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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN HERNANDEZ, SR.,

Defendant and Appellant.

D069672

(Super. Ct. No. SWF1302261)

APPEAL from a judgment of the Superior Court of Riverside County, John M. Davis, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Julian Hernandez of one count of forcible lewd acts on a child (Pen. Code, § 288, subd. (b)(1))¹ and two counts of lewd acts on a child (§ 288, subd. (a)) in connection with sexual conduct with his then 10-year-old granddaughter. Hernandez concedes the evidence supported the convictions for committing the lewd acts, but contends the evidence was insufficient to support the finding he employed force, duress or fear in committing the lewd acts. He argues this court must modify the conviction (§ 1260) to the lesser included offense of lewd acts on a child in violation of section 288, subdivision (a).

FACTS²

A. The Charged Offenses

The victim of the offenses (N.) is Hernandez's granddaughter. She was 10 years old and living with her parents in Winchester, California, at the time of the offenses. N.'s father (J.) is Hernandez's son.

In July 2007 Hernandez was at a family gathering, hosted by J. and his family at their home, celebrating both Independence Day and a cousin's birthday. Hernandez and his wife were staying at J.'s house. Because the house was full of guests, N. and her sister volunteered to sleep on the couch in the living room.

¹ All further statutory references are to the Penal Code.

² Where, as here, a defendant contends that substantial evidence does not support his conviction, we 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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We state the facts in the light most favorable to the judgment.

One night, N. was lying on the couch when she was awakened because she felt someone's hand rubbing her shoulder. She turned and saw it was Hernandez, standing over her as she lay on the couch, who was rubbing her. N. tried to stop Hernandez by shrugging her shoulders a couple of times, trying to shake his hand away, but this only caused a momentary pause in the touching, and Hernandez resumed forcing his hand on her. She gave up trying to shrug away Hernandez's hand because she sensed that would not stop him. He forced his hand back onto her shoulder each time and gradually moved under her shirt and sports bra to rub her chest. She did not articulate any objection during this rubbing because she was scared by this unusual behavior, and she did not want him to touch her sleeping sister.

The touching lasted about 30 minutes, with Hernandez gradually moving his hands down her shirt and her pants, and ultimately involved rubbing her chest under her shirt, and also rubbing her vagina over her clothing. N. remained on the couch and Hernandez remained standing next to the couch during this touching. The only conversation involved Hernandez's questions to her (and her responses) about a cartoon show then playing on the television in the living room.

N. was able to terminate the first set of touchings by getting up and going to the bathroom. She returned to the living room, but was still scared of Hernandez, who was an authority figure as the patriarch of the family and was "someone that can make . . . things happen." When she returned to the living room, Hernandez was still there. She tried to "squeeze in with my sister so I can, like, I guess hide myself" by wedging herself between her sister and the back of the couch, but Hernandez just laughed, walked over to

the couch, and resumed touching her by squeezing his hand onto her buttocks and rubbing her over her clothing. That touching was brief and ended when Hernandez went into the kitchen area adjacent to the living room.

N. wanted to go back to sleep but was unable to get comfortable enough while squeezed next to her sister, so she returned to her original sleeping spot on the couch. However, after she moved back to her original spot on the couch, Hernandez came back to the living room, stood over her as she lay on the couch, and commenced a third set of touchings, rubbing her chest and vagina areas again. He then stopped touching her, straightened up, and moved to the side of the couch and, with his pants and underwear lowered, he exposed his penis to her and asked if she wanted to "touch it." She looked away but said nothing because she was scared. Hernandez then went behind the couch and resumed touching her. Hernandez eventually went outside and N. woke her sister, which ended the episode.

N. did not tell her parents at that time what had occurred because she was scared and did not want Hernandez to hurt anyone and she did not want to "ruin [her] family." However, sometime in 2010, N. conducted internet searches seeking counseling and information for persons who had been molested, and was worried J. would find those searches; she then revealed Hernandez had molested her. Although J. reported the molestation to police and gave an initial interview to an officer, some time passed before a detective followed up on the report. By that time, J. decided not to pursue it because he believed it would be in N.'s "best interests" to not reopen old wounds. However, when J. learned of another incident in 2013 involving an apparent resumption by Hernandez of

sexual misconduct with another of his granddaughters, J. and N. decided to reopen the case involving N. because Hernandez "had to be stopped."

B. The Other Assaults

The prosecution introduced evidence Hernandez molested numerous family members over the years, starting as early as 1985 when he began molesting his daughter L.B., then 13 years old, and in 2003, when he began molesting another of his daughters (E.H.), 13 years old at the time the molestations began. He also molested another granddaughter when she was 12, and yet another granddaughter when she was 10.

Hernandez also committed molestations against N. not charged in this case. When N. and her family visited Hernandez at his Tijuana home approximately five months after the charged offenses, N. was on the floor one morning when Hernandez lay next to her and ground his crotch against her leg. About six months after that incident, N. and her sister went with Hernandez in his truck to see a horse but N. stayed in the truck while her sister and Hernandez went to view the horse. When Hernandez returned to the truck a short time later, he showed her a picture of a naked person and rubbed N.'s vagina.

The family finally broke its silence in 2013 after Hernandez broke into the bedroom of a granddaughter (whom he had previously molested six years earlier) while she was sleeping. He was wearing a towel over his head and face and he grabbed her. The granddaughter, thinking she was being attacked by a stranger, jumped out of bed and fought back. The towel fell from his face and she realized it was Hernandez. She reported the attack to her mother. Her mother told J.; they decided Hernandez had to be stopped and therefore reported the charged events to police.

ANALYSIS

The jury convicted Hernandez of one count of forcible lewd acts on a child in violation of section 288, subdivision (b), and two counts of lewd acts on a child in violation of section 288, subdivision (a), in connection with the sexual molestation of N. in July 2007. Hernandez concedes the evidence supported the guilty verdicts of lewd acts but asserts the evidence was insufficient to support the finding he employed force or duress in connection with the charged offenses. Accordingly, he argues this court should modify the section 288, subdivision (b)(1), conviction to the lesser included offense of committing a lewd act on a child in violation of section 288, subdivision (a).

A. Legal Standards

The "Force" or "Duress" Elements

To establish a violation of section 288, subdivision (b), the lewd act must be accomplished by, among other things, either force or duress. The "force" or "duress" element "is intended as a requirement that the lewd act be undertaken without the consent of the victim." (*People v. Neel* (1993) 19 Cal.App.4th 1784, 1787 (*Neel*).

The courts have described the "use of force" requirement as involving the use of "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474.) Accordingly, the force requirement will be deemed satisfied when the defendant uses any force "different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim's consent." (*Neel, supra*, 19 Cal.App.4th at p. 1790.)

"According to the majority of courts, this includes acts of grabbing, holding and

restraining that occur in conjunction with the lewd acts themselves." (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.) Moreover, although "resistance is not required to prove forcible sexual assault, the jury could reasonably have considered [the victim's] resistance in assessing whether defendant used force to accomplish the lewd act." (*People v. Babcock* (1993) 14 Cal.App.4th 383, 387 (*Babcock*)). "Whether a defendant used 'physical force substantially different from or substantially in excess of that required for the lewd act' [citation] is properly left as an issue for the jury to resolve." (*Id.* at p. 388, quoting *Cicero*, at p. 484.)

The element of duress involves similar considerations. "[D]uress as used in the context of section 288 . . . mean[s] a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted." (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50, fn. omitted.) As in the element of force, there must be something more than or distinct from the conduct necessary to accomplish the lewd act itself before a court can find sufficient evidence to support a verdict convicting a defendant of a lewd act accomplished by duress. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321.)

Standard of Review

Because Hernandez challenges the sufficiency of the evidence to support the force or duress element, we reiterate that the standard of appellate review of the sufficiency of the evidence to support a jury verdict is well settled. "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the

light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.

[Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, 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. [Citation.] . . . "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

A reviewing court must, under this standard, draw every inference in favor of the judgment that can reasonably be deduced from the evidence, even if the appellate court might have drawn a different inference. (*People v. Brady* (2010) 50 Cal.4th 547, 561.) Moreover, when conducting such review, it is error for an appellate court to focus "on evidence that did not exist rather than on the evidence that did exist." (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

B. Analysis

We conclude there was substantial evidence from which a jury could have concluded Hernandez engaged in conduct, apart from the touching itself, that satisfied the "requirement that the lewd act [was] undertaken without the consent of the victim" (*Neel, supra*, 19 Cal.App.4th at p. 1787), because he applied some modicum of additional force "different from and in excess of the type of force which is used in accomplishing similar lewd acts *with* a victim's consent." (*Id.* at p. 1790, italics added.) At the time of the offense, N. was a 10-year-old child and Hernandez was a fully grown adult. Hernandez towered over her as she lay prone and defenseless on the couch and began rubbing her shoulder. She resisted, shrugging her shoulder several times to rid herself of his unwanted touching (*Babcock, supra*, 14 Cal.App.4th at p. 387 ["jury could reasonably have considered [the victim's] resistance in assessing whether defendant used force to accomplish the lewd act"]), but Hernandez's hand was "forcing" when his hand "would go back to [touching her]." Hernandez's conduct thus signaled to N. that her further resistance would be futile because she perceived, from Hernandez's determined resumption of his conduct, that "it didn't look like he was gonna stop," so she "[gave] up trying to get the hand off [her] shoulder" and Hernandez, having subdued her resistance, then proceeded to rub her chest under her shirt and rub her vagina over her pants.³

³ Indeed, a jury could have concluded N. correctly perceived Hernandez was not going to take "no" for an answer because, when she *was* finally able to free herself after the first phase of the touchings (by going to the bathroom) and then returned to the couch and tried to shield herself from further unwanted touching by trying to use her sister to "hide" her body from Hernandez (by squeezing in between her sister and the back of the

"[T]he requirement of 'force' may be met by circumstantial evidence such force was used as would reasonably demonstrate the act was undertaken against the will of the victim, *considering all circumstances, including the sizes and ages of the defendant and the victim.*" (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1306, citing *People v. Cicero, supra*, 157 Cal.App.3d at pp. 481-482, italics added.) Here, we must consider *all* of the circumstances to evaluate whether the force employed by Hernandez "would reasonably demonstrate the act was undertaken against the will of the victim." (*Mendibles*, at p. 1307.) Hernandez was a fully grown man, and N. was only 10 years old and viewed Hernandez as an authority figure within the family to which she belonged. Moreover, Hernandez did more than merely touch N.: he stood over her as she lay prone and vulnerable and, when she tried to resist by shrugging her shoulders several times, he did not cease but instead continued "forcing" his hand back onto her shoulders in the face of her resistance (and squeezed his hand onto her buttocks when she tried to hide), and his persistence was ultimately successful in subduing her resistance and leading her to submit to additional touchings. We conclude this was sufficient "force" within the meaning of the statute. (Cf. *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 153 [where young and vulnerable victim put her hands in front of her vagina to resist act of intercourse but resistance was physically overcome by pushing aside victim's hands, evidence was sufficient to show force greater than that necessary to accomplish the act of

couch), he *laughed* at her efforts and then came to where she was wedged and "tr[ied] to squeeze his hand into . . . my butt area and then started . . . rubbing."

intercourse under § 261, subd. (a)(2)], disapproved on other grounds by *People v. Griffin* (2004) 33 Cal.4th 1015, 1028.)

Hernandez asserts the level and nature of the additional conduct he engaged in, even if "different from and in excess of the type of [conduct] which is used in accomplishing similar lewd acts with a victim's consent" (*Neel, supra*, 19 Cal.App.4th at p. 1790), is substantially *less* egregious than the type of conduct other courts have examined when upholding convictions under section 288, subdivision (b). Although the cases catalogued by Hernandez involved defendants who applied *more* physical constraints on the victims than Hernandez applied to N. here, none of those cases purported to establish a "floor" on the constellation of conduct necessary to support a finding of force. Indeed, when an appellate court must "decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts."⁴ (*People v. Thomas* (1992) 2 Cal.4th 489, 516.) As long as there is some evidence of conduct by the defendant different from or in excess of conduct minimally required to accomplish the lewd act, then "[w]hether a defendant used

⁴ Even if cross-comparisons were appropriate, the present case is not unlike other cases in which the application of force, while perhaps minimal, was nonetheless "substantially different from" or "substantially greater than" that necessary to accomplish the sexual act. For example, in *People v. Bolander* (1994) 23 Cal.App.4th 155, the defendant pulled the victim's shorts down, prevented the victim from pulling them back up, and put his penis inside the victim's anus. The defendant put his hands on the victim's waist and pulled the victim towards him as he was engaging in the conduct. *Bolander* concluded that "[a]pplying the principles set forth in *Cicero*, we conclude that defendant's acts of inhibiting [the victim] from pulling his shorts back up, bending [the victim] over and pulling [the victim] towards him constitute force within the meaning of subdivision (b) of section 288" (*Id.* at p. 159.)

'physical force substantially different from or substantially in excess of that required for the lewd act' [citation] is properly left as an issue for the jury to resolve." (*Babcock, supra*, 14 Cal.App.4th at p. 388.) We are satisfied there was evidence from which a jury could have concluded, in light of all of the circumstances, Hernandez used physical force to accomplish the lewd act employing conduct substantially different from or in excess of that required for the lewd act to overcome N.'s free will.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

I CONCUR:

HALLER, Acting P. J.

I CONCUR IN THE RESULT:

AARON, J.