

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHANN CHRISTIAN DAVIS,

Defendant and Appellant.

G048466

(Super. Ct. No. 12WF0668)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Sheila F. Hanson, Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney
General, William M. Wood and Amanda E. Casillas, Deputy Attorneys General, for
Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Johann Christian Davis was convicted of assault with the intent to commit rape and attempted sexual battery by restraint. On appeal, he argues there was not substantial evidence to support the convictions. We disagree. The evidence of defendant's actions and statements, before, during, and after the assault, amply supports the convictions. Defendant also argues the trial court erroneously instructed the jury regarding attempted sexual battery by restraint. Although we agree the trial court erred in its instruction, we conclude the error was harmless. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Shortly before 5:00 p.m. on March 19, 2012, a man wearing dirty, baggy clothes entered the reception area of a law office on the third floor of a three-story office building in Huntington Beach. Yen Quach, a legal assistant in the law firm, believed the man was with a female client, who had entered the office at the same time. Quach left the office about 5:05 p.m., walked down the hall, and entered the elevator. As the elevator door was about to close, defendant entered the elevator and stood very close to Quach, making her feel uncomfortable. Defendant asked Quach if he could use her iPhone; she responded no. Quach exited the elevator on the first floor; she walked to her car in the parking lot. Defendant followed Quach out of the building. As she got into her car, defendant walked past her and continued further into the parking lot.

Michelle Pollock worked as a paralegal in another law firm on the third floor of the same office building. On March 19, about 5:30 p.m., she left her office to use the restroom. Because the third floor restroom was being cleaned, she took the elevator to the first floor. When the elevator arrived at the third floor, Pollock and another woman entered. Defendant got into the elevator with them. The other woman immediately got

off the elevator. After the doors closed, defendant said, “too bad. We could have had a three-way.” Pollock interpreted his comment as a reference to a sexual act. Pollock did not respond to defendant, but looked down to avoid eye contact. Defendant said, “I would like to lick your pussy,” which made Pollock feel “gross.” Pollock believed defendant was under the influence of alcohol or methamphetamine because he was fidgety, smelled of alcohol, and had watery, bloodshot eyes and slurred speech. Defendant appeared dirty and sweaty.

Pollock went to the women’s restroom when the elevator reached the first floor. When she left the restroom, defendant was standing about 10 to 15 feet down the hallway. He said, “I’ve been thinking about you.” Pollock went quickly up the stairs to her office because she did not want to get back in the elevator with defendant.

The victim was working at a law firm on the second floor of the same building on March 19. About 5:50 p.m., the victim attempted to enter the women’s restroom on the second floor. She pushed the door open about five or six inches. She was surprised to see that the restroom was dark; each restroom had an overhead entry light which was always on and sensor lights over the sinks and the toilet stalls which came on automatically when the door opened. The victim felt resistance on the door. She pushed with more strength until the door opened almost all the way. Defendant, who was shirtless, reached from behind the door and grabbed the victim’s right wrist. He pulled the victim toward himself, saying “come here,” in a forceful manner; the victim’s face was buried in defendant’s chest, which felt sweaty and clammy and smelled of feces. The victim screamed and fought; she pulled her wrist free. She ran back to her office and told her coworkers to call 911.

When Huntington Beach Police Officer Kurt Stoecklein and his partner Officer Busquets arrived in response to the 911 call, they found two other officers holding the second floor women’s restroom door closed from the outside. The officers waited several more minutes for more officers to arrive. During that time, Stoecklein

heard the sound of metal banging and intermittent singing inside the bathroom. When the officers finally opened the restroom door, they saw defendant lying on his back in one of the restroom stalls. Defendant was wearing jeans, but no shirt, shoes, or socks. When the officers ordered defendant to come out, he slid out on his back. The officers took defendant to the parking lot. The victim identified him while looking out a first floor office window.

While defendant was being transported to the police station in a patrol car, he asked the officers to arrest a prostitute because he wanted to “do things that you usually do to women.” When the patrol car passed a woman on a bicycle, defendant stated, “she’s pedalling pussy.”

At the police station, defendant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and gave an audio-recorded statement that was played for the jury at trial. Defendant admitted he had entered the women’s restroom to take a quick shower. Defendant claimed he had used the women’s restroom because the men’s restroom was locked. He said that when a woman entered the restroom, he tried to explain himself, but the woman was screaming too loudly. Defendant denied grabbing the woman’s arm or telling her to “come here,” but admitted that his hand “may have made contact” with her body during the incident. Defendant told the officers that any mark on the victim’s wrist might have resulted from her contact with the restroom door. He also told the officers his comment about the woman on the bicycle was a joke.

A crime scene investigator discovered that the light bulbs over the sink in the second floor women’s restroom had been unscrewed. The investigator swabbed one of the bulbs for DNA; the DNA sample matched defendant’s DNA profile. Neither the men’s nor the women’s restroom had exterior locks. The men’s second floor restroom was not obstructed.

Defendant was charged in an information with assault with the intent to commit rape (Pen. Code, § 220, subd. (a)) (count 1) and attempted sexual battery by restraint (*id.*, §§ 664, subd. (a), 243.4, subd. (a)) (count 2).¹ (All further statutory references are to the Penal Code.) As sentencing enhancements, the information alleged defendant had suffered a prior felony, which qualified as a serious felony under section 667, subdivision (a)(1), and as a serious and violent felony and, therefore, as a second strike under sections 667, subdivisions (d) and (e)(1), and 1170.12, subdivisions (b) and (c)(1). The information also alleged defendant had suffered four prior convictions for which he had served prison terms. (§ 667.5, subd. (b).)

A jury found defendant guilty of both charges. In a bifurcated trial, the court found all prior conviction allegations to be true. The court sentenced defendant to a total of nine years in state prison: the low term of two years on count 1, doubled due to the two strikes provision, plus a five-year consecutive term pursuant to section 667, subdivision (a)(1). The court imposed and stayed execution of an 18-month sentence on count 2, and struck all prior prison term sentencing enhancements pursuant to section 1385. Defendant filed a timely notice of appeal.

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE

“‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of

¹ A charge of second degree commercial burglary (Pen. Code, §§ 459, 460, subd. (b)) was dismissed on the prosecution’s motion before trial began.

every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) “““[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.’ [Citation.]” [Citation.]” (*People v. Clark* (2011) 52 Cal.4th 856, 945.)

Both crimes of which defendant was convicted are specific intent crimes. “The specific intent with which an act is done may be shown by a defendant’s statement of his intent and by the circumstances surrounding the commission of the act.’ [Citation.] ‘In objectively assessing a defendant’s state of mind during an encounter with a victim, the trier of fact may draw inferences from his conduct, including any words the defendant has spoken.’ [Citation.]” (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597.)

A.

Assault with Intent to Commit Rape

“““To support a conviction for assault with intent to commit rape, the prosecution must prove the assault and an intent on the part of defendant to use whatever force is required to complete the sexual act against the will of the victim.”” [Citation.]” (*People v. Trotter* (1984) 160 Cal.App.3d 1217, 1222.) Defendant contends that there was not substantial evidence of his intent to have intercourse with the victim, or that he intended to use whatever force was necessary to accomplish the act of sexual intercourse.

No particular conduct must be proven to establish the intent to commit rape. (*People v. Meichtry* (1951) 37 Cal.2d 385, 389.) Intent may be inferred from the facts and circumstances surrounding the crime. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130.)

We conclude substantial evidence supports defendant's conviction for assault with the intent to commit rape. Having entered an office building without license, defendant followed Quach into an elevator, standing so close to her that she was uncomfortable. Defendant followed Quach to the parking lot, but then returned to the third floor of the office building, where he got into an elevator with Pollock and made sexual advances toward her. Defendant waited in the hallway until Pollock emerged from the women's restroom. He then made a further inappropriate comment that caused Pollock to have concern for her safety. Defendant next went inside the women's restroom on a different floor of the building, unscrewed the light bulbs so the lights on the automatic sensors would not come on. He waited behind the restroom door. When the victim attempted to enter the restroom, defendant, who had removed his shirt, grabbed her by the wrist and forcefully pulled her into the restroom, stating forcefully, "come here." After being arrested, defendant expressed a desire to engage in sexual activity with a woman. In light of all the circumstances, the jury could have reasonably inferred that at the time defendant, from inside the women's restroom, grabbed the victim's wrist he had the intent to engage in sexual intercourse with the victim and to use whatever force was necessary to accomplish the act.

That defendant's actions might be explained by innocent motives does not change the result. Defendant told the arresting officers he was using the women's restroom to clean up. He claims on appeal that he might have unscrewed the light bulbs in the restroom because he was under the influence of drugs and desired relative darkness. Even if these explanations are true, defendant could still have had the intent to rape the victim at the time he grabbed her and pulled her into the restroom. Defendant also contends that his actions were inconsistent with those of someone trying to rape the victim because it would have been easier to attack her if he had stood somewhere other than behind the door of the darkened restroom. Defendant's lack of good planning does not negate the evidence of his intent to commit the crime. Finally, defendant argues that

if he had wanted to rape a woman, he would have attempted to rape either Quach or Pollock, who defendant claims were younger and more attractive than the victim. Leaving aside the deeply troubling issues this argument raises regarding whether rape is a crime of power or of sexual attraction, it would be reasonable for a jury to infer that defendant's actions toward Quach, Pollock, and the victim demonstrate increasing aggressiveness, as well as an attempt to "case" the building for the easiest target.

Defendant cites several cases where the appellate court affirmed the defendants' convictions for assault with the intent to commit rape, in which the evidence of intent to rape was, in defendant's estimation, stronger than the evidence here. (See *People v. Bradley* (1993) 15 Cal.App.4th 1144, 1155; *People v. Trotter, supra*, 160 Cal.App.3d at p. 1220; *People v. Soto* (1977) 74 Cal.App.3d 267, 277-278.) This does not mean a conviction is only appropriate when those fact patterns are presented, however.

Defendant also relies on *People v. Greene* (1973) 34 Cal.App.3d 622, in which the appellate court concluded the evidence was insufficient to support a conviction for assault with the intent to commit rape. In *People v. Greene*, the defendant walked up to the victim, Linda M., and put his arm around her waist. (*Id.* at p. 629.) The defendant told Linda he had a gun, and said, "I just want to play with you." (*Ibid.*) The defendant "moved his hand up and down her waist a little." (*Ibid.*) Linda broke away from the defendant and ran, screaming, to the home of some neighbors. (*Id.* at pp. 629, 650.) The assault took place on a residential street, lit by streetlights as well as the lights in nearby homes; several cars passed by during the incident. (*Id.* at p. 650.) The defendant was not accused of having any other interactions with other women on the same day as the assault on Linda. Based on the foregoing, we find *People v. Greene* to be distinguishable. The assault in this case took place in a women's restroom where defendant had intentionally reduced the lighting, rather than in a lit public space. Defendant used force to grab the victim, and forcefully demanded that she "come here." Shortly before assaulting the

victim, defendant approached two other women and made sexual remarks to one of them. After being arrested for the assault, defendant expressed to the police his desire to engage in sexual activity with a prostitute. Although the appellate court in *People v. Greene* found the evidence insufficient to support a conviction for assault with the intent to commit rape and reduced the defendant's conviction to simple assault, we find the evidence and inferences from the evidence in this case to be sufficient to support the conviction.

B.

Attempted Sexual Battery by Restraint

Defendant also argues that there was not substantial evidence to support his conviction for attempted sexual battery by restraint. That crime requires proof of an intent, and a direct but ineffectual act in an attempt, to touch an intimate part of the body of an unlawfully restrained victim, without the victim's consent, for the purpose of sexual arousal, gratification, or abuse. (§§ 664, subd. (a), 243.4, subd. (a).) There is no issue here about the restraint element of the charge. Accordingly, the only difference between attempted sexual battery by restraint and assault with the intent to commit rape is that the former "requires a finding that the defendant had the purpose of 'sexual arousal, sexual gratification, or sexual abuse.'" (*People v. Dixon* (1999) 75 Cal.App.4th 935, 943.) Having concluded, *ante*, there was substantial evidence supporting defendant's conviction for assault with the intent to commit rape, we need consider here only whether there was substantial evidence defendant "had the purpose of 'sexual arousal, sexual gratification, or sexual abuse'" (*ibid.*).

The evidence amply shows defendant had the purpose of sexual arousal, gratification, or abuse when he grabbed the victim and pulled her to him in a darkened women's restroom. During the hour before the assault on the victim, defendant entered Quach's office without license, followed Quach into the elevator, stood uncomfortably

close to her, and followed her to the parking lot. Defendant then reentered the building and proceeded back up to the third floor, where he followed Pollock into the elevator and made graphic sexual comments to her. Defendant then waited outside the door of the women's restroom until Pollock emerged, at which point he made a further inappropriate comment to her. Defendant went into another women's restroom in the same building and disabled the automatic lights by unscrewing the light bulbs. When the victim tried to enter the restroom, defendant, who had removed his shirt, grabbed her by the wrist, pulled her into the restroom, and forcefully said, "come here." While being transported in the patrol car after being arrested, defendant asked the police officers to pick up a prostitute so he could engage in sexual activities with her. It was reasonable for the jury to infer from the evidence, including the circumstances before and after the assault on the victim, that defendant's purpose was to obtain sexual gratification or arousal and to commit a sexual assault in order to accomplish his goal. Substantial evidence therefore supports defendant's conviction for attempted sexual battery by restraint.

II.

INSTRUCTIONAL ERROR

Defendant argues that the trial court incorrectly instructed the jury with CALCRIM No. 935. The Attorney General concedes the trial court erred in its instruction, but contends the error was harmless beyond a reasonable doubt.

The trial court instructed the jury with CALCRIM No. 935, in relevant part, as follows: "To prove that the defendant is guilty of a sexual battery, the People must prove that: [¶] One, the defendant unlawfully restrained [the victim]. [¶] Two, while [the victim] was restrained the defendant touched an intimate part of her body. [¶] Three, the touching was done against [the victim]'s will. [¶] And four, the touching was done for the specific purpose of sexual arousal, sexual gratification or sexual abuse. [¶] An intimate part is a female's breast or the anus, groin, sexual organ or buttocks of anyone.

[¶] Contact must have been made with [the victim]’s bare skin. This mean[s] that: [¶] One, the defendant must have touched the bare skin of [the victim]’s intimate part. [¶] *Or two, [the victim]’s bare skin touched the defendant’s intimate part either directly or through his clothing.*” (Italics added.) The italicized portion of the instruction was incorrect; section 243.4, subdivision (a) requires that the defendant touch the bare skin of an intimate part of the victim’s body.²

An instructional error that improperly describes the elements of a crime does not require reversal if the error was harmless beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 502-503; see *Chapman v. California* (1967) 386 U.S. 18.) In this case, we conclude the error was harmless beyond a reasonable doubt. In addition to being convicted of attempted sexual battery by restraint, defendant was also convicted of assault with the intent to commit rape. In convicting defendant of assault with the intent to commit rape, the jury necessarily found that defendant had the intent to make skin-to-skin contact with the victim’s sexual organ. Therefore, the jury found beyond a reasonable doubt that defendant intended to touch the bare skin of an intimate part of the victim’s body. The error in instructing the jury that it could convict defendant if he intended that the victim’s bare skin touch an intimate part of defendant’s body is not prejudicial in this case.

² In relevant part, section 243.4 provides: “(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. . . . [¶] . . . [¶] (f) As used in subdivisions (a), (b), (c), and (d), ‘touches’ means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense. [¶] (g) As used in this section, the following terms have the following meanings: [¶] (1) ‘Intimate part’ means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.”

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.