Filed 5/8/13 P. v. Aultman CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JACQUES AULTMAN, JR., Defendant and Appellant.	E055470 (Super.Ct.No. SWF10001037) OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson, III, Judge. Affirmed.

Susan S. Bauguess, 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, Lilia E. Garcia and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jacques Aultman, Jr., guilty of (1) rape accomplished by means of force, violence, duress, menace, or fear (Pen. Code, § 261, subd. (a)(2));[1] (2) rape where the victim is prevented from resisting due to an intoxicating substance (§ 261, subd. (a)(3)); (3) oral copulation with a person under the age of 18 years old (§ 288a, subd. (b)(1)); (4) oral copulation where the victim is prevented from resisting due to an intoxicating substance (§ 288a, subd. (i)); and (5) sexual intercourse with a minor "who is not more than three years older or three years younger" than defendant (§ 261.5, subd. (b)). The trial court sentenced defendant to prison for a term of 10 years.

Defendant raises two issues on appeal. First, defendant contends substantial evidence does not support the conviction for forcible rape. Second, defendant asserts the trial court abused its discretion when imposing the upper prison term for the forcible rape conviction. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The victim was born in December 1992. Defendant was born January 22, 1990. The victim was friends with defendant's sister, Jackie. On January 15, 2010, the victim agreed to "hang out" with Jackie. On January 15, 2010, the victim was 17 years old and defendant was 19 years old. The victim and Jackie went to a housewarming party together at an apartment complex in Temecula. The party took place at defendant's

[1] All further statutory references will be to the Penal Code, unless otherwise indicated.

apartment. The victim's father drove her to the apartment complex and dropped her off at approximately 7:00 p.m. The victim's father said he would pick her up at 10:00 p.m.

There were approximately six people at the party when the victim arrived. The victim introduced herself to the people she did not know and then drank a shot of whiskey. The victim stayed in the kitchen area and consumed five to six shots of alcohol within 10 to 15 minutes. Prior to the party, the victim's experience of drinking alcohol included sipping beer; she had never finished a beer before and had never been drunk. The victim was drinking shots at this party due to peer pressure, in that Jackie continued pouring shots for the victim to drink, and Jackie and the victim were "going shot [for] shot" with one another. At some point during the five or six shots, defendant entered the kitchen and also began drinking shots of alcohol. Defendant had approximately three shots of alcohol. Defendant was present during four of the victim's shots, then he left to take a walk.

The victim was "feel[ing] the alcohol" so she went outside with Jackie and lay down on the sidewalk. The victim felt hot, was stumbling over her words, and had difficulty walking up and down the stairs. Defendant returned from his walk at the same time the victim and Jackie were moving to return to the apartment. When the victim reentered the apartment it was approximately 9:30, so the victim had been at the party for over two hours. The victim went to the kitchen and drank approximately five more shots of alcohol with Jackie. Defendant stayed in the living room, smoking.

The victim asked Jackie if they could talk and "catch-up" with one another. Jackie agreed, but needed to use the restroom. At approximately 9:45 p.m., the victim

went into a bedroom and sat on the bed while waiting for Jackie. The lights in the bedroom were on while the victim was waiting. The victim was expecting her father to call her cell phone around 10:00 to let her know he was at the apartment complex to pick her up, so her cell phone was in her sweatshirt pocket. The victim was wearing a bra, panties, jeans, tank top, pullover sweatshirt, and sneakers.

The victim passed out while waiting for Jackie. When the victim regained consciousness, she was lying on her back, the lights in the bedroom were off and the door was closed. The victim heard defendant talking to her and felt defendant on top of her. The victim tried pushing defendant off of her, and loudly said, "Get off me" four or five times. The victim could hear people talking and loud music playing in the apartment. The victim felt defendant kiss her lips and neck. The victim again lost consciousness.

The victim regained consciousness a second time. The bedroom door was still closed and music was still playing in the apartment. The victim heard her cell phone ring, but then the phone was silenced and she did not hear it ring again. The victim said to defendant, "Get off of me . . . what are you doing . . . I don't want . . . no, stop . . . go away." The victim used her hands to try pushing defendant off of her. The victim's sweatshirt was off, her tank top was pushed up, and her bra was pushed aside, so her breasts were exposed. Defendant was touching and kissing the victim's breasts. The victim again lost consciousness.

The victim vomited on the carpet. The victim regained consciousness a third time. The victim was lying on her back with her legs spread open. The victim's pants were off. Defendant was naked. Defendant was on top of the victim, holding the victim's arms so she could not move them. Defendant's erect penis was in the victim's vagina, and he was moving it back and forth. The victim said, "Stop. [¶] . . . [¶] Don't do it . . . I [am] a virgin . . . don't take my virginity." The victim again lost consciousness.

The victim regained consciousness a fourth time. Defendant placed his penis in the victim's mouth. Defendant's hands were on the back of the victim's head. The victim remained conscious for approximately 10 minutes while defendant's penis was in her mouth. The victim again lost consciousness, and did not wake until morning, at approximately 5:45.

When the victim woke, she was on the floor, wearing another person's clothes. Defendant was asleep on the bed. The victim found her cell phone next to the bed. The cell phone had been placed in silent mode. The victim had missed approximately 100 calls from her father and best friend. The missed calls began at 10:15 p.m. The victim found her clothes next to the bed. There was vomit inside her jeans. The victim could not find her panties.

Jackie yelled at the victim for "ditching" her to spend time with defendant. The victim told Jackie that she did not intentionally "ditch" Jackie, and that she thought defendant raped her. Jackie told the victim defendant did not rape the victim, rather, defendant "took advantage of the fact that [the victim] was drunk." The victim told

Jackie she was afraid defendant could have impregnated her. Jackie told the victim not to worry about being pregnant, and told the victim, "[D]on't say anything because, if you do, I'll find you [and] hurt you." The victim did not know how to respond, so she stopped talking about defendant.

The victim called her father at 6:00 a.m. and he said he would pick her up at 8:00 a.m. While waiting for her father, the victim and Jackie went for a walk around the neighborhood. Walking felt uncomfortable because the victim was sore. When the victim's father arrived, the victim explained she had fallen asleep watching a movie and did not hear her phone ring. When the victim arrived home she washed her clothes and took three showers because she "felt disgusting." The victim saw bite marks on her back, a mark on her neck, and bruising on her lower back.

The victim's father left to visit family and the victim's mother was in Orange County, so the victim was home alone. The victim called her best friend because she felt scared and "didn't want to be by [her]self." The victim's friend picked her up, they went to a coffee shop, picked up Chinese food, went to Target, and then ate by a duck pond. The victim told her friend about the incident with defendant. The victim and her friend went to see a movie and walked around the mall, in order to help the victim forget what happened.

The next day, the victim felt more shaken than she had the day following the incident. The victim was scared, so she called a different friend. The friend was at the mall, so the victim met her at the mall. The victim told her friend and the friend's mother what happened with defendant. The friend and her mother told the victim to tell

her parents what happened. The victim returned home and told her mother what happened with defendant. The victim asked her mother not to call the police. The victim did not want to contact the police because she was afraid of Jackie. The victim's mother called the police.

The victim submitted to a forensic examination, i.e., a "rape kit," on January 17. A forensic nurse examiner employed by Riverside County, Bethany Thrasher, examined the victim. Thrasher saw marks on the victim's back and neck. Thrasher noticed the victim was sore in her vaginal area and parts of her vaginal area were "more red than the other surrounding areas."

Riverside County Sheriff's Detective Guzman investigated the rape allegations against defendant. Guzman spoke to defendant on March 2, 2010. Guzman asked defendant why he thought Guzman wanted to speak to him. Defendant responded, "Because a young girl was afraid of getting in trouble from her parents so she called the rape charge." Defendant explained that he offered the victim a drink when she arrived at the party, but she rejected it, so he assumed she was not drinking alcohol. Defendant spent some time talking to the victim in the kitchen, but did not pay much attention to her because he was focused on another girl at the party.

Defendant explained that when he decided to go to his bedroom later in the night, the victim was laying on his bed. The victim was giving defendant "the look . . . like . . . she want[ed] it," so defendant figured he would "take it, you know whatever." The victim did not say anything to defendant; the communication was all done via eyes and

"[b]ody language." Jackie shut the bedroom door when defendant told her he was "talking" to the victim.

Defendant and the victim laid on the bed together, kissing. The victim told defendant, "[Y]ou can[']t get me pregnant . . . my dad would be so mad." Defendant also said the victim told him that if he impregnated her then the victim's dad would give defendant "all this money" and "pay for the house, apartment . . . and stuff like that." The victim told defendant, "[I]'ll suck your dick . . . swallow the cum." When defendant was "pushing on" the victim, she said she did not want him to "take her virginity." Defendant told Guzman, "you know when girls say no, but they don't, you know?" The victim "said no" to defendant two or three times, so defendant relented, but then "coaxed [his] way back over and then that's when [the victim] let [him], she was like okay, okay, you know . . . ."

Defendant rubbed his penis on the victim's mouth. The victim bit defendant's penis. Defendant orally copulated the victim. The victim vomited on the floor. Defendant placed a towel over the vomit and then returned to the victim. Eventually, the victim "did scream, she, before she did scream, she told [defendant] oh I'll do whatever, I'll do whatever you want to make, to make you think that people will think that we had sex. I just, you know, [don't] want penetration. She's all I'll suck your dick, I'll swallow the cum, I'll, I'll do whatever you want, just don't take my virginity. That [is] what [the victim] kept saying to [defendant]."

Defendant pulled up the victim's shirt, took off her bra, and removed her pants. Defendant explained, "[W]e were gonna start but she was like no, no, this and that you

know? I'll, you know I'll suck your dick blah, blah, blah and so we, I don't know, I can't really remember how we made it by the door but that's when the, it actually happened was by the door." Defendant said he had sex with the victim on the floor by the door, not on the bed. The victim asked defendant approximately 10 times not to take her virginity.

Defendant engaged in sexual intercourse with the victim while victim lay on her side and on her back. The victim did not talk during the sexual intercourse, but she was moaning. Defendant asked the victim, "[A]re you okay?" The victim did not respond so defendant "kept going." The victim occasionally tried to push defendant off of her, but defendant believed she was just being playful. The victim vomited a second time while defendant was "pushing on her." Defendant ejaculated in the victim's mouth.

The victim fell asleep on the floor. Defendant explained, "So you know she was drunk so she just fell right to sleep . . . ." Defendant said the victim was "very" coherent and "knew what she was doing." The following morning, the victim was smiling and talking to defendant, so he did not believe there were any problems. Defendant gave the victim a hug and said, "[A]lright, I'll see ya next time."

Defendant explained to Guzman that he knew the victim was under 18 years old, which is why he was focused on an older woman at the party. However, things did not work out with the older woman. Defendant explained engaging in intercourse with the victim, despite her being under 18 years old, as follows: "She just happened to be in my bed and I didn't get what I wanted so you know I took an opportunity." Defendant believed the victim wanted to have sex with him because she did not cry or leave the

room. Defendant explained to Guzman, "[Y]ou know man to man, . . . women say no when they mean yes."

The defense presented Jackie's testimony. Jackie gave the following version of the incident on January 15, 2010: The victim drank shots of alcohol at the party. The victim felt dizzy so they went outside. When Jackie and the victim returned to the apartment, the victim consumed more alcohol. The victim and defendant were talking to each other throughout the night. The victim wanted to talk to Jackie, so they went into the bedroom together. Jackie and the victim sat on defendant's bed. After a few minutes, Jackie left to use the restroom.

When Jackie returned to the bedroom, she saw the victim talking to defendant. The victim told Jackie she wanted to talk to defendant privately, so Jackie left and the victim closed the door. The victim was visibly intoxicated, but it appeared "she knew what she was doing." Approximately 30 minutes later, Jackie returned to the bedroom and saw defendant and the victim engaging in sexual intercourse. Jackie left the bedroom. Jackie never heard the victim yell "stop" or yell for help.

The following morning Jackie talked to the victim. The victim told Jackie that "she thought she was pregnant." The victim told Jackie "[t]hat if she [were] pregnant, [then] she would tell her parents that she got raped by a black guy."

DISCUSSION

A. SUBSTANTIAL EVIDENCE

Defendant contends the evidence supporting his conviction for forcible rape (§ 261, subd. (a)(2)), does not meet the substantial evidence standard. We disagree.

"A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.] Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

"Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [¶] . . . [¶] [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) "'[I]n order to establish force within the meaning of section 261[,] the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim].' [Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023-1024.)

The victim testified that when she regained consciousness a third time, she was lying on her back with her legs spread open. The victim's pants were off. Defendant was naked. Defendant was on top of the victim, holding the victim's arms so she could not move them. Defendant's erect penis was in the victim's vagina, and he was moving his penis back and forth. The victim testified that when she regained consciousness the second time, she had used her hands to try pushing defendant off of her. Defendant also

said the victim tried to push him off of her, she screamed, and she asked defendant approximately 10 times to not take her virginity.

Defendant told Detective Guzman that he wrestled in high school. Defendant explained that he never forgot his wrestling moves and that a lot of wrestling was about "wrist control" and "leverage." Defendant described a time when another wrestler "incapacitated" defendant by holding defendant's wrists.

Given that the victim had been trying to push defendant off of her using her hands, a reasonable trier of fact could conclude that defendant's act of holding the victim's arms down so that she could not move them while engaging in sexual intercourse with the victim, constituted the use of force during rape. It would appear from this evidence that defendant was attempting to stop the victim from pushing him off her, and therefore force was used during the rape. Accordingly, we conclude substantial evidence supports the finding that defendant used force during the rape.

Defendant asserts substantial evidence does not support the rape finding because alcohol was used to sedate the victim—"not any physical force"; defendant asserts he is guilty only of rape by intoxication, not rape by force. Defendant's argument is not persuasive because, as set forth *ante*, the evidence reflects he held the victim's arms down while engaging in sexual intercourse with her, after she had tried using her hands to push defendant off of her body. Thus, the record supports a finding that defendant used physical force to accomplish the rape.

Next, defendant asserts the jury did not convict defendant based upon the "force" aspect of the statute, and instead convicted defendant based upon the "duress" and

"menace" portions of the rape statute. Defendant bases this conclusion on the jury asking the trial court for the legal definitions of duress and menace. Defendant reasons that the jury would not have asked for these definitions if the jurors were basing their verdict on the "force" portion of the statute.

We cannot infer from the jury's question which theory of guilt was adopted by the jury. Defendant's argument is asking this court to speculate about the jury's actions based on a question that could reflect the jurors' mere curiosity. Speculation will not support reversal of a judgment. (*People v. Gray* (2005) 37 Cal.4th 168, 230.) Thus, we do not discuss this issue further, especially in light of the substantial evidence supporting the "force" aspect of the conviction. (See *People v. Senior* (1992) 3 Cal.App.4th 765, 769-770, fn. 3 [the multiple methods in which the crime can be committed are alternatives].)

B. UPPER TERM

1. *PROCEDURAL HISTORY*

At defendant's sentencing hearing, defendant's trial counsel asked the court to impose the low prison term. Trial counsel argued the low term was sufficient because (1) "it's not the worst case that we've ever seen," (2) defendant's only prior involved possession of marijuana, and (3) defendant suffered from "mental issues." Defendant spoke at the hearing. Defendant told the trial court, "[C]ontrary of what the jury thinks . . . I'm an innocent man. One thing that wasn't said that I think is important is that people get drunk and do things they don't remember all the time. So who's to say that she didn't do just that?"

The prosecutor argued (1) defendant was fired from a job for sexually harassing a female coworker; (2) defendant denied responsibility for his crime and blamed the victim when speaking to a probation officer, and (3) defendant, at the sentencing hearing, again denied his guilt. The prosecutor asserted defendant is "an example of someone who will continue to be a threat to the public in the future." The prosecutor argued defendant should be sentenced to the upper prison term, as suggested by the probation officer.

The trial court deemed the prison term for the forcible rape (§ 261, subd. (a)(2)) to be the principal term. The trial court imposed the upper prison term of eight years for the conviction. The trial court explained that the upper term was necessary because (1) "defendant literally forced a child to have sex, and that child was so drunk as to be rendered helpless"; (2) defendant raped the victim "throughout the night, all the while the helpless child was coming in and out of consciousness"; (3) the victim knew defendant, was comfortable around him, and was in his home, which placed defendant in a position of trust that he then violated; and (4) "defendant actually sees himself as the victim," which indicated to the trial court, "defendant does represent a real danger to the public, because he does not see how his actions destroyed this child's life."

2. *ANALYSIS*

Defendant contends the trial court erred by imposing the upper prison term for the forcible rape conviction because (1) the victim was not a child, and (2) defendant did not hold a position of trust.[2] We disagree.

"'California courts have long held that a single factor in aggravation is sufficient to justify a sentencing choice, including the selection of an upper term[.]' [Citation.]" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413.) Some of the enumerated factors in aggravation include: (1) the crimes involves acts disclosing a high degree of cruelty, viciousness, or callousness; (2) the victim was particularly vulnerable; (3) "[t]he defendant took advantage of a position of trust or confidence to commit the offense"; and (4) the defendant engaged in violent conduct that indicates a serious danger to society. (Cal. Rules of Court, rule 4.421.) We review the trial court's imposition of the upper prison term for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848; *People v. Jordan* (2006) 141 Cal.App.4th 309, 324.)

We address the vulnerability factor first. "'[A] "particularly vulnerable" victim is one who is vulnerable "in a special or unusual degree, to an extent greater than in other cases. Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act[.]" [Citation.]' [Citation.]" (*People v. Esquibel* (2008) 166 Cal.App.4th 539, 558.) The victim turned

---

[2] The People assert defendant forfeited these arguments by not raising these specific issues in the trial court. Since defendant argued for the imposition of the low term at the trial court, we will address the merits of his contention.

17 years old in the month prior to the rape. Thus, the victim was a minor at the time the rape took place. (*People v. Yuksel* (2012) 207 Cal.App.4th 850, 853.) The victim was sick from drinking alcohol at the time the rape occurred, as evinced by her vomiting multiple times throughout the incident. The victim also passed in and out of consciousness during the attack.

Given that defendant raped a minor, who was ill, and who was unconscious for portions of the attack, the trial court could reasonably conclude that the "particularly vulnerable" aggravating factor applied in this case because the victim was defenseless and susceptible to the attack, even if the victim does not meet the classic definition of a child. (See *People v. Yuksel*, *supra*, 207 Cal.App.4th at pp. 853-854 [distinguishing "minor" from "child" and noting that a 17 year old is not a "child"].) Since the trial court's application of the "particularly vulnerable" factor was within reason based upon the victim's status as a minor, the victim's illness, and the victim's lack of consciousness, we conclude the trial court did not err. (*People v. Hernandez* (2009) 180 Cal.App.4th 337, 348 [we review a court's decision, not its reasoning].)

We do not address defendant's contention concerning the "position of trust" aggravating factor because the issue is moot, in light of (1) the trial court properly applying the "particularly vulnerable" aggravating factor; and (2) defendant not taking issue with the application of the (a) "callousness" aggravating factor, or (b) "danger to society" aggravating factor. In other words, if we were to address the "position of trust" issue, we could not grant defendant any relief (assuming his arguments are correct) because only one factor is needed to impose an upper term, and in this case we have

concluded one factor was properly imposed, and defendant does not question the application of two other factors. (*People v. Quintanilla*, *supra*, 170 Cal.App.4th at p. 413 [single factor in aggravation sufficient to justify imposition of upper term]; *In re Albert G.* (2003) 113 Cal.App.4th 132, 134 [issue is moot when no relief can be granted].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

RICHLI
Acting P. J.

KING
J.