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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM LOWELL HOLLIFIELD,

Defendant and Appellant.

F064575

(Super. Ct. No. MCR041469A)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Joseph A. Soldani, Judge.

Rita Barker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant William Lowell Hollifield of two counts of lewd acts on a child (minor¹) under the age of 14 years (Pen. Code,² § 288, subd. (a)). Hollifield was sentenced to prison for a total of eight years. On appeal, he contends: (1) the evidence was insufficient to support his conviction on count 1; (2) the trial court abused its discretion in denying him probation; and (3) the trial court erred in calculating his presentence credits. We agree with Hollifield's third contention, which the People concede, and will modify the judgment accordingly. In all other respects, we will affirm.

FACTS

Prosecution Evidence

At Hollifield's trial, which took place in October 2011, the minor, then age 11, recalled that when she was around seven or eight years old, she and her mother came to live with Hollifield and his wife, Mary. At the time, the minor's mother was dating Mary's son, Richard. The minor shared a bedroom with her mother and Richard, and the three of them slept in the same bed. Sometimes when the minor was sleeping in the bed by herself, she would wake to find Hollifield touching her chest underneath her shirt, moving his hand from "[s]ide to side." Hollifield would also put his hands down the minor's pants and touch her "skin to skin." The minor did not know how many times the touching happened but recalled it happened more than once. The minor eventually told her mother about the touching and they went to tell Mary. After they told Mary, the minor and her mother moved out of Hollifield's house.

At some point in 2011, the minor moved back into Hollifield's house without her mother. During this time, the minor slept on a couch. Mary was nice to the minor and

¹ In this opinion, certain persons are identified by their status in accordance with our Supreme Court's policy regarding protective nondisclosure. Also, individuals who share a last name are identified primarily by their first name to avoid confusion. In both instances, no disrespect is intended.

² Further statutory references are to the Penal Code unless otherwise specified.

took care of her, but Hollifield soon started touching the minor again. She would wake to find his hand on her chest, moving side to side. He also put his hand inside her pants and moved his finger up and down inside her “private part.” Approximately two to three weeks after returning to Hollifield’s house, the minor told a neighbor what was happening.

On June 30, 2011, Hollifield agreed to meet and speak with Deputy Zachary Zamudio. During his interview with Zamudio, a recording of which was played to the jury, Hollifield initially denied putting his hand under the minor’s shirt and touching her chest. Hollifield said he saw the minor sleeping on the couch and went to cover her up and he might have “patted” her when he was putting the cover on. Hollifield eventually admitted that in April or May of 2011, he touched the minor’s chest when she was sleeping on the couch. Hollifield told Zamudio: “Okay I did lift her jack—her little shirt up” and “I touched the chest.” Hollifield said that after he touched the minor’s chest, he covered her back up and claimed this was the only time it happened. When Zamudio expressed skepticism towards this claim, Hollifield insisted:

“It was the only time. I realized how bad it was, how much I made a mistake with her and would put her in a bad situation, uh, cuz we wanted to keep her for the rest of the time and help her to succeed cuz we have that child. We think she has a lot of abilities. And we wanted to be the grandparents and grab her wa— uh, graze her; raise her.”

Zamudio then asked Hollifield to talk him through what happened. Hollifield responded: “Okay, um, like I said, I went to the bathroom. I got up and went back to, like, le— check her. And she was covered. And I lifted her shirt. And I lift—rubbed her chest.” Hollifield insisted he never did it again. He also denied touching the minor’s vagina.

Zamudio then asked Hollifield, “what about back in 2006?” Hollifield replied: “Uh, I probably did play with her chest. I probably did.” Hollifield said he could not

remember doing it and “[i]t may have happened but not vagina.” Zamudio continued questioning Hollifield:

“Q. You don’t remember that, though? You just...

“A. Yeah, I, uh, I think I did with, uh, cuz I remember went— went there and she was uncovered. And I just rubbed, uh, um, shirt up and I’d rub her chest.

“Q. This is back when...

“A. Back in...

“Q. ...back when she was seven, like, 2006...

“A. Yeah.

“Q. ...about that?

“A. Yeah.

“Q. Okay.

“A. Six or seven.

“Q. And then the next day, is that when your wife talked to you about...

“A. Mm-hm.

“Q. ...not doing that? And did she say [the minor’s mother], or um...

“A. Her and [the minor’s mother] talked about it and, um, and just told me to leave them, you know, leave her...

“Q. Okay.

“A. ...leave it alone.”

Hollifield went on to tell Zamudio he was “devastated” when in May 2011, the police came to pick up the minor and child protective services told Mary that the child had been sexually molested. Zamudio questioned Hollifield about this and why he

touched the minor. Asked whether he was “just kind of attracted to her,” Hollifield replied, “Yeah.”

Hollifield denied that he had touched other children. He told Zamudio he considered the minor “my special grandchild” and they were “buddies.” Zamudio responded: “Yeah, that’s what it sounds like. I mean, she—she missed you. But, um, I mean, you know it was wrong, what you did, right, that you shouldn’t have...” Hollifield answered: “Of course. That’s why I—it was one time. And I pulled back. And I stayed away.” Hollifield continued: “I knew it was wrong. And I didn’t want her to have bad feelings like that to develop something.”

Towards the end of the interview, Zamudio observed there was “probably one or two more kids” Hollifield was attracted to and invited Hollifield to call him if he wanted to talk about it. Hollifield responded, “I didn’t get attracted to any other child” and “even my real granddaughter, I wasn’t attracted to her.” Zamudio observed that “blood” relatives were usually “the ones you stay away from” and the attraction was more likely to be towards “step-grandchildren or a neighbor or something like that.” Hollifield replied, “maybe so.”

Zamudio also interviewed Mary. Mary told Zamudio she had heard about the earlier allegations against her husband and she had told him not to touch the minor anymore.

Defense Evidence

Joseph Thornton, the pastor of Hollifield’s church testified that he had known Hollifield for approximately 20 years. During this time, Hollifield has a good reputation for honesty. Mary was also an honest woman. Thornton had always observed them both to speak the truth.

The minor’s grandmother testified that the minor lived with her for a two-month period and described a number of instances of the minor becoming violently angry and

needing to be restrained. The grandmother ultimately called child protective services and asked them to remove the minor.

Hollifield's stepson, Richard, testified that the minor would refer to Hollifield and Mary as "grandma" and "grandpa" when she lived with them in 2006 and again in 2011. The minor would hold on to Hollifield just like she would hold on to Richard and her mother. When the minor said hello and goodbye, Hollifield would hug her and she never objected to being hugged by him. The minor, who always communicated openly with Richard, never brought up being inappropriately touched or complained anything wrong was happening to her.

Hollifield's wife, Mary, testified that from the time the minor first came to live at their house, the minor referred to her as "grandma" and Hollifield as "poppa" or "grandpa." The minor would also introduce them as grandma and grandpa to people at school events.

Mary testified that Richard brought the minor to their house around 9:30 p.m. on April 15, 2011. When they arrived, the minor greeted Hollifield and gave him a hug. Mary observed that the minor seemed "very excited, very hyper" and the minor was sick with a "terrible cough."

Eventually the minor fell asleep on the couch and Mary and Hollifield went to bed. A little later, they woke up to the minor screaming. Mary and Hollifield ran down the hallway. The minor was kicking and screaming in her sleep. Hollifield touched the minor's chest and stomach to try to wake her up. She finally woke up, said, "oh, Poppa," and went back to sleep.

Later, after Hollifield and Mary had gone back to sleep, the minor came into their room. She seemed scared and said, "Grandma I had some bad dreams." Mary put the minor in bed with her and later she moved with the minor to the sofa bed.

Mary also testified that Hollifield had a stroke in August 2009.

The minor's father and stepmother testified regarding instances of the minor being dishonest with a counselor, a police officer, and school employees. The minor's untruthful statements included that her father and stepmother did not feed her, that they were requiring her to pay for a window she had broken, and that her father punched her in the face.

Hollifield testified on his own behalf. As a result of his stroke in 2009, Hollifield experienced memory loss, and he often had difficulty finding the right words when he spoke. Zamudio accused Hollifield of sexually touching the minor, but Hollifield told Zamudio that he did not. Hollifield denied being sexually attracted to children. He explained that when he made the statement about not being attracted to his biological granddaughter like he was to the minor, he simply meant he "favored" the minor over his granddaughter.

Hollifield denied that he played with the minor's chest when she lived with him in 2006. The minor used to jump on him and climb all over him when he was sitting in his lounge chair. He would grab and tickle her, but that was it. He never touched her vagina or touched her in a sexual way.

Hollifield also testified regarding the incident that Mary described in her testimony. According to Hollifield, when the minor returned to live with them in April 2011, she fell asleep on the couch where they had a blanket and pillow for her. After Hollifield and Mary went to bed, he woke up and heard the minor moaning. He and Mary went to check on her. The minor was on her back, twitching like she was having a nightmare. Her pajama top was up, showing her belly, and she did not have any covers on her. Hollifield took the cover and pulled it up over the minor. She looked up at him while he calmed her down by patting her chest and saying it was okay. The minor relaxed and went back to sleep. A little later, the minor came into their bedroom and said

she had a nightmare. Mary took the minor to the living room where they slept on the sofa bed.

DISCUSSION

I. Sufficiency of the Evidence

Hollifield contends there was insufficient evidence to convict him of committing a lewd and lascivious act on the minor as charged in count 1. The crime of committing a lewd or lascivious act upon a child requires a touching of a child under the age of 14 with the specific intent “of arousing, appealing to, or gratifying the lust, passions, or sexual desires.” (§ 288, subd. (a); *People v. Davis* (2009) 46 Cal.4th 539, 606.) Here, the criminal information alleged that Hollifield committed the act in count 1 “on or about and between February 13, 2006 and February 12, 2008.” Because we find that count 1 was adequately supported by substantial evidence, we reject Hollifield’s challenge.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “Reversal ... is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*Ibid.*)

Hollifield does not dispute that there was sufficient evidence he touched the minor during the timeframe alleged in count 1, but he argues there was insufficient evidence that he touched her with the requisite specific intent. Relying primarily on his own trial testimony denying that he touched the minor in a sexual way, Hollifield asserts: “In reality, there are many innocent, non-sexual reasons that a man, a grandfather, would touch the chest of a six-year-old girl, especially when adjusting the blankets, covers, pajamas of a restless child to make sure she stays warm.”

Hollifield's claim of insufficient evidence is no more than a request that this court reweigh the evidence on appeal. This is not the function of an appellate court. (*People v. Diaz* (1992) 3 Cal. 4th 495, 541; *People v. Palma* (1995) 40 Cal.App.4th 1559, 1567.) The minor's testimony that when she first came to live at his house, Hollifield would place his hand on her chest, underneath her shirt, and move it from side to side, combined with Hollifield's admissions to Zamudio that he lifted the minor's shirt and rubbed her chest in 2011, and that he knew that it was wrong and a mistake, and that he recalled similarly lifting her shirt and rubbing her chest in 2006, constituted sufficient evidence that the earlier touching of the minor's chest was sexually motivated and committed for the purpose of Hollifield's sexual gratification. The jury was free to reject his testimony to the contrary as self-serving and deserving of little weight.

Likewise, the minor's testimony that in addition to rubbing her chest when she was younger, Hollifield would place his hands inside her pants and touch her "skin to skin," which escalated several years later to him putting his finger inside her "private part" and moving it up and down, constitutes substantial evidence that the earlier touching was sexually motivated and was sufficient to support Hollifield's conviction on count 1. The testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to support the verdict. (*People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.) Nothing in the record suggests that the minor's testimony was inherently improbable or physically impossible.

Viewing the evidence in the light most favorable to the judgment, there was ample evidence to establish Hollifield had the requisite specific intent when he touched the minor and sufficient evidence to support his conviction on count 1.

II. Denial of Probation

Hollifield contends the trial court abused its discretion in denying him probation and sentencing him to prison. The trial judge has discretion to make numerous

sentencing choices, including whether to grant or deny probation. In making these choices, the trial court need only state its reasons in simple language, identifying the primary factor or factors that support the exercise of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 850-851; Cal. Rules of Court, rule 4.406(a).) When we review a trial court's decision to deny probation, we may not substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order denying probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) A defendant bears a heavy burden when attempting to show an abuse of that discretion. (*Ibid.*)

In this case, the trial court heard the arguments of counsel and considered all the documents filed relating to the issue. (See *People v. Birmingham* (1990) 217 Cal.App.3d 180, 185 [decision to grant or deny probation requires consideration of all facts and circumstances of case].) The court also properly stated its reasons for denying probation, as follows:

“This is a difficult case I know for both sides, as well as for the Court. But the Court has heard the testimony of the witnesses. I have seen the victim testify. I have seen the defendant. I have heard the statements. And again, *the Court continues to be concerned with this not being an isolated incident. It occurred when she was younger. And then as soon as she's back in the home, the defendant immediately starts again with this type of conduct that is inappropriate, that is offensive. That takes advantage of his position with the—the victim.* And because of all these things and the fact that it occurred when she was in the home, initially, and when she got back in the home it continued to occur. That is what the Court's concerned about. *Along with the fact that the defendant doesn't believe that he did anything inappropriate in this matter. And that makes it a double concern for the Court because a person on probation who is believing that they're on probation inappropriately because they didn't do the things that are alleged, makes a difficult time for them to be engaged in, in the process of probation and the counseling.* They're doing it just

because the Court's ordering it, not because they have any issues with what they've done in this matter.

"This act had a profound effect upon the victim. These acts had a profound [effect] upon the victim. I cannot disregard that in the Court's ruling in this matter. So for all of these reasons, the Court does believe that probation is not appropriate in this case." (Italics added.)

Hollifield does not dispute that the record contains sufficient facts to support the court's reasons. Nor does he dispute that these reasons constitute proper grounds for denying probation. (See Cal. Rules of Court, rule 4.414(a)(3) [vulnerability of victim], (a)(4) [defendant inflicted physical or emotional injury], (a)(9) [defendant took advantage of position of trust or confidence to commit crime], and rule 4.414(b)(3) [willingness to comply with terms of probation], (b)(4) [ability to comply with reasonable terms of probation], (b)(7) [whether defendant is remorseful].)

Ignoring or minimizing these reasons, however, Hollifield contends the trial court's ruling exceeded the bounds of reason because it discounted factors favoring probation, including Hollifield's advanced age and fragile health, his lack of a prior criminal record, his stable family life and employment history, his history of service to society as a former naval officer and police officer, and the assessment performed by Dr. Robert Taylor, pursuant to section 288.1, which concluded that Hollifield was at low risk for recidivism.³ Hollifield's argument that the trial court abused its discretion is in essence an argument that in his view the trial court could have exercised its discretion differently. He has failed to demonstrate the court abused its discretion. There was ample support in the record for the trial court's stated reasons for denying probation. "Probation is not a matter of right but one of grace and clemency. [Citations.]" (*People v. Dandy* (1951) 106 Cal.App.2d 19, 21.)

³ Notwithstanding Taylor's conclusion, his report supported the trial court's observations regarding Hollifield's persistence in denying wrongdoing. For example, Taylor's report noted: "Based upon the police reports, the defendant would meet the criteria of Pedophilia though he denied having committed the alleged acts."

III. Presentence Custody Credits

Hollifield argues, and the People concede, that he is entitled to two additional days of presentence custody credits. We agree.

Hollifield was arrested on July 27, 2011, and sentenced on February 6, 2012, and should have been credited with 195 days in custody plus 29 days (15 percent) of conduct credits for a total of 224 days of presentence custody credit. Yet, he was credited with only 194 days in custody plus 28 days of conduct credits for a total of 222 days of presentence custody credit.

DISPOSITION

The abstract of judgment shall be amended to reflect two additional days of presentence custody credit. The judgment is affirmed as modified. The matter is remanded to the trial court with directions to amend the abstract of judgment accordingly and to transmit certified copies of the amended abstract to all appropriate parties and entities.

HILL, P. J.

WE CONCUR:

KANE, J.

PEÑA, J.