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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TRAYVION RENE THOMAS, Defendant and Appellant.	B286703 (Los Angeles County Super. Ct. No. MA068928)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Trayvon R. Thomas was convicted of several sex offenses and of dissuading a victim from reporting a crime. On appeal, defendant argues his Sixth Amendment right to confront witnesses was violated because the trial court permitted the victim to testify while wearing dark glasses. Defendant also challenges the sufficiency of the evidence to support his conviction for dissuading a victim from testifying.

We conclude that allowing the victim to wear dark glasses was harmless beyond a reasonable doubt. We reject defendant's challenge to the sufficiency of the evidence for his conviction of dissuading a victim from reporting a crime. We thus affirm the judgment of conviction.

FACTUAL BACKGROUND

Defendant and the victim H.T. were cousins. The conduct underlying defendant's convictions for sex offenses occurred when H.T. was 16 years old.

It was undisputed that H.T. was developmentally delayed. H.T.'s mother explained that H.T. was in special education. H.T.'s mother also testified that H.T. was not permitted to cook because she did not understand heat. She was not permitted to cross a street alone because she was unable to assess oncoming traffic. H.T.'s mother believed that her skill level at age 18 was akin to a child in fourth grade. A deputy sheriff described H.T.'s behavior as similar to a seven- or eight-year-old child. A nurse indicated she was distracted easily and had difficulty focusing.

H.T. testified at trial with the assistance of a support person. She stated that when she was 16 years old, she visited her father in California. H.T. spent a lot of time at her grandmother's house, where the conduct underlying defendant's convictions occurred.

H.T. testified that defendant touched her vagina with his hand. He inserted his penis into her vagina, causing her to bleed. Defendant removed his penis, rubbed it, and reinserted it into H.T.'s vagina. H.T. testified that defendant inserted his penis in her vagina a third time. She also testified that defendant licked her vagina.

H.T. also testified defendant told her not to tell anyone. H.T. agreed, but only because she had crossed her fingers, and for that reason felt comfortable lying to defendant.

During cross-examination, it became clear that H.T. either could not recall or could not communicate the chronology of events. It was unclear whether defendant's sexual conduct occurred on a single day or on multiple days. H.T. could not recall what she had told a nurse shortly after the events. During cross-examination, H.T. testified that defendant licked her breasts.

In an interview with a nurse, H.T. was unable to answer questions about the timing of events. H.T. showed the nurse a picture of defendant, who she said sexually assaulted her. H.T. did not tell the nurse that defendant inserted his fingers in her vagina, that defendant ejaculated inside of her, or that defendant licked her breasts. H.T. reported that defendant inserted his penis in her vagina and licked her vagina.

H.T. told a deputy sheriff that defendant touched her vagina and breasts, licked her vagina, and ejaculated inside of her. She also described defendant inserting his penis inside her vagina multiple times.

H.T. told a sexual assault examiner that defendant inserted his penis in her vagina, removed it, and reinserted it two more times. H.T. reported that defendant put his tongue in her vagina.

The sexual assault examiner noticed that H.T.'s basa was bleeding, an injury consistent with sexual penetration. H.T. did not tell the examiner that defendant licked her or kissed her, and H.T. was not sure if defendant ejaculated.

H.T.'s external genital swab contained DNA matching defendant with a probability of 1 out of 2.8 decillions. The external genital swab had blood, semen and saliva. Defendant's DNA also was found in a semen sample from H.T.'s pants. Defendant's DNA was not found in a sample from H.T.'s cervix.

Defendant fled to Las Vegas, Nevada. Defendant told an officer that he heard H.T. was "crazy." Defendant also told an officer that H.T. was 17 years old.

PROCEDURAL BACKGROUND

In a seven-count amended information, defendant was charged with rape (Pen. Code,[1] § 261) and unlawful sexual intercourse with a person more than three years younger than the defendant (§ 261.5, subd. (c)). He was charged with forcible acts of sexual penetration on a victim incapable because of a development disability to give consent (§ 289, subd. (b)) and forcible acts of sexual penetration with a person who is under 18 years of age (§ 289, subd. (h)). Defendant was charged with oral copulation with a victim who because of a developmental disability was incapable of giving consent (§ 288a, subd. (g)) and oral copulation of a person under 18 years of age (§ 288a, subd. (b)(1)). With respect to each pair of crimes, the prosecutor argued that the first involved the inability to consent because of a developmental disability and the second concerned illegal conduct based on H.T.'s age.

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[1] Undesignated statutory citations are to the Penal Code.

Defendant also was charged with dissuading H.T. from reporting a crime to authorities. (§ 136.1, subd. (b)(1)). It was alleged that defendant suffered three prior serious or violent convictions within the meaning of the three strikes law and within the meaning of section 667.5, subdivision (c). It was alleged defendant suffered two prior convictions within the meaning of section 667, subdivision (a)(1) and four prior convictions within the meaning of section 667.5, subdivision (b).

Defendant did not testify at trial and provided no defense.

In his opening and closing argument, defense counsel admitted that defendant had unlawful sexual intercourse with a person under 18 and orally copulated a person under 18. Counsel argued that with respect to the remaining offenses, H.T. made conflicting statements. Counsel also contended defendant's DNA was found only on some of the swabs, but not all of them. Counsel argued that defendant did not know H.T. had a developmental disability.

Jurors convicted defendant of all charges. Defendant admitted the prior convictions. The trial court struck one prior conviction in the interest of justice. The court sentenced defendant to an indeterminate 50 year-to-life term and a determinate 12-year term. Defendant timely appealed.

DISCUSSION

We first discuss defendant's challenge based on the Confrontation Clause. We then turn to his challenge to his conviction for dissuading a victim from reporting a crime.

A. H.T.'s Use of Dark Glasses Does Not Require the Reversal of Defendant's Criminal Convictions

For purposes of this appeal we assume without deciding that the trial court violated defendant's right under the Confrontation Clause when it allowed H.T. to testify while wearing dark glasses without inquiring into, or making findings as to why she had to wear the dark glasses. We begin with additional background and then explain why defendant cannot show prejudice.

1. Additional background

Prior to trial, the prosecutor informed the court that H.T.'s mother requested H.T. testify while blindfolded because she was afraid to see defendant. The prosecutor stated that she had not discussed the issue with H.T. The prosecutor requested that instead of a blindfold, H.T. be permitted to testify while wearing "eclipse glasses" "so she is unable to basically see anything." The trial court described the dark glasses as "very dark sunglasses," made of paper in order to view the eclipse. Defense counsel objected to H.T. covering her eyes.

The trial court did not question H.T. No witness testified that defendant's presence would traumatize H.T.

The trial court stated it would "allow the accommodation." "I think it's akin to having a child witness where the court does need to make appropriate accommodations to make the witness as comfortable as possible." Following that decision and just before her testimony, H.T. stated, "I'm scared." The court indicated it would make H.T. as comfortable as possible and explained the procedure.

Prior to H.T.'s testimony the trial court told jurors that the fact H.T. had a support person was not "evidence of anything." The court also instructed the jurors: "[O]ur witness has asked us for permission to wear dark glasses while she testifies and again I'm allowing that because it makes her feel more comfortable. It's not evidence of anything. Please don't consider it for any purpose. Don't discuss it in your deliberations." At the end of trial the court instructed jurors: "You must not be influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

2. Permitting H.T. to testify in dark glasses was harmless beyond a reasonable doubt

As noted, we assume without deciding that H.T.'s testimony while wearing dark glasses violated the Confrontation Clause. A violation of the Confrontation Clause requires the reversal of the conviction only if the error was prejudicial under a harmless beyond a reasonable doubt standard. (*Coy v. Iowa* (1988) 487 U.S. 1012.) "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." (*Id*. at p. 1022.)

We conclude permitting H.T. to testify while wearing dark glasses was harmless beyond a reasonable doubt. Defendant admitted that he engaged in unlawful sexual intercourse with a minor and oral copulation with a person under 18. Although defendant did not admit he was aware of H.T.'s inability to consent, her developmental delays were undisputed. H.T. did not

testify about her developmental delays. That element was proven through the testimony of H.T.'s mother and the law enforcement and medical personnel who interviewed her. Thus, the dark glasses could not have affected the jury's evaluation of the only disputed element of the rape and oral copulation counts, that is, defendant's contention he was unaware of H.T.'s development disabilities.

Defendant presented no defense regarding the charges of sexual penetration with a foreign object (on a person incapable of consenting because of a developmental disability and on a person under 18) or on the charge of dissuading a victim from reporting a crime. H.T.'s testimony was undisputed. The testimony regarding her developmental disability was undisputed. Additionally, the physical evidence corroborated H.T.'s overall testimony, demonstrating that defendant's semen was found in an external genital swab and in H.T.'s pants. H.T.'s vagina showed signs of penetration. Defendant's flight to Las Vegas further evidenced his consciousness of guilt. Given the undisputed, overwhelming evidence and the absence of any defense, defendant cannot demonstrate prejudice with respect to any conviction based on the fact that H.T. testified with dark glasses.

Finally, defendant's argument that the trial court's allowing H.T. to testify wearing dark glasses was error because it played to the jurors' sympathy is unavailing. The trial court instructed jurors not to consider the dark glasses for any purpose and not to consider sympathy during their deliberations. We must presume that the jurors followed the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

B. Sufficient Evidence Supported Defendant's Conviction for Dissuading a Victim From Reporting A Crime

It is undisputed defendant told H.T. "don't tell anyone." Defendant argues his conduct was insufficient to support his conviction for dissuading a victim from reporting a crime because he did not specifically warn her against reporting the crime to law enforcement officer or to a judge. Section 136.1, subdivision (b) criminalizes dissuading a victim from "[m]aking any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge." (§ 136.1, subd. (b)(1).)

"To evaluate a claim that a conviction lacks sufficient evidence, ' "we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." ' [Citation.] Our focus ' "is on the *whole* record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' " ' [Citation.] ' " ' "If the circumstances reasonably justify the trier of fact'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." ' " ' [Citation.] Instead, reversal is required only if ' "it appears 'that upon no hypothesis whatever is

there sufficient substantial evidence to support [the conviction].' " ' " (*People v. Sanford* (2017) 11 Cal.App.5th 84, 91.)

Defendant's challenge to the sufficiency of the evidence ignores the plain meaning of "anyone." That word does not impart any limitation, and certainly not that it includes only family members to the exclusion of law enforcement personnel. Defendant did not warn H.T. to refrain from telling only her family members, as defendant argues. Defendant cites no evidence limiting the word "anyone" to family members, and the jury's verdict demonstrates that they rejected such a definition. In short, substantial evidence supported the juror's conclusion that defendant attempted to dissuade H.T. from reporting a crime to law enforcement authorities.

Finally, defendant correctly argues that the trial court erred in instructing jurors on malice. Dissuading a victim as defined in section 136.1, subdivision (b)(1) does not require a showing of malice. Defendant acknowledges "malice is not an element of" section 136.1, subdivision (b)(1). The instructional error, however, benefitted defendant because it set forth a more difficult standard to convict. Defendant has thus failed to demonstrate any miscarriage of justice caused by this instructional error. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829 [instructional error cannot be the basis for reversal unless it results in a miscarriage of justice].) Because malice is not an element of section 136.1, subdivision (b)(1), we need not consider defendant's challenge to the sufficiency of evidence of malice.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

CURREY, J.*

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