said that appellant touched her, "hard," and that he scratched her.

When Rosalinda's mother noticed she was missing, she began walking up and down the aisles of the store, calling her name. Rosalinda did not respond. The mother started screaming that someone had taken her child. At that point, appellant came out of the storage area with Rosalinda. The child was crying and looked frightened. She ran to her mother and hugged her mother's legs. Appellant explained that Rosalinda had followed him into the storage area where she became scared and started crying.

Rosalinda's mother walked with her to the front of the store. They paid for their groceries and left. Once outside, Rosalinda said she would never go back to the store again. When her mother asked why, Rosalinda said that appellant, "touched me here," and grabbed her front crotch area. Rosalinda's mother immediately looked inside Rosalinda's underwear and noticed that she had urinated all over herself. They went to a store across the street and called police.

Los Angeles Police Officer Lawrence Sinclair was the first officer who spoke with Rosalinda. She told him that appellant put his hands inside her underwear and pressed in her vagina hard, scratching her. Later that same day, Rosalinda was interviewed by LAPD Detective Eloy Ochoa. She told Detective Ochoa that appellant put his hands under her clothing and twice put his fingers inside her "really hard." She made consistent statements in an interview with the prosecutor and at appellant's preliminary hearing, five months later. During a sexual assault examination, Rosalinda told the nurse, "I was in the store to get juice, and a man was in there; came in, and hurt me in my vagina." The examination identified two abrasions in Rosalinda's vaginal area,

one located between the labia majora and labia minora, and the other located near the urethral opening.

Rosalinda was five years old when the assault occurred. She was eight when she testified at appellant's trial. During her trial testimony, Rosalinda contradicted her prior statements. She first testified that appellant "touched me under my pants and he did me a scratch." When she was asked if the man's hands went under her underwear, she replied, "No. On top." She also testified that the man touched her "[k]ind of hard" and that he did it "[o]nly once." Later, the prosecutor asked Rosalinda, "Did you tell Detective Ochoa that he put his fingers in you two times?" She answered, "Yes." The prosecutor asked, "Was that truth?" Rosalinda answered, "Yes." On cross examination, Rosalinda agreed with the statement that appellant "put his hands inside of your privates[.]"

Rosalinda's mother testified that, immediately after the incident, Rosalinda told her that the man touched her and put his finger inside her private part. She did not tell her mother how many times the man touched her, however, Rosalinda's mother overheard her tell Detective Ochoa that the man touched her two times.

In her closing argument, the prosecutor urged the jury to find that appellant touched Rosalinda's vagina "skin-to-skin," and then inserted his finger inside her. The sexual penetration offense alleged in count 3 (§ 288.7, subd. (b)) occurred when appellant inserted his finger in Rosalinda. The lewd conduct offense alleged in count 4 (§ 288, subd. (a)), occurred when he touched her vagina. The jury found appellant guilty of both offenses.

Discussion

Appellant contends the touching alleged as lewd conduct for purposes of count 4 was incidental to the digital penetration alleged in count 3, rather than a separate offense. He touched Rosalinda's vagina "en route" to committing the digital penetration, and not a discreet act of abuse. As a consequence, he contends, his conviction of lewd conduct must be reversed because it is not supported by substantial evidence.

In every substantial evidence inquiry, we examine the entire record to determine whether it contains reasonable, credible evidence of sold value upon which a rational trier of fact could rely to find the essential elements of the crime beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) We view the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced form the evidence. (*People v. Boyer* (2006) 38 cal.4th 412, 480.) We do not resolve credibility issues or reweigh the evidence. (*People v. Maury, supra*, 30 Cal.4th at p. 403.) The testimony of a single witness may be sufficient to uphold a jury's findings of fact. (*People v. Barnwell* (2007) 41 Cal.4th 1038.)

Here, appellant contends he could be convicted of only one offense because the lewd conduct (count 4) was incidental to the sexual penetration (count 3). We are not persuaded. As our Supreme Court held in *People v. Harrison* (1989) 48 Cal.3d 321, and reaffirmed in *People v. Scott* (1994) 9 Cal.4th 331, multiple sex offenses can occur during a single encounter, resulting in multiple convictions. "Each individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation." (*Scott, supra*, 9 Cal.4th at p. 346-347.) The court in *People v. Jiminez* (2002) 99 Cal.App.4th 450, was even more specific when it held, "Where a defendant fondles one area of the victim's body and then moves on to fondle a different area, one offense has ceased and another has begun. There is no requirement that the two be separated by a hiatus, or a period of reflection." (*Id.* at p. 456.)

Rosalinda described the assault to Detective Ochoa shortly after it occurred. She told Detective Ochoa that appellant put his finger inside her twice and that he put his hand on her crotch, under her clothes. She made consistent statements to the prosecutor in an interview that occurred shortly thereafter, and in her testimony at appellant's preliminary hearing, held five months after the assault. Three years later, Rosalinda testified at trial that appellant touched her once, outside her clothing. She also testified that she told Detective Ochoa the truth when she said appellant touched her skin, under her clothes and put his finger inside her two times.

A reasonable jury could have found that the passage of time caused Rosalinda's memory for the details of the assault to fade, and that her earliest statements were entitled to greater weight than her trial testimony. The earlier statements provide substantial evidentiary support for two separate offenses as found by the jury. Appellant digitally penetrated Rosalinda at least once and he put his hand on her crotch, under her clothes. Alternatively, the jury could have found that appellant digitally penetrated Rosalinda twice, again providing substantial evidence for two separate convictions. (*See, e.g., People v. Harrison, supra* 48 Cal.3d at pp. 324-327.) There was no error.

Conclusion

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

William Sterling, Judge
Superior Court County of Los Angeles

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, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.