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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE HUMBERTO LOPEZ
HERNANDEZ,

Defendant and Appellant.

G044619

(Super. Ct. No. 09CF1954)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard W. Stanford, Jr., Judge. Affirmed as modified.

Michael B. McPartland, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia and
Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Jose Humberto Lopez Hernandez was convicted of a single count of aggravated sexual assault of a child (count 1, described *post*). The victim was the seven- or eight-year-old daughter of defendant's cousin; defendant was 26 years old at the time of the crime.

On appeal, defendant argues there was insufficient evidence that the sexual act was accomplished by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. We conclude, to the contrary, that there was sufficient evidence of both force and duress in the commission of the sexual act to support the jury's verdict.

Defendant also argues the trial court erred in failing to instruct the jury on sodomy with a child as a lesser included offense of aggravated sexual assault of a child. However, because there was not sufficient evidence that defendant was guilty only of committing the lesser, not the greater, offense, the trial court did not err in failing to instruct the jury on the lesser included offense.

Finally, defendant correctly argues, and the Attorney General concedes, that defendant's presentence credits were miscalculated. We direct the trial court to amend the abstract of judgment to note the correct number of days of defendant's presentence custody and conduct credits. In all other respects, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant is the cousin of the victim's mother, and a friend of the victim's father; the victim thought of defendant as her uncle. Between the fall of 1997 and the summer of 1998, the victim was seven or eight years old; at the time, defendant was 26 years old.

Count 1: The victim testified that she was watching a movie in her bedroom with her father, her brother, and defendant; the victim and defendant were lying

next to each other on her bed. When her father left the room, defendant removed the victim's clothes and made her touch his exposed penis. Defendant grabbed the victim, turned her on her side, put a pillow over her head, and sodomized her. The victim was in "a lot" of pain. The incident lasted 30 to 40 seconds. The victim left the room to use the restroom.

Count 2: When the victim returned to her bedroom, defendant turned her on her side, again covered her with a pillow, and again sodomized her. Defendant told the victim not to tell anyone about what happened, or he would kill her.

Count 3: Two or three weeks later, defendant was again in the victim's bedroom, when he sodomized her. The victim felt the same pain as during the first two incidents. Defendant put his arms around the victim's mouth, and she bit his finger.

Several weeks later, the victim told her mother about defendant touching her. Her mother confronted defendant, who denied the victim's claims. Because her mother believed defendant, the victim told her mother she had lied about the touchings.

In 2002, the victim again told her mother defendant had touched her, and further told her mother she had recanted her earlier allegations because no one believed her. The victim's mother confronted defendant and warned him she would call the police if he did not leave town. The victim would not allow her mother to call the police because she was concerned for defendant's children.

In 2009, the victim, with her mother's encouragement, told the police about the incidents. At a police officer's request, the victim made a covert call to defendant, during which defendant responded that he remembered what he had done to her. Defendant told the victim the sexual contact occurred because she initiated it and he "got aroused." Defendant told the victim he did not try to penetrate her "a lot of times," but did not deny penetrating her. Defendant denied covering the victim's mouth, but admitted he put a pillow over her so she would not look at him. Defendant told the victim that when she got married, and was penetrated "for real," she would know that

defendant only attempted to penetrate her, “like a poke.” When the victim asked, “[b]ut you do remember that it did hurt, right,” defendant responded, “[w]ell, yeah, because I poked you.”

After the call with the victim, defendant was interviewed by two Santa Ana police officers. Defendant again claimed the victim initiated the contact, and said he was using drugs at the time. Defendant claimed the victim removed her underwear, and he lifted her legs, and then “I didn’t—didn’t know where [my penis] was going, but only like, this, I lifted and quickly. I gave it a poke—a shove.” Defendant admitted lying to the victim’s mother when she confronted him. He admitted the victim was uncomfortable and complained during the incidents, and admitted covering her with a pillow. Defendant also admitted some portion of his penis penetrated the victim.

At trial, defendant testified he fell asleep on the victim’s bed while watching a movie, and woke up when the victim touched his penis. Defendant claimed the victim then moved to another bed in the room, and lay down on her back. He admitted he then placed a pillow over her face, and grabbed, spread, and lifted her legs. Defendant claimed he never penetrated the victim, however, and immediately zipped up his pants and left the house. Defendant claimed that during his police interview, he denied any penetration, or any touching of any part of the victim’s body with his penis. When defendant’s counsel asked him, “[a]re you responsible, do you accept responsibility for touching and poking [the victim]’s skin or body on [that] day,” defendant replied, “I accept it. I will accept responsibility.” Defendant also admitted during his testimony that his intention was to penetrate the victim’s vagina with his penis, and that he touched the victim inappropriately in a sexual way. On cross-examination, defendant was asked, “[n]ow, at that point, sir, you took your penis and you pushed it into [the victim]’s body; correct?” Defendant replied, “[y]es.”

Defendant was charged with three counts of aggravated sexual assault of a child under 14 year of age, and more than seven years younger than defendant, where the act of sodomy was committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person. (Pen. Code, § 269, subd. (a)(3).) (All further statutory references are to the Penal Code.) Defendant was convicted of the first count of aggravated sexual assault, but was found not guilty of the other two counts, as well as all lesser included offenses. Defendant was sentenced to 15 years to life in state prison. Defendant timely appealed.

DISCUSSION

I.

SUBSTANTIAL EVIDENCE

Defendant argues the conviction for aggravated sexual assault on a child must be reversed because there was insufficient evidence the act of sodomy was accomplished by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. “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.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Having reviewed the record, we conclude there was substantial evidence that defendant committed the act of sodomy by means of force or duress.

Force, for purposes of section 286, means “any force that is ‘different from and in excess of the type of force which is used in accomplishing similar lewd acts with a victim’s consent.’” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.) The evidence in this case established that defendant removed the victim’s underwear, grabbed and lifted her legs so he could penetrate her, and placed a pillow over her, in part because the victim complained that defendant was hurting her. These facts, none of which was essential to committing the act of sodomy itself, establish that defendant used force to accomplish the act of sodomy against the victim’s will.

Additionally, there was sufficient evidence to establish defendant committed the act against the victim’s will by the use of duress. Duress is “‘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.’ [Citation.]” (*People v. Leal* (2004) 33 Cal.4th 999, 1004, italics omitted.) “Duress can arise from various circumstances, including the relationship between the defendant and the victim and their relative ages and sizes. [Citations.] ‘Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim’ is relevant to the existence of duress. [Citation.]” (*People v. Schulz* (1992) 2 Cal.App.4th 999, 1005.) At the time the act of sodomy occurred, the victim was seven or eight years old, and defendant was 26 years old. It would be entirely proper for the jury to have inferred that defendant was considerably physically larger than the victim. Further, defendant was a close family member. Given the victim’s extremely young age, defendant’s physical size relative to the victim’s, and the nature of the familial relationship between defendant and the victim, the evidence at trial established that defendant committed the act of sodomy against the victim by means of duress.

II.

FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE

Defendant argues the trial court erred when it failed to instruct the jury on the lesser included offense of sodomy with a child under 14 years of age, and 10 or more years younger than defendant. (§ 286, subd. (c)(1).)¹ The trial court has a duty to instruct the jury on a lesser included offense when there is sufficient evidence to merit consideration by the jury that the defendant is guilty only of committing the lesser included, not the greater, offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) “‘An offense is necessarily included in another if . . . the greater statutory offense cannot be committed without committing the lesser because all of the elements of the lesser offense are included in the elements of the greater.’ [Citation.] In other words, when the greater crime ‘cannot be committed without also committing another offense, the latter is necessarily included within the former.’ [Citation.]” (*People v. Hughes* (2002) 27 Cal.4th 287, 365-366.)

At the time the acts in question were committed, section 286, former subdivision (c) was a lesser included offense of section 269, former subdivision (a)(3). The elements of a violation of section 269, former subdivision (a)(3) were (1) an act of sodomy, (2) committed by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, (3) committed upon a child who is under 14 years of age and 10 or more years younger than the defendant.² The

¹ At the time the acts in question were committed, the subparts of section 286, subdivision (c) did not exist. Legislation creating subparts (1), (2), and (3) was enacted on September 28, 1998, and as urgency legislation it became effective immediately. (Stats. 1998, ch. 936, § 40.) The Legislative Counsel’s Digest made clear that the amendments to former section 286 were technical and nonsubstantive. (Legis. Counsel’s Dig., Assem. Bill No. 105 (1997-1998 Reg. Sess.)) We will consider defendant’s argument to be that the trial court erred by failing to instruct the jury with section 286, former subdivision (c), as a lesser included offense.

² “Any person who commits any of the following acts upon a child who is under 14 years of age and 10 or more years younger than the person is guilty of aggravated

elements of a violation of section 286, former subdivision (c) were (1) an act of sodomy, (2) with a child who is under 14 years of age and more than 10 years younger than the defendant.³

However, there was no error in this case, because the evidence would not have supported a finding by the jury that defendant committed only the lesser, not the greater, offense. Defendant admitted in his police interview and in his testimony at trial that he placed a pillow over the victim. As explained *ante*, this constituted a use of force to accomplish the act of sodomy against the victim. An instruction on the lesser included offense was not warranted, and the trial court did not err.

III.

DEFENDANT'S PRESENTENCE CREDITS WERE MISCALCULATED.

The Attorney General agrees that defendant's presentence custody credits were miscalculated. The trial court found defendant had been in custody for 495 days, but did not calculate his presentence conduct credits. The abstract of judgment does not reflect any conduct credits. "[T]he court imposing a sentence' has responsibility to

sexual assault of a child: [¶] . . . [¶] (3) Sodomy, in violation of Section 286, when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (§ 269, former subd. (a)(3).) The jury was instructed with the current version of section 269, which requires the prosecution to prove that the victim was seven or more years younger than defendant. Defendant concedes that this error was harmless, because he was more than 10 years older than the victim at the time of the incident.

³ "Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he or she, or when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat shall be punished by imprisonment in the state prison for three, six, or eight years." (§ 286, former subd. (c).) Although there were three different ways to have violated section 286, former subdivision (c), we consider only the first, based on the difference in ages.

calculate the exact number of days the defendant has been in custody ‘prior to sentencing,’ add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. [Citations.]” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) In this case, the trial court failed to fulfill this responsibility.

Defendant was arrested on August 6, 2009, and sentenced on December 17, 2010. He therefore spent a total of 499 days in custody. Defendant is entitled to presentence conduct credits in an amount totaling 15 percent of the custody credits. (§ 2933.1, subd. (c).) In this case, as defendant and the Attorney General agree, defendant is entitled to 74 days of conduct credit, for a total of 573 presentence credits.

DISPOSITION

We direct the trial court to amend the abstract of judgment to reflect that defendant is entitled to 573 days of presentence credits, of which 499 are actual custody credits and 74 are local conduct credits, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.