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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. LESTER C. BANNER, Defendant and Appellant.	B261604 (Los Angeles County Super. Ct. No. YA090456)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed in part, reversed in part, and remanded with directions.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Lester Banner (defendant) of two criminal offenses: oral copulation of an unconscious person and sexual penetration by foreign object of an unconscious person. Both charges stemmed from an incident in which defendant approached victim T.S., who was asleep in a bed, and began penetrating her vagina with his fingers and licking her rectal area. The trial court sentenced defendant to consecutive terms of imprisonment for the two convictions, and it ordered him to pay restitution to reimburse the California Victim Compensation Board for a payment it made so T.S. could relocate to another residence after the sexual assault. We consider whether there was sufficient evidence that T.S. was "unconscious of the nature of the act[s]," as required by the statutes of conviction; whether the court erred in imposing consecutive rather than concurrent prison terms; and whether there are grounds to reverse the restitution order.

I. BACKGROUND

T.S. met a man named Danny through an internet dating service. On their second date, in February 2014, the two met in the evening outside what Danny told her was his brother's apartment. T.S. was also under the impression that Danny and his brother were roommates. When T.S. and Danny entered the apartment, defendant was sitting in the living room watching television; Danny introduced defendant as his brother. T.S. and Danny sat down in the dining room, had drinks, and began watching a movie on a laptop computer. Later, they proceeded to a bedroom that T.S. assumed was Danny's, and after watching a few minutes more of the movie, the two had sex and then fell asleep in bed.

Early the next morning, T.S. was still asleep in the bed, lying on her stomach and wearing only a t-shirt and bra. By this time, Danny had left the apartment but T.S. was unaware of this. T.S. felt someone putting his fingers in and out of her vagina. Thinking she was dreaming, she also felt "somebody take my buttocks, spread it apart and they were licking me and then they were putting their fingers in and out of me while they were licking me." T.S. was "not woke" at that point but she was cognizant of the actions and thought it was Danny licking her and putting his finger in her vagina; she "was still waking up" and her eyes were closed. T.S. next felt the person she thought was Danny pull her to the edge of the bed, flip her onto to her back, spread her legs, and say "open your eyes." Upon opening her eyes, she saw defendant, fully nude, not Danny. Defendant tried to insert his penis into T.S.'s vagina, and she told him to "get the fuck off me." Defendant complied, and T.S. grabbed her jeans, put them on, collected some of her belongings (others were left behind in her haste), and left the apartment. She drove a short distance away and called 911 to report what had happened.

The District Attorney filed an information charging defendant with violating Penal Code section 288a, subdivision (f),[1] oral copulation of an unconscious person, and section 289, subdivision (d), sexual penetration of an unconscious person with a foreign object (his finger). A jury returned guilty verdicts following the presentation of evidence at trial, and the trial court sentenced defendant to the high term of eight years in prison for the oral copulation conviction plus two years in prison for the

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

penetration conviction, to be served consecutively. In deciding to impose consecutive rather than concurrent sentences, the court found the crimes "were separate sexual acts although it was a single victim[,] and they required separate behavior as well as intent . . . ." In addition, the court imposed two prior prison term enhancements (§ 667.5, subd. (b)) and struck two others, which resulted in an aggregate sentence of 12 years in state prison.

Defendant noticed an appeal from the convictions and sentence. Several months later, the trial court held a hearing to consider whether to require defendant to pay $2,000 in restitution. The prosecution presented documentation to the court indicating the California Victim Compensation Board (the Board) paid that amount to relocate T.S. to another residence after defendant's sexual assault because she feared defendant could find her address, either directly or through his friend Danny. Counsel for defendant initially objected ordering restitution, arguing there was no evidence either defendant or Danny knew where T.S. lived. But later in the hearing, after the court offered to schedule a hearing at which the prosecution would bring before the court any information the Board considered in determining whether T.S.'s relocation claim should be paid, defense counsel demurred and submitted without further argument. Expressly noting defense counsel had submitted, the court then ordered defendant to pay restitution in the amount requested.

Defendant noticed an appeal from the court's order to pay restitution, and we consolidated that appeal with his earlier appeal of his conviction and sentence. We consider all of defendant's contentions of error in this opinion.

II. DISCUSSION

We affirm defendant's convictions but reverse one aspect of the sentence imposed. Under the applicable standard of appellate review, there is substantial evidence T.S. was "unconscious or asleep" within the meaning of the charged criminal statutes when defendant penetrated and licked her while asleep and before she was fully awake. However, the court's decision to impose consecutive not concurrent sentences for both crimes, resting on its finding the two crimes were separate acts committed with separate intent, was an abuse of discretion. We accordingly remand for resentencing, but only on that issue because we agree defendant's challenge to the restitution award is meritless.

A. Substantial Evidence Supports Defendant's Convictions

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." [Citation.] 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." [Citation.] 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." [Citation.]'" (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.) Unless physically impossible or inherently

improbable, the testimony of a single witness can suffice to support a conviction. (*People v. Jones* (2013) 57 Cal.4th 899, 963-964; *People v. Robertson* (1989) 48 Cal.3d 18, 44; CALCRIM No. 301.)

Section 288a, subdivision (f) and section 289, subdivision (d) criminalize (respectively) oral copulation and sexual penetration committed on a person who a defendant knows to be "unconscious of the nature of the act" being committed. The statutes define "unconscious of the nature of the act" to mean, among other things, that the victim is "incapable of resisting because the victim . . . [¶] . . . [w]as unconscious or asleep." (§§ 288a, subd. (f)(1), 289, subd. (d)(1).)

Reviewed in the light most favorable to the verdict, T.S.'s testimony is sufficient to establish she was, in the language of the statutes, incapable of resisting because she was unconscious or asleep. Defendant asserts the convictions are infirm because "[T.S.] was aware, knowing, perceiving and cognizant of each of the acts." This argument fails for two reasons.

First, the statutory text does not require proof that the victim remained fully asleep or unconscious throughout the act, only that the sleep or lack of consciousness render the victim incapable of resisting. Here, a rational factfinder could rely on T.S.'s testimony to conclude the reason she was unable to resist defendant is because she was fully asleep at the moment defendant first began penetrating and licking her.

Second, as defendant acknowledges in his opening brief, "'[i]t is settled that a victim need not be totally and physically unconscious in order for the statute[s] . . . to apply.'" (*People v. Lyu* (2012) 203 Cal.App.4th 1293, 1300 (*Lyu*); *People v. Ogunmola* (1987) 193 Cal.App.3d 274, 279; see also *People v. Howard* (1981)

117 Cal.App.3d 53, 54-55 [rejecting principle that victim must be totally unconscious and affirming convictions for sodomizing and orally copulating a mentally disabled man "with the mentality of five to seven-year olds"].) A rational jury could rely on T.S.'s testimony, particularly her statements that she thought she was dreaming and still waking up at the time defendant assaulted her, to conclude she was in a hypnopompic state, and incapable of resisting, until the point at which defendant pulled her to the edge of the bed and told her to open her eyes. (See *People v. Howard*, *supra*, 117 Cal.App.3d at p. 55 [victim need not have "a total unawareness that the physical act is being performed"]; see also Webster's 3d New Internat. Dict. (2002) p. 1114 [defining hypnopompic as "of, relating to, or associated with the semiconsciousness preceding waking"].) By that point, the crimes as charged had already been completed.[2] (§ 289, subd. (k) [sexual penetration is the act of causing penetration, however slight, of the genital opening]; *People v. Dement* (2011) 53 Cal.4th 1, 41 [any contact, however slight, between mouth and sexual organ constitutes oral copulation], disapproved on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Substantial evidence supports the jury's verdict.

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[2] The cases defendant cites to argue the contrary, *Lyu* and *People v. Stuedemann* (2007) 156 Cal.App.4th 1, are inapposite. In both cases, the victims—fully awake, without any suggestion of somnolence—were sexually assaulted during the course of what was supposed to be just a massage session. (*Lyu*, *supra*, 203 Cal.App.4th at pp. 1295-1296; *People v. Stuedemann*, *supra*, at pp. 4-5.) Neither case has any bearing on the evidence here, which involved a victim who was unable to resist because she was asleep and, as she put it, "still waking up."

B. The Trial Court Erroneously Imposed Consecutive Sentences

"When a person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively." (§ 669, subd. (a).) Rule 4.425 of the California Rules of Court enumerates criteria for courts to consider when deciding whether to impose a consecutive or concurrent sentence (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262-1263), and "[o]nly one criterion is necessary to impose a consecutive sentence" (*People v. King* (2010) 183 Cal.App.4th 1281, 1323 (*King*)).

Rule 4.425 specifies three such criteria related to a defendant's offense conduct: whether "[t]he crimes and their objectives were predominantly independent of each other," whether "[t]he crimes involved separate acts of violence or threats of violence," or whether "[t]he crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)-(3).) In addition, rule 4.425 permits a trial court to rely on "[a]ny circumstances in aggravation or mitigation" to impose a consecutive sentence except a fact used to impose an upper term sentence, a fact otherwise used to enhance a defendant's prison sentence, or a fact that is an element of the crime. (Cal. Rules of Court, rule 4.425(b)(1)-(3).)

A trial court has broad discretion when deciding whether sentences should be imposed concurrently or consecutively, and we review such determinations for abuse of that discretion. (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) But while deferential, the abuse of discretion standard of review "is not empty." (*People v. Williams* (1998) 17 Cal.4th 148, 162 [courts must ask "whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts"].)

The trial court's decision to sentence consecutively on the two counts of conviction here falls outside the bounds of reason. The trial court's rationale for consecutive sentences, that defendant's actions comprised "two separate sexual acts . . . and they required separate behavior as well as intent," does not square with either the rule 4.425 criteria or T.S.'s testimony. Rule 4.425 does permit a trial court to consider whether the crimes involved separate acts of violence, but here the crimes involved no acts of violence, at least as defined in statute (no element of force was required). Nor is there any basis to conclude defendant's crimes and their objectives were predominantly independent or committed at different times or separate places—either of which would support consecutive sentencing. As the prosecution conceded during the sentencing hearing, defendant's oral copulation and digital penetration acts "occurred rather close in time, if not simultaneously." We agree the evidence shows the acts did occur simultaneously or near-simultaneously; T.S. testified on direct examination that she "felt somebody take my buttocks, spread it apart and they were licking me and then they were putting their fingers in and out of me while they were

licking me."[3] If there were any interval between the acts at all (which we doubt), it was a matter of just seconds, and that cannot be the foundation for imposing consecutive sentences under the rule 4.425 criteria.

In arguing whether defendant's sentences should have run consecutively or concurrently, both defendant and the Attorney General also analogize to cases decided under section 667.6. Our review of these cases only reinforces our conclusion that it was error to sentence defendant to consecutive terms.

Section 667.6, subdivision (d) requires a trial court to impose consecutive sentences, under specified circumstances, for violent sex offenses enumerated in the statute. (*People v. Sasser* (2015) 61 Cal.4th 1, 9 ["In 1979, the Legislature enacted section 667.6, which applies to defendants convicted of certain forcible sex offenses"].) Strictly speaking, section 667.6 is not applicable in this case because defendant was not convicted of one of the enumerated violent sex crimes. But the rule section 667.6 establishes for when consecutive sentencing is required for multiple sex offenses—when the offenses "involve the same victim on separate occasions"—has some analytical bearing on the question we decide. As the statute itself explains: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, 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

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[3] On cross-examination, T.S. similarly testified she "felt someone putting their fingers in my vagina licking me between my—the area between my buttocks and my vagina . . . ."

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." (§ 667.6, subd. (d); *People v. Jones* (2001) 25 Cal.4th 98, 104 [appellate courts have not required a break of any specific duration or change in physical location in applying the "separate occasions" rule in section 667.6].)

The section 667.6 rule does not militate in favor of consecutive sentencing here. Defendant engaged in digital penetration and oral copulation with no interval affording a reasonable opportunity for reflection—his acts occurred, *at most*, within a matter of seconds. (See *People v. Corona* (1988) 206 Cal.App.3d 13, 18.)

By contrast, this is not a case like *King*, *supra*, 183 Cal.App.4th 1281, the decision cited by the Attorney General to argue defendant's crimes should be treated as separate occurrences warranting consecutive sentencing. The crimes in *King* took place within two minutes of one another, but the defendant stopped penetrating the victim with his fingers when he saw lights and a car drive by, only resuming his act with his other hand after "look[ing] around uneasily." (*Id.* at p. 1325.) There is no similar evidence that defendant paused for any appreciable length of time during his two crimes. Other decisions that hold consecutive sentences were proper under section 667.6, subdivision (d) are likewise factually inapposite. (See, e.g., *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092-1093 [oral copulation and digital penetration separated by the defendant's order that the victim strip, punching the victim, and threatening the victim with a gun]; *People v. Plaza* (1995) 41 Cal.App.4th 377,

380-381 [forced oral copulation in bathroom followed by digital penetration in bedroom, among other crimes].)

The trial court's conclusion that consecutive sentences were justified because defendant's crimes were separate acts was therefore error. Moreover, we see no adequate basis on the record to conclude the trial court would have nonetheless relied, consistent with California Rules of Court, rule 4.425(b), on one or more aggravating factors to impose consecutive sentences. We therefore hold the court's error was prejudicial and a limited remand to reconsider the issue of concurrent or consecutive prison terms is required. Nothing in this opinion precludes the trial court from identifying and relying on an appropriate aggravating factor, if one exists, in deciding whether to impose consecutive prison terms upon resentencing.

C. The Restitution Award Was Proper

Where a victim suffers economic loss as the result of a defendant's conduct, the court must require the defendant to pay restitution. (§ 1202.4, subd. (f).) The standard of review we apply when a defendant challenges an order to pay restitution is the abuse of discretion standard. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498.) "'When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court.' [Citations omitted.]" (*Id.* at p. 499.) Reimbursement of relocation expenses are among those economic damages that may be compensated by restitution. (§ 1202.4, subd. (f)(3)(I); *People v. Mearns*, *supra*, at p. 501.)

At the restitution hearing, the prosecution submitted documentation evidencing a $2000.00 payment from the Board to

relocate T.S. to another residence based on her fear that defendant would track her down at her former residence. Defendant asserted that there was no evidence defendant knew or could find out where victim lived and, thus, no reason to believe T.S.'s relocation was attributable to his conduct. The trial court disagreed, finding T.S. relocated because she felt unsafe and was fearful that defendant could ascertain her location.

The prosecutor also emphasized, and the court agreed, that the Board had reviewed T.S.'s relocation expense claim—on evidence perhaps not in the parties' possession—and determined it was a valid claim and she was entitled to the money. Defendant then declined an offer by the court to schedule a hearing on the Board's determination, at which the prosecution could produce any information the Board considered. By declining the offer, and by failing to offer any evidence of his own that would suggest the Board's determination was improper, defendant cannot be heard to challenge the restitution order. (§ 1202.4, subd. (f)(4)(A) ["If, as a result of the defendant's conduct, the Restitution Fund has provided assistance to or on behalf of a victim . . . the amount of assistance provided shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered"]; *People v. Lockwood* (2013) 214 Cal.App.4th 91, 101 [presumption affects the burden of proof and imposes upon defendant the burden to prove the nonexistence of the presumed fact]; cf. *People v. Clark* (2016) 63 Cal.4th 522, 547, 550 [defendant forfeited issue when court raised the issue at a hearing and defense counsel asked the court to take the motion off calendar].)

DISPOSITION

Defendant's convictions are affirmed. Defendant's sentence is reversed, and the matter is remanded for resentencing consistent with this opinion.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.*

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