

No. D083165

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE

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THE PEOPLE OF THE STATE OF CALIFORNIA,  
*Plaintiff and Respondent,*

v.

NANDU NARSAPPA,  
*Defendant and Appellant.*

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San Diego County Superior Court, Case No. SCS310809  
The Honorable Marcella O. McLaughlin, Judge

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**RESPONDENT'S BRIEF**

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September 10, 2024

## TABLE OF CONTENTS

	<b>Page</b>
Introduction.....	5
Statement of the case .....	5
Statement of facts .....	6
Argument.....	10
Substantial evidence supports appellant’s conviction for forcible lewd act upon a child.....	10
A. Claims of insufficient evidence are reviewed for substantial evidence .....	10
B. The “force” required for forcible lewd act upon a child must be substantially different from or greater than that necessary to accomplish the lewd act itself .....	11
C. Substantial evidence supported the jury’s finding that appellant used the requisite force for forcible lewd act upon a child when he grabbed K.C. and pushed her against the wall to grope her .....	12
Conclusion .....	17

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>People v. Alvarez</i> (2009) 178 Cal.App.4th 999 .....	12
<i>People v. Babcock</i> (1993) 14 Cal.App.4th 383 .....	12, 15
<i>People v. Holt</i> (1997) 15 Cal.4th 619.....	11
<i>People v. Jimenez</i> (2015) 242 Cal.App.4th 1337 .....	11
<i>People v. Jimenez</i> (2019) 35 Cal.App.5th 373.....	12, 14, 15
<i>People v. Leonard</i> (2014) 228 Cal.App.4th 465.....	14
<i>People v. Morales</i> (2018) 29 Cal.App.5th 471 .....	12, 14
<i>People v. Navarro</i> (2021) 12 Cal.5th 285.....	10
<i>People v. Oliver</i> (2023) 90 Cal.App.5th 466.....	11
<i>People v. Perez</i> (1992) 2 Cal.4th 1117.....	14
<i>People v. Soto</i> (2011) 51 Cal.4th 229.....	12
<i>People v. Young</i> (2005) 34 Cal.4th 1149.....	11, 16

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**STATUTES**

Penal Code

    § 288, subd. (a) ..... 5, 11

    § 288, subd. (b)(1).....*passim*

**COURT RULES**

California Rules of Court

    Rule 4.421(a)(11) .....5

## **INTRODUCTION**

During the summer of 2019, appellant grabbed and pushed his 12-year-old neighbor, K.C., against the wall of his garage, groped her body, and kissed her neck. Appellant lewdly touched K.C. a total of six times that summer. A jury convicted appellant of one count of forcible lewd act upon a child under the age of 14 and five counts of lewd act upon a child. The trial court sentenced him to eight years in prison.

On appeal, appellant contends insufficient evidence of force supported his conviction for forcible lewd act upon a child. Not so. K.C.'s testimony and messages she sent to a friend established that appellant grabbed K.C. "like a hug," "pushed" her against his garage wall, and then groped her body. The jury could reasonably infer from such evidence that appellant used force substantially different from or in excess of that required to commit the lewd act itself. Accordingly, this court should affirm the judgment.

## **STATEMENT OF THE CASE**

On August 11, 2023, a San Diego County jury convicted appellant of one count of forcible lewd act upon a child under the age of 14 (Pen. Code<sup>1</sup>, § 288, subd. (b)(1); count 1), and five counts of lewd act upon a child (§ 288, subd. (a); counts 2-6). (CT 21.) The jury also found true the allegation that appellant took advantage of a position of trust and confidence (Cal. Rules of Court, rule 4.421(a)(11)). (CT 23.) The court sentenced appellant

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

a total term of eight years in state prison, consisting of the low term of five years for his forcible lewd act upon a child conviction, a consecutive three-year term for one of his lewd act upon a child convictions, and concurrent terms on his remaining convictions. (9 RT 2859.)

Appellant timely filed a notice of appeal. (2 CT 329.)

### **STATEMENT OF FACTS**

During the summer of 2019, appellant was neighbors with 12-year-old K.C. and initiated a friendship with K.C.'s father. (3 RT 723, 725-726.) Appellant offered to tutor K.C. at his house and gave her a job cleaning his fish tank. (3 RT 727.) Appellant asked K.C. for her phone number and began texting her to find out when she would be coming to see him. (3 RT 754, 757-758.) At one point, appellant texted, "Wow, [K.C.], you're so seductive." (3 RT 759.) His text message left K.C. "in shock, very uncomfortable, [and] surprised." (3 RT 759.) Appellant asked K.C. to download a messenger app to use as an alternative to texting because messages sent through the app were untraceable and could be deleted. (3 RT 760-761.) K.C. found it suspicious that appellant did not want his messages tracked, and she declined to download the app. (3 RT 761.)

Around the middle of the summer, appellant began lewdly touching K.C. (4 RT 1017.) The first incident occurred when appellant asked K.C. to accompany him to his garage to look at some presents for her. (3 RT 770-771.) K.C. was standing near the corner of the garage. (3 RT 770-771.) Appellant, who was approximately six inches taller, approached K.C. with his arms

outstretched. (3 RT 772.) Without saying anything, appellant “came to [K.C.] chest to chest, grabbed [her], like a hug,” and pushed her against the wall. (3 RT 771-772; 4 RT 1041-1042; People’s Exh. 64.<sup>2</sup>) Appellant then rubbed K.C.’s sides, hips, and butt. (3 RT 771-772.) He also kissed K.C. on the left side of her neck under her ear while he was touching her. (3 RT 774-775.) Feeling “panicked,” “in a state of shock,” “scared,” and “very uncomfortable,” K.C. tried pushing appellant away. (3 RT 772-775.) Appellant continued touching K.C. for approximately five minutes. (3 RT 773.) When appellant’s daughter unexpectedly appeared in the garage, appellant “quickly got off [K.C.]” and acted if he was doing something else. (3 RT 776.)

On another occasion, appellant sat directly next to K.C. on his living room couch. (3 RT 777.) Although the couch was large enough to fit more than two people, appellant scooted close to K.C. so that his thigh was touching hers. (3 RT 778.) While appellant and K.C. were talking, appellant put his hand on K.C.’s leg and began rubbing her thigh. (3 RT 778.) He continued to rub her thigh for most of their conversation. (3 RT 778.) K.C. felt uncomfortable, and appellant touching her felt wrong. (3 RT 778.)

Another time, while K.C. was in appellant’s kitchen, appellant “grabbed onto [her], hugging her . . . like it was normal.” (3 RT 778.) During a separate incident, appellant grabbed K.C. while she was facing him and wrapped his hands

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<sup>2</sup> Respondent has concurrently filed a motion to transmit exhibits.

around her hips so that they were touching hip to hip. (3 RT 778-779.) Appellant asked K.C., “What are we?” (3 RT 780.) When K.C. responded that they were “friends,” appellant told her, “I think we’re more.” (3 RT 780.) K.C. felt very awkward and nervous, and she did not know what to say. (3 RT 779.) Appellant also made multiple inappropriate comments to K.C., including calling her “very pretty,” “seductive,” and “sexy,” and telling her she should “wear less [clothing].” (3 RT 779, 781.) Appellant once used a pen to reference male anatomy and tried to get K.C. to say the word “penis.” (3 RT 780-781.) On another occasion, while K.C. was facing away from appellant, appellant stated, “Wow, I have a good view from here.” (4 RT 1044, 1160; see People’s Exh. 67.)

As the summer progressed, K.C. grew increasingly hesitant to see appellant. (3 RT 729.) By August, appellant had touched K.C.’s butt a total of four or five times. (3 RT 782-784.) K.C. ultimately texted her father that she did not want to go to appellant’s house anymore. (3 RT 729-730.) Around the same time, appellant began texting K.C.’s father with increasing persistency to ask if K.C. could come over. (3 RT 728.) K.C. went to appellant’s home up to 10 times that summer. (3 RT 727, 756.)

At the end of August, K.C. messaged her friend Caleb on Instagram. (4 RT 1040, 1041; see People’s Exhs. 60-67.) She told Caleb, “[Appellant] took me to the back room saying that he needed help getting something then pushed me to the wall and touched me.” (4 RT 1160; see People’s Exh. 64.) K.C. went on to say, “[Appellant] touched me . . . bellow [sic] the waist and

kissed me I just didn't know what to do at the time I just wanted to study and then THAT HAPPENED I HATED EVERY SECOND OF IT." (4 RT 1160; see People's Exh. 67.) Caleb encouraged K.C. to tell her parents, but K.C. was initially afraid they would hate her or feel disgusted by what happened. (4 RT 1040.) She ultimately decided to write a note to her parents that explained that appellant had inappropriately touched her, and she and her parents went to the police to report appellant's abuse. (4 RT 1042-1043, 1160; see People's Exhs. 58-59.)

A sex crimes detective used K.C.'s phone to text appellant as K.C. During their conversations, appellant said, "you are my sexy girl"; "you stole my heart"; "Kimby, darling, I love you"; "you ARE THE ONE. I am your man"; "I wish you were right next to me right now"; "I would just hug you tightly and kiss you all over [winky face emoji]"; "I love you to death. Which day did I tell you I loved you? Do you remember? Remember in the kitchen?"; and "your [sic] so friggin sexy my darling . . . just texting you is doing things to my body." (4 RT 1115-1119.) Appellant agreed to meet "K.C." outside her school. (4 RT 1124-1125.) When he arrived, police arrested him. (4 RT 1125-1126.)

At trial, appellant testified in his own defense. (7 RT 1915-1968.) He repeatedly denied any wrongdoing, including ever lewdly touching K.C., asking K.C. to download a messaging app, and telling K.C. to delete their messages. (7 RT 1930-1931, 1937-1938, 1945, 1955.) Appellant also claimed that police manipulated, edited, and deleted his text messages to K.C. (7 RT 1942-1943.)

## ARGUMENT

### SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR FORCIBLE LEWD ACT UPON A CHILD

Appellant contends insufficient evidence supports the force element of his conviction for forcible lewd act upon a child. (AOB 12-16.) Specifically, he argues K.C. did not testify to any act by appellant that constituted force substantially different from or in excess of that required for him to commit the lewd act. (AOB 16.) Viewing the evidence in the light most favorable to the judgment, substantial evidence supports the jury's finding that appellant used force within the meaning of section 288, subdivision (b)(1). The jury could reasonably infer from K.C.'s testimony and the messages she sent to her friend that appellant grabbed and pushed K.C. against the wall of the garage to facilitate groping her body. Moreover, a reasonable jury could also infer that appellant used the requisite force when he overcame K.C.'s attempt to push him away.

#### **A. Claims of insufficient evidence are reviewed for substantial evidence**

In considering a challenge to the sufficiency of evidence, the reviewing court must determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*People v. Navarro* (2021) 12 Cal.5th 285, 302.) Under this standard, the review court must “presume the existence of every fact that the jury could reasonably have deduced from that evidence.” (*Ibid.*) Further, “[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts.”

*(People v. Young* (2005) 34 Cal.4th 1149, 1181.) “Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact.” *(Ibid.)*

Moreover, “[t]he uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable.” *(People v. Oliver* (2023) 90 Cal.App.5th 466, 484.) Before the underlying judgment may be reversed, “it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it.” *(People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1354.) The standard of review is the same when the evidence of guilt is primarily circumstantial. *(People v. Holt* (1997) 15 Cal.4th 619, 668.) If the circumstances reasonably justify the jury’s findings, “the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” *(Ibid.)*

**B. The “force” required for forcible lewd act upon a child must be substantially different from or greater than that necessary to accomplish the lewd act itself**

Section 288, subdivision (a) prohibits any person from committing a lewd or lascivious act on a child under the age of 14 “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.”

Subdivision (b)(1) of the statute prohibits the commission of such lewd or lascivious act “by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.” (§ 288, subd. (b)(1).) In this context, “force”

means “ ‘ physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.’ [Citation.]” (*People v. Soto* (2011) 51 Cal.4th 229, 242; accord, *People v. Jimenez* (2019) 35 Cal.App.5th 373, 391 (*Jimenez*).) “[A]n act is forcible if force facilitated the act rather than being merely incidental to the act.” (*People v. Morales* (2018) 29 Cal.App.5th 471, 480 (*Morales*).) “[A]cts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves” are sufficient to support a finding that the defendant forcefully committed the lewd act. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.)

Further, a reasonable jury can infer that a defendant used force within the meaning of section 288, subdivision (b)(1) where the defendant overcame the victim’s attempts to push the defendant away. (See *Jimenez, supra*, 35 Cal.App.5th 373 at pp. 392-393 [child victim’s testimony that she attempted to block defendant’s advances “by pushing him away” supported jury’s finding of force because it could infer he used force to overcome the victim’s resistance]; see also *People v. Babcock* (1993) 14 Cal.App.4th 383, 387 [jury could reasonably consider victim’s resistance in assessing whether defendant used force to accomplish the lewd act].)

**C. Substantial evidence supported the jury’s finding that appellant used the requisite force for forcible lewd act upon a child when he grabbed K.C. and pushed her against the wall to grope her**

Here, K.C.’s testimony and her Instagram messages that were admitted into evidence sufficiently proved that appellant’s conduct was “forcible” within the meaning of section 288,

subdivision (b)(1). Specifically, the record shows that appellant grabbed K.C. and pushed her back against the wall of the garage—an action which was neither necessary nor merely incidental to appellant’s subsequent groping of K.C.’s sides, hips, and butt. (3 RT 771-772; 4 RT 1041-1042, 1160; see People’s Exh. 64.)

When describing the incident in the garage, K.C. testified, “[Appellant] came to me chest to chest, grabbed me, like a hug, and rubbed the sides, hips, my butt, what I can remember. . . . I was directly on the wall.” (3 RT 771-772.) K.C. later authenticated Instagram messages between her and Caleb, which provided additional details about the garage incident. (4 RT 1041, 1160; see People’s Exhs. 64 & 67.) In one message, K.C. stated, “[Appellant] took me to the back room saying that he needed help getting something then pushed me to the wall and touched me.” (4 RT 1041, 1160; see People’s Exh. 64.) Regarding this message, K.C. testified that she was explaining that appellant took her to the back room of the garage. (4 RT 1041.) The prosecutor asked K.C., “[Y]ou mentioned being pushed to the wall here?” (4 RT 1041.) K.C. responded, “Yes.” (4 RT 1041.) The prosecutor then asked, “Is that what you talked about yesterday with [appellant] pushing you against that side wall . . . ?” (4 RT 1042.) Again, K.C. responded, “Yes.” (4 RT 1042.) From this testimony, the jury could reasonably infer that in stating appellant “pushed [her] to the wall and touched [her],” K.C. was further describing appellant’s conduct in the garage that led to the lewd act underlying count 1. Taken together, the

evidence supported a finding that appellant “c[ame] to [K.C.] chest to chest,” “grabbed [her], like a hug,” and “pushed [her] to the [garage] wall,” where he then rubbed her sides, hips, and butt. A rational jury could therefore conclude that to facilitate the groping, appellant used “physical force substantially different from or substantially greater than that necessary to accomplish the lewd act itself.” (*Jimenez, supra*, 35 Cal.App.5th at p. 391; see also *Morales, supra*, 29 Cal.App.5th at p. 480 [testimony by a child victim that defendant held her in such a manner that she could not move while he positioned her against a tree and fondled her “amply established that defendant used force to facilitate the lewd act, rather than merely incidentally touching [the victim] in the course of the lewd act.”].) For these same reasons, this court should reject appellant’s claim that “[K.C.] never testified that appellant pushed her.” (AOB 16.) Accordingly, substantial evidence supported the force element of appellant’s forcible lewd act conviction in count 1.

Moreover, the jury could reasonably conclude the force element was proven based on the evidence that appellant overcame K.C.’s attempt to push him away.<sup>3</sup> During direct examination, the prosecutor specifically asked K.C., “Did you try

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<sup>3</sup> It is immaterial that the prosecutor did not argue that appellant overcoming K.C.’s effort to resist him was independent evidence of force. “It is elementary . . . that the prosecutor’s argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1126; accord, *People v. Leonard* (2014) 228 Cal.App.4th 465, 487.) Thus, the jury was entitled to rely on any theory of force supported by the evidence.

and get away?” (3 RT 775.) K.C. responded, “I tried pushing, yes.” (3 RT 775.) K.C. also testified that appellant continued groping her for approximately five minutes, and he only stopped when his daughter came into the garage “around the end [of the incident].” (3 RT 773, 776.) From this testimony, the jury could reasonably infer that appellant overcame K.C.’s attempt to push him away and continued to rub K.C.’s hips, sides, and butt given that his groping did not cease until he was interrupted by his daughter. The force used by appellant to overcome K.C.’s resistance was distinct from his lewd act of groping K.C., therefore, falls within the scope of force contemplated by section 288, subdivision (b)(1). (See *Jimenez, supra*, 35 Cal.App.5th at pp. 392-393; see also *Babcock, supra*, 14 Cal.App.4th at p. 387.) Nevertheless, appellant asserts that K.C. “did not testify that she resisted [appellant] during this incident.” (AOB 16.) However, as described above, the record belies appellant’s claim and shows that K.C. explicitly testified that she tried pushing appellant away. (3 RT 775.)

To support his claim of insufficient evidence, appellant also argues, “while [K.C.] authenticated the messages to Caleb, she did *not* state that her recollection was refreshed regarding being pushed into the wall.” (AOB 16.) Although K.C. did not explicitly say so, her testimony and responses to the prosecutor’s questions indicated that her memory had indeed been refreshed. (4 RT 1038-1042.) The prosecutor asked K.C., “would it refresh your memory to look at the messages you sent Caleb?” and K.C. responded, “yes.” (4 RT 1038.) K.C. then authenticated the

messages and described them in detail, including telling the jury what she wrote and when and how she was feeling at the time. (4 RT 1038-1042.) More importantly, though, K.C.'s messages were admitted into evidence and thus the jury could rely on them in finding that the force element in count 1 was proven. (1 CT 250-252 [Exhibit list]; 2 CT 394 [People's Exhibits 1-67 admitted].)

Lastly, much of appellant's argument amounts to a presentation of the evidence in the light most favorable to himself. (See AOB 16.) For example, he argues that "[K.C.'s] actual testimony about her backing up to the wall and being hugged, explained in detail about what she meant by being pushed in the Instagram message." (AOB 16.) However, the meaning of K.C.'s message to Caleb that appellant "pushed" her, as well as her testimony on the matter, presented a factual issue for the jury to resolve. By highlighting the evidence in his favor, appellant essentially asks this court to reweigh the evidence, which is improper under the applicable standard of review. (See *People v. Young, supra*, 34 Cal.4th at p. 1181.)

For all of these reasons, substantial evidence supported appellant's forcible lewd act upon a child conviction in count 1.

## CONCLUSION

Accordingly, this court should affirm the judgment.

Respectfully submitted,

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<sup>4</sup> Counsel for respondent wishes to acknowledge the substantial contribution of Alexandra Harten, Certified Legal Intern, in the preparation of this brief.

## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Century Schoolbook font and contains 3,177 words.

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September 10, 2024  
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