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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JARIAN ISAAC TILLMAN,

Defendant and Appellant.

C068695

(Super. Ct. No. 10F04124)

Defendant Jarian Isaac Tillman was a family friend of the 12-year-old victim when he twice forced her to orally copulate him.

The first time was when the victim was sitting on the couch in the living room watching television. Defendant started asking her questions about sex. He then pulled down his pants, forced the victim's mouth open, and put his penis inside. Defendant prevented her from getting off the couch by putting his hands on her shoulders.

The second time was shortly after the first. The victim was trying to go outside to tell her mother what defendant had just done, but defendant grabbed her hand, took her into her

bedroom, and made her sit on the bed. He then used one hand to open her mouth and the other to stick his penis inside her mouth.

A jury found defendant guilty of two counts of oral copulation by force or fear. Defendant appeals from the resulting conviction, raising contentions relating to the sufficiency of evidence, the instructions, and the fines and fees. Disagreeing with these contentions, we affirm.

DISCUSSION

I

There Was Sufficient Evidence Defendant Used Force To Orally Copulate The Victim

Defendant contends there was insufficient evidence he used force for the victim to orally copulate him, which violated his right to due process.¹

"[T]he 'force' required to commit a forcible lewd act . . . [must] be substantially different from or substantially greater than the physical force inherently necessary to commit a [nonforcible] lewd act" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1027.) An example of sufficient force includes the force necessary to prevent a victim from getting away. (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1307.)

¹ The title of defendant's argument focuses on the lack of force. In the body of the argument, defendant focuses on the lack of force, but he also discusses the lack of duress, fear, violence and menace. Since there was sufficient evidence of force, we need not discuss the others.

Here, this is what happened on both occasions. The first time, defendant prevented the victim from getting off the couch by putting his hands on her shoulders. The second time, defendant prevented the victim from leaving by grabbing her hand and making her sit on the bed. These displays of physical force were not necessary for the commission of the lewd acts.

II

The Court's Instruction On Fear

Did Not Prejudice Defendant

Defendant contends the court's instruction defining fear was "ambiguous and confusing" because it "allowed the jury to find [him] guilty without requiring it to find that [he] used [the victim's] fear" "as a means of accomplishing the lewd act." The instruction was as follows: "An act is accomplished by fear if the child is actually and reasonably afraid or if she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it."

Defendant did not object to this instruction, but he claims he can raise this argument now because his substantial rights were affected and/or his trial counsel was ineffective. Neither theory gets defendant anywhere because there was no prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.2d 674, 693-694] [ineffective assistance requires prejudice]; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146 [a defendant's substantial rights are affected if there is a miscarriage of justice, which requires a prejudice showing].)

The only theory of the People's case at trial was defendant committed lewd acts on the victim using force. As the People described the element of force in closing, it was "grabbing her head, forcing her mouth open, pinning her to the couch, pulling her into the other room, pushing her down. That's the increased force we are talking about." Defendant took the stand and claimed he never committed any sex acts on the victim. On this record, where the trial did not at all focus on the fear element, defendant could not have been prejudiced by an instruction that he claims was ambiguous or confusing on the fear element.

III

Defendant Has Forfeited His Arguments Regarding The Ability To Pay The Jail Booking And Classification Fees And The Court's Failure To Determine

Actual Administrative Cost Of Booking Or Classification

The court imposed a main jail booking fee of \$270.17 and a main jail classification fee of \$51.34. When defense counsel reminded the court it needed to make an ability-to-pay finding, the court stated, "the term of imprisonment that he's going to receive would provide him sufficient opportunity to earn the funds for the fines and fees that I imposed." Defendant now contends there was an insufficient determination of his ability to pay and a failure to determine actual administrative cost of booking or classification. The People argue defendant has forfeited these arguments by not objecting in the trial court. We agree with the People.

The right to appellate review of a nonjurisdictional sentencing issue not raised in the trial court is forfeited. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751-755; *People v. Scott* (1994) 9 Cal.4th 331, 356.) This rule of forfeiture has been repeatedly applied to the challenge of a fine or fee on appeal, including claims of insufficiency of evidence. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1069-1072; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469.)

IV

The Court Did List The Statutory Basis For The Fines And Fees

Defendant contends we must remand the case for the trial court to list the proper statutory basis for the fines and fees. (See *People v. High* (2004) 119 Cal.App.4th 1192, 1200-1201.) Defendant's argument is misplaced because the abstract of judgment does list the statutory basis for the fines and fees.

DISPOSITION

The judgment is affirmed.

We concur: _____ ROBIE _____, J.

_____ BLEASE _____, Acting P. J.

_____ BUTZ _____, J.