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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.

EFRAIN GARCIA JIMENEZ,

Defendant and Appellant.

E063157

(Super.Ct.No. BLF1400084)

OPINION

APPEAL from the Superior Court of Riverside County. Richard A. Erwood,  
Judge. Affirmed.

Rex Adam Williams 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  
Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendant Efrain Garcia Jimenez of committing a lewd or lascivious act on child under 14 years old. (Pen. Code, § 288, subd. (a).)<sup>1</sup> He was sentenced to six years in state prison.

Defendant contends that there was insufficient evidence that he had lewd or lascivious intent when he touched the victim. We disagree.

## I

### STATEMENT OF FACTS

#### A. Prosecution Evidence

In September 2013, the seven-year-old victim and her father lived in a house near Blythe. Defendant was an ex-boyfriend of the victim's great-aunt.

On September 7, 2013, defendant was visiting the victim's house when the father went grocery shopping and left her alone with defendant for a short time. Defendant had never babysat for the victim before. The father did not tell her that he was leaving. The victim was lying on her stomach on her bed in her room.<sup>2</sup> Defendant "jump[ed]" on her and lay his whole body down on top of her. Defendant then "touched [her] on the private (sic)," through her clothes, but not under them. The victim felt defendant's hand on her private and it made her feel "[d]isgusting." The victim told defendant that she had to go

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

<sup>2</sup> The victim testified that she was asleep lying on her side in her bed. She also testified that defendant was on top of her on her back when "[h]e started to touch my private." Apparently she was sleeping on her side but was forced to her stomach when defendant "jump[ed]" on top of her.

to the bathroom, and he let her go. When she came out, she ran toward the bed. The victim testified that defendant's "hand was out, and I didn't see it, and then it scratched my chin." She then ran back into the bathroom, locked the door, and cried until her father came home. Defendant never tried to stop her from going anywhere. When the father returned, the victim told him what defendant had done and the father ordered defendant to leave the house.

A Riverside County sheriff's detective was assigned to investigate the incident. He scheduled an interview for the victim with a Child Protective Services forensic interviewer. The interview took place on September 11, 2013, and was recorded and played for the jury at trial. In the interview, the victim said that defendant touched her two different times. She described one of the times as being when her father was out shopping. The victim was lying on her back watching television and defendant jumped on top of her. She described that defendant lay down on top of her covering her whole body with his. The victim was shaking because she was scared. Then defendant got off of her and went to a couch to lie down, and she went to the bathroom. When she got out of the bathroom, defendant tried to "stop" her by holding out his hand and instead scratched her chin. He said he was sorry.

The victim also described a second earlier incident when she was sleeping and woke to find defendant touching her "bathroom" area over her clothes with his hands. The father was home but in his room. Defendant stopped and left the room and the

victim went back to sleep. The victim eventually told her father because “he ke[pt] on asking [her] a lot of times.”

At trial, the victim only remembered defendant touching her once; however she thought her memory of the event was better at the time of her forensic interview than at trial. On cross-examination she denied having told the interviewer that defendant touched her a second time when her father was home and in his room even after reading the transcript of the interview.

In an interview on November 26, 2013, the detective told defendant that the victim had been interviewed and that he had concluded that she was not lying. Defendant admitted to the detective that he was in the house the night of September 7, but denied touching the victim on her vagina. Defendant said that he drank a tall can of beer and asked the father to go buy him cigarettes and more beer. Defendant was left to watch the victim while the father was out. The victim became out of control and defendant had to restrain her. She wanted to go outside and defendant held her down. During the struggle, he scratched her chin with his fingernail. Although at first, defendant said that the victim had never laid down, he later changed that to “she laid down for a little bit.”

The detective conducted a second interview on December 12, 2013. The second interview was recorded and a recording was played for the jury. In that interview defendant said that the victim was laying down sleeping and “it all occurred to me.” Defendant had “nothing” in mind, but was “just [] rolling with it.” Defendant “got her like that” and “grabbed” the victim “in the front” one time with his whole hand.

Defendant “had her so that she didn’t move much” and told her to stay still but did not get on top of her. Defendant “reacted [] and said what am I doing.” Defendant said that he may have touched her a second time “in the legs” when he grabbed her legs to hold her at one point. Defendant agreed with the detective’s description that it was “something that just happens . . . in those moments when you want to and not at the same time. And all of a sudden you’re like committed . . . and you’re already there. [¶] . . . [¶] And then all of a sudden you realize and get out.”

#### B. Defense Evidence

Defendant did not testify, but called the victim’s great-aunt to testify on his behalf that the victim was behaviorally “out of control” during the relevant time period, “was always jumping,” and would not listen to instruction. The great-aunt babysat the victim once, but would not do it again because she was unable to control her. The victim’s grandmother and great-grandmother were also unable to control her.

## II

### DISCUSSION

Defendant contends that there was insufficient evidence that he had lewd intent when he touched the victim. We disagree.

When considering a challenge to the sufficiency of the evidence supporting a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains reasonable, solid, credible evidence from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. (*People v.*

*Johnson* (2015) 60 Cal.4th 966, 988.) We employ this same standard in evaluating both direct and circumstantial evidence. (*Ibid.*; *People v. Towler* (1982) 31 Cal.3d 105, 118.) We do not invade the province of the jury by reweighing the evidence, or by reconciling competing circumstances and redrawing competing inferences from those circumstances. It is the jury—not the appellate court—which must be convinced of the defendant’s guilt beyond a reasonable doubt. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055-1056; *People v. Nelson* (2011) 51 Cal.4th 198, 210.) “ ‘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.’ ” (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) Even the testimony of a single witness may provide the jury with sufficient evidence to support a conviction. (*Ibid.*)

Section 288, subdivision (a), provides, “[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part . . . thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person . . . is guilty of a felony.” A lewd act “can occur through the victim’s clothing and can involve ‘any part’ of the victim’s body.” (*People v. Martinez* (1995) 11 Cal.4th 434, 444.) The intent of a touching “must be inferred from all the circumstances,” including “the nature of the touching[] or the absence of an innocent explanation.” (*Id.* at p. 452 [where the

defendant forcibly held the victim against his body “no purpose other than [for] sexual gratification reasonably appears”].) A lewd act may occur even if it is “fleeting.” (People v. Owen (1945) 68 Cal.App.2d 617, 619.) Actual arousal is not necessary as long as the defendant had intent for arousal. (People v. Lopez (2010) 185 Cal.App.4th 1220, 1233.)

Thus, as applied to this case, if upon consideration of the entire record, the victim’s testimony coupled with defendant’s admissions to the police provide substantial evidence that defendant’s intent was lewd when he touched her vagina, the judgment must be affirmed.

Here, the victim’s testimony as to how defendant touched her vagina, as well as defendant’s own admissions to the police as to how he touched her vagina, constitute substantial evidence of lewd intent. The victim testified that while she was lying down defendant “jump[ed]” on top of her and touched her on the “private.” Defendant agreed with the detective’s description that he wanted to touch her and not touch her at the same time and said that he was “just [] rolling” with the situation that presented itself. Defendant immediately recognized what he did was wrong and questioned himself “what am I doing.” Given defendant’s own admission, and especially because of the otherwise unexplained touching of the victim’s vagina while she was lying down on a bed, “no purpose other than sexual gratification reasonably appears.” (People v. Martinez, supra, 11 Cal.4th at p. 452.)

The unsubstantiated conjecture in the appellant’s opening brief that the touching was “inadvertently done during horseplay” was not even defendant’s trial defense, which was that he had to physically restrain the victim who was out of control. Regardless, this conjecture does not make the jury’s opposite finding unreasonable and is belied by defendant’s admissions to the investigating detective as well as the victim’s testimony, that she did not like defendant even before the touching. Whether the touching was “fleeting” is unimportant. (*People v. Owen, supra*, 68 Cal.App.2d at p. 619 [substantial evidence supported conviction for lewd touching even though “ ‘fleeting’ ”].) Similarly, whether defendant was actually aroused makes no difference. (*People v. Lopez, supra*, 185 Cal.App.4th at p. 1233 [actual arousal unnecessary].) Finally, defendant’s argument that he did not tell the victim “to not tell her father” does not make the jury’s finding of lewd intent unreasonable and, in any event, may have simply been a case of not having enough time to speak with her before the father came home.

Accordingly, substantial evidence supported the jury’s finding that defendant had lewd intent when he touched the victim.

### III

#### DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

HOLLENHORST J.

CODRINGTON J.