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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BUENAVENTURA RAFAEL BAILON,

Defendant and Appellant.

D060353

(Super. Ct. No. SCN255173)

APPEAL from a judgment of the Superior Court of San Diego County,  
Runston G. Maino, Judge. Affirmed.

A jury convicted Buenaventura Rafael Bailon of 14 counts of lewd and lascivious acts on a child under the age of 14 by force or fear (Pen. Code,<sup>1</sup> § 288, subd. (b)). The jury also found as to each count that Bailon victimized multiple children (§ 667.1, subd. (c)), and that with the exception of count 11, Bailon had substantial sexual contact with the victims. (§ 1203.066, subd. (a)(8).) Bailon was sentenced to an indeterminate term of 195 years to life in prison.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

Bailon filed a timely notice of appeal. Bailon's appeal is very limited. He challenges only the sufficiency of the evidence to show three counts as to a five-year-old boy, D., contending the evidence only shows two counts were proved. We have reviewed the record and conclude there is sufficient evidence to prove the three acts on which the jury convicted regarding D.

#### STATEMENT OF FACTS

Since Bailon does not challenge the 11 convictions involving sexual assaults on his daughters and another girl, we will omit the sordid details of those unchallenged convictions. It is also the case that Bailon does not contend the evidence is insufficient to show the acts he did commit against D. violated section 288, subdivision (b). Bailon only challenges whether the evidence supports three acts or just two. Accordingly our statement of facts will be quite short.

At the time of the offenses in this case, D., a five-year-old boy, and his mother were living in Bailon's residence. The evidence regarding the acts committed on D. included the boy's testimony at trial and the evidence of a forensic interview, which was also introduced at trial.

At trial, D. testified to two specific events wherein Bailon forcibly inserted his finger into D.'s anus. In those instances, Bailon threatened the child in order to commit the acts. D. did not recall at trial the event, which occurred in the bathroom, when Bailon again inserted his finger into D.'s anus, an occasion when Bailon lubricated his finger with some form of cream.

In his forensic interview, D. described the third incident which occurred in the bathroom. D. said he was in the bathroom urinating when Bailon entered the room. He forced D. to remove his pants. Bailon then put cream on his finger and forcibly inserted his finger into the boy's anus.

## DISCUSSION

Bailon, relying on D.'s testimony at trial contends the evidence was not sufficient to show three acts. He notes the prosecution suggested the court stay the sentence on count 14, given the somewhat confused evidence as to the number of times Bailon inserted his finger into D.'s anus. However, the forensic interview was admitted in evidence pursuant to Evidence Code section 1360, and Bailon does not challenge its admissibility on this appeal. Thus, we must consider the entire record in determining whether the evidence supports the convictions.

The parties agree that when an appellate court reviews a challenge to the sufficiency of the evidence we apply the very familiar substantial evidence standard of review. Under that standard we review the entire record in the light most favorable to the trial court's decision. We draw all reasonable inferences in favor of that decision. However, we do not make credibility determinations nor do we attempt to weigh the evidence. The question we must decide is whether there is sufficient substantial evidence in the record from which the jury in this case could find each element of the offense proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319;

*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Applying the proper standard of review it is very clear there is sufficient evidence to prove three separate lewd acts committed on D. As is likely the case in many trials involving young children, there was some confusion in D.'s memory at trial. He did not recall the events involving Bailon placing cream on his finger as a lubricant when he inserted his finger into D. for the third time. However, considering the trial testimony and the forensic interview, it is clear that the child identified two instances which occurred in the bedroom and a third, involving cream on Bailon's finger, which occurred in the bathroom. Considering the totality of the evidence, the jury could reasonably conclude that Bailon committed three separate and distinct acts upon D. The evidence is sufficient to support all three convictions for crimes against D.

#### DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McDONALD, J.