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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARIANO SAMSON AVILES, Defendant and Appellant.	B210571 (Los Angeles County Super. Ct. No. TA095849)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelvin D. Filer, Judge. Affirmed in part, reversed in part and remanded.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Mariano Samson Aviles on count one of forcible lewd act upon a child (§ 288, subd. (b)(1))[1] and on count two of forcible sexual penetration by a foreign object (§ 289, subd. (a)(1)). The trial court sentenced defendant to two consecutive three-year sentences, for a total of six years in state prison. Defendant appeals from the judgment, arguing that substantial evidence does not support the conviction for forcible child molestation and that the trial court abused its discretion in ordering the sentences to run consecutively.

We conclude the conviction for forcible child molestation is supported by substantial evidence. We also conclude, however, that the trial court erred in ordering the sentences on count one and count two to run consecutively. Accordingly, we remand for resentencing.

BACKGROUND

In early 2008, defendant was living with his girlfriend and her eight year old daughter Z.[2] At the time, Z. was about three and a half feet tall and weighed approximately 90 pounds. On the evening of March 2, 2008, defendant's girlfriend was working late and defendant was home alone with Z. Z. was in her pajamas watching television in the living room while defendant was in the bedroom he shared with Z.'s mother.

Around 8:00 p.m. that night, defendant called Z. into the bedroom. Rather than waiting for her to come over, he came to her, grabbed her by the hand and walked her into the bedroom. Defendant told Z. to lie down on the bed, which she did. Defendant then lay down behind Z. so that they were side-by-side. He wrapped his arms around Z.'s stomach and held her tightly from behind. Defendant then let go of her with his right arm and put his right hand down her pajama pants and underwear. Defendant then put his finger inside Z.'s vagina. Although Z. told defendant what he was doing hurt her and asked him to stop, defendant continued to move his finger in and out of her for a couple

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[1] All section references are to the California Penal Code.

[2] To protect her privacy, we refer to the victim by her first initial only.

minutes. Z. was in pain, tried to pull away and yelled for him to stop. The entire time he was doing this, defendant continued to hold Z. around her waist with his left arm.

When defendant finally stopped, he told Z. not to tell her mother what had happened. Although later that night Z. told her mother what happened, Z. told defendant she would not tell because she was scared and afraid he might hit her.

Afterward, Z. returned to watching television. Although she needed to use the bathroom, Z. waited to do so until her mother came home. While she was waiting, Z. was in some pain and felt what she thought was urine in her underwear. Her mother arrived home at 11:00 that night. Z. and her mother went to the bathroom together. In the bathroom, Z.'s mother noticed blood in Z.'s urine, on her underwear, and on the toilet seat. Her mother asked about the blood, and Z. told her what defendant had done.

After the jury found defendant guilty on both counts, the trial court sentenced defendant to three years in state prison for each count. Applying section 667.6, subdivision (d), the court ordered the sentences to run consecutively, for a total of six years in prison. Defendant appealed.

DISCUSSION

1. Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support his conviction under count one. Defendant does not dispute that the underlying events occurred, rather he argues the evidence does not support a finding of force or duress as required to convict under section 288, subdivision (b)(1). We disagree.

"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." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 288, subdivision (b)(1) provides that "[a]ny person who commits an act described in subdivision (a) [i.e., lewd acts committed with sexual intent against a child under the age of 14] by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years." (§ 288, subd. (b)(1).) As used in this subdivision, the term "force" is defined as "physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474.) The jury was instructed on this element of the crime.

Defendant relies primarily on *People v. Schulz* (1992) 2 Cal.App.4th 999 and *People v. Senior* (1992) 3 Cal.App.4th 765 for the position that, although defendant grabbed and held Z. tightly, he did not exercise "force" as that term is used in section 288, subdivision (b). In *Schulz*, the court did not regard as "force" the defendant's act of grabbing the victim and holding her arm as she screamed and cried and he fondled her. (*Schulz*, *supra*, 2 Cal.App.4th at p. 1004.) The *Schulz* court stated that "[s]ince ordinary lewd touching often involves some additional physical contact, a modicum of holding and even restraining cannot be regarded as substantially different or excessive 'force.'" (*Ibid.*) Following *Schulz*, the *Senior* court did not regard as "force" the defendant's act of pulling the victim back toward him when she tried to get away from oral copulation. (*Senior*, *supra*, 3 Cal.App.4th at p. 774.)

Courts have repeatedly criticized *Schulz* and *Senior* for their interpretation and application of the term "force" as used in section 288, subdivision (b). (See *People v. Bolander* (1994) 23 Cal.App.4th 155, 159-161; *People v. Neel* (1993) 19 Cal.App.4th 1784, 1789-1790; *People v. Babcock* (1993) 14 Cal.App.4th 383, 387-388.) In *Babcock*, the court explained that the *Schulz* and *Senior* courts erred in merging, as a matter of law, (a) the lewd acts and (b) the force by which they were accomplished. (*Babcock*, *supra*, 14 Cal.App.4th at p. 388.) "Unlike the court in *Schulz*, we do not believe that holding a victim who was trying to escape in a corner is necessarily an element of the lewd act of touching her vagina and breasts. Unlike the court in *Senior*, we do not believe that

pulling a victim back as she tried to get away is necessarily an element of oral copulation. And, unlike the defendant in this case, we do not believe that grabbing the victims' hands and overcoming the resistance of an eight-year-old child are necessarily elements of the lewd acts of touching defendant's crotch." (*Ibid.*) Similarly, here, we do not believe that grabbing and holding Z. tightly around her waist from behind are elements of the lewd acts defendant committed.

Whether the evidence supports a finding of force is an issue for the jury to decide. (*Babcock*, *supra*, 14 Cal.App.4th at p. 388.) In addition to defendant's acts of grabbing and holding Z. tightly, the evidence also showed Z. resisted defendant's conduct. Although resistance is not required to prove force under section 288, subdivision (b), the jury could have reasonably considered Z.'s resistance to defendant's conduct in determining whether defendant used force to accomplish the lewd act. (*Id.* at p. 387.)

Similarly, whether the evidence supports a finding of duress is an issue for the jury to decide. Although defendant claims "duress was not presented to the jury," the jury was in fact instructed on the element of duress. Duress means a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person to submit to or to perform an act they otherwise would not submit to or perform. (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50.) The evidence presented here included defendant's position as a trusted member of Z.'s closest family and friends, defendant's size and age relative to Z., and Z.'s resistance and attempts to get away from defendant as he molested her. Thus, even if defendant did not make a direct threat against Z. to coerce her into submitting to the lewd act, the evidence supports a finding that an implied threat caused Z. to submit to the molestation, an act to which she would not otherwise have submitted.

The cases defendant relies on are distinguishable because they do not involve a direct or implied threat of force, violence, danger, hardship or retribution. (See *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1320 [the defendant did not grab, restrain or corner the victim, and the victim did not cry or resist or make any oral or physical response to the defendant's acts]; *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1250-

1251 [holding that "'[p]sychological coercion' without more does not establish duress. At a minimum there must be an implied threat of 'force, violence, danger, hardship or retribution'"].)

Accordingly, we conclude substantial evidence supports defendant's conviction under section 288, subdivision (b).

2. Sentencing

Defendant also argues that, under section 654, the trial court was required to stay the three-year sentence on count two. Section 654, subdivision (a), provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Defendant did not raise his section 654 argument below. In fact, in his sentencing memorandum filed with the trial court, defendant conceded the applicability of section 667.6, subdivision (c), which permits the trial court to impose consecutive sentences in certain cases. The trial court did not address section 654 either, but instead found that subdivision (d) of section 667.6 applied.[3] The People contend that, because defendant did not object to consecutive sentences below, he has waived the objection. Defendant does not address the issue of waiver.

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[3] Subdivision (d) of section 667.6 requires consecutive sentences when a defendant commits certain crimes (including those at issue here) involving the same victim on separate occasions. (§ 667.6, subd. (d).) In determining whether crimes against the same victim occurred on "separate occasions," subdivision (d) directs the trial court to "consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (*Ibid.*) In articulating its decision to order consecutive sentences, the trial court explained it found the crimes occurred on separate occasions because "defendant had a reasonable opportunity to reflect upon his actions and nevertheless resumed the sexually assaultive behavior."

We conclude defendant has not waived his section 654 argument. "Ordinarily, a section 654 claim is not waived by failing to object below. '[T]he waiver doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' (*People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.) This is an exception to the general rule that only those claims properly raised and preserved by the parties are reviewable on appeal. This exception is not required by the language of section 654, but rather by case law holding that a court acts in excess of its jurisdiction and imposes an unauthorized sentence when it fails to stay execution of a sentence under section 654. (See *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.)" (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Thus, having determined defendant has not waived the issue, we now address his section 654 argument. Defendant was charged with two different crimes—one count of forcible lewd act upon a child and one count of forcible sexual penetration by a foreign object. The People claim defendant's conduct constitutes two distinct acts, namely, (1) by forcibly holding Z. next to him on the bed and putting his hand inside her pajama bottoms, defendant violated section 288, subdivision (b)(1) (forcible lewd act upon a child), and (2) by moving his hand inside her underwear and his finger inside her vagina, defendant violated section 289, subdivision (a)(1) (sexual penetration by a foreign object). We are not persuaded. In our view, under the circumstances of this case, defendant's acts of holding Z. next to him on the bed and putting his hand inside her pajama bottoms are a part of and facilitated his act of committing forcible sexual penetration by a foreign object. We do not agree that defendant's conduct constitutes separate acts on separate occasions.

Although somewhat factually similar, *People v. Harrison* (1989) 48 Cal.3d 321 does not mandate a different result. In *Harrison*, over the course of seven to ten minutes, the defendant had put his finger in the victim's vagina three times. (*Id.* at p. 325-326.) As a result, he was charged with, and found guilty of, three violations of section 289, subdivision (a). Our Supreme Court upheld the three separate convictions. (*Id.* at

p. 334.) The Court also determined that section 654 did not require the trial court to stay two of the sentences imposed for the defendant's violations of section 289, subdivision (a). The Court explained "[i]t is well settled that section 654 protects against multiple punishment, not multiple conviction. . . . We have traditionally observed that if all of the offences were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." (*Id.* at p. 335.)

In contrast with *Harrison*, the prosecution here did not charge defendant with multiple violations of section 289. Rather, as noted above, defendant was charged with two different crimes based on defendant's molestation of Z. Defendant's lewd act of putting his hand inside Z.'s pajama bottoms facilitated his single intent to molest her. Accordingly, *Harrison* does not support respondent's position here.

We conclude that, under section 654, defendant's sentence on count one and count two cannot be imposed consecutively.

DISPOSITION

The judgment is reversed insofar as it orders the sentences on count one and count two to run consecutively. We remand for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

FERNS, J.*

We concur:

MALLANO, P. J. ROTHSCHILD, J.

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.