

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONSO SYLVESTER YBARRA,

Defendant and Appellant.

D058842

(Super. Ct. No. SCD277197)

APPEAL from a judgment of the Superior Court of San Diego County, Louis R. Hanoian, Judge. Affirmed in part, reversed in part, and remanded.

A jury convicted Alfonso Sylvester Ybarra of two counts of committing a forcible lewd act upon a child (Pen. Code,¹ § 288, subd. (b)(1)) and six counts of committing a lewd act upon a child and found true the allegations that he had substantial sexual contact with a victim who is under 14 years of age (§ 288, subd. (a); § 1203.066, subd. (a)(8)). The court sentenced him to a total of 28 years in prison. Ybarra appeals, arguing that

¹ All statutory references are to the Penal Code.

insufficient evidence existed to convict him of both counts of committing a forcible lewd act and two of the six counts of committing a lewd act upon a child. He also contends that the court committed reversible error by failing to instruct the jury to consider the lesser included offense of committing an attempted forcible lewd act.

We agree with Ybarra that insufficient evidence existed to convict him of committing more than one forcible lewd act upon the victim, and therefore we reverse his conviction for count 2, committing a forcible lewd act upon a child, last time. In all other respects, we affirm the judgment.

FACTS

M.R. began living with her father when she was four years old. While her father was at work, M.R. would often stay with her 80-year-old grandfather, Ybarra, after school beginning when she was in the third grade.

During third grade, when M.R. was nine years old, Ybarra attempted to lick her stomach while watching her after school. M.R. ran out of the room and told her grandmother and father what happened. Neither of them believed her accusation, and she continued to stay with Ybarra after school. In that same year, Ybarra touched her vagina more than once. The following year, when M.R. was in fourth grade, Ybarra touched her vagina twice. Finally, in fifth grade, he touched her vagina more than once over the course of the year. At various times, Ybarra would kiss her with his tongue and fondle her breasts and buttocks both over and under her clothing.

At one point between third and fifth grade, Ybarra grabbed M.R.'s hand and forced her to touch his nipples. M.R. jerked her hand out of his, but not before touching his skin.

The final incident of abuse occurred during fifth grade. Ybarra and his wife had fallen asleep in their bedroom watching television, so M.R. went into the living room to change her clothing. She sat on a couch wearing only a shirt, without any pants or underwear on. Ybarra entered the room, knelt before her, and began to touch and rub her vagina with his fingers. She pushed his head away, but he continued to move toward her. Ybarra's wife woke up, entered the room, and asked him what he was doing. Ybarra said he was "just looking" and left the room.

Ybarra's wife contacted M.R.'s father, who came over immediately and took her out of the house. M.R.'s father confronted Ybarra, who did not say anything in response.

Ybarra admitted to police that he had sexually abused M.R. for two years. He would pick her up from school and kiss her with his tongue while parked in an alley behind their house. He admitted that he kissed, touched, and rubbed her vagina and breasts on more than one occasion. Ybarra characterized M.R. as the instigator, and claimed it was all her fault because she seduced him and gave him love that had been missing from his marriage.

PROCEDURAL HISTORY

TESTIMONY REGARDING YBARRA'S FORCIBLE LEWD CONDUCT

Ybarra was charged with two counts of committing a forcible lewd act: grabbing M.R.'s hand and forcing her to touch his nipple the first time (count 1) and the last time

(count 2). In support of counts 1 and 2, the district attorney questioned M.R. regarding Ybarra's actions:

"Q: Do you remember a time where he wanted you to touch him?

"A: Yeah.

"Q: Tell us about that.

"A: He would tell me to touch his nipples or he would--and he grabbed my hand but I would pull it away from him. And then--yeah.

"Q: At some point, did you in fact--did you actually touch his nipples?

"A: No.

"Q: Do you remember--do you remember telling Ms. Lisa that he grabbed your hand and forced you to touch his nipple?

"A: (No audible response.)

"Q: Is that yes?

"A: Yes.

"Q: Is that because that's what happened?

"A: Yeah.

"Q: Okay. Do you think that he forced you to touch his nipple once or more than once?

"A: Yeah. Just once.

"Q: Do you remember--do you remember telling Ms. Lisa it was more than once where you touched his nipple?

"A: No.

"Q: Do you think that was--do you remember testifying in court at the preliminary hearing a little bit earlier this year?

"A: Yeah.

"Q: And do you remember . . . [¶] when I asked you . . . , 'I don't know if I asked you this before, but when you talked about how your grandfather would try to make you squeeze his nipples, did it happen once or more than once' and your answer was that you weren't sure how many times? And I asked you, 'Do you think--is it your memory that it was only one time or could there have been more than one time' and your answer was 'I think more than just one time.'

[. . .]

"A: I believe so, yeah.

"Q: And is that because in fact it was more than one time that you had to touch him?

"A: Uh huh. No. There was just one time."

M.R. later testified that on the only occasion he forced her to touch his nipple, she touched him on his skin. The act occurred sometime between third and fifth grade.

The district attorney also offered the testimony of Jesse Holt, a police investigator with the child abuse unit. Holt testified that M.R. told him that Ybarra forced her to touch his nipples more than once.

*TESTIMONY REGARDING LEWD ACTS COMMITTED
IN THIRD THROUGH FIFTH GRADE*

M.R.'s Testimony

Ybarra faced charges of multiple lewd acts committed against M.R.: a first time and a last time in third grade, a first time and a last time in fourth grade, and a first time and a last time in fifth grade.

M.R. testified as to all three years during the trial:

"Q: And during the period that you were there for third grade, during that school year, did he touch your front private, your vagina, once or more than once?

"A: Maybe more--I think more than once.

"Q: And when you were in fourth grade, did he touch your front private, your vagina, once or more than once?

"A: Maybe twice.

"Q: And when you were in fifth grade, did he touch your vagina once or more than once?

"A: Maybe more than once."

M.R. later testified that Ybarra would touch her, "[a]lmost every time [she] would go over" to his house. She said that she told her father and grandmother in third grade that he touched her, but that they did not believe her. M.R. then "took back" the accusation because everyone insisted that it never happened.

Recording of Ybarra's Interview with Police

The district attorney played a recording of Ybarra's interview with police before he was arrested, and provided a transcript of the interview to the jury. In the interview, Ybarra admitted to kissing M.R. with his tongue, kissing and touching her breasts, and touching M.R.'s vagina under her clothing. Ybarra claimed he only began touching and kissing her when she was 11 years old.

Testimony of M.R.'s Grandmother

M.R.'s grandmother, Ybarra's wife, testified that she caught Ybarra kneeling before her granddaughter, who was wearing a shirt but no pants or underwear. Ybarra's

face was about a foot away from M.R.'s vagina. She said that this was the first and only incident she had witnessed between them.

Ybarra's wife admitted that M.R. had told them that Ybarra was touching her back when she was in third grade, but said that she did not believe her because she believed M.R. to be untrustworthy.

JURY INSTRUCTIONS

The trial court instructed the jury on both unanimity (CALCRIM No. 3500), and battery as a lesser included offense of lewd conduct (CALCRIM No. 960). The court did not instruct on attempted forcible lewd conduct, and neither side's counsel requested it.

DISCUSSION

I

YBARRA'S CONVICTIONS FOR COMMITTING A FORCIBLE LEWD ACT

A. Substantial Evidence Supports Ybarra's Conviction for One Count of Forcible Lewd Act, But Not a Second

Ybarra was convicted of two counts of committing a forcible lewd act upon M.R. by grabbing her hand and forcing her to touch his nipple. Ybarra contends that sufficient evidence does not exist to support his conviction for both counts. We find that sufficient evidence exists to support a conviction for the first time he made her touch his nipple, but not the last time.

When we review a judgment for sufficiency of the evidence supporting the verdict, we presume every fact that the jury could reasonably deduce from the evidence and view the whole record in the light most favorable to the judgment. (*People v. Davis*

(1995) 10 Cal.4th 463, 509 (*Davis*.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The relevant question is, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

Section 288, subdivision (a) forbids the commission of any lewd or lascivious act upon or with the body of a child who is under the age of 14 with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child. Section 288, subdivision (b) prohibits the commission of a lewd act as described in subdivision (a) by use of force, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person. (§ 288, subd. (b)(1).)

"Force" means physical force substantially different from or substantially greater than necessary to accomplish the lewd act itself. (*People v. Neel* (1993) 19 Cal.App.4th 1784, 1790.) The lewd act itself must be committed without the victim's consent. (*Id.* at p. 1787.) Holding the victim's hand through the entire act is evidence of a use of force to accomplish the act. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 48 (*Pitmon*) [manipulation of the victim's hand to complete the act and holding the victim's hand through the entire act was a sufficient use of force].) Even if a victim resists or pulls away, a defendant is guilty if he places his own hand on the victim's and uses it to control the victim's actions. (*People v. Babcock* (1993) 14 Cal.App.4th 383, 386-387 (*Babcock*.) Resistance by the victim is evidence of a forcible lewd act. (*Ibid.*)

There can be no doubt that, with regard to count 1 (forcing M.R. to touch Ybarra's nipple the first time), sufficient evidence exists to support Ybarra's conviction. M.R. testified that he grabbed her hand and put it on his nipple. She also testified that he forced her to touch his skin when he did this. Ybarra wanted her to touch his nipples for sexual gratification, which makes it a lewd act, and the fact that he had to hold her hand to make her do it makes it a forcible one. (*Pitmon, supra*, 170 Cal.App.3d at p. 48.) Sufficient evidence exists to support the conviction for count 1.

However, we do not find that there is sufficient evidence in the record before us to support Ybarra's conviction for count 2 (last time). Notwithstanding the best efforts of the district attorney to get her to testify otherwise, including leading questions and impeaching her with her own prior testimony, M.R. steadfastly stated that Ybarra only forced her to touch his nipples once. The district attorney offered the testimony of Holt, who stated that M.R. told him that Ybarra forced her to touch his nipples more than once. However, M.R. affirmed in her own testimony that it only happened once. Even when presented with prior testimony in which she stated that it had occurred multiple times, she insisted it happened only one time.

We find that Holt recounting a statement made by M.R. months earlier, who that same day specifically contradicted his testimony, is not sufficient to convict Ybarra of count 2. Holt's testimony was the only evidence presented to support count 2, but as it was specifically refuted by M.R. on the stand, we do not find it sufficient to convict Ybarra of count 2. Therefore, we do not believe substantial evidence exists to convict Ybarra of a second time, and therefore reverse Ybarra's conviction for count 2.

B. Ybarra Was Not Entitled to an Instruction on
Committing an Attempted Forcible Lewd Act.

Ybarra also argues that the trial court committed reversible error by failing to instruct the jury on the lesser offense of committing an attempted lewd act. Because M.R. was able to pull her hand out of Ybarra's, he contends that this made the act an attempted one, rather than a completed one, and that a jury instruction was therefore required. We disagree.

A trial court must instruct on a lesser included offense whenever evidence raises a question of whether all elements of the charged offense have been established and there is evidence of a lesser offense which is substantial enough to merit consideration by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Substantial evidence in this context is evidence from which a jury could conclude that the lesser offense, but not the greater one, was committed. (*Id.* at p. 162.)

Section 288, subdivision (b) is violated if a defendant grabs the victim's hand and places it on his body for purposes of sexual gratification. (*Babcock, supra*, 14 Cal.App.4th at pp. 385-386.) Even if the victim resists or pulls away, the act is considered complete if the defendant uses force to hold the victim's hand in place. (*Id.* at p. 387.)

No evidence in the record before us supports a mere attempt. Rather, with regard to count 1, it supports a completed act. Ybarra grabbed her hand and made her touch his nipple; M.R. was able to pull her hand out of his after the touching. The fact that she pulled away does not make it a mere attempt; the fact that he grabbed her hand for the

purpose of making her touch his nipples is enough. Therefore, an instruction for attempt was not supported by the evidence, and was not required.

Even if such an instruction was required, the error was harmless. As discussed *ante*, sufficient evidence existed to support Ybarra's conviction for count 1. M.R.'s testimony clearly states that Ybarra, using force to grab and control her hand, made M.R. touch his nipple. The outcome would not likely have been different, and therefore we find that any error was harmless.

II

SUBSTANTIAL EVIDENCE SUPPORTS YBARRA'S CONVICTIONS FOR MULTIPLE COUNTS OF COMMITTING A LEWD ACT

Ybarra was convicted of six counts of committing a lewd sexual act upon a child under age 14: a first and a last time in third grade, a first and a last time in fourth grade, and a first and a last time in fifth grade. Ybarra contends that insufficient evidence existed for count 4 (last time, third grade) and count 6 (last time, fourth grade). We disagree.

As discussed *ante*, we presume every fact that the jury could reasonably deduce from the evidence and view the whole record in the light most favorable to the judgment. (*Davis, supra*, 10 Cal.4th at p. 509.)

Section 288, subdivision (a) is violated by any touching of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child. (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) The victim must describe the type of act with sufficient clarity to distinguish between the prohibited offenses, and must

describe the number of acts with sufficient clarity to support each of the counts alleged (i.e. "twice a month" or "every time we went camping"). (*People v. Jones* (1990) 51 Cal.3d 294, 316 (*Jones*)). The victim must also be able to describe the general time period during which the acts occurred to assure that they were committed within the applicable limitation period (i.e. "the summer before my fourth grade," or "during each Sunday morning after he came to live with us"). (*Ibid.*) Additional details regarding the time, place, or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction. (*Ibid.*)

Furthermore, "generic testimony" (i.e. an act of intercourse "once a month for three years") outlines a series of specific, albeit undifferentiated, incidents, each of which amounts to a separate offense, and each of which can support a separate criminal sanction. (*Jones, supra*, 51 Cal.3d at p. 314.) A witness's failure to specify precise dates, times, places, or circumstances does not render generic testimony insufficient, since "the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (*Id.* at p. 315.)

Viewing M.R.'s testimony in the light most favorable to the prosecution, we find it sufficient evidence to support Ybarra's convictions of a "last time" in third and fourth grade. She testified that he touched her, "I think more than once," in third grade and "[m]aybe twice" in fourth grade. At another point in her testimony, she said that Ybarra touched her every time he went over to her house. It is not our task to reweigh the evidence or assess the credibility of witnesses, and we will not do so. M.R.'s testimony

could support the jury's conclusion that Ybarra was guilty of both first and last time of touching her in third, fourth, and fifth grade, and we will not disturb the jury's determination.

DISPOSITION

The conviction for count 2 (committing a forcible lewd act, last time) is reversed. The case is remanded to the trial court for resentencing in light of the reversal of count 2. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.