Filed 11/20/14 P. v. Esquivel 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ERIC ESQUIVEL, Defendant and Appellant.	B251846 (Los Angeles County Super. Ct. No. TA122124-01)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Judge. Affirmed with modifications.

Craig C. Kling, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan J. Kline and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Eric Esquivel was convicted, following a jury trial, of one count of assault with the intent to commit rape in violation of Penal Code section 220, subdivision (a)(1), and one count of unlawful driving or taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a). The trial court sentenced appellant to the upper term of six years in state prison for the assault conviction and a concurrent term of two years for the Vehicle Code conviction.

Appellant appeals from the judgment of conviction, contending there is insufficient evidence to support his conviction for assault with intent to commit rape. Respondent contends appellant's custody credits must be reduced and the abstract of judgment corrected to show that appellant was convicted by a jury.

We order the custody credits reduced and the abstract of judgment corrected, and affirm the judgment of conviction in all other respects.

FACTS

On February 17, 2012, around 5:30 a.m., 51-year-old B. B. went to get coffee at Tom's Burgers at the intersection of Martin Luther King Boulevard and Imperial Highway, in Lynwood. It was still dark outside. B. saw that the restaurant was closed, so she "walked towards her place of employment."

As she walked, B. saw appellant by a van. When she reached a corner, appellant grabbed her from behind and pushed her to the ground. B. landed on her knees. Appellant tried to pull down B.'s pants, using both hands. She was wearing sweatpants with an elastic waistband. B. held onto her pants with one hand to prevent appellant from lowering them. B. thought appellant wanted to rape her. She screamed. B. estimated the struggle with appellant lasted for two minutes.

Appellant heard someone coming and turned around. B. was able to break free, run to a house and go through a gate and close it. Appellant reached in and grabbed her breasts, then ran away.

B.'s niece called 911 on B.'s behalf. B. told the 911 operator that appellant "knocked me to the ground[.]" "He was going to do things to me, and I screamed." "He

said he was going to remove my pants . . . ." B. also told the operator that "he didn't tell me anything."

Around 5:45 a.m., Los Angeles County Sheriff's Deputies Edgar Bonilla and Salvador Ponce responded to an address on San Vicente Avenue in Lynwood, and spoke to B.

Around 6:00 a.m., Deputy Debbie Rocha was driving her patrol car northbound on Beechwood Avenue in Lynwood, when she heard tires screech and saw appellant get out of a car with his hands raised. Appellant was naked from the waist down. Deputy Rocha called for an assisting unit.

Deputies Bonilla and Ponce responded. Appellant was advised of, and waived, his Miranda[1] rights. He told Deputies Bonilla and Ponce that he had gone to a restaurant on Imperial. Appellant saw a lady walking on the street, and he pushed her down. He wanted to "feel her up" because she had a "big ass." Appellant said he was high on "meth," and that meth makes him "horny." According to the deputies, appellant displayed the objective symptoms of someone who was under the influence of methamphetamine.

The car which appellant exited was determined to have been stolen sometime after 9:00 p.m., from a location approximately one and a half miles from the location of the attack on B.

DISCUSSION

1. Intent to commit rape

Appellant contends the evidence is insufficient to show an intent to commit rape. He contends the evidence shows at most a sexual battery. We do not agree.

"In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is

---

[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] [I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210 [internal quotation marks omitted].)

Appellant knocked B. to the ground and attempted to pull down her pants. She held onto her pants and prevented him from pulling them down. He fled when there were sounds of someone approaching. B. estimated that the struggle lasted two minutes. Appellant was later apprehended by the police and told them he was "horny." It is more than reasonable to infer from these circumstances that appellant knocked the victim to the ground and attempted to pull the victim's pants down because he intended to rape her. Rape is the most obvious reason to remove a victim's pants.

Appellant contends correctly, that there is evidence that he said he wanted to "feel up" the victim who had a "big ass." There is, however, no evidence that he made any attempt to touch the victim on her bottom through her clothing or to insert his hands into her pants. While it is possible that appellant struggled with the victim for two minutes attempting to remove her pants simply to "feel" her up, it is a less obvious inference. Even assuming a jury could reasonably have found that appellant's intent was only to touch the victim on her bottom and so he had no intent to commit rape, that circumstance does not require reversal of the judgment. (*People v. Nelson*, *supra*, 51 Cal.4th at p. 210 ["if the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding"].)

Appellant contends that *People v. Greene* (1973) 34 Cal.App.3d 622 (*Greene*) and *People v. Mullen* (1941) 45 Cal.App.2d 297 (*Mullen*) show that there is insufficient evidence to support his conviction. In *Greene*, the defendant put his arm around the defendant's waist, said he "just wanted to play with" her and moved his hand up and down the victim's waist. The victim broke free and ran away. (*Greene, supra*, 34 Cal.App.3d at pp. 629, 650-655.) Touching a victim through her clothing in the waist area is a much less direct indication of an intent to commit sexual penetration of the victim than is violently attempting to remove the clothing of a victim which covers her genital area. Thus, the fact that the defendant's touching in *Greene* was not sufficient to show intent to commit rape is of no assistance in evaluating appellant's intent in attempting to remove B.'s pants.

The opinion in *Mullen*, *supra*, 45 Cal.App.2d 297, is likewise of no assistance.[2] The defendant in that case did remove the victim's clothing in order to touch her breasts and "private parts," but ultimately released her without raping her. The court held that "[w]hatever the extent and however rough the fondling of the woman, if her pursuer without fear of interruption voluntarily abandons his endeavor to ravish her sexual organs, then the force he employed was not an assault with intent to commit rape." (*Id*. at p. 300.) Here, appellant did not abandon his planes, but was interrupted.

Appellant also cites numerous cases in which the Court of Appeal found sufficient evidence to support a conviction for assault with intent to commit rape.[3] He contends all of those cases involve "significant" additional acts not present in this case. We do not

---

[2] Respondent notes that *People v. Mullen, supra*, 45 Cal.App.4th 297, has been severely criticized. (See *People v. Trotter* (1984) 160 Cal.App.3d 1217, 1222-1223 & fn. 1.) We agree with those criticisms. However, as we discuss, even if we take *Mullen* at face value, it is of no assistance to appellant.

[3] *People v. Bard* (1968) 70 Cal.2d 3; *People v. Nye* (1951) 38 Cal.2d 34; *People v. Dyser* (2012) 202 Cal.App.4th 1015; *People v. Leal* (2009) 180 Cal.App.4th 782; *People v. Dixon* (1999) 75 Cal.App.4th 935; *People v. Craig* (1994) 25 Cal.App.4th 1593; *People v. Bradley* (1993) 15 Cal.App.4th 1144; *People v. Martinez* (1985) 171 Cal.App.3d 727; *People v. Trotter* (1984) 160 Cal.App.3d 1217; *People v. Elder* (1969) 274 Cal.App.2d 381; *People v. Clifton* (1967) 248 Cal.App.2d 126.

agree that all the cases involve "significant" additional acts. Further, when an appellate court "decide[s] issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts." (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)

2. Custody credit

Respondent contends the trial court erroneously awarded appellant one extra day of custody credit. We agree.

The trial court found that appellant had 579 days of actual custody, and awarded him 87 days of conduct credit for a total of 666 days. Appellant was convicted of a violent felony and so his conduct credit is calculated at 15 percent. (§§ 667.5 subd. (c)(15); 2933.1.) Fifteen percent of 579 is 86.85, which must be rounded down to 86. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-817.) Thus, appellant's total award of presentence custody credits should be 665 days. We order the judgment modified and the abstract of judgment corrected to reflect this amount. (See *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 935-936 [receipt of excess presentence conduct credit is jurisdictional error].)

3. Abstract of judgment

Respondent contends that the abstract of judgment mistakenly shows that appellant was convicted by plea. Respondent is correct. Appellant was convicted by a jury. We order the abstract of judgment corrected to reflect this fact. (See *People v. Boyde* (1988) 46 Cal.3d 212, 256.)

DISPOSITION

The judgment is modified to award appellant 665 days of presentence custody credit. The abstract of judgment is ordered corrected to show 665 days of credit and to show that appellant was convicted by a jury. The clerk of the superior court is instructed

to prepare an amended abstract of judgment reflecting these changes and to deliver a copy 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

MINK, J.*

We concur:

TURNER, P.J.

MOSK, J.

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