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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>STEPHEN CHRISTOPHER BROWN,<br><br>Defendant and Appellant. | B293570<br><br>Los Angeles County<br>Super. Ct. No. BA457364 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael R. Johnsen and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Appellant and defendant Stephen Christopher Brown was convicted of forcible oral copulation, forcible rape, and sexual penetration by foreign object and sentenced to six years in state prison. On appeal, he argues: (1) his convictions on all three counts must be reversed because it is undisputed that C.O., an adult female, initially consented to having sex with him, and there was insufficient evidence she withdrew her consent; (2) the penetration by foreign object conviction must be reversed because there was insufficient evidence of the requisite element of penetration; and (3) the trial court erred by not instructing the jury on lesser included offenses of attempted sexual penetration by a foreign object and assault with the intent to commit penetration by foreign object.

We reject these contentions and emphatically reject Brown's additional argument that he was entitled to presume consent — or as he puts it, have a "good faith belief in consent" — because he and C.O. had engaged in consensual sex and she had told Brown she liked "rough sex." Under these circumstances, he argues (apparently with no irony intended) his conduct "could not have been construed by a reasonable man to be against her will."[1] Not so. Consent may be withdrawn at any time. This is not a new concept nor one that should be difficult to grasp. The prosecution presented substantial evidence that C.O. communicated through words and acts that her consent had been withdrawn. The jury was entitled to conclude from the evidence that a reasonable

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[1] Particularly in a sexual violence case, we prefer the more gender neutral formulation of "reasonable person."

person would have understood she no longer consented. We therefore affirm the judgment.

## PROCEDURAL BACKGROUND

An information charged Brown with sexually assaulting two individuals. With respect to the first person, the information alleged Brown committed forcible oral copulation (Pen. Code,[2] § 288a, subd. (c)(2)(A)[3]; count one); sexual penetration by a foreign object (§ 289, subd. (a)(1)(A); count two); and attempted sodomy by use of force (§§ 664, 286, subd. (c)(2)(A); count three). With respect to the second person, C.O., it alleged Brown committed forcible oral copulation (§ 288a, subd. (c)(2)(A); count four); forcible rape (§ 261, subd. (a)(2); count five); and sexual penetration by a foreign object (§ 289, subd. (a)(1)(A); count six). The information further alleged a "multiple victim"[4] special circumstance with respect to all six counts. (§ 667.61, subds. (b),

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[2] All undesignated statutory references are to the Penal Code.

[3] Effective January 1, 2019, this section was renumbered to section 287, subd. (c)(2)(A) by Stats 2018 ch 423 § 49 (SB 1494). Brown was convicted in 2018, prior to when this change went into effect.

[4] We use the word "victim" advisedly, knowing many (but not all) who have endured sexual assault prefer to use "survivor" or some other more empowering term. Here, we use "victim" because it is used in a statute.

(c), & (e)(4)).[5] Before trial, the court dismissed counts one through three pursuant to section 995.[6] Counts four through six were renumbered as counts one through three for purposes of the jury trial.

The jury convicted Brown of all three counts. The trial court sentenced him to a middle term of six years for forcible oral copulation, and imposed concurrent six-year middle terms for the forcible rape and sexual penetration by foreign object convictions.

Brown timely appealed.

## FACTUAL BACKGROUND

Due to Brown's contention that his conviction was not supported by substantial evidence, we are required to summarize pertinent portions of the trial testimony. This opinion, therefore, necessarily contains sexually explicit language.

C.O. met Brown through Tinder. After communicating only through the app and via text messaging, they agreed to a date. C.O. and Brown planned to eat dinner and watch a movie at Brown's apartment. C.O. also went to Brown's apartment intending to have sex. Our description of the events that evening is based on C.O.'s testimony. Brown did not testify.

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[5] The information incorrectly alleged the special circumstance under subdivision (a) of section 667.61 rather than subdivision (b).

[6] Although the court did not explicitly dismiss the section 667.61 "multiple victim" allegations, the section 995 ruling effectively dismissed them because it dismissed all the counts pertaining to the other person Brown allegedly assaulted.

C.O. arrived at Brown's apartment at 10:45 p.m. They shared a glass of wine and talked while sitting on the sofa. Brown put his right arm around C.O. and held her there. He explained he likes to get close to people to see how they react. C.O. was slightly put-off by this interaction, but was still attracted to him. They ate delivery food and then lay down on Brown's rug in the living room watching videos on his laptop.

C.O. and Brown started to "make out." After "things started getting a little [ ] more physical," C.O. went to get condoms from her purse, but Brown said he did not use condoms. C.O. was "pretty insistent" she wanted to use condoms because she was not taking birth control pills and did not want to get pregnant. Brown convinced her not to use condoms, however, and they started to have consensual sexual intercourse.

After some time, C.O. testified, she became uninterested in having intercourse. Brown performed oral sex to get her interested again. After "a little while," she felt "repulsed" and had a "gross feeling." She "didn't want to have sex with him anymore." She ran to the bathroom and pretended she was ill. While in the bathroom, she turned on the water and formulated a plan to leave. She did not feel comfortable saying, "I need to leave right now" because she "didn't know what [Brown's] reaction would be" and "was afraid of finding out."

After three to five minutes, C.O. came out of the bathroom and said she "wasn't feeling well" and "wanted" or "needed" to leave. Using slang, Brown said he had not yet orgasmed. C.O. responded she had not either, but Brown said "it was different for women." C.O. was holding her phone. Brown grabbed C.O.'s wrists, threw her phone on the floor, and pulled her down to the rug. He laid her on her back and pinned her down with his body.

C.O. could not move her arms because Brown's legs were over them. Brown said he wanted to "face f**k" her. C.O. explained to the jury she understood the phrase to mean "the man having complete control over oral sex." C.O. shook her head to communicate she did not want to participate. She started to say, "I do not want to," but Brown put his penis in her mouth before she could finish saying the word "to."

When Brown did this, she "kind of froze" in shock. She testified she did not kick or scream because she did not know how Brown would react. She told the jury Brown had a very muscular build, was twice her size, and had already grabbed her wrists and pinned her down. She "did not want to know if it would get worse."

Brown then masturbated himself while touching C.O.'s clitoris, vulva, and vagina. He stuck his finger inside her vagina "a few times."[7] She did not get up and leave because she was afraid. She looked at Brown and kept making "faces mimicking" she was not feeling well. Brown looked at her "[o]n and off." C.O. believed her facial expressions communicated she did not want to have sex with Brown. C.O. told the jury Brown rolled her onto her right side with his hands so he would not have to see her face.

C.O. was on her stomach and Brown masturbated himself "for a while." Brown said he was close to having an orgasm and was going to put himself inside of her. C.O. said she did not want

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[7] During an interview with Detective Michelle Jacquet of the Los Angeles Police Department on May 4, 2017, C.O. said Brown rubbed, but did not penetrate, her vagina. When asked about this statement at trial, C.O. testified she did not recall her response when Detective Jacquet asked whether Brown penetrated her vagina with his fingers.

to have sex. Brown said it would not take long and put his penis inside her vagina.[8] C.O. cried quietly. Brown had vaginal intercourse with C.O. for a few minutes. Brown's hands were on C.O.'s lower back holding her down. Brown pulled his penis out of her vagina and ejaculated on her back.

C.O. went to the bathroom and cleaned herself. She felt disoriented. She was shaking and knew she needed to leave. She left the bathroom, put on her clothes as fast as possible, and said she was leaving because she did not feel well. Brown was eating on the rug while naked. As she left, Brown asked for a hug. C.O. still felt shocked. She agreed, and Brown walked out of his apartment door naked into the building's hallway to hug her. C.O. left.

C.O. went to the police station at 9 p.m. the following evening. She did not go immediately after the attack because, she said, she needed to emotionally process what happened. The police took C.O. to get a physical examination around midnight. Daisy Robinson was the sexual assault nurse examiner who examined C.O. The results from C.O.'s genital examination were normal. Based on the hypothetical of a woman engaging in consensual sex with a male using coconut oil as a lubricant before she withdrew consent and the male thereafter forcing his penis inside her vagina, Robinson opined it would be possible the woman would not have injuries.[9]

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[8] C.O. told Detective Jacquet she told Brown "But I don't—," and Brown put his penis inside her before she could finish her sentence.

[9] At some point earlier, Brown had put coconut oil on his penis as a lubricant.

Detective Jacquet interviewed C.O. on May 4, 2017, for approximately one hour at the Rampart police station. An audio recording of the interview was played for the jury.

## DISCUSSION

### 1. Substantial Evidence Supports the Jury's Conclusion That C.O. Withdrew Her Consent with Respect to All Counts

Brown argues his convictions for forcible oral copulation, forcible rape, and sexual penetration by foreign object must be reversed because the record contains insufficient evidence C.O. withdrew her consent. In response, the Attorney General argues the record shows C.O. verbally communicated she did not want to engage in further sexual activity, and her physical actions and the circumstances surrounding the sexual assault also show she did not consent to the conduct underlying the convictions. We conclude the jury's verdict is supported by substantial evidence.

In reviewing a judgment for sufficiency of the evidence, we examine the record in the light most favorable to the judgment to determine if there is substantial evidence from which any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Staten* (2000) 24 Cal.4th 434, 460.) Substantial evidence is evidence that is "'reasonable in nature, credible, and of solid value.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Substantial evidence includes circumstantial evidence and reasonable inferences based on that evidence. (*In re James D.* (1981) 116 Cal.App.3d 810, 813.) As the reviewing court, we "presume in support of the judgment the existence of every fact

that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal based on 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. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Applying these principles, we conclude substantial evidence supports the jury's implied lack of consent findings on all three counts.[10] Our Legislature has defined "consent" to mean "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (§ 261.6.) Actual consent is different from submission. (*People v. Ireland* (2010) 188 Cal.App.4th 328, 336 (*Ireland*).) "'A selection by the victim of the lesser of two evils—rape versus the violence threatened by the attacker if the victim resists—is hardly an exercise of free will. [Citation.]'" (*Id.*, internal citations omitted; accord *People v.*

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[10] Lack of consent is an element of all three crimes of which Brown was convicted. Forcible oral copulation is an act of oral copulation that occurs against a victim's will and is committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim. (§ 288a, subd. (c)(2)(A).) Forcible rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, and against that person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury. (§ 261, subd. (a)(2).) Sexual penetration by a foreign object is an act of sexual penetration that occurs against a victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person. (§ 289, subd. (a)(1)(A).)

*Giardino* (2000) 82 Cal.App.4th 454, 460, fn. 3 ["victim's decision to submit to an attacker's sexual demands out of fear of bodily injury is not consent"].)

Withdrawal of consent may occur at any time. (*In re John Z.* (2003) 29 Cal.4th 756, 762.) The law does not require victims to communicate their lack of consent (*Ireland*, *supra*, 188 Cal.App.4th at p. 338), nor does it require victims to resist. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1024-1025.) The law also does not require victims who previously consented to communicate their lack of consent. (See e.g. *Ireland*, *supra*, 188 Cal.App.4th at pp. 335-338 [defendant's use of a knife, along with his express or implied threats to harm his victims if they did not cooperate, automatically negated their previously given consent].)

Although C.O. and Brown initially engaged in consensual sex, there was sufficient evidence from which the jury could conclude she withdrew her consent to any further sexual activity. For example, the jury could conclude from the following facts that she did not consent to oral copulation after emerging from the bathroom: (1) she said she "wasn't feeling well" and "wanted" or "needed" to leave; (2) Brown used force, grabbing C.O.'s wrists, pulling her down to the rug and pinning her down with his body, prohibiting her from moving her arms; (3) C.O. shook her head to communicate she did not want to perform oral sex, and started saying "I do not want to"; and (4) she testified she did not kick or scream because she was worried the situation "would get worse" if she fought back against Brown, who was twice her size and had a very muscular build. (*Ireland*, *supra*, 188 Cal.App.4th at p. 336.)

In addition to the circumstances surrounding the forcible oral copulation, C.O.'s lack of consent to further sexual

intercourse was demonstrated by her (5) explicitly telling Brown she did not want to have sex; and (6) crying during the rape.

The jury also was presented sufficient evidence from which it could conclude C.O. did not consent to sexual penetration with a foreign object. In addition to her withdrawal of consent communicated prior to, during, and after the forcible oral copulation, the jury could conclude from C.O.'s account of the assaults that Brown was aware she did not want to engage in sexual conduct but chose to ignore her wishes. While Brown was masturbating and putting his finger inside C.O.'s vagina, she looked at Brown and made faces indicating she was not feeling well and did not want to have sex. C.O. saw Brown look at her, and he then rolled her onto her side, she believed, so he would not have to see her face.

In sum, C.O.'s statements to Brown, Brown's use of force, the circumstances surrounding the assaults, and C.O.'s crying and body language constituted sufficient evidence of her lack of consent with respect to all three counts.

**2. Substantial Evidence Supported Brown's Conviction for Sexual Penetration by A Foreign Object**

Brown next contends his conviction for sexual penetration by a foreign object must be reversed because there was insufficient evidence of penetration. We disagree. C.O. testified Brown digitally penetrated her multiple times.

Sexual penetration is defined as "the act of causing the penetration, however slight, of the genital or anal opening of any person . . . for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (§ 289, subd. (k)(1).)

During her interview with Detective Jacquet on May 4, 2017, C.O. said Brown did not penetrate her vagina with his fingers. At trial, however, C.O. testified that as Brown masturbated, he touched her "clitor[is], [her] vulva and [her] vagina; all of it," and put his finger inside her vagina "a few times."

The jury could reasonably have found Brown sexually penetrated C.O. with a foreign object (his finger) based on her testimony at trial. Although C.O. made a prior inconsistent statement, the jury could reasonably have found her trial testimony was more accurate than statements she made during the interview while still processing the traumatic assault. It is not this Court's role to reappraise C.O.'s credibility or resettle the conflict between her testimony and prior statement to the detective; these functions are reserved for the trier of fact. (*People v. Xiong* (2013) 215 Cal.App.4th 1259, 1268.)

Brown notes the prosecutor stated during closing argument the jury could find Brown guilty of sexual penetration for putting his finger "on" C.O.'s clitoris. The prosecutor's closing statement, however, has no bearing on Brown's sufficiency claim. Even if it did, the trial court instructed the jury it must follow the court's instructions if the attorneys' comments on the law conflict with the court's instructions. (See *People v. Holt* (1997) 15 Cal.4th 619, 662 [jurors are presumed to understand and follow instructions].)

Thus, substantial evidence supported Brown's conviction for sexual penetration by a foreign object.

### 3. The Trial Court Did Not Err by Failing to Instruct on Other Offenses

With respect to the sexual penetration by foreign object count (§ 289, subd. (a)(1)(A)), Brown argues the trial court erred by not instructing *sua sponte* on attempted sexual penetration by foreign object (§§ 664, 289) and assault with intent to commit penetration by foreign object (§ 220) as lesser included offenses. The Attorney General argues neither instruction was required because there was insufficient evidence Brown committed the lesser offenses but not the greater offense. For the same reason, the Attorney General argues any purported error was harmless. We agree.

We review de novo whether the trial court erred by not instructing on a lesser included offense. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) A trial court has a *sua sponte* duty to instruct on a lesser included offense if there is substantial evidence the defendant committed the lesser but not the greater offense. (*People v. Nelson* (2016) 1 Cal.5th 513, 538.) We are not persuaded this standard has been met. C.O. testified Brown digitally penetrated her vagina several times. Brown claims the two other instructions were warranted because C.O., during the police interview, said Brown touched but did not penetrate her vagina. Although C.O.'s statement during the police interview was inconsistent with her subsequent testimony at trial, it did not warrant instruction on either of the two offenses Brown proposes. With respect to attempted sexual penetration by foreign object, even assuming *arguendo* the jury believed C.O.'s police interview statement but did not believe her trial testimony, this would not provide substantial evidence Brown *attempted* but

did not succeed in completing the act of penetration. Similarly, with respect to assault with intent to commit penetration by foreign object, assuming *arguendo* the jury believed C.O.'s police interview statement but not her testimony, this would not constitute substantial evidence Brown *intended* to commit the act of penetration but failed to do so.[11]

Because the record does not contain substantial evidence Brown committed either of the two lesser offenses he proposes, it is not reasonably probable the outcome would have been different had the jury been instructed on them. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[11] Because we conclude there is no substantial evidence Brown committed assault with intent to commit penetration by foreign object, we need not address the Attorney General's alternative argument that this crime is not a lesser included offense of sexual penetration by foreign object.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.