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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR ADAIR,

Defendant and Appellant.

D059701

(Super. Ct. No. SCD228574)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed and remanded with directions.

Edgar Adair appeals from a judgment convicting him of three sexual offenses arising from a molestation incident against a young girl. He asserts the judgment should be reversed for one of the offenses (lewd act based on the touching of the victim's buttocks) because there was insufficient evidence of sexual intent for this offense. We conclude there is substantial evidence to support the jury's finding of sexual motivation for this touching.

Alternatively, Adair argues the sentence on the buttocks-touching offense should have been stayed under Penal Code section 654¹ because it was committed merely to facilitate a subsequent oral copulation offense. The record supports the trial court's finding that Adair had independent sexual arousal objectives for the buttocks touching and the oral copulation, thereby permitting punishment for both acts.

¹ Subsequent unspecified statutory references are to the Penal Code.

Finally, the Attorney General does not oppose Adair's request that the case be remanded for delineation of the amount and statutory basis for each penalty assessment included in a lump-sum penalty imposed by the court. We grant this request by directing the superior court clerk to amend the sentencing minute order and abstract of judgment to include this delineation.

We affirm the judgment as to the conviction and sentence, except we remand the case for delineation of the amounts and statutory grounds for the penalty assessments.

FACTUAL AND PROCEDURAL BACKGROUND

The molestation incident occurred in October 2009 at a home shared by Adair and several other roommates, including the victim's parents and the six-year-old victim. The victim (A.D.) described the incident in statements to a social worker and in her trial testimony. A.D. stated that Adair was sitting on the living room couch watching television. When A.D. joined him to watch television, he touched her "[p]ee-pee" over her clothes, holding it with his hand and tickling her "a little." He asked her if this tickled. While she was sitting on the couch, he "slipped [his hand] under [her] buttocks" over her clothes. He was holding and pushing her buttocks "trying to get it closer." Next, he "started going towards his pee-pee." He took his "front private" out of his shorts and he was trying to put her mouth on it. He pushed her buttocks "towards it" and then her lip touched the top of his front private. His front private looked like a cylinder and a circle; the top was "kind of pink" and was about the size of a quarter; and it felt "kind of goeey." He told her to open her mouth but she said "no." She hit him in the stomach, ran to her parent's room, and told her parents what happened.

In a recorded statement to the police, Adair admitted the molestation incident.

Jury Verdict and Sentence

For count 1, the jury found Adair guilty of oral copulation against a child age 10 or younger. (§ 288.7, subd. (b).) For two additional counts, the jury found him guilty of lewd acts against a child under age 14; i.e., forcible lewd act based on the touching of the victim's buttocks (count 2, § 288, subd. (b)(1)), and lewd act based on the fondling of her vagina (count 3, § 288, subd. (a)). Additionally, the jury found true a count 3 allegation that Adair engaged in substantial sexual conduct with a victim under age 14. (§ 1203.066, subd. (a)(8).)

The court sentenced Adair to 15 years to life for the count 1 oral copulation, plus a consecutive six-year term for the count 2 buttocks touching. The court imposed a concurrent six-year term for the count 3 vaginal fondling.

DISCUSSION

I. Evidence Supports Jury Finding of Sexual Intent for Buttocks Touching

Adair argues there is insufficient evidence to support the sexual intent element for the count 2 lewd act offense consisting of the touching of the victim's buttocks. In support, he contends there were no facts showing that he was focused on the victim's buttocks, that he touched her buttocks in a sexualized manner, or that he made comments indicating a sexual motivation for touching her buttocks. He asserts the victim's statements showed he was only holding and pushing her buttocks to try to move her

closer to accomplish the oral copulation, and hence the touching of the buttocks was "nothing more than 'a mere touching [en] route' to" the desired oral copulation.²

When reviewing a challenge to the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine whether there is substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) If the circumstances reasonably justify the trier of fact's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. (*Id.* at p. 793.)

The lewd act offense requires the intent to arouse or gratify the sexual desires of the defendant or the child. (§ 288, subd. (a); *People v. Martinez* (1995) 11 Cal.4th 434, 442.) The crime does not require a touching of intimate body parts or a touching in an inherently lewd manner; any type of sexually motivated contact with the child suffices to establish the crime. (*Martinez, supra*, at pp. 438, 442, 444.) Because intent can seldom be proved by direct evidence, it may be inferred from the circumstances. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 662.) To determine whether a touching was committed for the purpose of sexual arousal, relevant circumstances include the manner of touching and other lewd acts committed by the defendant. (*Martinez, supra*, at p. 445.)

The record supports the jury's finding that Adair sought sexual gratification when he touched the victim's buttocks. The jury could consider that buttocks are intimate body parts not routinely touched during everyday human interaction. Further, the jury could reason that the context of the touching (which occurred after the vaginal fondling and before the oral copulation) showed defendant's sexual motivation when holding and pushing the victim's buttocks. The jury could reasonably conclude that Adair chose to hold and push A.D. by her buttocks because that body part was sexually arousing to him.

Adair's failure to touch the victim's buttocks in an overtly sexual way or to make sexual comments during this portion of the touching did not preclude the jury's finding of sexual intent during this touching. Direct evidence of sexual intent was not necessary; rather, the jury was entitled to draw an inference of intent based on all the circumstances.

The court's holding in *People v. Jimenez* (2002) 99 Cal.App.4th 450, cited by Adair, does not require a contrary conclusion. The *Jimenez* court upheld multiple convictions based on the defendant's acts of fondling the victim's breasts, buttocks, vagina and thigh. (*Id.* at p. 456.) In reaching its holding, the court commented: "We do not consider here whether fondling of each and every separate portion of a victim's body will always amount to multiple offenses; we are not called upon to reach that question. . . . The evidence established a separate fondling of each indicated body part and not merely a touching en route to another area. This suffices for separate

² For example, Adair notes that when defense counsel asked the victim if he made any kind of motion with his hand on her buttocks, she responded that he "just slipped it under [her] buttocks."

convictions." (*Ibid.*) The facts here do not conclusively show Adair's act of buttocks touching was nothing more than a nonsexual touching designed to achieve the oral copulation, and there is nothing in *Jiminez* that invalidates the jury's inference of sexual intent during the buttocks touching.

The record supports the jury's finding of sexual intent for the buttocks touching.

II. Court Was Not Required To Stay Sentence on Buttocks Touching Count

Even if the record can support the conviction on the count 2 buttocks touching offense, Adair argues the sentence for this offense should have been stayed under section 654. He contends the touching of the buttocks was committed merely to facilitate the count 3 oral copulation, asserting there was no showing that he "fondled, squeezed, rubbed, or otherwise targeted" the victim's buttocks.

At sentencing, the trial court found that Adair had "mixed motives" for touching the child's buttocks, both to draw her closer to commit the oral copulation and also for his independent sexual arousal. The court stated that it viewed the vaginal and buttocks touchings as independent of the oral copulation, explaining that while "touching and fondling the child, Mr. Adair became more aroused and [he] then led [the victim] to commit" the oral copulation. Based on his independent sexual purpose for the buttocks touching, the court concluded his sentence should not be stayed for this offense.

Section 654, subdivision (a) prohibits multiple punishment for a single act or indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) When a defendant is convicted of two offenses that are part of an indivisible course of conduct, the sentence for one of the offenses must be stayed. (*Id.* at pp. 591-592.) The purpose of section 654 is to ensure that a defendant's punishment is commensurate with his or her culpability. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Whether a transaction is divisible so as to allow multiple punishment under section 654 depends on whether the defendant had an independent objective for each offense. (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, [a] defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*) In contrast, if the defendant "harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*Ibid.*)

Even when the defendant has a single overall objective, a finding of multiple independent objectives may be supported by a showing that the defendant engaged in consecutive acts which reflect a decision to continue the course of criminal conduct notwithstanding an opportunity to reflect and stop the behavior. (*People v. Harrison, supra*, 48 Cal.3d at p. 338 [defendant could properly be punished for multiple digital penetrations; "instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior"]; *People v. Brown* (1994) 28 Cal.App.4th 591, 601 [defendant could properly be punished for multiple reinsertions of penis under circumstances showing that "[e]ach time [the victim]

struggled and defendant's penis came out, he could have chosen to stop his attack"]; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212.) Further, multiple distinct objectives may exist if the defendant simultaneously entertains more than one objective during the transaction. (*People v. Booth* (1988) 201 Cal.App.3d 1499, 1502 [finding that defendant had "dual objectives of rape and theft when entering the victims' residences" supported punishment for both burglaries and rapes]; see *People v. Latimer, supra*, 5 Cal.4th at p. 1212.)

In the context of sex crimes, the courts have recognized that although a defendant may have the single objective of sexual gratification, section 654 generally does not bar multiple punishment for multiple statutory violations if the circumstances show "separate base criminal acts" upon the victim. (*People v. Harrison, supra*, 48 Cal.3d at pp. 325, 337; *People v. Brown, supra*, 28 Cal.App.4th at p. 601.) "[M]ultiple sex acts committed on a single occasion . . . are generally 'divisible' from one another under section 654, and separate punishment is usually allowed." (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6 (*Scott*)). Multiple objectives can be found even if the sex offenses were committed during a single encounter closely connected in time (*People v. Harrison, supra*, 48 Cal.3d at p. 336; *People v. Hicks* (1993) 6 Cal.4th 784, 788 & fn. 4), and even if one of the crimes consisted of a preparatory fondling-type offense (*Scott, supra*, at p. 347, fn. 9).

With respect to fondling offenses, *Scott* explained: "[C]ontrary to the approach followed in . . . older cases, courts no longer assume that fondling offenses are 'incidental' to other sex crimes within the meaning of section 654, or that they are exempt from separate punishment. The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act." (*Scott, supra*, 9 Cal.4th at pp. 347-348, fn. 9, italics added; see also *People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006-1007.) This development in the law is consistent with the legislative intent that punishment be commensurate with culpability because each separate sexually motivated act, including preparatory sexual arousal acts, can be found to be "a separate insult to the body — and the spirit — of an unwilling [or underage] victim" (*People v. Madera* (1991) 231 Cal.App.3d 845, 855.)

On appeal we apply the substantial evidence standard to review the court's finding that the defendant had separate objectives. (*People v. Brents* (2012) 53 Cal.4th 599, 618.) We view the evidence in the light most favorable to the court's determination, and presume in support of the court's conclusion the existence of every fact that could reasonably be deduced from the evidence. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

There is substantial evidence to support the court's finding that the buttocks touching and oral copulation involved two distinct sexual arousal objectives. As set forth above, the fact that a defendant has a single overall objective of sexual gratification does not in and of itself rule out a finding of independent sexual arousal objectives for each distinct act. Factors that can support independent sexual objectives include the opportunity to reflect between the touchings and multiple invasive acts inflicted upon the victim. These factors are present here. First Adair fondled the victim's vagina. Second, he held and pushed the victim's buttocks to try to move her closer. While this was

occurring, he displayed his penis to the victim. Finally, he made the victim touch his penis with her mouth. The trial court could reasonably infer that Adair pursued his sexual arousal objective via the vaginal and buttocks touching, and then he chose to continue and escalate the sexual encounter by making the victim touch his penis with her mouth. Further, the court could consider that from the victim's perspective, the buttocks touching was an invasive act apart from the oral copulation, and hence the distinct acts of buttocks touching and oral copulation increased defendant's culpability and warranted separate punishment.

The fact that Adair may have had *dual objectives* when touching the victim's buttocks (i.e., immediate sexual arousal *and* facilitation of the oral copulation) did not diminish the factual support for the finding that he had a distinct sexual arousal objective during the buttocks touching. Notably, this is not a case where the defendant engaged in a *single invasive act* to pursue sexual gratification. (See, e.g., *People v. Siko* (1988) 45 Cal.3d 820, 823, 826 [section 654 barred punishment for lewd act conviction in addition to punishment for rape and sodomy convictions; the lewd acts were the same acts as the rape and sodomy].)

The trial court was not required to stay the sentence for the count 2 buttocks touching.

III. Remand for Delineation of Penalty Assessments

At sentencing, the trial court imposed a \$300 sex offender fine as required by section 290.3, subdivision (a). It also added a lump sum of \$840 to this fine for various penalty assessments. The amounts and statutory bases for the penalty assessments are not specified in the oral pronouncement of judgment, the minute order, or the abstract of judgment. Adair requests that the case be remanded for delineation of the amount of each penalty assessment and its statutory basis.³ The Attorney General does not oppose this request, and we grant it. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864.)

We remand the case to the superior court with directions to amend the judgment to list each penalty assessment and its statutory basis. This may be accomplished by the superior court clerk by amending the minute order and the abstract of judgment. (See *People v. Sharret, supra*, 191 Cal.App.4th at p. 864 [trial court may orally impose penalties by shorthand reference to "penalty assessments"; trial court clerk should then specify penalties in minute order and abstract of judgment].)

³ Adair cites various statutory provisions that appear to support the total amount of \$840 in penalty assessments; i.e., Section 1464: \$300 (state penalty, 100 per cent of base fine); Section 1465.7: \$60 (state surcharge, 20 percent of base fine); Government Code section 70372: \$150 (court construction penalty, 50 percent of base fine); Government Code section 76000: \$210 (county penalty, 70 percent of base fine); Government Code section 76000.5: \$60 (emergency medical services penalty, 20 percent of base fine); and Government Code sections 76104.6 and 76104.7: two \$30 fines (DNA funding assessments, each 10 per cent of base fine).

DISPOSITION

The judgment is affirmed as to the conviction and the sentence. The case is remanded with directions to the superior court to list each penalty assessment and its statutory basis in an amended minute order and an amended abstract of judgment. The superior court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.