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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN JOSEPH CATT,

Defendant and Appellant.

D058623

(Super. Ct. No. SCD222979)

APPEAL from a judgment of the Superior Court of San Diego County, Joseph P. Brannigan, Judge. Affirmed.

A jury convicted Shawn Joseph Catt of rape by a foreign object of an unconscious victim (Pen. Code, § 289, subd. (d))¹ and sexual penetration of an intoxicated person (§ 289, subd. (e)). The trial court sentenced Catt to five years of formal probation with 365 days in local custody.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

Catt contends that insufficient evidence supports the verdict on both counts. We conclude that Catt's argument lacks merit, and accordingly we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Catt lived in a house in the Pacific Beach neighborhood of San Diego with two housemates and his then-girlfriend. One of Catt's housemates, Todd Difley, threw a party and invited several guests from out of town, some of whom planned to stay overnight at the house after the party. Neither Catt's girlfriend nor his other housemate was in town on the night of the party.

Two of the overnight guests were women named Cindy and Christine.² The party involved a substantial amount of drinking. It is undisputed that Cindy became extremely intoxicated after consuming beer from a "beer bong" and tequila. A group of partygoers walked to a bar around 11:30 p.m., but Cindy was denied entrance because she was too intoxicated.

Catt was present during the alcohol consumption at the house, but instead of going to the bar, Catt stayed at the house with his group of friends. Someone walked Cindy back to the house after she was denied entrance to the bar, and she passed out on the bed in Difley's room at around 1:00 a.m. When Difley returned to the house from the bar, he carried Cindy from his bed to the bed in his absent housemate's room at around 2:15 a.m. Cindy did not wake up during the move to the other bed. After returning from the bar,

² We use first names to protect the women's identities, and we intend no disrespect by doing so.

Christine talked with Catt and other people in the kitchen and then went to sleep in the same bed as Cindy at around 3:00 a.m. after moving Cindy over in the bed. Cindy did not wake up when Christine moved her.

According to Cindy's testimony, she remembered part of the walk home from the bar, and the next thing she recalled was waking up in bed around 4:00 a.m. because she felt pain in her vagina caused by Catt's finger inside of her. She saw Catt lying next to her but did not know who he was, as she did not remember ever meeting him. Cindy testified that upon waking, she remembered a dream in which she was kissing a man, who had inserted his finger in her vagina, which felt good to her, and she might have said "harder" out loud, or she may have only said it in her dream. Cindy stated that prior to waking up because of the pain in her vagina, she was not aware of what was going on, and the interaction with Catt seemed surreal, like she was watching it happen to two people next to her. After she realized what was happening, Cindy was shocked, pushed Catt's hand away and walked to the bathroom, where she was later joined by Christine.

Christine testified that she woke up in the bed around 4:00 a.m. because she felt Catt's hands touching her breasts and crotch on top of her clothing. Christine sat up, and Catt said, "It's fine." Christine said, "No, it is not." Christine went to the bathroom and found Cindy there.

After telling each other what happened, Christine and Cindy returned to the bedroom. According to their testimony Catt had already exited the bedroom but then returned twice to say something such as, "I'm sorry. And, don't tell anyone. Don't tell

[Difley]. Don't tell my girlfriend." Cindy and Christine went back to sleep. In the morning, as Cindy was leaving the house, Catt again apologized saying, "I'm sorry."

During his testimony, Catt stated that he experienced an alcoholic blackout at the end of the evening, and thus he had no memory between drinking a beer in the backyard around 2:00 a.m. and finding himself in bed next to Cindy around 4:00 a.m. According to Catt, his first memory in the bedroom was of Cindy rubbing his head, bringing his head toward her and then kissing him. Catt stated that after he and Cindy kissed passionately for a while, Cindy guided his hand to her genital area. Catt explained that he inserted his finger in Cindy's vagina because it seemed like something she wanted him to do based on her body movements. Shortly after Cindy told him "harder" while his finger was in her vagina, Cindy told him to stop and got up to walk to the bathroom. Catt stated that Cindy's eyes were open during the incident, starting from when Cindy pulled his head toward her. According to Catt, at no time during the encounter did he think that Cindy was unconscious or that she was too intoxicated to know what she was doing. He based that belief on the fact that Cindy seemed to be giving him directions on how to please her.

Catt testified that after Cindy left for the bathroom, he lay back down on the bed. The next thing he remembered was Christine shaking or nudging him, asking who he was and where Cindy was. He had no memory of touching Christine. According to Catt, he apologized to Cindy because he had been intimate with her while he was in a relationship with his girlfriend.

Catt spoke with Difley about the incident the next day. As Difley recalled Catt's statements the next morning, Catt told him that "he was creeping on the girls and kissing on them and that it got out of hand or it got weird." Difley also recalled a telephone conversation later in the day, during which Catt said that "he was kissing on Cindy and that he fingered her and then she woke up and pretty much all hell broke loose after that," and that he was "kissing on" Christine too. According to Difley, Catt told him that he felt bad and he was sorry, and that he had "apologized to the girls."

Based on Catt's conduct toward Cindy, the jury convicted Catt of rape by a foreign object of an unconscious victim (§ 289, subd. (d)) and sexual penetration of an intoxicated person (§ 289, subd. (e)). Based on the incident with Christine, Catt was charged with sexual battery (§ 243.4, subd. (e)(1)), but the jury acquitted him of that charge as well as the lesser included offense of simple battery.

II

DISCUSSION

Catt's sole appellate challenge is to the sufficiency of the evidence to support his convictions.

For the crime of sexual penetration of an intoxicated person (§ 289, subd. (e)), the jury was instructed pursuant to CALCRIM No. 1047 that it was required to find, among other things, that "[t]he defendant knew or reasonably should have known that the effect of that [intoxicating] substance prevented the other person from resisting the act" of sexual penetration with a foreign object. According to the instruction, "a person is

prevented from resisting if he or she is so intoxicated that he or she cannot give legal consent."

For the crime of sexual penetration of an unconscious person (§ 289, subd. (d)), the jury was instructed with CALCRIM No. 1048 that it was required to find, among other things, that "[t]he defendant knew that the other person was unable to resist because she was unconscious of the nature of the act" of sexual penetration with a foreign object. The instruction stated that "[a] person is *unconscious of the nature of the act* if she is unconscious or asleep or not aware that the act is occurring."

Catt contends that insufficient evidence supports the jury's finding against him as to both of these required elements because he "might reasonably have mistaken the arousal and touching [of his head]" by Cindy "for the real consent of a consciously participating person." Catt argues that he "could have mistaken the situation" and "made a reasonable mistake as to [Cindy's] consciousness." According to Catt, the evidence suggests that Cindy was in an alcoholic blackout state in which she appeared to be conscious, and "any man might have mistaken a girl putting her hand on the back of his head, and responding to fondling and digital penetration by saying 'harder' as real conscious consent." An expert witness testified that someone can have a dream and be holding a conversation when the person is not conscious as to what is going on, and that when someone is asleep or passed out, the person can still be sexually stimulated without being conscious of what is happening. As we understand Catt's argument, he contends that Cindy exhibited such behavior, and therefore he mistakenly believed she was awake and capable of giving consent.

In considering a challenge to the sufficiency of the evidence, "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. . . . We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. . . . If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. . . . 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 60, citations omitted.)

Applying this standard of review, we reject Catt's challenge to the sufficiency of the evidence. A reasonable juror *could have* made the finding that Catt suggests is supported by the evidence, namely that Cindy's apparent arousal and interaction with him during the incident led Catt to reasonably, but mistakenly, believe that Cindy was conscious and was sober enough to consent. However, as we will explain, substantial evidence also supports the *opposite* conclusion, namely that Catt knew or reasonably should have known that Cindy was asleep in an alcoholically induced state of unconsciousness when he inserted his finger in her vagina and that she was unable to consent due to that condition.

Several aspects of the evidence, taken together, support such a finding. Cindy testified that she was not awake or aware of what was happening to her when Catt kissed her and inserted a finger in her vagina, but instead she was asleep in a dream state.

Moreover, there was evidence that Cindy's lack of consciousness of what was happening to her was due to the fact that she was passed out from alcohol consumption.

Specifically, numerous witnesses testified that Cindy was extremely drunk, that she passed out in bed around 1:00 a.m., and that she was unconscious when she was moved at 2:15 a.m. and again at 3:00 a.m. Difley's testimony about what Catt told him the next day supports a finding that Catt was aware of Cindy's unconscious state when he inserted his finger in her vagina, and that he was not under the mistaken belief that she was awake and capable of consenting. Specifically, as Difley stated, Catt told him that "he was kissing on Cindy and that he fingered her *and then she woke up* and pretty much all hell broke loose after that." (Italics added.) Finally, the fact that Catt touched Christine's breast and crotch while Christine was sleeping lends support to a finding that Catt followed the same approach with Cindy by engaging in a sex act with her when he knew she was asleep, and that Catt was not being truthful when testifying that he believed Cindy was awake and capable of consenting. Based on all of these facts, a reasonable juror could have concluded that Catt inserted his finger in Cindy's vagina while she was unconscious and so intoxicated that she could not give legal consent. We therefore conclude that verdict is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.