Filed 10/2/18 P. v. Blackman CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CHANCE BLACKMAN, Defendant and Appellant.	B288142 (Los Angeles County Super. Ct. No. BA452577)

APPEAL from an a judgment of the Superior Court of Los Angeles County, David V. Herriford, Judge. Affirmed.

Vanessa Place, 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, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Chance Blackman contends that the trial court erred by concluding that it was required to impose consecutive sentences for his convictions for forcible oral copulation, in violation of Penal Code section 288a, subdivision (c)(2)(A),[1] and forcible rape, in violation of section 261, subdivision (a)(2). The two convictions arose from Blackman's conduct with one victim in a relatively short period of time, and Blackman argues that the offenses did not occur on "separate occasions" as defined under the mandatory consecutive sentencing provision of section 667.6, subdivision (d). We affirm.

FACTS AND PROCEEDINGS BELOW

On the night of December 12, 2016, R.R. went to stay at the apartment of her friend T.L. T.L.'s home was close to R.R.'s nursing school, where she had an appointment the next morning. R.R. had her period and was suffering from cramps and a migraine so she took a sleep aid shortly after she arrived and went to sleep on T.L.'s couch.

Early the next morning, T.L., who was not at home at the time, called R.R. and told her that Blackman and his girlfriend J.S. were coming over to take a shower. R.R. unlocked the door for Blackman and J.S., who went into the bathroom. Blackman then sat down near R.R.'s feet on the couch where she was lying. Blackman called J.S. in, and she took his clothes off and started performing oral sex on him. R.R. tried to get up from the couch, but she still felt drowsy from the sleep aid she had taken.

Blackman lay down next to R.R. on the couch, told J.S. to stop, and told R.R. to start performing oral sex on him. R.R. refused and started crying, but Blackman said he did not care about her tears, and said he would break her face. J.S., whose

---

[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

face appeared swollen with an injury, told R.R., "Just do what he say[s]. You see my face." Blackman told J.S., "Go get my gun." R.R. complied and started performing oral sex on Blackman. After a while, Blackman picked R.R. up, laid her on her back, and took off her pajamas. R.R. told Blackman she had her period, but Blackman said she was lying because she was wearing a thin menstrual pad which did not look full. Blackman said he should break R.R.'s face for lying to him. Blackman held R.R. down and penetrated her vagina with his penis until he ejaculated.

When Blackman was finished, R.R. got up and put her pants back on. She told Blackman she had to leave to go to school. Blackman said he would hurt her if she told anyone. R.R. went to a friend's house and told her what happened. The friend called the police, who took R.R. to a hospital.

An information charged Blackman with (1) one count of forcible oral copulation, in violation of section 288a, subdivision (c)(2)(A); (2) one count of forcible rape, in violation of section 261, subdivision (a)(2); (3) one count of injuring a spouse, cohabitant, fiancee, girlfriend, or child's parent, in violation of section 273.5, subdivision (a); and (4) one count of dissuading a witness from reporting a crime, in violation of section 136.1, subdivision (b)(1).

Blackman testified in his own defense at the first trial of the case. He claimed that he had been paying R.R. for sex approximately once a week for the past five weeks. On December 13, 2016, he arranged to enact a rape fantasy scenario with R.R. He denied hitting J.S. In an interview with police shortly after the event, Blackman did not mention the rape fantasy story.

The jury in Blackman's first trial convicted him on count 3, injuring his girlfriend J.S., but was unable to reach a verdict on the other charges. The trial court declared a mistrial on counts 1, 2, and 4. After a second trial, the jury convicted Blackman of all three counts.

The trial court sentenced Blackman to a total of 18 years in prison, as follows: On count 1, forcible oral copulation, the upper term of eight years; on count 2, forcible rape, the upper term of eight years to be served consecutively; on count 3, injury to a spouse, cohabitant, or girlfriend, the low term of two years to be served consecutively; and on count 4, dissuading a witness, the middle term of two years to be served concurrently.

DISCUSSION

Blackman contends that the trial court erred by imposing consecutive sentences for counts 1 and 2. He argues that the evidence at trial did not show that the forcible oral copulation and forcible rape occurred on "separate occasions" (§ 667.6, subd. (d)), and that, consequently, the court was not required to impose consecutive sentences for the two offenses. We disagree.

Section 667.6 imposes sentencing requirements for certain sex offenses, including the crimes of which Blackman was convicted in counts 1 and 2. (See § 667.6, subds. (e)(1) & (e)(7).) When imposing sentence for these offenses, a "full, separate, and consecutive term shall be imposed for each violation . . . if the crimes involve separate victims or involve the same victim on separate occasions." (§ 667.6, subd. (d).) The statute includes guidance on how to determine whether two offenses were committed on separate occasions. In deciding this issue, "the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (*Ibid.*) When reviewing a trial court's decision on this issue, "we will reverse 'only if no reasonable trier of fact could have decided

the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior.' " (*People v. King* (2010) 183 Cal.App.4th 1281, 1325, quoting *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 (*Garza*); accord, *People v. Pena* (1992) 7 Cal.App.4th 1294, 1314 (*Pena*).)

The trial court described the question as "a very close issue," but concluded that the offenses in counts 1 and 2 happened on separate occasions. The court reasoned as follows: "What we have in this case, I tend to agree with the People insofar as the actions between the two sexual assaults tend to suggest a certain amount of reflection. . . . [A]t least a determination in the mind of the perpetrator whether or not he should proceed with the assault . . . . I would note although it's a small amount of time that passed between the two incidents, and there is an argument that it's all part of one continuous action, we have the cessation of the oral copulation. Then we have clothing being removed. And then the whole incident of the pad and the words that were said regarding the fact that she was wearing the pad. Followed by, as [defense counsel] said, somewhat ambiguous what was said at this time. There are all types of things said as to what that could have been. But, nevertheless, there were words spoken. And so, I think given the facts and circumstances, I would have to find that these are separate occasions and that the mandatory provisions of [Penal Code, section] 667.6[, subdivision](d) are applicable. I think the situation is closer to *Garza*[, *supra*, 107 Cal.App.4th 1081] than it is to *Pena*[, *supra*, 7 Cal.App.4th 1294]."

The cases the trial court cited, *Garza* and *Pena*, are illustrative of the distinction courts draw with respect to this issue. In *Pena*, the defendant "pushed [the victim] into her home and onto a rollaway bed in her living room where he raped her. Subsequently, appellant got off of her, twisted her by the legs violently, and orally copulated her." (*Pena*, *supra*, 7 Cal.App.4th at p. 1299.) The court held that the defendant's assaults did not

occur on separate occasions because "nothing in the record before this court indicates *any* appreciable interval 'between' the rape and oral copulation. After the rape, appellant simply flipped the victim over and orally copulated her. The assault here was also continuous. Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior." (*Id.* at p. 1316.)

In *Garza*, by contrast, the court upheld the trial court's finding that the defendant's offenses occurred on separate occasions because, "[a]fter defendant forced the victim to orally copulate him, he let go of her neck, ordered her to strip, punched her in the eye, put his gun to her head and threatened to shoot her, and stripped along with her. That sequence of events afforded him ample opportunity to reflect on his actions and stop his sexual assault, but he nevertheless resumed it." (*Garza*, *supra*, 107 Cal.App.4th at p. 1092.)

We agree with the trial court that the forcible oral copulation and forcible rape occurred on different occasions for purposes of section 667.6, subdivision (d). According to R.R.'s testimony, there was a break between the two offenses when Blackman pulled off her pajamas, saw the menstrual pad, R.R. told him she had her period, and he accused her of lying and threatened to break her face. It is irrelevant that the gap between the two offenses did not last long, or that Blackman maintained his ability to attack R.R. the entire time and did not move to a new location. What is relevant is that there was a sufficient break between the two acts to give him the opportunity to reflect, but instead of stopping he chose to continue his attack. (See § 667.6, subd. (d); *People v. Jones* (2001) 25 Cal.4th 98, 104.)

Blackman contends that the trial court erred because "there is no way of telling when the sexual acts involving R.R., as opposed to J.S., transpired or how long each took, and certainly no proof that there was an interruption between acts meaningful enough to provide an opportunity to stop the assault."

In essence, Blackman asks us to reweigh the facts of the case. But that is not our role. We review the trial court's factual findings only for substantial evidence. (See *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230.) Although R.R. did not remember all the details of Blackman's attack, her testimony was clear enough to support the trial court's conclusion that the two offenses occurred on separate occasions.

DISPOSITION

The judgment of the trial court is affirmed.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.