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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADEBOLA ADEKOLA AIYEDOGBON,

Defendant and Appellant.

A136968

(San Mateo County
Super. Ct. No. SC073619)

Defendant Adebola Aiyedogbon was charged with one count of raping an intoxicated person, S.F., and three counts arising out of an alleged rape of another woman.¹ All four charges were jointly tried. A jury found him guilty of raping S.F., but it deadlocked on the rape count involving the other woman and acquitted him of the remaining two counts. The trial court sentenced him to six years in state prison, suspended execution of the sentence, and placed him on three years of probation with the condition that he serve one year in county jail.

On appeal, Aiyedogbon argues that his conviction must be reversed because the record lacks sufficient evidence that S.F.'s intoxication left her without the capacity to consent to the sexual encounter. He also claims the record contains a clerical error. We conclude there is substantial evidence to support the conviction, but we agree that the

¹ The count involving S.F. was brought under Penal Code section 261, subdivision (a)(3). The counts involving the other victim were brought under Penal Code sections 220, subdivision (a) (assault with the intent to commit forced rape or oral copulation), 261, subdivision (a)(2) (rape by force), and 288a, subdivision (c)(2) and 664 (attempted forced oral copulation). All further statutory references are to the Penal Code.

error he identifies requires correction. Accordingly, we order the error corrected but otherwise affirm the judgment.

I. FACTS

The events both leading up to and immediately following the sexual interaction between Aiyedogbon and S.F. were largely uncontested. In recounting the facts, we acknowledge the areas of relevant dispute while viewing the facts in the light most favorable to the verdict.

A. *The Party.*

Early on the morning of May 8, 2011, after getting off work at midnight, S.F. returned to her house in San Bruno for a party she had arranged with some female friends. She had invited K.E., whom she had been dating for several weeks, and some other male acquaintances. While waiting for guests to arrive, S.F. and her friends began drinking and socializing.

K.E. and a group of men, including Aiyedogbon, arrived at S.F.'s home sometime before 1:30 a.m. Although not personally invited to the party by S.F., Aiyedogbon drove K.E. and the other men from San Francisco to her house. K.E. testified that he had met Aiyedogbon only once, and they had "never hung out before."

After arriving in San Bruno, the men purchased alcohol from a corner store and went to the party. S.F. testified she recognized Aiyedogbon from the college she attended because he had tried to talk to her a few times on campus, and she had declined his advances. When the men arrived, S.F. introduced herself to Aiyedogbon and told him she remembered him from school. She did not recall paying any attention to him for most of the rest of the evening, and K.E. never saw the two speak to each other.

S.F. testified that she drank alcohol and smoked marijuana throughout the party, and she spent most of the night with K.E. Sometime during the night, she had sex with K.E. in the laundry room. Later, around 4:30 a.m., she and K.E. went upstairs to her bedroom. S.F. testified that she and K.E. then had sex again. K.E. generally corroborated S.F.'s account of these events.

S.F. fell asleep, and K.E. covered her with a blanket and went downstairs. S.F. testified that right before falling asleep, she felt “[a] lot” of “the effects of the alcohol.” She fell asleep “partly because [she] was tired and partly because [she] was intoxicated.”

B. S.F.’s Account of the Rape.

S.F. testified that the next thing she remembered after falling asleep was waking up with Aiyedogbon on top of her. She was lying on her back and he was holding both of her arms down, and she knew he was having sex with her because she could feel his penis in her vagina and “it hurt.” She tried to push him off and get away, but she was “too weak.” She repeatedly told him to stop and get off her, but he continued having sex with her.

S.F. testified that a couple minutes later, Aiyedogbon stopped, got off of her, and began putting on his clothes. As he was dressing, S.F. grabbed a blanket and ran downstairs. Crying, she yelled that Aiyedogbon had raped her, and one of her friends called the police. A San Bruno police officer who responded to S.F.’s house around 5:30 a.m. observed that S.F.’s “level of intoxication” was “[m]oderate to heavy.”

C. Aiyedogbon’s Interview with Police.

Within a week of the incident, San Bruno police interviewed and arrested Aiyedogbon. He did not testify at trial, but the video recording of the interview was played for the jury.

During the interview, Aiyedogbon recalled being “drunk as hell” at the party. He initially claimed he remembered having sex with a woman but not who she was. He then stated, however, that after K.E. and S.F.—whom he did not know by name—had sex, K.E. approached him and said that S.F. was upstairs waiting for Aiyedogbon. K.E. denied this at trial.

Aiyedogbon reported that he went upstairs and found S.F. lying in bed, naked. He said she was “awake” but also “drunk” and “incoherent.” He claimed they began kissing, and he then took off his clothes and they had “consensual” sex. He believed she consented because she was on top of him, was kissing him back, and told him “it’s good.” He denied ever being on top of her while she was lying on her back.

According to Aiyedogbon, after about 10 to 15 minutes of sexual activity, S.F.'s mood changed drastically. At that point, S.F. became agitated and said, " 'Oh, fuck no!' " He theorized that she began sobering up, realized that he was not her boyfriend, and became angry.

Aiyedogbon claimed that as soon as S.F. said " 'no,' " he stopped having sex with her. He agreed that after he left the room, she ran down the stairs wrapped in a blanket and said he had raped her. He said he denied her accusations and left the party.

II. DISCUSSION

A. *Substantial Evidence Supports Aiyedogbon's Conviction for Rape of an Intoxicated Person.*

Aiyedogbon argues that the record contains insufficient evidence that S.F. was unable to legally consent due to intoxication, violating his federal and state due process rights.² We disagree.

Rape of an intoxicated person consists of "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [¶] . . . [¶] [w]here [the] 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).) Accordingly, a conviction of this crime requires proof of four elements: (1) the defendant had sexual intercourse with the victim; (2) the defendant and the victim were not married at the time of the intercourse; (3) the effect of an intoxicating, anesthetic, or controlled substance prevented the victim from resisting; and (4) the defendant knew or reasonably should have known that the effect of such substance prevented the victim from resisting. (§ 261, subd. (a)(3); CALCRIM No. 1002.)

² In the course of his argument, Aiyedogbon also claims he was prejudiced by the joinder of the counts involving the other victim because the jury could have impermissibly relied on the prosecution's characterization of him as a predator to convict him of raping S.F. He does not contend that joinder was improper, however, and whether any prejudice resulted from it does not bear on whether there was substantial evidence to support his conviction of raping S.F.

Aiyedogbon challenges the sufficiency of the evidence to prove the third element, prevention of resistance.³ The third element is satisfied if the victim is prevented from resisting sexual intercourse because he or she is too intoxicated to give legal consent, which in turn requires an inability “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.” (*People v. Giardino* (2000) 82 Cal.App.4th 454, 466 (*Giardino*)). The issue whether a person “possessed sufficient mental capacity to give legal consent despite her intoxication is a question of fact for the jury.” (*Id.* at p. 470.)

In evaluating this claim, “ ‘we review the whole record to determine whether . . . [there is] substantial evidence to support the verdict . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence.’ ” (*People v. Manibusan* (2013) 58 Cal.4th 40, 87.) “Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence.” (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Aiyedogbon relies on *Giardino, supra*, 82 Cal.App.4th 454 to argue that S.F. could legally consent at the time of the incident and was therefore not “prevented from resisting.” *Giardino* reversed convictions for rape and oral copulation by intoxication because the trial court did not define the statutory words “prevented from resisting” after the jury requested clarification of the phrase’s meaning. (*Id.* at pp. 458, 464-467, 470-471.) The Court of Appeal noted that the statutory language “was not clear,” as it

³ To the extent Aiyedogbon also challenges the sufficiency of the evidence to prove the fourth element, he does not provide any separate argument as to why that element was not met.

“suggests that the factual issue is whether the intoxicating substance prevented the victim from physically resisting” instead of “whether the victim’s level of intoxication prevented him or her from exercising judgment.” (*Id.* at p. 466.) The court concluded the instructional error was prejudicial because there was evidence in the record from which the jury could have concluded that the victim was capable of exercising reasonable judgment, including her objection to using an amyl nitrite inhalant the defendant tried to force on her, her ability to dress herself and walk down stairs unassisted, and her amicable association with the defendant and another perpetrator the next day. (*Id.* at pp. 469-470.)

Aiyedogbon claims that S.F. was capable of exercising reasonable judgment because she possessed motor skills and exhibited cognitive abilities similar to those of the victim in *Giardino, supra*, 82 Cal.App.4th 454. *Giardino* did not hold, however, that such motor skills and cognitive abilities necessarily establish a victim’s capability to legally consent. Rather, the Court of Appeal discussed this evidence in the context of assessing the prejudice resulting from the instructional error at issue, and it merely held that the jury *could* have relied on that evidence to conclude the victim had the capacity to give legal consent. (*Id.* at pp. 469-470.)

Here, in contrast, the trial court gave CALCRIM No. 1002, which incorporates *Giardino, supra*, 82 Cal.App.4th 454 by instructing that “to give legal consent[,] a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, [its moral] character and probable consequences.” (CALCRIM No. 1002; *Giardino*, at pp. 466-467; see also *People v. Smith* (2010) 191 Cal.App.4th 199, 205.) Although there was some evidence that S.F. had a measure of control over herself, there was substantial other evidence that she did not have the capacity to give legal consent. She testified, and other witnesses corroborated, that she drank alcohol and smoked marijuana throughout the night and became intoxicated. She described falling asleep at least in part due to her intoxication and not awakening until Aiyedogbon was having sex with her, strongly suggesting she did not have the capacity to give legal consent at the time the intercourse began. Even

Aiyedogbon himself told police that S.F. was very drunk and incoherent when he approached her in the bedroom.

Aiyedogbon also claims the jury improperly relied on speculation to determine that intoxication prevented S.F. from resisting because there was no evidence introduced on certain issues. First, he argues that expert testimony and forensic evidence were required to prove S.F.'s level of intoxication, establish that S.F. could not resist solely due to intoxication and not also because of her tiredness, and explain how S.F. could be incapable of legally consenting while at the same time exhibiting certain motor skills. But Aiyedogbon does not cite any authority for his assertion that expert testimony or forensic evidence is required in cases such as this one to establish the victim lacked capacity to legally consent, and we are aware of none. It is instructive that *Giardino* did not cite forensic evidence or expert testimony in its discussion of what evidence a jury may rely on to conclude a victim was sufficiently intoxicated. (*Giardino, supra*, 82 Cal.App.4th at pp. 466-470.) Indeed, the Court of Appeal specifically determined there was “evidence from which the jury could have concluded that the victim was not capable of exercising reasonable judgment,” yet the only evidence discussed in the opinion was testimony from the victim and other lay witnesses. (*Id.* at pp. 467-470; see also *People v. Williams* (1992) 3 Cal.App.4th 1326, 1332 [lay opinion on “another’s state of intoxication” permissible “when based on the witness’s personal observations of . . . commonly recognizable signs” of intoxication].) There was sufficient evidence that S.F. lacked the capacity to give legal consent despite the absence of expert testimony or forensic evidence related to her intoxication.

Second, Aiyedogbon claims there was “no evidence of physical injury from forced sex” or expert testimony to suggest S.F. was unconscious at the time. Although force is an element of some other forms of rape, it is not an element of rape of an intoxicated person. (*Giardino, supra*, 82 Cal.App.4th at pp. 461-462; § 261, subd. (a)(3); cf. § 261, subd. (a)(2).) Unconsciousness is not an element either. (§ 261, subd. (a)(3); cf. § 261, subd. (a)(4); see also *Giardino*, at pp. 462-463.) Thus, no such evidence was required.

Finally, Aiyedogbon challenges S.F.'s credibility at length. But any credibility issues and evidentiary conflicts that existed were properly resolved by the jury, and we cannot revisit those determinations on appeal. (See *People v. Maury*, *supra*, 30 Cal.4th at p. 403.) We conclude that sufficient evidence supports his conviction for rape of an intoxicated person.

B. An Error in the April 12, 2012 Minute Order Requires Correction.

Aiyedogbon argues there is a clerical error in the minute order from the sentencing hearing. The Attorney General concedes the error, and we agree that it should be corrected.

The April 12, 2012 minute order states, “ALL REMAINING COUNTS DISMISSED. REASON: NEGOTIATED PLEA.” It is true that during the sentencing hearing, Aiyedogbon agreed to waive his rights under *People v. Harvey* (1979) 25 Cal.3d 754 in exchange for the dismissal of a pending, unrelated misdemeanor charge. The prosecutor also moved to dismiss the remaining count involving the other victim, but on the basis that it resulted in a hung jury, not as part of a plea agreement with Aiyedogbon. Thus, the statement that all remaining counts were dismissed by way of a negotiated plea was inaccurate. We may order this clerical error corrected so that the record will “ ‘reflect the true facts’ ” (*People v. Mitchell* (2001) 26 Cal.4th 181, 185), and we adopt Aiyedogbon’s suggestion that the second sentence be stricken.

III.
DISPOSITION

The phrase “REASON: NEGOTIATED PLEA” is ordered stricken from the April 12, 2012 minute order. The judgment is otherwise affirmed.

Humes, P.J.

We concur:

Margulies, J.

Banke, J.