Filed 10/14/16 P. v. Flores CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTEMIO FLORES, Defendant and Appellant.	B266776 (Los Angeles County Super. Ct. No. BA427240)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed as modified.

Law Advocate Group, Ryan Agsalud, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Scott A. Taryle, Supervising Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Artemio Flores (defendant) of (1) rape of an intoxicated person, his 18-year-old sister-in-law C.D. (C.); and (2) sexual battery by restraint. We consider whether there is sufficient evidence to support the convictions and whether the trial court erred in failing to instruct the jury on a lesser included offense of the sexual battery by unlawful restraint charge notwithstanding the defense attorney's tactically-motivated request that the trial court refrain from so instructing the jury. We are also asked to decide whether the trial court prejudicially erred in admitting, pursuant to a hearsay exception, C.'s answer "yes" when her cousin asked if defendant had raped her the next day after it happened.

I. BACKGROUND

In May 2014, 18-year-old C. went to stay with her older sister Brenda Flores while her parents were out of town. Brenda was married to defendant, and their teenage son Sergio lived with them.

A couple days after arriving at her sister's home, C. went with Brenda and defendant to a party at a neighbor's home. At the party, C. drank two beers and some vodka, the precise quantity of which she could not say. As C. was drinking a third beer, she blacked out. She had no further memory of the party or of returning to the Flores apartment. Her next memory was of waking up on the bed in Sergio's room and vomiting.

Brenda and Sergio testified at trial about events during C.'s black-out.[1] According to Brenda, C. had trouble walking back to the apartment. She was holding onto the walls. When she reached the apartment, she fell down inside the front door, and Brenda helped her get up and walk to the bathroom. Brenda put her in the bathtub and turned on the shower, and after the shower, Brenda dressed C. and took her to Sergio's bedroom. With defendant's assistance, Brenda placed C. in the bottom bed of Sergio's bunk bed.

---

[1] Brenda and Sergio were called as defense witnesses. Portions of their testimony are recounted here to provide a recounting of events chronologically.

Once in the bed, C. immediately began throwing up. Defendant helped Brenda hold up C.'s head while she was vomiting. Brenda and defendant brought towels to clean up the vomit, and defendant cleaned C.'s neck and upper chest with a towel. C. returned to consciousness briefly while vomiting and felt Brenda wiping her cheek. Defendant was also in the room at the time, and C. then fell back asleep.

At some point while with C., Brenda heard a "big scream" from her dog. She asked others in the apartment what happened and learned defendant had stepped on the dog and the dog hadn't moved after that. Brenda took the dog to the veterinarian between 11:45 p.m. and midnight, leaving defendant, C., and Sergio as the only people in the apartment at the time. C. was still lying down in Sergio's room, and Sergio was lying on his parents' bed in another room down the hall.[2]

When C. next regained consciousness, only defendant was in the room with her. Defendant wiped some vomit off her cheek. He then put his hand in the center of her chest. It was skin-to-skin contact. C. tried using her own hand to stop defendant from touching her, but defendant kept removing her hand. Defendant then reached underneath her clothing and began fondling her right breast. C. again tried to stop defendant, but he kept moving her hand away. Although C. physically tried to stop defendant from touching her, she did not say anything to defendant because she still felt very intoxicated and did not know what to do.

Defendant then reached into the leg opening of her shorts and began to touch her vagina with his fingers. She tried to close her legs but defendant kept using his free hand to open them. Defendant next inserted his fingers in her vagina. C. kept trying to close her legs but defendant kept pulling them apart. Defendant tried to pull her legs toward him, away from the wall on the other side of the bed, but C. resisted and turned away

---

[2] During the defense case at trial, Sergio testified he could see down the hallway to the room where C. was sleeping. He claimed he did not see defendant in the hallway, nor did he see any lights come on in the bathroom. The walls in the apartment were thin, but he did not hear anything. During the prosecution's rebuttal case, C. and Brenda's cousin Carmen testified she heard Sergio tell Brenda that when he was in his parent's room on the night of the incident, he was playing games while wearing headphones.

from him (toward the wall), hoping he would stop. Defendant did not stop and instead inserted his penis in her vagina. C. said, "Ow. It hurts." Defendant continued to thrust his penis inside her two more times and C. kept saying, "Ow. It hurts." After thrusting his penis inside her three times, defendant left the room and C. laid in the bed crying, still intoxicated and not sure what to do. She heard defendant go into the bathroom across the hall and turn on the water, and she then fell back to sleep.

C. woke up at some point during the night and looked for her phone because she wanted to call the police. She felt "a little bit more sober" but numb and in shock. She went into the living room and found the phone on a desk. She saw defendant lying on the floor. The phone was dead, so C. took it back to the bedroom and plugged it in to charge. She then fell back asleep.

Brenda returned home about 1:45 a.m. Defendant was passed out on the living room floor. Brenda also slept in the living room, with Sergio sleeping in her bed.

Brenda woke C. up at about 7 a.m. the next morning. C. told Brenda that she was not feeling well and was not going to go to school. C. didn't tell Brenda what defendant had done because she didn't remember what happened until she reawakened at about 10 a.m. At that moment, "[e]verything just came back" to her. Her vagina hurt when she walked and sat down. She was in shock and did not know what to do. She did not want to believe it had happened to her and she wanted to pretend nothing had happened.

C. did not see defendant again until suppertime. After supper, at about 10 p.m., C. told Brenda her vagina hurt while they both were alone in the living room. Brenda asked her why it hurt, and C. revealed that defendant had sexually assaulted her. C. had been trying to "just go on with [her] life" but the emotional and physical pain became too much to bear. Brenda then went into her bedroom and confronted defendant with C.'s accusation. According to Brenda, defendant seemed surprised, and they both went into the living room; defendant said "I don't remember anything about last night" to Brenda when they first entered the living room, but defendant did not say anything directly to C..

According to C., defendant came out of the bedroom, trailing Brenda who was crying, and told C. that "if he did do that, that he was sorry."[3]

Brenda next called 911. She asserted she called 911 because C. told her that there was evidence inside her that would prove she was not lying about the rape.[4] Firefighters responded to the residence, asked C. what happened, and then took her to UCLA Medical Center in an ambulance.

C.'s and Brenda's cousin Carmen came to the apartment after Brenda called and asked her to come over. She found defendant sitting on the floor in the bathroom, crying and hitting himself on the right side of his head with his fist. Carmen asked defendant what happened and he said he did not remember anything but defendant told her "that . . . 'I say [sic] sorry to Brenda, [C.], and Sergio.'" Carmen then went to comfort Brenda, and about 20 minutes later, police arrived. They asked Carmen to leave so they could talk with Brenda and defendant. At Brenda's request, Carmen went to the hospital to check on C.

Carmen went to UCLA Medical Center, where C. was undergoing a sexual assault exam. C. was first interviewed by a social worker and nurse. According to the examining nurse, C. was shaking and tearful when she told them what had happened. C. felt emotionally numb. She told the nurse that defendant orally copulated her, and penetrated her both digitally and with his penis. C. described the acts as forced. C. also

---

[3] Brenda agreed she was crying when she left the bedroom with defendant.

[4] Brenda's exact testimony was that she called 911 "to prove that she [C.] was not lying this time." Defendant states in his opening brief that, while C. was in Guatemala, she fabricated an accusation that he had molested her. Respondent contends the trial court struck Brenda's testimony about this incident on hearsay grounds. Although it does appear the trial court intended to strike this testimony, there is some ambiguity in the record concerning the extent of the testimony that was being stricken. C. testified that the incident in Guatemala consisted of defendant, who had been drinking, sitting down next to her and pinching and annoying her. As a result of this conduct, she told her family that she wanted to go home.

said defendant put his penis on her arm, and something splashed on her chest and right arm.

The nurse examined C. using a "Wood's lamp" which allows the examiner to see secretions on the body invisible to the naked eye. The lamp indicated a secretion on C.'s right arm. The nurse took a swab from that area, and also from C.'s chest (including her breasts) and neck. The nurse also examined C.'s vaginal area. She observed bruising and broken blood vessels at the entrance of C.'s vagina. The injuries indicated "there was some sort of blunt force trauma to the area." The injuries were consistent with having been caused by a penis, "with some sort of penetration past the labia." The injuries were also consistent with having been inflicted within the last 72 hours.

The swabs obtained from C. were later subjected to DNA analysis. The sample taken from C.'s right breast contained a mixture of DNA from both defendant and C..[5] Defendant's DNA found on C.'s breast more likely came from a mucous membrane rather than from a touch. While it is possible that the DNA found on C.'s breast was "transfer DNA," as in DNA transferred from one person touching a towel or a sheet to another person who touches the same towel or sheet, the amount of DNA found on C.'s right breast suggested that it was deposited there by something "significantly more than a touch" and not merely transfer DNA.

Carmen was waiting at UCLA Medical Center when C. was finished with the sexual assault examination. C. looked like she had aged. Carmen tried to hug C., but C. did not allow Carmen to touch her. Carmen drove C. home, and C. cried during the drive. After about 20 minutes, Carmen asked her if it was true that defendant had raped her. Carmen recalled that C. said "Yes," while still crying at the time. C. did not remember saying anything to Carmen during the drive.

---

[5] The forensic scientist who tested the samples explained "the DNA mixture that I found was 300 trillion times more likely to be a mixture of [defendant] and [C.] versus [C.] and someone random from the population."

C. later went to a police station and reported the rape. She was interviewed by Officer Joshua Bohm. She was also subsequently interviewed by Los Angeles Police Department Detective Alan Aldegarie, once on the telephone and once in person. The interviews were recorded, but the recordings were misplaced.

At trial, defense counsel highlighted certain inconsistencies between C.'s statements to the police and her testimony. For example, C. told Officer Bohm that she was awakened the second time by defendant fondling her breast while she testified at trial that she was awakened by defendant wiping vomit off her cheek. She told Officer Bohm that defendant made her grab his penis with his hand and attempted to use her hand to masturbate him, but did not mention this when testifying. C. also told Officer Bohm and Detective Aldegarie that the nurse found semen inside her, but the nurse did not find any semen on C.. (C. explained at trial that she believed that what the nurse found on her was semen because she could think of no other logical explanation.)

Detective Aldegarie testified at trial about his interview of defendant, the recording of which was also misplaced. The detective testified that defendant stated he saw C. drink at the party, and that when they left the party, she was heavily intoxicated or drunk. She needed help to walk, and he saw C. vomiting quite a bit. Detective Aldegarie asked defendant if he thought a rape occurred and defendant said "I'm not sure. I don't know. I'd feel really bad if something happened."

II. DISCUSSION

The jury convicted defendant of one count of rape of an intoxicated person in violation of Penal Code[6] section 261, subdivision (a)(3) and one count of sexual battery by restraint in violation of section 243.4, subdivision (a). Defendant contends there is insufficient evidence to support the convictions because C.'s testimony is not credible and should be rejected. While there are some gaps and inconsistencies in C.'s account of events, we hold her testimony and the physical evidence that partially corroborates it is

---

[6] Undesignated statutory references that follow are to the Penal Code.

substantial evidence of defendant's guilt.[7] Defendant additionally argues the trial court should have instructed the jury on misdemeanor sexual battery, a lesser included offense of felony sexual battery by unlawful restraint. We see no basis for reversal on this ground because defendant invited the asserted error of which he now complains. We also reject defendant's argument that the trial court erred in concluding C.'s "yes" answer to Carmen's question about whether she had been raped was admissible under a hearsay exception.

A. Sufficiency Of The Evidence

1. Standard of review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27[ ].) We 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.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319[ ].) In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053[ ].) 'This standard applies whether direct or circumstantial evidence is involved.' (*People v. Catlin* (2001) 26 Cal.4th 81, 139[ ].)" (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

---

[7] Because we "determine that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation] as is the due process clause of article I, section 15 of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

2. Elements of the charged offenses

Sexual battery by restraint occurs when the defendant touches "an intimate part of another person while that person is unlawfully restrained by the accused" and the touching is against the will of the victim and "is for the purpose of sexual arousal, sexual gratification, or sexual abuse." (§ 243.4, subd. (a); *People v. Ortega* (2015) 240 Cal.App.4th 956, 966.) "[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will; a restraint is not unlawful if it is accomplished by lawful authority and for a lawful purpose, as long as the restraint continues to be for a lawful purpose. The 'unlawful restraint required for violation of section 243.4 is something more than the exertion of physical effort required to commit the prohibited sexual act.' [Citation.]" (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28; accord, *People v. Grant* (1992) 8 Cal.App.4th 1105, 1112-1113.)

"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following conditions: [¶] . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused." (§ 261, subd. (a)(3).) A person is "prevented from resisting" when "'as a result of her level of intoxication, the victim lacked the legal capacity to give 'consent' . . . [which] is the ability to exercise reasonable judgment, i.e., to understand and weigh not only the physical nature of the act, but also its moral character and probable consequences.' [Citation.]" (*People v. Smith* (2010) 191 Cal.App.4th 199, 204.)

3. Substantial evidence supports defendant's convictions

C.'s testimony describing defendant's sexual battery and rape is sufficient evidence to support defendant's conviction on those charges. (*People v. Jones* (2013) 57 Cal.4th 899, 963-964 [unless physically impossible or inherently improbable, testimony of a single witness sufficient to support a conviction]; *People v. Robertson* (1989) 48 Cal.3d 18, 44; CALCRIM No. 301.) C. testified that defendant made skin-to-skin contact with her breast and vagina. She also testified that he moved her hands away when she tried to stop him from touching her, attempted to reposition her by pulling her legs toward him, and pried her legs apart when she tried to close them to prevent him from touching and penetrating her. These efforts to resist defendant—or more precisely, his actions to overcome that resistance and place C. in a compromised position—satisfy the element of unlawful restraint and the element that requires the touching be against the victim's will. (See *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1661 [unlawful restraint occurs when defendant uses physical force to overcome a victim's attempts to block the touching].) A jury also had ample basis to conclude defendant's fondling of C.'s breast and penetration of her vagina with his penis and finger(s) was for purposes of sexual gratification.

C.'s testimony is also sufficient evidence to support the rape conviction. C. testified that defendant inserted his penis into her vagina. It was undisputed that C. was highly intoxicated when she returned to the Flores apartment after the party and that defendant had to assist her in getting into bed and saw her vomiting. C. repeatedly testified that she still felt very intoxicated at the time of the assaults and did not know what to do. The jury could reasonably infer that she was unable to exercise reasonable judgment and give consent.

Indeed, defendant does not contend her testimony was somehow substantively insufficient to establish the elements of rape of an intoxicated victim. Rather, he claims the evidence of intoxicated rape (and of sexual battery) is insufficient because C. was not a credible witness and her testimony should be disbelieved. He emphasizes C.'s intoxication, her delay in telling anyone about the assault, inconsistencies in her

statements, and what he characterizes as her prior false accusation of sexual misconduct as reasons to reject her testimony. We are unpersuaded, for it was principally the jury's task to determine C.'s credibility and the jury obviously found her credible. Thus, even if we found C.'s testimony subject to justifiable suspicion, which we do not, such suspicion would not warrant reversal of the judgment. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030 ["It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility"].)

Although it is accordingly unnecessary to sustain the conviction, there is also physical evidence that corroborates aspects of C.'s testimony. The nurse testified that the injuries to C.'s vagina were recent and consistent with penetrating blunt force trauma, including trauma caused by a penis.[8] In addition, defendant's DNA was found on C.'s right breast, and the amount of DNA suggested that it was deposited as a result of "significantly more than a touch" and not mere transferred DNA. Defendant's actions consistent with a consciousness of guilt as recounted by C.'s cousin Carmen (hitting himself on the head and the statement regarding saying sorry to Brenda, C., and Sergio) are further corroboration on which the jury could have relied.

---

[8] Defendant suggests, without citation to the record, that the injuries could have been caused by a tampon. We see no testimony to that effect. Even if there were other possible sources of C.'s vaginal injuries, we would view the evidence in the light most favorable to the judgment. (*People v. Avila*, *supra*, 46 Cal.4th at p. 701.) Thus, we view the injuries as consistent with vaginal rape.

B. Lesser Included Offense Instruction

Defendant's contention that the trial court erred by not instructing the jury on the lesser included offense of misdemeanor sexual battery is barred by the doctrine of invited error.[9]

"It is for the court alone to decide whether the evidence supports instruction on a lesser included offense. (*People v. Barton* (1995) 12 Cal.4th 186.) As [our Supreme Court has] stated, 'neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged.' (*Ibid*.) Indeed, '"California decisions have held for decades that even absent a request, and even over the parties' objections, the trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citations.]"' (*People v. Carter* (2005) 36 Cal.4th 1114, 1184.) [¶] Despite the circumstance that it is the court that is vested with authority to determine whether to instruct on a lesser included offense, the doctrine of invited error still applies if the court accedes to a defense attorney's tactical decision to request that lesser included offense instructions not be given. (*People v. Barton*, *supra*, 12 Cal.4th at p. 198; see also *People v. Horning* (2004) 34 Cal.4th 871, 905.) Such a tactical request presents a bar to consideration of the issue on appeal. (*Ibid*.)" (*People v. Prince* (2007) 40 Cal.4th 1179, 1264-1265, italics omitted; accord, *People v. Castaneda* (2011) 51 Cal.4th 1292, 1330.)

Defendant was charged with sexual battery by restraint. During discussion of the jury instructions, the trial court noted defense counsel did not want an instruction on the

---

[9] In his opening brief, defendant asserts in the heading and introduction to his argument on lesser included offenses that the trial court erred in not instructing on "any" lesser included offenses to the rape of an intoxicated person charge. But defendant does not identify any such offenses, nor does he present any argument or citations to the record to show the evidence supported instructing on any specific lesser included offense or cite any legal authority concerning lesser included offenses to rape of an intoxicated person. The point is therefore waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [when a brief does not contain a legal argument with citations on a particular point, court may treat point as waived].)

lesser included offense of simple battery. The prosecutor pointed out there was also a lesser included offense of misdemeanor sexual battery (which does not require restraint). Defense counsel responded, "We are satisfied with the instructions as drafted. We are not interested in a lesser-included defense. We feel that may be a chance for the jury not to deliberate on the issue of the sexual gratification and simply look for a compromise[ ] verdict."

Because the record establishes defense counsel opposed instructions that would support "a lesser-included defense" for tactical reasons—a desire to avoid a compromise verdict—the doctrine of invited error applies. (*People v. Cooper* (1991) 53 Cal.3d 771, 827 [doctrine of invited error applied when defense counsel requested no instructions on lesser included offenses for the tactical purpose of guarding against a compromise verdict].) Defendant may not seek reversal on the ground that the court erred by doing just what he urged the court to do.

C. C.'s Out-of-Court Statement to Her Cousin

C. completed the sexual assault exam at the hospital about 24 hours after the rape occurred. During the drive home, Carmen asked C. if defendant had raped her. C. replied, "Yes." The trial court ruled C.'s response was admissible under the hearsay exception for spontaneous statements. We hold the court's ruling was not an abuse of its discretion nor was it one that admitted key testimony which, if excluded, would have possibly resulted in a more favorable outcome for defendant.

1. Spontaneous statement exception

"Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.)

For a statement to be admissible under section 1240, "'it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render

the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.'" (*People v. Poggi, supra*, 45 Cal.3d at p. 319.) In some instances, a triggering event may occur after the original event and be sufficient to cause a renewed nervous excitement, thus making the statement spontaneous. (*People v. Trimble* (1992) 5 Cal.App.4th 1225, 1235 [declarant's statement was spontaneous even though made two days after defendant murdered her mother; statement was an "emotional outpouring of previously withheld emotions and utterances" triggered by the visit of her grandmother and aunt inquiring about the mother's disappearance and defendant's departure from the house].)

"Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*People v. Merriman* (2014) 60 Cal.4th 1, 65.) "[T]he discretion of the trial court is at its broadest" when deciding whether the utterance was made before the declarant has had time to contrive and misrepresent, i.e., while the nervous excitement of the event still dominates. (*People v. Poggi*, *supra*, 45 Cal.3d at pp. 318-319.)

2. Trial court's ruling

The court ruled: "With regard to the statement that [C.] D. made to Carmen . . . in the car, the court is allowing it under spontaneous statement, Evidence Code section 1240; not under the other two code sections, not under 1241 or 1250. [¶] The court finds that [C.] D. was operating under the emotions of the incident at the time, whether consensual or not consensual. She had no time to reflect or deliberate. The statement occurred within 24 hours of the incident and well before police interviewed her. She was sick and had been under the influence of a large amount of alcohol consumption. She had just gone through medical examination given to most rape victims. The testimony is that she was crying and upset and had been crying and upset for a while. [¶] Because stress can continue for a period of time after a startling event, the statement we have need not be made immediately after the startling event. The court finds she was still operating under the incident. However, she perceived it such that she did not have an opportunity to reflect or deliberate."

3. Analysis

C.'s demeanor and her description of her emotional state, coupled with the alcohol she had consumed and its aftereffects, are sufficient to support the trial court's finding that she was still under the stress of the sexual assaults when she spoke to Carmen.

After the exam at UCLA Medical Center, C. felt numb and in shock. C. looked at the car floor during the entire ride home from the hospital with her cousin. She did not remember speaking at all. According to Carmen, C. looked "aged" after the exam. She cried during the ride home. Carmen asked her if defendant had raped her, and she replied, "Yes."

Even assuming that the shock subsided at some point in the evening of May 18, when C. spoke with Brenda and the firefighters, there is substantial evidence that the sexual assault exam again triggered the stress of the incident. She was crying and shaking during the exam, and she continued to cry on the way home. The trial court did

not abuse its discretion in finding that C. was under the stress of excitement caused by the sexual assault when she made her statement to Carmen.

Moreover, even assuming the trial court improperly admitted C.'s reply to Carmen, the error would be harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 26; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The jury heard testimony from others, not just Carmen, that C. accused defendant of raping her shortly after the incident occurred: the sexual assault examination nurse who testified that C. said the sex acts were forced, and Brenda who testified that C. said defendant had taken sexual advantage of her. That Carmen also recounted C.'s statement to the same effect when she was asked merely repeated what the jury had already effectively heard. We have no doubt the result at trial would have been the same even if the trial court had excluded the challenged statement.

D. Cumulative Error

Defendant argues that the cumulative effect of trial court errors deprived him of due process. We have found no cognizable errors, and so defendant's claim of cumulative error necessarily fails.

E. Custody Credits

Respondent notes that the trial court orally awarded defendant 166 days of presentence custody, consisting of 83 days of actual custody and 83 days of conduct credit but that the abstract of judgment reflects only 163 days of presentence custody credit. Respondent requests that we correct the abstract of judgment to match the oral pronouncement of judgment.

The court's computation was inaccurate. Although defendant had 83 days of actual custody, he is only entitled to 82 days of conduct credit, for a total of 165 days of presentence custody. (*People v. Chilelli* (2014) 225 Cal.App.4th 581, 591 [defendant is entitled to conduct credit at a rate of two days for every two days in presentence custody;

if defendant serves an odd number of days he does not receive credit for the remaining single day].) We order the abstract of judgment corrected accordingly.

DISPOSITION

Defendant's custody credit award is ordered corrected to show 83 days of actual custody and 82 days of conduct credit, for a total of 165 days of presentence custody. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting this correction and to deliver a copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

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