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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. DAVID ARTHUR GIBSON, Defendant and Appellant.	C069181 (Super. Ct. No. 10F8935)

A jury convicted defendant David Arthur Gibson of sexual intercourse with a child 10 years of age or younger (count 1), oral copulation with a child 10 years of age or younger (count 2), sexual penetration with a child 10 years of age or younger (count 3), continuous sexual abuse of a child under 14 years old (count 4), and continuous sexual abuse of a child under 14 years old (count 5). The trial court granted defendant's motion for a new trial on counts 1 through 3, but declined to dismiss count 4. The trial court

sentenced defendant on counts 4 and 5, which involved two different victims, to an aggregate term of 31 years to life in prison.

Defendant contends his conviction on count 4 for continuous sexual abuse must be reversed because there is insufficient evidence to support the conviction. We will affirm the judgment.

BACKGROUND

Defendant moved into a two-bedroom house with Donna B. and her daughter A.C. Defendant and Donna subsequently had a daughter, M.G., born in 1998. In 1999, the family moved to another home on Alfreda Way in Redding.

In 2005 or 2006, Donna and defendant split up. Defendant received legal custody of M.G., who was seven years old. Defendant and M.G. lived in various locations including an apartment on Hartnell Avenue in Redding. In 2010, M.G. informed Donna that defendant had been sexually molesting her.

M.G. was almost 13 years old at the time of trial. She testified that defendant had been molesting or sexually abusing her for "[a]s long as I can remember." The first time M.G. could recall defendant sexually abusing her was on Alfreda Way when she was four or five years old and it snowed in Redding. She was on the bed with defendant and his penis was touching her vagina when their neighbor knocked on the door. Defendant pulled up his pants and ran to the door. The touching made M.G. feel "disgusted." When M.G. was asked how many times defendant touched her in a way that she considered "disgusting," she replied, "[M]ore than I can remember." When asked if it was more than 20 times, M.G. replied, "More than likely."

Defendant sexually abused M.G. for about five to six years and ended in late December 2009 or January 2010. The sexual abuse consisted of defendant touching his penis to her vagina, putting his hands on her vagina, placing her hands on his penis, and putting his mouth on her vagina and licking it.

During cross-examination, when asked how frequently defendant touched her inappropriately while she lived in the apartment on Hartnell Avenue, M.G. replied, "I don't know exactly how frequent. I mean, like I said earlier, I don't pay attention to like the times and stuff." Counsel then asked if the touchings occurred "once a month, once a week, every day," and M.G. answered, "Not every day. But I mean, sometimes once a week. I mean, not once a month. It was definitely more times than once in a month."

M.G. was examined for sexual abuse in January 2010. M.G.'s hymen was abnormal, there were signs it had been penetrated several times, and the findings were consistent with sexual abuse.

A.C. was 20 years old at the time of trial. She testified that she lived with her mother and defendant on Alfreda Way for six to seven years. During that time defendant would put his hand on her vagina (sometimes under her clothes and other times over her clothes) and massage it. This occurred "ten to 15 times or so." The molestations became less frequent as A.C. got older. Defendant touched A.C. on the chest about "three to five times" but most of the time he focused on her "vaginal area." A.C. left the Alfreda Way home when she was in the seventh grade and went to live with her biological father.

Defendant testified at trial and denied molesting A.C. or M.G.

The jury convicted defendant of sexual intercourse with M.G., a child 10 years of age or younger (Pen. Code, § 288.7, subd. (a) -- count 1);[1] oral copulation with M.G., a child 10 years of age or younger (§ 288.7, subd. (b) -- count 2); sexual penetration with M.G., a child 10 years of age or younger (§ 288.7, subd. (b) -- count 3); continuous sexual abuse of M.G., a child under 14 years of age (§ 288.5, subd. (a) -- count 4); and continuous sexual abuse of A.C., a child under 14 years of age (§ 288.5, subdivision (a) -- count 5). On counts 4 and 5 the jury found true enhancement allegations that the offenses

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

were committed against more than one victim within the meaning of section 667.61, subdivision (b), and section 1203.066, subdivision (a)(7).

Defendant moved for a new trial, arguing that the convictions on counts 1 through 3 violated ex post facto principles and that there was insufficient evidence to support the conviction on count 4. The trial court, with the People's concurrence, granted the motion on counts 1 through 3, but denied the motion on count 4. The trial court sentenced defendant on count 4 to 15 years to life in prison, and on count 5 to 16 years in prison, for an aggregate term of 31 years to life in prison.

DISCUSSION

Count 4 charged defendant with continuous sexual abuse of M.G. from April 16, 2009 to January 9, 2010, during the period when M.G. lived with defendant on Hartnell Avenue. Defendant contends "M.G.'s generic testimony that some form of 'touching' occurred more than once per month at Hartnell" is insufficient to support the conviction because "M.G. had no specific testimony regarding the actual conduct that occurred in the time period, how many times that specific conduct occurred, and in fact stated she did not remember any details or frequency."

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) And as the California Supreme Court explained, "even generic testimony (e.g., an act of intercourse 'once a month for three years') outlines a series of *specific*, albeit undifferentiated, incidents . . . ." (*Ibid.*, original italics.)

The trial court instructed the jury with CALCRIM No. 1120, stating that to prove continuous sexual abuse of M.G., the People must prove "1. The defendant lived in the

same home with a minor child; [¶] 2. The defendant engaged in three or more acts of substantial sexual conduct or lewd or lascivious conduct with the child; [¶] 3. Three or more months passed between the first and last acts; AND [¶] 4. The child was under the age of 14 years at the time of the acts." The instruction defined substantial sexual conduct as "oral copulation or masturbation of the child or the offender or penetration of the child's vagina by the other person's penis or any foreign object." The instruction also defined lewd or lascivious conduct as "any willful touching of a child accomplished with the intent to sexually arouse the perpetrator or the child. The touching need not be done in a lewd or sexual manner. Contact with the child's bare skin or private parts is not required. Any part of the child's body or the clothes the child is wearing may be touched."

M.G. testified that defendant placed his penis, hands and mouth on her vagina. At a minimum, this constituted lewd and lascivious conduct. And although M.G. could not recall other details, such as the time or location in the house when the touching occurred, she testified that during the time period charged in count 4, defendant touched her "sometimes once a week" and "definitely more times than once in a month." The evidence was sufficient to support the conviction.

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

BLEASE, Acting P. J.

ROBIE, J.