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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ARON JEROME BLACHE,

Defendant and Appellant.

E059677

(Super.Ct.No. RIF1210190)

OPINION

APPEAL from the Superior Court of Riverside County. Jeffrey Prevost, Judge.

Affirmed.

Dacia A. Burz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Aron Jerome Blache engaged in substantial sexual conduct with his wife's granddaughter, Jane Doe, from the time she was six years old

until she was the age of 12. Defendant was convicted of two counts of sexual intercourse with a minor under the age of 10; one count of sexual penetration of a minor under the age of 10; two counts of attempted sexual intercourse with a minor under the age of 10; and eight counts of committing lewd and lascivious sexual acts on a minor.

Defendant now claims on appeal as follows: (1) Insufficient evidence was presented to support his two convictions of violating Penal Code section 288.7, subdivision (a),¹ sexual intercourse with a minor under the age of 10, and one count of violating subdivision (b) of section 288.7, sexual penetration of a minor under the age of 10, as it was not proven that these three acts occurred after the effective date of the statute, which was September 20, 2006; and (2) the trial court erred by failing to sua sponte instruct the jury with the lesser included offense of attempted sexual intercourse with a minor under the age of 10 for one of the counts of violating section 288.7, subdivision (a). Such instructional error violated his federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments.

We affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

Defendant was found guilty by a Riverside County Superior Court jury in counts 1 and 2 of sexual intercourse with a minor under the age of 10. (§ 288.7, subd. (a).) In counts 3 and 4, defendant was found guilty of attempted sexual intercourse with a minor

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

under the age of 10. (§§ 664, 288.7, subd. (a).) In count 5, he was found guilty of sexual penetration of a minor under the age of 10. (§ 288, subd. (b).) In counts 10, 11, 13, 18, 19, 20, 21, and 22, defendant was found guilty of committing a lewd and lascivious act upon a child. (§ 288, subd. (a).)²

Defendant was sentenced to 25 years to life on count 1 and 15 years to life on count 5 for a total indeterminate sentence of 40 years to life. He also received a determinate sentence of 19 years four months, which was to run consecutive to the indeterminate sentence.

B. FACTS

1. *PEOPLE'S CASE-IN-CHIEF*

a) Doe's Testimony³

Doe was born in November 1997; she was 15 years old at the time of trial. P.G. (Mother) was Doe's mother; Doe's maternal grandmother (Grandmother) was married to defendant. E.H. was Grandmother's goddaughter who lived with defendant and Grandmother. Defendant and Grandmother lived in Moreno Valley. Doe had known defendant since she was born. Doe did not want to look at defendant in court.

The inappropriate sexual acts between Doe and defendant started when she was six years old. When she was six years old, other children at her school talked about

² The remaining charged counts were dismissed pursuant to a section 1118.1 motion and the jury was unable to reach a verdict on two counts.

³ Additional detail regarding Doe's testimony will be provided in Sections III and IV, *post*.

sexual things. She became curious. Little boys in her class pulled down their pants and showed their penises to the girls. She decided to try some of the sexual things that they talked about at school with defendant. She assumed he would want to do these things with her because he oftentimes kissed her on the mouth. He kissed her longer on the lips after she turned six. Doe began masturbating at the age of six.

When Doe was seven years old, they started touching each other more. Defendant continued to kiss her and hold her hands.

When Doe was nine years old, she snuck out of her room. Mother and Grandmother were asleep in one of the bedrooms. Defendant was on the couch. Defendant was asleep and she woke him up. She straddled him and sat on top of his penis. She was not wearing underwear. Doe told him that she wanted to know what it felt like to have his penis in her vagina.

Defendant put on a pornographic movie. Doe told defendant she wanted to try a sexual position that she saw in the movie. Defendant got on top of her and tried to put his penis in her vagina, but her vagina was too small. Defendant lay on his back and Doe straddled him. She tried to put his penis in her vagina but it would not fit. Thereafter, she “roll[ed] around” her vagina on top of his penis. Defendant could only get the tip of his penis a little bit into her vagina but it hurt her too much.

On another occasion, Doe was laying on top of defendant while he was half asleep on the couch. It was dark in the room. Grandmother walked into the room. Doe rolled off of defendant and pretended she was playing with the dog on the floor. Grandmother

went into the kitchen. Defendant whispered to her to get her underwear and go into the bedroom. Doe heard Grandmother and defendant arguing.

Defendant had also performed oral sex on her; he put his mouth on her vagina while they were in the bedroom where she and E.H. slept. Doe had learned about oral sex from other children at school. She performed oral sex on him “once or twice maybe.” She did not like it. The oral sex acts occurred when she was under 10 years old.

Doe recalled that she had tried on two separate occasions to put his penis in her buttocks but she was too small. From the age of nine years to when she was 12 years old, she got on top of defendant and rubbed her vagina against his penis two to five times. His penis would be touching her clitoris. Doe had touched defendant’s penis with her hand a “couple of times.”

Doe felt as though she was in a relationship with defendant because of the sexual things that they did but she was confused because he was supposed to be her grandfather. Doe did not feel she was being forced to do these sex acts; she wanted to make defendant happy and she thought he wanted to make her happy. The relationship between Doe and Grandmother changed after she saw them on the couch. Doe felt like Grandmother suspected something. Prior to trial, Doe was shown a photograph of two penises. She circled the one that looked like defendant’s penis.

b) Other Testimony

When Doe was around 12 years old, Mother was told by a friend that Doe had told her daughter defendant was molesting Doe. Mother confronted Doe. Doe started crying. Mother asked her if it was true she had been touched by defendant, and Doe responded,

“Yeah Mom. He’s touching me.” Mother did not contact the police because she believed her husband would try to kill defendant. Also, her husband had just suffered a heart attack and she was afraid he would have another one.

Grandmother would watch Doe, Doe’s brother, and E.H. on the weekends. They would stay at her house. Doe also would stay with Grandmother and defendant when she was on school breaks. Mother would oftentimes go with her, but not always. Doe never said that she did not want to stay with Grandmother and defendant. Mother never suspected that anything wrong was happening.

Mother had seen defendant sleep on the couch because he had drunk too much. Mother was a light sleeper and never heard anything happening in the living room at night. Mother did notice that defendant hugged E.H. and Doe a lot. When Doe was 13 or 14 years old, she complained that Grandmother treated E.H. better than her despite Doe being her granddaughter.

Riverside Police Officer Eric Garcia was working patrol on August 25, 2012. He received a call to respond to Mother’s house regarding a concern that Doe was going to hurt herself and was suicidal. Officer Garcia spoke with Doe in private. Doe disclosed that she had been sexually abused by defendant. Doe told Officer Garcia that the abuse started when she was four years old and continued until she was 11 years old. Doe told Officer Garcia that she had been molested 10 times between the ages of six and 11. Officer Garcia admitted her to a hospital for a mental health hold because he feared she would hurt herself.

Riverside County Sheriff's Detective Eric Holland was assigned to the sexual assault unit in Moreno Valley. He took over the case from Officer Garcia when it was discovered that the sexual assaults occurred in Moreno Valley. He showed a photograph of a circumcised and uncircumcised penis to Doe. Detective Holland interviewed defendant on November 19, 2012.

Defendant and Grandmother had lived together since 1990. They got married in 2005. Doe visited them with Mother. Defendant thought Doe acted too old for her age. Defendant insisted he was never alone with Doe; Mother was always with her. Defendant's penis was uncircumcised.

Defendant recalled that he was asleep on the couch one time. He woke up and Doe, who was five or six years old at the time, was on top of him straddling him. Defendant was not naked and he had blankets on top of him. Grandmother came in the room. Grandmother took Doe off of him and took her to one of the bedrooms. This was the only time it happened.

Detective Holland showed defendant that Doe had described defendant's penis as uncircumcised. Defendant asked "why [did] she pick me?" Detective Holland stated, "Why did she pick you to have sex with?" Defendant responded, "She had—she—she had some—some—some kind of infatuation or something but I'm—not" Detective Holland encouraged defendant to admit the abuse to help Doe address her mental problems. Defendant responded, "But—but that's what I'm saying. I do not remember any of this happening." He then admitted that the sexual acts could have happened when he was drunk.

Later, defendant said, “If—if she says it happen then it happened okay yeah, but I’m—I’m saying I don’t remember now. And none of it happening myself except for the one time. [*Sic.*] That’s it. If she says it happened. It happened all right.” Defendant agreed Doe was not making it up and said, “[j]ust like I said no, she’s not making it up. If she says it happened—It happened. Oh man.” Detective Holland asked him if he felt better, and he responded, “Yeah I feel better, but it’s just—just crazy—crazy.” Defendant claimed that Doe was never left alone with him after the straddling incident. However, he could not explain when all of the other sexual activities occurred. He was adamant it was not when she was eight, nine, 10 or 11 years old.

Detective Holland spoke with Doe. He then told defendant he clarified that when Grandmother caught Doe straddling defendant, she was nine years old. Defendant stated he might not remember because he had always been drunk; he drank a lot of Scotch. He acknowledged it could have happened but refused to admit it.

Defendant wrote Doe a letter: “Dear [Doe], this your grandfather writing you. I’m sorry for what happened years ago when I . . . might have not been in a good state of mind. Maybe when you get some help, we can talk. Aron Blache. Grandpa.”

2. *DEFENSE*

Grandmother started dating defendant in 1992 and they got married on March 5, 2005. Doe visited her home on weekends and sometimes on holidays. Mother came with her except for one or two times. Grandmother never left Doe alone in the house with just defendant. Grandmother never heard Doe come out of her room between the ages of six and 11 when she stayed with her.

When Doe was eight or nine years old, Grandmother walked into the living room during the day. Defendant was asleep on the couch. She saw Doe standing next to him while he was asleep and it looked “suspicious.” It appeared that Doe was going to touch defendant but she was just staring at him.⁴ Grandmother asked Doe why she was staring at defendant, and she responded, “I don’t know.” Grandmother denied that she thought there was something sexual occurring, but immediately made Doe go home.

Grandmother had never seen anything she thought was sexual between Doe and defendant before that day. Grandmother had seen defendant hug Doe, but not kiss her. Grandmother did not allow Doe to come to the house after the incident on the couch without Mother. Grandmother kept a close eye on Doe after that because she was concerned by what she saw between them that day.

DISCUSSION

A. INSUFFICIENT EVIDENCE

Defendant contends that the trial court erred in denying his section 1118.1 motion to dismiss counts 1, 2 and 5, and that insufficient evidence was presented to prove counts 1, 2 and 5, because the evidence failed to establish the acts occurred after September 20, 2006.

1. *ADDITIONAL FACTUAL BACKGROUND*

Defendant brought a section 1118.1 motion. The parties discussed all of the counts and the acts that were committed to support those counts. Pertinent here, counts 1

⁴ Grandmother told an investigator prior to trial that she had found Doe straddling defendant and had to pull her off of him.

and 2 were the attempts to have intercourse, defendant putting the tip of his penis into Doe's vagina. Counts 3 and 4 involved her rubbing her vagina on his penis. Count 5 involved digital penetration by a finger at the same time as the other sexual acts.

Defense counsel argued that counts 1 through 8 (pertinent here, counts 1 through 5) were for violations of section 288.7, which did not become the law until September 20, 2006. Doe was born on November 12, 1997. As such, the law came into effect two months prior to her ninth birthday. He argued that there was uncertainty as to all of those counts that involved a violation of section 288.7, whether they occurred after the effective date. Defense counsel asked to dismiss counts 1 through 4 as they could have occurred when she was only eight and a half years old.

The prosecutor argued as to counts 1 through 4 that there was evidence supporting that the acts occurred when Doe was nine years old. Doe told Detective Holland she was nine years old when they occurred. She only said she could be eight and a half after long questioning by defense counsel, and it was clear she was breaking down. The prosecutor stated the jury should be advised that the crimes had to be committed after September 20, 2006. Count 5 should not be dismissed; it was the one time he also put his finger inside her during oral sex.

Defense counsel argued that count 5 involved the finger during the oral copulation and there was no specific date as to when it occurred; only evidence of him orally copulating her was when she was under 10 years old.

The trial court denied the section 1118.1 motion as to counts 1 and 2 finding that a reasonable jury could find that the occurrence was after September 20, 2006. As for

count 5, the jury could find that it occurred during the applicable age range for the statute. The prosecutor amended the information to add counts 19, 20, 21, and 22 as section 288, subdivision (a) charges, based on the same conduct as in counts 1 through 4. If the jury found the evidence did not support that defendant engaged in the conduct alleged for counts 1 through 4 after September 20, 2006, they could nonetheless find him guilty for those acts by finding him guilty of these added counts, which did not require that they be committed on or after a specific date.

The jury was instructed as to counts 1 and 2 that defendant engaged in sexual intercourse with a child under the age of 10. They were instructed that defendant had to have “engaged in an act of sexual intercourse with [Doe]” and that “when the defendant did so, [Doe] was 10 years of age or younger.” They were instructed, “Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis.” They were instructed as to count 5 that “[s]exual penetration means penetration, however slight, of the genital opening of the other person by any foreign object, substance, instrument, device, or any unknown object for the purpose of sexual abuse, arousal, or gratification.”

The jury was given special instructions that counts 1 and 2 were based on acts of sexual intercourse between September 20, 2006, and November 11, 2008. The jury was instructed that counts 3 and 4 were acts of attempted sexual intercourse between September 20, 2006, and November 11, 2008. Count 5 was an act of sexual penetration between the dates of September 20, 2006, and November 11, 2008. Counts 9 through 18 were lewd and lascivious acts charges with no date range. Counts 19, 20, 21 and 22,

were based on the same acts as in counts 1, 2, 3 and 4, respectively, but charged as violations of section 288, subdivision (a), lewd and lascivious acts, with no date required as to when the acts occurred.

2. ANALYSIS

“In determining whether the evidence was sufficient either to sustain a conviction or to support the denial of a section 1118.1 motion, the standard of review is essentially the same. [Citation.] “[W]e do not determine the facts ourselves. Rather, we ‘examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—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.’ [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . ‘[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.” [Citations.] Notably, however, ‘[r]eview of the denial of a section 1118.1 motion made at the close of a prosecutor’s case-in-chief focuses on the state of the evidence as it stood at that point.’ [Citations.]” (*People v. Hajek* (2014) 58 Cal.4th 1144, 1182-1183.)⁵

⁵ The state of the evidence regarding the dates that counts 1, 2 and 5 occurred was essentially the same at the conclusion of the case, and at the time of the section 1118.1 motion.

““““Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]’” [Citation.]’ [Citations.]” (*People v. Mejia* (2007) 155 Cal.App.4th 86, 98 (*Mejia*).

Section 288.7, subdivision (a) provides that “any person 18 years of age or older who engages in sexual intercourse or sodomy with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 25 years to life.” Subdivision (b) provides, “Any person 18 years of age or older who engages in oral copulation or sexual penetration, as defined in Section 289, with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life.” Section 288.7, subdivisions (a) and (b) became effective on September 20, 2006. (Stats. 2006, ch. 337, §9.)

3. *COUNTS 1 AND 2*

Counts 1 and 2 referred to the times that defendant put the tip of his penis in Doe's vagina. Based on the totality of the evidence, the jury could conclude that these events occurred after the effective date of section 288.7.

It was established that Doe was born on November 12, 1997. On November 12, 2006, she would have been nine years old. On direct examination, Doe testified she snuck out of her room and then straddled defendant. She wanted to know what it felt like to have penis in her vagina. Defendant put on a "sex tape." Doe testified, "Well, he tried to get on top of me, but that when he tried, it was too complicated, so he laid back down and I got on top of him, and I tried putting his penis in my vagina, but I was too small." The prosecutor asked her, "How old were you about that time?" Doe responded, "I was nine." She said the tip of his penis went in her vagina but it hurt. Doe also testified that they "tried to do it a couple of times" but had been caught.

During cross-examination, the following exchange occurred:

"[Defense Counsel:] And that experience of the first vaginal intercourse, you attempted one position and it didn't work right?

[Doe:] Yes.

[Defense Counsel:] And then you went to the missionary position where he got on top of you?

[Doe:] Yes.

[Defense Counsel:] And he attempted to penetrate your vagina with his penis; right?

[Doe:] Yes.

[Defense Counsel:] But it didn't fit; is that correct?

[Doe:] Yes.

[Defense Counsel:] On that occasion, did it stop there or did something else happen sexually?

[Doe:] Something else happened sexually. When it didn't fit, I just got on top of him, and I tried to put his penis in my private area, and my vagina, but I was too small, and it was—it wouldn't work.”

Defense counsel also asked Doe on cross-examination about when the sexual intercourse occurred as follows: “And it is possible that you were still eight years of age when that occurred? She responded, “Eight or nine.” Defense counsel then asked, “Could you have been eight and a half?” She responded, “Maybe, yes.” Later, she was asked about the second time that the rubbing of his penis with her vagina occurred. She responded, “Honestly, I really—I'm really not good with the ages, what happened when or what. I only remember what happened the time it happened. I don't remember the time or day. I only remember at that moment what happened.”

On redirect, the prosecutor asked about the time defendant put his penis inside her vagina. The prosecutor stated, “When you were talking about it to the detective, about it being around when you were nine years old, and when you told us in the beginning that you were nine years old; is that correct.” Doe responded, “Yes.” The prosecutor then asked Doe, “At the end of the questioning, after two hours for [defense counsel], he asked you ‘Well, is it possible that you were eight and a half;’ do you understand that?” Doe

responded, “Yes.” The prosecutor then asked, “Do you remember that you were about nine years old; is that correct.” Doe responded, “Yes.”

Defense counsel then asked Doe to listen to a portion of the interview that she had with Detective Holland prior to the trial. After listening, Doe stated that she told him she was younger than nine when the oral sex and vaginal intercourse occurred. The prosecutor asked Doe to listen to the portion of the tape again. She admitted that during that short portion, there was no mention of oral sex or vaginal penetration. She recalled that they were just discussing defendant touching her.

The prosecutor, during closing argument, emphasized that the acts of sexual intercourse had to have occurred after September 20, 1996, and before Doe was 11 years old. The prosecutor argued that the sexual penetrations occurred when Doe was nine years old. The prosecutor advised the jury that if they found the sexual intercourse did not occur within the date range with which they had been instructed, they must find defendant not guilty of counts 1 and 2.

Here, there was reasonable and credible evidence from which the jury could find that defendant committed counts 1 and 2 after September 20, 2006. Doe testified that she was nine years old on several occasions. While it is true she also stated that she may have been eight and a half years old, we cannot find that the evidence was insufficient based on this inconsistency. As stated, conflicts and even testimony that is subject to justifiable suspicion do not justify reversal as it is up to the jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (*Mejia, supra*, 155 Cal.App.4th at p. 98.) “Accordingly, we find the contradictions in the

victim's testimony did not render it impossible to believe or obviously false, but merely presented the jury with a credibility determination that is not reviewable on appeal." (*Id.* at p. 99.)

As is apparent, we have thoroughly reviewed the evidence that was before the jury as to counts 1 and 2, and conclude that the jury could reasonably conclude that the sexual intercourse occurred when Doe was nine years old, which would have been after the effective date of section 288.7.

Defendant contends that this case is similar to another finding in *Mejia*. In *Mejia*, the appellate court held the evidence was insufficient to support the defendant's conviction of continuous sexual abuse under section 288.5, which requires that the defendant engaged in "three or more acts of substantial sexual conduct" with a child under 14 years of age over a period of at least three months. (*Mejia, supra*, 155 Cal.App.4th at pp. 94-95.) The defendant was charged with acts occurring "on or between June 1, 2004 and September 17, 2004," and the victim testified the defendant had molested her 10 times in June and July and at least twice in September, however the abuse had not occurred every week. (*Id.* at pp. 94-95.) On appeal, the court held that although the jury could reasonably infer that "defendant's abuse began sometime in June and continued to some date in September . . . the jury could only speculate that the first incident occurred early enough in June to satisfy the 90-day requirement expiring on September 17, 2004." (*Id.* at pp. 94-95.)

Mejia is distinguishable. Here, Doe specifically testified on several occasions that she was nine years old at the time of the sexual intercourse. Unlike the victim in *Mejia*,

who did not testify specifically that a sexual act occurred in early June, Doe stated on several occasions that she was nine years old when the sexual intercourse occurred. There was testimony upon which the jury could reasonably conclude that the sexual intercourse occurred after September 2006. We find that the trial court properly denied defendant's section 1118.1 motion to dismiss counts 1 and 2, and that sufficient evidence was presented to support those counts.

4. *COUNT 5*

Defendant contends that Doe's equivocal and vague testimony as to how old she was when defendant digitally penetrated her with his finger does not support his conviction in count 5.

Doe testified that defendant had put his mouth on her private area. She initially could not recall what age she was when this act occurred. Later, she did recall that all of the oral copulation occurred when she was under 10 years old. On cross-examination, she twice stated that the vaginal intercourse occurred before the oral sex. She also testified the first oral sex occurred when she was "around nine or eight." She later stated that defendant put his finger in her vagina only one time when he was performing oral sex on her. The prosecutor asked Doe, "And the oral stuff, do you believe you were nine years old?" Doe responded, "Yes."

Based on the foregoing evidence, the jury could reasonably conclude that the oral sex during which defendant digitally penetrated her with his finger occurred when she was nine years old. She clarified with the prosecutor that she was nine years old when the oral sex occurred. She also had stated on several occasion that they engaged in the

oral sex acts after they had vaginal intercourse. We have already concluded the jury could reasonably conclude that the vaginal intercourse occurred when Doe was nine years old. Again, conflicts in Doe’s testimony did not make her claims “impossible” and it was within the exclusive province of the jury to decide Doe’s credibility. (*Mejia, supra*, 155 Cal.App.4th at p. 98.) Substantial evidence supported that the digital penetration of Doe occurred after September 20, 2006.

B. FAILURE TO INSTRUCT THE JURY WITH LESSER INCLUDED OFFENSE OF ATTEMPTED SEXUAL INTERCOURSE

Defendant contends the trial court erred in not instructing the jury sua sponte on the crime of attempted sexual intercourse with a minor under the age of 10 years in violation of sections 664 and 288.7, subdivision (a), for either count 1 or 2. He insists that there was a question as to whether defendant actually penetrated Doe’s vagina two times.

“A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial. [Citations.] This sua sponte obligation extends to lesser included offenses if the evidence ‘raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense. [Citations.] [Citations.]’ (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288.)

A trial court has a “duty to instruct on ‘all theories of a lesser included offense which find substantial support in the evidence,’” even without a formal request by the defendant. (*People v. Rogers* (2006) 39 Cal.4th 826, 866-867.)

However, the “substantial evidence requirement is not satisfied by “any evidence . . . no matter how weak,” but rather by evidence from which a jury composed of reasonable persons could conclude “that the lesser offense, but not the greater, was committed.” [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 293; *People v. Breverman* (1998) 19 Cal.4th 142, 162.) ““On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.”” (*Verdugo*, at p. 293.)

We have set forth the elements of section 288.7, subdivision (a), *ante*. For purposes of “sexual intercourse,” as that term is used in the aforementioned section, the prosecution need not prove that the defendant fully penetrated the victim’s vagina with his penis. Slight penetration, including penetration of the labia majora without further penetration into the vagina, satisfies the element of sexual intercourse for sex crimes. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097 [“The conviction on count 1 required proof that [the defendant] had ‘sexual intercourse’ with Minor (§ 288.7, subd. (a)), which required penetration of her labia majora, not her vagina”].)

Attempted sexual intercourse is a lesser included offense of sexual intercourse. (See, e.g., *In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609 [“California appellate courts have repeatedly accepted the principle that attempt is a lesser included offense of any completed crime”].) To justify an attempted sexual intercourse instruction, there must have been substantial evidence that defendant intended to penetrate the victim’s vagina with his penis but was “unsuccessful in the attempt.” (*People v. Holt* (1997) 15 Cal.4th 619, 674.)

It is clear based on Doe's testimony that defendant put the tip of his penis in her vagina on two separate occasions. First, defendant got on top of Doe, in the missionary position, and tried to fit his penis in her vagina, but it did not fit. Doe then got on top of defendant and tried to fit his penis in her vagina. However, it did not fit because she was too small. This evidence established that there were two times that defendant put his penis in her vagina.

Defendant contends the evidence did not establish that defendant actually penetrated Doe's vagina while they were in the "missionary" position on the couch. He claims "[i]n view of [Doe]'s testimony reasonably inferring that there was only one or two occasions that the tip of [defendant]'s penis penetrated [Doe]'s 'vagina' and that she and [defendant] abandoned the missionary position because it was uncomfortable, this evidence was consistent with the reasonable possibility that [defendant] attempted sexual intercourse by getting on top of [Doe], but abandoned it without penetrating either her genitalia or vagina. [Citation.]" He further contends the jury could have concluded that since defendant was bigger than Doe, they abandoned the position because it was uncomfortable; they abandoned the position before there was penetration.

Defendant does not reasonably interpret Doe's testimony. Doe testified that defendant first tried to fit his penis inside her vagina while they were in the missionary position. It did not fit. Thereafter, she got on top of him and tried again to put his penis in her vagina. The only reasonable interpretation of this evidence was that the tip of defendant's penis went in Doe's vagina on two occasions. No evidence supported giving

a lesser offense instruction that he only attempted sexual intercourse. The trial court did not err by failing to sua sponte instruct the jury on a lesser offense for either count 1 or 2.

Since we conclude there was no error in failing to sua sponte instruct the jury with the lesser offense of attempted sexual intercourse, defendant cannot show that his federal constitutional rights were violated.

DISPOSITION

We affirm the judgment.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.