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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FALESIMA POUSINI,

Defendant and Appellant.

D059253

(Super. Ct. No. SCE299565)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia K. Cookson, Judge. Affirmed.

A jury convicted Falesima Pousini of two counts of lewd acts on a child (Pen. Code,¹ § 288, subd. (a)). The trial court granted Pousini probation on various terms and conditions including that he spend 365 days in jail.

Pousini appeals contending the evidence at trial was not sufficient to prove he had the specific intent required by the statute. We will reject Pousini's contention and affirm.

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

STATEMENT OF FACTS

Pousini's niece, T.E., testified that he molested her on two separate occasions. The first acts took place at T.E.'s home in National City. She lived in that home with her parents until August 2006. On the date of the molestation, T.E.'s family had a barbeque at their house. Pousini and his wife were among the various family members and friends who attended.

Because there was considerable drinking at the party, a number of people stayed overnight at T.E.'s parent's house. T.E. and Pousini slept on one of the couches. Pousini's wife slept on the floor. Sometime on that evening, Pousini picked up T.E. and put her on his lap. He placed his fingers in her mouth. Apparently T.E. again fell asleep and was awakened when Pousini put his hand on her vagina. She felt his fingers go into her vagina, and it was not "very comfortable." It felt like his fingers were moving around inside her.

The second molestation occurred when T.E.'s family lived in Spring Valley after another family gathering at which Pousini was present. Again various people stayed after the party and some of them slept on couches and on the floor. T.E. fell asleep while lying on the floor watching television. She was awakened by Pousini who was squeezing her breasts. T.E. pretended to be asleep.

Pousini continued the touching by pulling down her shorts and underwear. He then placed his fingers inside her "private." They were under a blanket at the time.

When T.E.'s father got up to go to the bathroom, Pousini pulled up her shorts and then got up. Pousini placed his fingers in his mouth and then washed his hands.

T.E. did not tell her parents about Pousini because she was afraid of them. She did report the events to her school counselor, who in turn, notified police.

Pousini was interviewed by two detectives in Hawaii where Pousini was stationed in the Navy. Pousini acknowledged that he had occasionally stayed at T.E.'s parent's house. He denied touching T.E. at any time. Even though the detectives falsely informed Pousini that his DNA had been recovered from T.E.'s vagina, he continued to deny that he had touched her.

Later during his interview, Pousini acknowledged he had touched T.E., but stated it was an accident. He explained he was accustomed to checking his son's diapers. He said on that occasion he was sleeping on the floor with other adults and children and that apparently he reached into T.E.'s pants by mistake. He indicated his fingers may have gone into her vagina, but that it was an accident. Pousini knew when he woke up that touching T.E. was wrong. Pousini also acknowledged that on one occasion he was hugging and tickling T.E. while they were on the couch, along with his wife. Pousini admitted he stuck his hands down T.E.'s pants, but knew that was a mistake and removed his hands. He also admitted that he accidentally stuck his hands inside T.E.'s shirt and tickled her breast.

When the interview with detectives was finished, Pousini wrote a letter of apology to T.E. He acknowledged he had touched her, but stated the acts were accidental and that he meant her no harm.

Defense Case

Pousini testified in his own behalf. He did not remember staying overnight at the National City house. Further, he did not remember lying with T.E. on the couch and denied ever touching her vagina or breasts. Pousini also called other family members to testify about events at the various parties to impeach T.E.'s version of the events.

DISCUSSION

Pousini contends there is not sufficient substantial evidence to prove that he had the intent to arouse the sexual desires of either the child or himself as required by section 288, subdivision (a). A person violates that section when the person ". . . willfully and lewdly commits any lewd or lascivious act . . . 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"

After a review of the entire record we are satisfied there is sufficient substantial evidence to support the convictions.

1. Standard of Review

When we review a challenge to the sufficiency of the evidence to support a conviction we apply the familiar substantial evidence standard of review. Under that

standard we examine the entire record and draw all reasonable inferences in favor of the trial court's decision. We do not make credibility determinations nor do we undertake to reweigh the evidence. Our task is to determine if there is sufficient substantial evidence from which a reasonable jury could be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We apply the same standard when a conviction, or an element of an offense has been proven with circumstantial evidence. (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Section 288, subdivision (a) is violated by any touching of an underage child which is accomplished with the intent of arousing sexual desire on the part of either the child or the perpetrator. (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) It is rare that intent can be proven by other than circumstantial evidence. It can, however, be inferred by drawing reasonable inferences from the circumstances surrounding the acts. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 662.)

2. Analysis

When we consider Pousini's contention in light of all the evidence, it is abundantly clear there is sufficient evidence to support the verdict. Although Pousini has variously denied and admitted inappropriate touching, his basic analysis of the evidence at trial is based on his viewing the evidence in the light most favorable to his point of view. That is not the task of an appellate court. Credibility decisions are made in the trial court and not on appeal.

In the present case the jury could well have rejected Pousini's several versions of the events. If it found Pousini to not be credible, it could well have accepted the victim's version of the events as truthful. If we accept her version of the events Pousini not only touched the child, he twice inserted his fingers into her vagina. He did not merely "tickle" the child, but squeezed her breasts under her clothing. Respectfully, it is entirely reasonable for a jury to conclude Pousini touched the child in the manner he did for the purpose of sexual gratification on his part or sexual arousal of the victim. His position at trial of either denying any touching or if there were any, then they were accidents, could easily be rejected by a reasonable jury. Bluntly stated, his claim of insufficient evidence to establish the requisite intent is wholly without merit and we therefore reject his contention.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.