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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JULIO CESAR VAZQUEZ, Defendant and Appellant.	2d Crim. No. B254123 (Super. Ct. No. 2011033462) (Ventura County)

A defendant who is charged with committing lewd acts upon a child is entitled to a voluntary intoxication jury instruction only if there is evidence that his intoxication actually affected his ability to form lewd intent. It is not enough that his drunkenness caused sexual dysfunction.

Julio Cesar Vazquez appeals a judgment after conviction by jury of four counts of committing lewd acts upon a child. (Pen. Code, § 288, subd. (a).)[1] The jury found true allegations that Vazquez had substantial sexual contact with a victim under the age of 14. (§ 1203.066, subd. (a)(8).) We reject his contention that the trial court's initial refusal to instruct the jury on voluntary intoxication coerced him to relinquish his privilege against self-incrimination. Vazquez made a voluntary tactical decision to relinquish that privilege in order to supply missing evidence to support the intoxication defense upon which the trial court ultimately instructed. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL BACKGROUND

Julio "Cesar" Vazquez moved into the home of A.V.'s family when A.V. was 13 years old. Vazquez was 25. He had sexual contact with A.V. in the home on two occasions.

The first incident occurred on the couch. Vazquez kissed A.V. on the lips (count 3) and then touched her vagina with his fingers (count 1).

The second incident occurred on the stairs. Vazquez fondled A.V.'s breast (count 4) while he rubbed his penis against her vagina (count 2).

A.V. reported these incidents to a school official. She also reported that her stepfather, and former stepfather, each molested her. She told police officers that Vazquez used force. There was no evidence of force at trial.[2]

In a recorded "cool call," A.V. told Vazquez that her mother knew "how [he] put [his] penis in [her] vagina" and "[he] put [his] fingers in [her] vagina too." Vazquez responded, "Oh fuck!" A.V. asked Vazquez what she should do. Vazquez said, "[L]ie to her because, if your mom finds out, uh, she can send me to jail, you know? . . . Li-lie to her, honey tell her that I didn't - that nothing happened, that . . . well we kissed and that was all." When A.V. said, "[Y]ou . . . forced me to do it on the stairs." Vazquez said, "But that wasn't true . . . . I wasn't forcing you, honey." Vazquez did not mention his intoxication and did not deny that he had sexual intent.

A police sergeant interviewed Vazquez. Vazquez initially denied any sexual contact with A.V. But when he was confronted with the recorded telephone call, he admitted each of the four contacts. He said he kissed A.V. on the lips and rubbed her vagina with his hand under her pants while they were on the couch. He said he fondled her breasts and rubbed his penis against her vagina on the stairs. He acknowledged fault. "I know that's my fault . . . when I couldn't say, no, and stuff . . . . [T]hat's my fault

[2] At the sentencing hearing, the prosecution acknowledged that "there was no force used in this case." The trial court agreed: "[T]he People's concession is well-taken, that the victim testified to no such force . . . that instead the testimony at trial largely mirrored what Mr. Vazquez's admissions were."

because I'm adult." He said, "I could, uh, stop everything, but I, I don't . . . . So I know that's my fault."

Vazquez said he was drunk during the couch incident and that he was hung over during the stairway incident. The sergeant asked if, during the stairway incident, his penis was hard. Vazquez responded, "Not really. . . . I was, like, kinda drunk. I was . . . hung over." The sergeant asked, "So when you get drunk, you can't get a hard on?" Vazquez responded, "Not really. . . . When I, I get drunk . . . I'm, I'm lazy. I just want to, uh, go to sleep or do something. But when I'm drunk, I, I don't have too many sex. I don't have sex." Later, an officer, who was also present in the interview room, interjected, "[I]t does get hard," and Vazquez responded, "Yeah, yeah, but I don't want it." The sergeant asked, "You have no desire for it when you're drunk?" and Vazquez answered, "Yeah," "I like to enjoy," "I don't like doing stuff just for doing it, you know?" The sergeant asked about the couch incident: "[Y]ou were drinking again, so you probably had a limp dick again. Did you? Was your penis limp . . . or hard?" Vazquez responded, "Limp."

The interview was videotaped and the jury watched it at trial. They also heard the recorded cool call. A.V. testified that Vazquez seemed drunk during the couch incident but not during the stairway incident.

When the prosecution rested, Vazquez asked the trial court to instruct the jury on voluntary intoxication. The court refused. It acknowledged there was substantial evidence Vazquez was intoxicated, but found no evidence that intoxication affected his ability to form lewd intent.

Vazquez presented testimony of four witnesses and testified on his own behalf. The first two witnesses were A.V.'s current and former stepfathers, who each denied they molested her.

Vazquez's other two witnesses testified about his behavior when intoxicated. Rita Galvan, a friend, testified that when Vazquez is drunk he is "giggly" and "slobberish." Daisy Magana, Vazquez's girlfriend, testified that when he is "tipsy," he is "useless," and unable to achieve an erection. She said he wants to sleep.

Vazquez testified that during the stairway incident his penis was not erect, he was not sexually aroused, and he did not intend to arouse himself when he touched A.V. He said he was not trying to have sex with A.V. He said, "I was just letting me lead by the moment. But . . . something clicked in my head. And that's when I stopped. And I just told her to go. I got up, and I told her that I was scared. . . . I just got up and left." He said he was scared because he "knew that that was wrong"; "[w]hen [he] was in contact with her, that's when [he] realized that that was wrong." He said he was drunk during the couch incident and did not remember whether he kissed A.V., but he did rub her vagina with his hand.

Following this testimony, the trial court announced that it would instruct on voluntary intoxication. (CALCRIM No. 3426.)[3] The court stated, "[W]e now have a triable issue on whether and to what extent intoxication interfered with his ability to form a specific intent." The jury found Vazquez guilty of all four counts.

The trial court sentenced Vazquez to nine years in prison, consisting of the three-year low term for count 1 and consecutive two-year subordinate terms for the remaining three counts. The court found there was no evidence of force. It also found that the absence of any significant criminal record outweighed the aggravating circumstances that the victim was vulnerable and that Vazquez was in a position of trust.

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[3] The trial court instructed the jury:
"You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the intent of arousing, appealing to, or gratifying his lust, passions, or sexual desires, or those of the child.
"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.
"In connection with the charge of Lewd Act Upon a Child as alleged in Counts 1, 2, 3 and 4, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent of arousing, appealing to, or gratifying his lust, passions, or sexual desires, or those of the child. If the People have not met this burden, you must find the defendant not guilty of Lewd Act Upon a Child as alleged in Counts 1, 2, 3 and 4.
"You may not consider evidence of voluntary intoxication for any other purpose."

The trial court denied Vazquez's request to stay the sentences on counts 3 and 4 pursuant to section 654. It also denied his request to run the sentence for count 3 concurrent to count 1 (the couch incident) and count 4 concurrent to count 2 (the stairway incident) because each offense involved separate acts of violence.

Voluntary Intoxication Instruction

Vazquez contends the trial court forced him to relinquish his privilege against self-incrimination in order to exercise his right to present a defense when it initially refused to instruct on voluntary intoxication. (U.S. Const., 5th, 6th & 14th Amends; *Simmons v. United States* (1968) 390 U.S. 377, 394.) We disagree. The initial refusal was proper because there was no substantial evidence to support the instruction until Vazquez testified. Vazquez voluntarily relinquished his privilege against self-incrimination for tactical reasons.

Evidence of voluntary intoxication is admissible solely on the issue of whether or not a defendant actually formed a required specific intent. (§ 29.4, subd. (b).) A defendant is entitled to an instruction on voluntary intoxication only when there is substantial evidence (1) he or she was voluntarily intoxicated, and (2) the intoxication affected his or her actual formation of specific intent. (*People v. Roldan* (2005) 35 Cal.4th 646, 715, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The specific intent required to prove a lewd act upon a child is the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the defendant or the child. (§ 288, subd. (a).)

Before Vazquez testified, there was no substantial evidence that intoxication affected his actual formation of lewd intent. The jury heard the sergeant's interview in which Vazquez said he did not have an erection when he touched A.V., that he gets lazy when he is drunk, and that he prefers to have sex when he can enjoy it. But in that interview, and in the cool call, Vazquez acknowledged wrongdoing. The contact was overtly sexual. Vazquez did not deny that the contact was sexually motivated. He clearly recalled and recounted it. (See *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180-1181 [no substantial evidence to support voluntary intoxication instruction in prosecution

for murder, rape, and sodomy where the defendant testified he was drunk but he gave a detailed account of the events and did not suggest his drinking affected his memory or conduct]; *People v. Williams* (1997) 16 Cal.4th 635, 677 [no substantial evidence to support voluntary intoxication instruction in murder prosecution where defendant testified he was "doped up," but there was no evidence of any effect on his ability to formulate intent]; *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1662 [no substantial evidence to support voluntary intoxication instruction in attempted murder prosecution where the defendant testified he was high on speed but gave a detailed account of the events]; *People v. Simpson* (1987) 192 Cal.App.3d 1360, 1369-1370 [no substantial evidence to support voluntary intoxication instruction in prosecution for assault with infliction of great bodily injury where the defendant testified he was "woozy" but recalled the events and said he intended only to protect himself].)

That Vazquez could not achieve an erection when intoxicated did not disprove lewd intent. (See *People v. Peckham* (1967) 249 Cal.App.2d 941, 945 ["If the defendant had been impotent (by reason of intoxication) when the assault was committed that fact would not of itself be a defense to the crime of assault with intent to commit rape"]; *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1418 [claim of impotence did not bar conviction for attempted rape].) The trial court's duty to instruct on voluntary intoxication first arose when Vazquez testified that he was not aroused when he touched A.V.

Decision Not to Stay Counts 3 and 4 Pursuant to Section 654

The trial court's decision not to stay the sentences on counts 3 and 4 pursuant to section 654 was supported by substantial evidence that Vazquez harbored a separate intent and objective for each offense.

Section 654 bars multiple punishment for multiple convictions that arise out of an indivisible course of conduct committed pursuant to a single criminal objective. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Multiple sex offenses committed during a single course of conduct may be punished separately if they are divisible; that is, if they are separate and distinct, do not facilitate each other, and are not incidental to each other.

(*Id.* at pp. 553-554.) The fact that sex offenses share a general intent to achieve sexual gratification does not bar separate punishment. (*Id.* at p. 552.)

Whether a defendant entertained single or multiple criminal objectives is a question of fact for the sentencing judge. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) The trial court found that both the couch incident (counts 1 and 3) and the stairway incident (counts 2 and 4) involved separate acts within a single course of conduct.[4] It concluded that each course of conduct was divisible because each was a separate violation of section 288.

The trial court stated, under *People v. Scott* (1994) 9 Cal.4th 331, "[I]t's been the law for some time. That with regard to the 654 argument . . . . [¶] [e]ach of those touchings is regarded as a separate violation of the person which are outside the scope of 654. So the Court finds that 654 does not bar multiple punishment for those things." *Scott* held that each distinct lewd act on a single occasion can result in a separate conviction. (*Scott*, at pp. 336, 347.) In a footnote, *Scott* observed that "[s]uch offenses are generally 'divisible' from one another under section 654, and separate punishment is usually allowed." (*Id.* at p. 344, fn. 6.) In another footnote, it stated, "[C]ourts no longer assume that [simultaneous] fondling offenses are 'incidental' to other sex crimes within the meaning of section 654, or that they are exempt from separate punishment. The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act." (*Id.* pp. 347-348, fn. 9.) The trial court's reference to *Scott* does not warrant the conclusion, suggested by Vazquez, that it was unaware of its sentencing discretion.

A trial court's implied finding that the defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) We imply such a finding

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[4] The trial court described these as "Counts 1 and 3, the couch incident, which is a kissing and vaginal fondling at the same time on the same date with the same victim, and the stairway incident, which are Counts 2 and 4. Which is the fondling of the breast and the touching of the penis to the vagina, same incident, same date, same victim."

here from the trial court's statement that "[e]ach of those touchings is regarded as a separate violation of the person which are outside the scope of 654." Its determination is supported by substantial evidence. The evidence supports a conclusion that the kissing on the couch was neither a means of committing, nor incidental to, the vaginal fondling that followed immediately afterward. It also supports a conclusion that the fondling of A.V.'s breast on the stairway was neither the means of committing, nor incidental to, the simultaneous touching of her vagina with Vazquez's penis.

Decision to Impose Consecutive Terms

The trial court imposed consecutive subordinate terms because "the crimes involved, each and every one of them, separate acts of violence, as the law regards them. That is with each touching." (Cal. Rules of Court, rule 4.425(a)(2).)[5] We are satisfied that the trial court understood it had discretion to impose concurrent terms, notwithstanding *People v. Scott*, *supra*, 9 Cal.4th 331, if the particular facts of the case so warranted. (§ 669, subd. (a); see also *People v. Rodriguez* (2005) 129 Cal.App.4th 1401.)

The trial court has broad discretion to impose consecutive subordinate terms. (*People v. Scott*, *supra*, 9 Cal.4th 331, 349.) The criteria guiding its decision include whether or not: "(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)-(3).) Facts in mitigation or aggravation may also be considered, provided the fact is not an element of the crime and is not used to impose an upper term or to otherwise enhance the defendant's sentence. (*Id.*, rule 4.425(b)(1)-(3).)

The trial court "conclude[d] in balancing the factors and exercising [its] discretion, that consecutive subordinate terms are in fact appropriate." It found that two

[5] The trial court also found that the couch and stairway incidents were "committed at different times." (Cal. Rules of Court, rule 4.425(a)(3).) Vazquez does not challenge the court's decision to impose consecutive sentences as to counts 1 and 2.

counts were committed at the same time and place as two other counts, but the crimes involved separate acts of violence. The court properly exercised its discretion based on its consideration of the facts of this case and the factors set forth in California Rules of Court, rule 4.425.

DISPOSIITON

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Matthew P. Guasco, Judge

Superior Court County of Ventura

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