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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX CARREON,

Defendant and Appellant.

E052856

(Super.Ct.No. INF067654)

OPINION

APPEAL from the Superior Court of Riverside County. Stephen Gallon, Judge.

Affirmed.

Michael Bacall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Christine Levingston Bergman, Deputy Attorney General, for Plaintiff and Respondent.

Alex Carreon, defendant and appellant (hereafter defendant), raises two claims of error in this appeal from the judgment entered after a jury found him guilty as charged of assault with intent to commit rape (Pen. Code, § 220), two counts of forcible sexual penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)), and assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). First, he contends he was denied his right under both the state and federal Constitutions to a speedy trial. Next, he contends the evidence does not support the jury's great bodily injury true findings. We disagree and will affirm the judgment.

FACTS

Resolution of the issues defendant raises in this appeal does not require an extensive recitation of the facts. Moreover, the pertinent facts are undisputed. Therefore, we rely on the statement of facts set out in defendant's opening brief which reveals that in the evening on April 5, 2008, defendant went out drinking after work with a group of friends, one of whom was Molly Doe. After drinking for several hours at a bar, the group moved to the home of one of their number and drank margaritas. After 30 minutes or so, between 1:00 a.m. and 1:30 a.m., the group started to break up. Molly got into defendant's SUV because earlier in the evening he had offered to be her designated driver.

Molly testified that she did not recall getting into defendant's car and that when she regained consciousness, she was lying naked on someone's front lawn, with defendant on top of her. She screamed for help. Defendant yelled at her to shut up, and

then put his forearm across her neck. When she screamed again, defendant choked her with both his hands. Molly tried to loosen defendant's grip by kicking her legs. When she finally was able to pry defendant's fingers loose, she whispered to him that if he did not kill her, she would not tell what had happened. The next thing Molly remembered was hearing the sound of tires screeching as defendant drove off.

Molly got help and was taken to a nearby hospital about 5:30 a.m. on April 6, 2008. At the hospital, she was treated for dehydration and examined by Diana Faugno, a Sexual Assault Response Team (SART) nurse. We recount the details of the nurse's testimony, below, in our discussion of defendant's insufficiency of the evidence claim.

An Indio police officer arrested defendant later in the day on April 6, 2008. When interviewed defendant initially claimed he did not remember what had happened after he and Molly left the home of their friend. Eventually defendant acknowledged that he and Molly had a consensual sexual encounter that started with them kissing while in his SUV. Eventually defendant "dragged" Molly from the vehicle onto the grass. Molly took her clothes off, and they were going to have sex, but defendant claimed he just could not do it; he could not take advantage of Molly when she was drunk.

Defendant said he tried to get Molly back in his SUV, but she did not want to go with him. Molly was being too loud, and when defendant saw a security officer drive by, he left Molly on the lawn and drove home. Defendant denied that Molly resisted, that she screamed, or that he choked her. Defendant explained that he might have scratched Molly on the neck with his nails. When asked about a scratch on his own arm, defendant

speculated that Molly must have scratched him when he dragged her from the SUV to have sex on the lawn.

Additional facts pertinent to the issues raised on appeal will be recounted below.

DISCUSSION

1.

SPEEDY TRIAL RIGHT

Defendant contends he was denied his constitutional right to a speedy trial because the prosecution's purported delay of 845 days in bringing his case to trial resulted in the loss of a percipient witness. We disagree.

A. Factual and Procedural Details

As previously noted, defendant was arrested in this case on April 6, 2008. The district attorney charged defendant in an information filed on June 25, 2008. Defendant filed a petition for writ of mandate in this court on July 27, 2009 (case No. E048878) in which he sought a writ directing the trial court to dismiss the charges as a result of the prosecutor's alleged violation of defendant's statutory right to a speedy trial. In an opinion filed October 16, 2009, we issued that writ. In doing so we held that the trial court erred when, over defendant's objection, it granted the prosecutor's request to continue defendant's trial. The prosecutor had represented to the trial court that a necessary witness in defendant's trial would be serving for several weeks as an "investigating officer" in another case. Therefore, the prosecutor requested, and the trial court granted, a continuance of defendant's trial for the anticipated duration of the other

trial. We concluded the trial court should not have accepted the prosecutor's implicit claim that the officer could not be spared at any time during the other trial—"It defies belief that had a good faith effort been made, the officer could not have been made available for the time necessary to testify in petitioner's trial. As the party seeking a continuance, the burden was on the People to establish good cause (*People v. Howard* (1992) 1 Cal.4th 1132, 1171) and certainly the record is utterly inadequate to support any finding of the officer's blanket unavailability." (*Carreon v. Superior Court* (Oct. 16, 2009, E048878) [nonpub. opn.] [at p. 2].) Because the statutory time limit for bringing a defendant to trial can only be extended for "good cause," and the People had not met their burden to make a factual showing of good cause, we directed the trial court to dismiss the charges against defendant. (*Id.* [at p. 3].)

After the remittitur issued and the trial court dismissed the information, the district attorney immediately filed a new felony complaint against defendant. That complaint is what defendant refers to as the "instant action." We adopt that designation. The complaint in the instant action was filed on December 21, 2009, and defendant was arraigned and remanded into custody on that date. The district attorney filed the information in the instant action on January 13, 2010, and trial began on August 12, 2010. In the interim, both sides had moved for and had obtained several continuances.

In his trial brief defendant argued, among other things, that his right to a speedy trial had again been violated and as a result a purported eyewitness could no longer be located. The trial court deferred ruling on that motion until the conclusion of trial. At the

hearing on defendant's speedy trial motion, defense investigator Enrique Tira testified, in pertinent part, that he had been unable to locate three witnesses, two of whom had been in the group that went out drinking with defendant and Molly Doe. The third, Joanna Osuna, was a security guard who told the police she had seen two people on the front lawn of a house as she drove by in the early morning hours of April 6 and that she thought they were just having sex in the front yard. Tira testified that he had spoken with all three witnesses about a year ago but could not locate any of them now.

With respect to locating Osuna, Tira testified that he first started to look for her "a couple weeks ago," and that he went to her apartment several times but no one answered the door the first few times. When a person did finally come to the door, "they" were new residents; they had been in the apartment for about four months and did not know Osuna. Tira talked to the man who lived next door to Osuna's former apartment and concluded from what he said that Osuna had moved out between 10 and 12 months earlier. Tira then contacted Osuna's former employer, and spoke with one of the security guards who said Osuna left the company nine or 10 months ago. When Tira contacted the company's corporate headquarters, they refused to give him any information about Osuna without a subpoena.¹ Tira testified that he also checked utility records in an effort to locate Osuna.

The trial court denied defendant's motion to dismiss.

¹ Tira served that subpoena, but the date for compliance apparently had not yet arrived.

B. Standard of Review

We independently review whether the federal constitutional speedy trial right was violated. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894, 901-902 [de novo review of mixed questions of law and fact that affect constitutional rights].)

C. Analysis

The Sixth Amendment to the United States Constitution, and article I, section 15 of the California Constitution both guarantee a criminal defendant the right to a speedy trial. “[T]he Sixth Amendment speedy trial guarantee begins to operate either on the filing of an indictment, information, ‘or other formal charge,’ or when a suspect ‘has been arrested and held to answer.’ [Citation.]” (*People v. Martinez* (2000) 22 Cal.4th 750, 761, citing *United States v. Marion* (1971) 404 U.S. 307, 321.) The filing of a felony complaint triggers speedy trial protection under the state Constitution. (*People v. Martinez, supra*, at p. 765.)

We note at the outset that defendant does not raise a statutory speedy trial claim in this appeal. Therefore, although the prior opinion is law of the case, it is also irrelevant because the issue in this appeal is not the same as the issue defendant asserted in his writ petition. In this appeal, defendant contends we must assess his constitutional speedy trial claim from the date of his arrest on the original felony complaint on April 6, 2008. Defendant ignores the intervening dismissal of the original action and does not discuss its effect, if any, on his speedy trial claim.

In the writ proceeding, we directed the trial court to dismiss the original action as a result of the trial court's error in granting a continuance to the prosecutor that extended the date for defendant's trial beyond the 60 days specified in Penal Code section 1382. "Section 1387 provides that an order of dismissal of a criminal charge is not 'a bar to any other prosecution for the same offense . . . if it is a felony.' Included in such orders of dismissal are those granted by reason of the fact that the defendant was not brought to trial within statutory time limits. Although the right to a speedy trial is grounded in both the United States and California Constitutions [citations] the timely refiling of charges once dismissed for denial of a speedy trial has been deemed constitutionally permissible absent a showing by the accused of actual prejudice. [Citations.]" (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437.) "If such accused cannot show that he has been prejudiced and the People are not barred by limitations applicable to the filing of an information or the presentment of an indictment [citation], the rule is that the statutory time period within which to bring a defendant to trial starts to run anew. [Citations.]" (*Id.* at pp. 437-438.)

Defendant did not challenge the district attorney's refiling of the charges and does not claim he was prejudiced thereby. Because the statutory time period for bringing a defendant to trial is an adjunct of the state constitutional right to a speedy trial, we must conclude that not only the 60-day statutory period, but also the constitutional period for assessing speedy trial claims also begins anew.

Apart from a violation of the statutory speedy trial provision, “a defendant may claim a violation of the state Constitution’s speedy trial right based on delay not covered by any statutory speedy trial provision. [Citation.]” (*People v. Martinez, supra*, 22 Cal.4th at p. 766.) “In this situation, when the claimed speedy trial violation is not also a violation of any statutory speedy trial provision, [the Supreme Court] has generally required the defendant to affirmatively demonstrate that the delay has prejudiced the ability to defend against the charge. [Citation.]” (*Ibid.*)

The state constitutional right to a speedy trial ““serves a three-fold purpose” [Citation.] “It protects the accused . . . against prolonged imprisonment; it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime; and . . . it prevents him from being ‘exposed to the hazard of a trial, after so great a lapse of time’ that ‘the means of proving his innocence may not be within his reach’—as, for instance, by the loss of witnesses or the dulling of memory.” [Citation.] The question posed in evaluating a speedy trial claim is whether delay at the state’s hands unreasonably prejudices these interests. [Citations.] The test is necessarily a balancing one: ‘prejudice to the defendant resulting from the delay must be weighed against justification for the delay.’ [Citation.]” (*Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1540.)

Similarly, once the federal constitutional speedy trial right attaches, courts balance four criteria to determine whether the right has been violated: (1) the length of the delay; (2) whether the government or the defendant is more to blame for the delay; (3) whether the defendant asserted his right to a speedy trial in due course; and (4) whether the

defendant suffered prejudice from the delay. (*Doggett v. United States* (1992) 505 U.S. 647, 651-652; *Vermont v. Brillon* (2009) 556 U.S. 81, 90.) Under the federal Constitution, an uncommonly long delay creates a rebuttable presumption of prejudice. (*People v. Lowe* (2007) 40 Cal.4th 937, 942.) In contrast, when only the state constitutional speedy trial right applies, the defendant has the initial burden to affirmatively show prejudice; the burden then shifts to the prosecution to show justification for the delay; and then the court weighs the justification against the actual prejudice suffered by the defendant. (*Ibid.*)

The length of delay in this case, assessed from December 21, 2009, the date the felony complaint was refiled and defendant rearrested, to August 12, 2010, the date trial started, is not uncommonly long. In any event, the record reveals the delay was equally attributable to defendant and the prosecution. Initially, defense counsel requested a continuance due to illness or a family emergency, then the prosecutor was in trial on another matter and for that reason obtained continuances, then defense counsel obtained a continuance again due to illness or family emergency, and finally over defendant's unspecified objection, the trial court granted the prosecutor a continuance of 12 days for reasons not disclosed in the record.² The record on appeal does not support an inference that the delay in getting to trial was attributable to the prosecution.

² The clerk's minutes reflect the reason for granting the motion to continue trial as "OT – Other." There is no reporter's transcript for the date in question.

But even if we were to conclude otherwise, defendant has not demonstrated prejudice as a result of the delay. He contends here as he did in the trial court that absent the delay in bringing the matter to trial defendant would not have lost Joanna Osuna, the security guard, whom he describes as “the only neutral percipient witness.” The record does not support this claim. According to the previously recounted testimony of defense investigator Tira, defendant failed to keep in contact with Osuna and as a result lost track of her. Moreover, defendant did not have Osuna under subpoena for trial because she had agreed to appear at prior hearings and was willing to testify. The fact that defendant did not keep tabs on Osuna during the pendency of this matter and did not have her under subpoena to appear at trial, belies his claim that the loss of her testimony resulted in the loss of a meritorious defense.

Moreover, if Osuna had testified consistently with her statement to the police, she would have said that between 3:00 a.m. and 3:30 a.m. on the date in question, she was working as a security guard. She was driving and passed by two people having sex in the front yard of a house. Defendant contends because Osuna did not say in her statement to the police that she saw Molly struggling or kicking at defendant in order to get away, that her testimony corroborates his claim that Molly had consented. Contrary to defendant’s assertion, Osuna could not testify that defendant and Molly were having consensual sex; at most she would have been able to say that when she drove by, she did not notice Molly struggling to get away from defendant. While that testimony arguably is favorable to defendant, it does not constitute a meritorious defense as defendant contends. Therefore,

the loss of Osuna’s testimony is not akin to the loss of a meritorious defense as defendant contends.

In summary, and for each of the reasons discussed, we must reject defendant’s first claim of error in this appeal.

2.

SUBSTANTIAL EVIDENCE

Defendant contends the jury’s finding on the allegation that he inflicted great bodily injury is not supported by the evidence. We disagree.

A. Standard of Review

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – evidence that is reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

B. Analysis

As noted above, defendant challenges the sufficiency of the evidence to support the jury's finding that in connection with counts 2, 3, and 4, he personally inflicted great bodily injury on Molly Doe within the meaning of sections 12022.7 and 667.61, subdivision (d). For purposes of section 12022.7, great bodily injury means a significant or substantial injury. (§ 12022.7, subd. (f).) As the trial court instructed the jury, "Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm."

In challenging the sufficiency of the evidence defendant does not dispute the evidence, which consists of Molly's testimony and that of the SART nurse. Instead defendant cites the testimony of his expert witness that Molly's injuries were consistent with a consensual sexual encounter and that there was no "documented evidence" or "objective criteria" such as medical records of follow up care for Molly.

Defendant does not dispute Molly's testimony in which she stated that when she regained consciousness she had a huge goose egg on her head, bleeding scratches down her side, a huge gash in the flesh on her ankle, a bite mark on her stomach, scratches on her breasts, and severe pain in her "privates." Nor does defendant dispute that Nurse Faugno, the SART nurse, testified in pertinent part that Molly not only had lots of scrapes and abrasions on both sides of her neck, on her breasts, her backside, her knees, and legs, she also had red raised bumps on her face that were consistent with her claim that defendant had strangled her. Molly also had what appeared to be bite marks on her

abdomen and left elbow. In addition, Nurse Faugno testified that Molly had multiple lacerations to her genitalia, and a very large red contusion and an avulsion (torn skin that is hanging by a thread) on her anus.

The noted evidence is sufficient to support the jury’s finding that defendant inflicted great bodily injury on Molly. “It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. “Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury’s finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.” [Citations.]” (*People v. Escobar* (1992) 3 Cal.4th 740, 750, fn. omitted.)

Accordingly, we reject defendant’s challenge to the sufficiency of the evidence.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.