

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

XAVIER HAKIM,

Defendant and Appellant.

E060145

(Super.Ct.No. FVI1300962)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Thomas E. Robertson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

**I**

**INTRODUCTION**

On September 3, 2013, an information charged defendant and appellant Xavier Inez Hakim with sodomy with a child ten years of age or younger, in violation of Penal Code<sup>1</sup> section 288.7, subdivision (a) (count 1); and oral copulation or sexual penetration with a child ten years of age or younger, in violation of section 288.7, subdivision (b) (count 2).

Prior to trial, the People filed a motion in limine to admit defendant's statements made during his pre-examination interview with the polygraph examiner. Defense counsel argued that defendant's statements were involuntary confessions made under the "umbrella of a polygraph examination." The court ruled that these statements – recorded on digital video – were admissible.

The minor victim testified against defendant at trial. Moreover, the People played the video of defendant's interview with the polygraph examiner. Defense counsel made a motion for acquittal under section 1118.1; the court denied the motion.

Defendant requested that the jury be instructed on loss of consciousness, CALCRIM No. 3425. The court denied the request; it stated that there was no substantial evidence to support the instruction.

The jury returned a mixed verdict. On count 1, the jury acquitted defendant on the sodomy offense, but convicted him on the lesser included offense of simple battery. On count 2, the jury convicted defendant on the charge of oral copulation.

---

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

The trial court sentenced defendant to an indeterminate term of 15 years to life, as follows: 15 years to life on the oral copulation conviction, and 180 days on the simple battery conviction to run concurrent. Defendant received actual custody credit of 239 days, and conduct credit of 35 days under section 2933.1.

Defendant filed a timely notice of appeal.

## **II**

### **STATEMENT OF FACTS**

In March of 2013, defendant was living in a house with his girlfriend, his children, and numerous members of his girlfriend's family. In all, seven adults and eight children lived in the house.

On the evening of March 20, 2013, several of the adults, including defendant, went out to a bar. While the adults were out, several of the children fell asleep in defendant's room. One of these children was the victim, defendant's seven-year-old niece.

After having drinks at the bar, the adults returned to the house around 2:00 a.m. Defendant tried to sleep with his girlfriend on the living room couch but she turned him away. Defendant, therefore, went to his room and tried to sleep on the floor.

At some point during the night, the victim moved from the bed to the floor. While lying on the floor, the victim felt her pants being taken off. She also felt defendant's penis under her butt and touching her back. Next, the victim saw defendant remove her underwear and lick her vagina for a short period of time. The victim called out

defendant's name; defendant moved off of her. Defendant told the victim to be quiet and left the room.

The next day, the victim told her parents about the incident. When confronted, defendant suggested that the parents take the victim to the doctor for an evaluation to clear his name. The victim's father, however, neither took the victim to the doctor nor reported the incident right away. Instead, the entire family, including defendant, continued to live together for another week.

About one week after the incident, the police were contacted. After speaking with the family, the investigating detective called defendant. The next day, defendant drove to the police station. He denied any inappropriate touching of the victim. After the detective offered a polygraph examination, defendant changed his story. Defendant explained that he mistook the victim for his girlfriend and pulled off her pants. Defendant began to cry and requested to take the polygraph examination.

The following week, defendant returned to the police station. During the pre-polygraph interview, defendant was not wearing handcuffs, and the examiner explained that defendant was neither under arrest nor required to take the polygraph test. Defendant stayed and made numerous statements during the 45-minute interview. For example, defendant made the following statements: (1) He was still drunk when the victim ended upon the floor next to him; (2) he ripped off the victim's pants; (3) there was a "five out of ten" possibility that his mouth was on the victim's vagina; and (4) his mouth was on her vagina for "a few seconds" while he believed he was performing oral sex on his girlfriend.

Based on the nature of defendant's statements, the examiner and detective decided to cancel the polygraph examination. Defendant's pre-polygraph examination, however, was recorded on video and played for the jury at trial.

Two weeks after the incident, a nurse examined the victim. There were no physical findings related to sexual abuse.

According to defendant, he was asleep on the floor of his room when he sensed a body lie down next to him. Believing it was his girlfriend, defendant removed her pants. However, when he heard the victim's voice call out his name, he woke up. He then saw the victim standing naked. He gave the victim back her pants and immediately left the room. He never put his mouth on the victim's vagina.

### **III**

#### **ANALYSIS**

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, but he has not done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

**IV**  
**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.