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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EZEQUIEL V., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EZEQUIEL V.,

Defendant and Appellant.

D059168

(Super. Ct. No. J227304)

APPEAL from a judgment of the Superior Court of San Diego County, Yvonne E. Campos, Judge. Affirmed.

Ezequiel V., a minor, appeals the finding he committed a lewd act on a child under the age of 14 (victim) by use of force or duress in violation of Penal Code section 288, subdivision (b)(1).

## FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

In late June 2010, Ezequiel was with his older brother and mother in their apartment in Oceanside. Ezequiel at the time was 13 years old. For the two preceding months, the mother had been the regular babysitter for victim and victim's twin sister. Victim was nearly seven years old at this time. On the day of the incident, the mother was babysitting the twin girls and tending to Ezequiel and his brother.

While the mother was in the living room of her apartment, victim and her sister were in the "closet playroom" watching television. Ezequiel walked into the playroom and told victim to "[t]ake off [her] clothes." When victim did not comply, Ezequiel removed her clothes and took off his own clothes. Victim's sister saw Ezequiel take off victim's clothes. Ezequiel then touched victim's "private parts," including her vagina, and sat her on his lap; victim next laid on the floor and Ezequiel got on top of victim and pushed his penis on victim and possibly into her vagina. Victim reported having pain while Ezequiel was on top of her and stated she held her sister's hand during the incident. Victim knew Ezequiel had done a "bad thing" to her.

That evening, victim told her mother what happened in the playroom with Ezequiel earlier in the day. Victim's mother sensed something was wrong with her daughter because victim seemed "very sad," appeared scared and responded with fear to

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<sup>1</sup> In considering a challenge to the substantiality of the evidence, we do not reweigh the evidence but instead view the record in the light most favorable to the trial court's order or judgment. (See *In re Julie M.* (1999) 69 Cal.App.4th 41, 46; *In re Shelley J.* (1998) 68 Cal.App.4th 322, 329.)

victim's mother's questions. Victim told her mother that Ezequiel took off her clothes while she was in the playroom closet watching television and that Ezequiel told her not to tell anyone about what had happened.

The next day, victim's mother spoke with Ezequiel's mother about the conversation with victim the night before. Ezequiel, who was present during their conversation, denied touching victim.

Victim's mother called police on July 1, 2010. Officers Daniel Sullivan and Ann O'Neill responded. Officer O'Neill, who is a certified Spanish interpreter, spoke with victim and her mother about the incident. Victim told the officers that Ezequiel used his penis to touch her vagina. Victim used the words "banana" and "flower" to describe Ezequiel's penis and her vagina, respectively. Victim also stated that Ezequiel told her to take her clothes off and that it hurt when he touched her with his penis. Finally, victim told Officer O'Neill that Ezequiel told her not to tell anyone.

A medical examination of victim on July 1, 2010, by Dr. Mary Spencer revealed two injuries to victim's genital area around her labia and some redness near the clitoral

hood. Dr. Spencer opined that victim's injuries were consistent with a penis being pressed on and perhaps inserted into victim's vagina.<sup>2</sup>

The trial court found beyond a reasonable doubt that Ezequiel committed a violation of Penal Code section 288, subdivision (b)(1). The trial court subsequently found Ezequiel a ward of the court and placed him on probation, after he served nine days in juvenile hall.

## DISCUSSION

Ezequiel contends there is insufficient evidence in the record to support the trial court's finding that he used force or duress to commit the lewd act on victim, in violation of Penal Code section 288, subdivision (b)(1).

### *A. Trial Court's Findings*

The trial court sustained the allegation that Ezequiel violated Penal Code section 288, subdivision (b)(1) when it found beyond a reasonable doubt the existence of both force and duress, either of which was sufficient to support the violation of this statute.

The trial court in its well-reasoned order ruled in part as follows:

"In reviewing my notes, in addition to being clear on the uncontroverted facts that the minor [e.g., Ezequiel] not only told the child [e.g., victim] to remove her clothes, but

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<sup>2</sup> Ezequiel in his briefing notes that victim's "injuries" could have come from her scratching or touching herself, or from pressure from objects such as a toilet paper or a washcloth. While relevant in the trial court given its role as fact finder, such arguments are not germane in this appeal where our role is limited to determining whether the trial court's findings are supported by substantial evidence in the record. (See *ante* footnote 1.)

that he pulled down her clothes, the second female law enforcement witness testified that contemporaneous with the investigation of this offense, the child had indicated that the minor had told her not to tell anyone. And so that goes towards the duress.

"I know that legally I'm not required to make any explanation of my findings. But given that we had a long discussion as to what facts before me I would have to hang my hat on, and given that I had questioned [the prosecutor] yesterday as to whether or not there was precedent in support of his theory that the removing of the clothes would be an act sufficient to substantiate the [subdivision] (b)(1) [of Penal Code section 288 finding], I'm satisfied that that is a separate act of force.

"And again, I'm looking at the public policy behind the Statute and behind the law, which is that it's about really the degradation of the victim and using or doing something that would expose the victim to the further sexual act.

"And so I'm satisfied that the pulling down of the child's clothing covering her private parts and her legs, even if it's not fully and completely removed, it certainly is a separate act that was done with force. And by that, I mean, it's a physical act, so it's different. I'm not saying that the clothes were ripped off or that anything was done with any substantial force, but it's an alternative definition.

"And I'm satisfied that the child at the age of six was certainly under the age of 14 at the time of the offense. I'm satisfied that given the totality of the circumstances there was the willful touching of a couple of body parts of the child. I mean, there's clear evidence in my mind that the minor's penis was on or in the child's vagina, as well as his

hands were on her buttocks. And that, as I've indicated, force was used. Duress also comes in play, and that the commission of those acts were with the intent to appeal to or gratify the sexual desires of the minor.

"In connection with this true finding, I'm satisfied that . . . the allegations of the petition are true. . . . [¶] . . . . And the degree of the offense would be a felony offense if committed by an adult. And, again, I mean, these are difficult cases, but I did have the opportunity to consider the testimony of the witnesses, their demeanor on the stand, and also certainly hear witnesses on the minor's behalf. . . . And I am satisfied, as well, by more than clear and convincing evidence that when the minor was 13 during the commission of this offense, that he did have knowledge of the wrongfulness of the act committed. So if I have said that prior to making the true finding, that's my inadvertent misquote. And my factual findings are, again, beyond a reasonable doubt."

#### B. *Governing Law*

"When a defendant challenges the sufficiency of the evidence, "[t]he 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." [Citation.] [Citation.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.] [Citation.] We "' presume in support of the judgment the existence of every

fact the trier could reasonably deduce from the evidence.' " [Citation.]' [Citation.]"  
(*People v. Clark* (2011) 52 Cal.4th 856, 942.)

Section 288 of the Penal Code provides in relevant part:

"(a) . . . [A]ny person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

"(b)(1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony . . . ."

To establish lewd conduct by force, the prosecution was required to prove that Ezequiel used force " 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' " (*People v. Soto* (2011) 51 Cal.4th 229, 242; *People v. Griffin* (2004) 33 Cal.4th 1015, 1027.)

In *People v. Alvarez* (2009) 178 Cal.App.4th 999, the court explained that "a 'defendant may fondle a child's genitals without having to grab the child by the arm and hold the crying victim in order to accomplish the act. Likewise, an assailant may achieve oral copulation without having to grab the victim's head to prevent the victim from resisting.' [Citation.] Lewd conduct of this sort is punishable in and of itself. [Citation.]

Therefore, it stands to reason that the force requirement will be deemed satisfied when the defendant uses any force that is 'different from and in excess of the type of force which is used in accomplishing similar lewd acts . . . .' [Citation.] [¶] According to the majority of courts, *this includes acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves.* [Citations.]" (*Id.* at pp. 1004-1005, italics added; see also *People v. Bolander* (1994) 23 Cal.App.4th 155, 160–161 [pulling victim's pants down, bending victim over and pulling victim toward defendant constituted forcible lewd conduct]; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1790 [pushing the victim's head down on defendant's penis, grabbing victim's wrist and placing victim's hand on his penis to masturbate him constituted forcible lewd conduct]; *People v. Babcock* (1993) 14 Cal.App.4th 383, 387 [grabbing victim's hand and making victim touch defendant's genitals constituted sufficient force].)

### C. Analysis

Here, the evidence in the record shows that Ezequiel walked into the small closet playhouse and ordered victim, then aged six, to remove her clothes. When victim did not comply and thus refused his request, Ezequiel removed victim's clothes for her. He next removed his own clothes, grabbed victim and placed her on his lap. This evidence alone is sufficient to constitute "force" within the meaning of Penal Code section 228, subdivision (b)(1). (See *People v. Alvarez, supra*, 178 Cal.App.4th at p. 1005.)

Ezequiel, however, also grabbed victim's buttocks, and after victim laid on the floor Ezequiel got on top of her where he either pressed his penis on her vagina or

partially inserted his penis into her vagina, causing her pain. This additional evidence, particularly when considered in light of the evidence that victim was physically very small and Ezequiel much bigger than victim, further supports the finding of the trial court that Ezequiel used force on victim within the meaning of Penal Code section 288, subdivision (b)(1) when he committed the lewd act or acts.<sup>3</sup>

#### DISPOSITION

We affirm the trial court's order finding that Ezequiel used force when committing a lewd act on victim, a minor under the age of 14 years (see § 288, subd. (b)(1)).

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BENKE, Acting P. J.

WE CONCUR:

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McDONALD, J.

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McINTYRE, J.

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<sup>3</sup> In light of our decision, we deem it unnecessary to decide whether there is substantial evidence in the record to support the trial court's alternative finding that Ezequiel used duress—as opposed to force—in committing the lewd act or acts on victim, as also set forth in Penal Code section 288, subdivision (b)(1).