Filed 12/18/06 P. v. Green CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GARY GREEN, Defendant and Appellant.	B185652 (Los Angeles County Super. Ct. No. BA279164)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara R. Johnson, Judge. Affirmed.

Jeralyn Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gary Green appeals, alleging the trial court erred when it failed to give the jury the unanimity instruction in CALJIC No. 17.01, denied his motion for new trial based on the same alleged instructional error, relied on a factor to impose a high term sentence that is not supported by the evidence, and imposed an aggravated sentence in violation of *Blakely v. Washington* (2004) 542 U.S. 296. We affirm.

PROCEDURAL BACKGROUND

Defendant was charged with two counts of forcible oral copulation, in addition to forcible rape, assault with a deadly weapon, and assault with intent to commit rape. (Pen. Code, §§ 288a, subd. (c)(2); 261, subd. (a)(2); 245, subd. (a)(1); 220.)[1] It was alleged that defendant inflicted great bodily injury on the victim and used a deadly weapon during the commission of the crimes. (§§ 12022.8; 12022.3, subd. (a); 12022.7, subd. (a); 12022, subd. (b)(1).) It was also alleged that defendant had committed the sex crimes under circumstances which met the requirements of section 667.61, subdivisions (a), (b), and (c). Defendant was convicted of one count of forcible oral copulation, assault with a deadly weapon, and assault with intent to commit rape. He was found to have inflicted great bodily injury on the victim and to have used a deadly weapon in the commission of each crime. Defendant was acquitted of forcible rape and the second count of forcible oral copulation.

Defendant filed a motion for new trial. He claimed the trial court erred when it failed to give the jury the unanimity instruction in CALJIC No. 17.01. The motion was denied. The court sentenced defendant to state prison for a term of 25 years to life for the forcible oral copulation pursuant to section 667.61, subdivision (a). Relying on the fact that defendant was on probation at the time the offense was committed, the court imposed the high term of four years for the assault with a deadly weapon, added an additional three-year term for the infliction of great bodily injury, and ordered the sentence stayed

---

[1] All statutory references are to the Penal Code.

pursuant to section 654. Sentences for the other assault and remaining allegations were also imposed and stayed.

STATEMENT OF FACTS

The Prosecution Case[2]

The victim B.F. was a prostitute. She knew defendant and had engaged in an act of prostitution with him in the past. On February 10, 2005, she saw defendant on the street. They had a conversation and she agreed to go to his house. They arrived at the house at about 4:00 a.m., and she told him she could not stay long.

Once inside, defendant asked B.F. if she wanted to use drugs. She declined. Defendant went into the kitchen. When he returned, he asked to use her cocaine pipe. As she opened her purse to retrieve the pipe, defendant produced a large butcher knife. He slashed her on the leg and chest. He ripped B.F.'s t-shirt off and said, "You gonna suck my dick, Bitch. Or I'm going to kill you."

They struggled for control of the knife. As defendant tried to stab B.F. in the neck, she grabbed the knife by the blade. Despite being cut, she was able to take the knife from him. Defendant choked her and ordered her to remove her pants. She complied. Defendant got on top of her and placed his penis in her vagina.

Defendant was unable to climax. He grabbed a crowbar from under a nearby table and struck B.F. in the head with it. Defendant had difficulty ejaculating during intercourse and twice he removed his penis from B.F.'s vagina and demanded that she suck on it. After ejaculating, defendant told B.F. he would not let her leave because he wanted to climax again. B.F. said the sex continued, but she did not testify to any further specific acts.

At about 6:00 a.m., defendant told B.F. she could get dressed. Defendant's mother let B.F. out of the house. B.F. complained that defendant had cut her, but defendant's

---

[2] As defendant is not contesting the sufficiency of the evidence of guilt, we present a summary of the pertinent testimony.

mother told B.F. to get out of her yard. B.F. asked her to call the paramedics, but she refused.

B.F. eventually got help at a fire station. She told fire personnel that she had been raped and cut by her attacker. Later at the hospital, B.F. had surgery on her hand. At the time of trial, she did not have full movement of one finger. B.F. also suffered an injury to her chest that required stitches, a stab wound to the breast, as well as other knife wounds to her neck, shoulders, hands, and arms.

On February 10, at about 8:30 a.m., Los Angeles Police Department Officer Patrick Welsh spoke to B.F. in the hospital. She appeared tired and scared. She told Officer Welsh that she met her attacker on the street at about 4:00 a.m. B.F. described the rapist and explained how and where the attack took place.

On February 16, B.F. was released from the hospital. Detective Thayer Lake met B.F. at the hospital and she directed him to the house where she had been raped. On February 18, they returned to the house. While at the location, B.F. saw defendant come out of one of the houses on the property and dash back inside after Detective Lake called to him. B.F. told the detective that defendant was the man who raped her. As B.F. waited for officers to arrest defendant, defendant's brother delivered a message to her. He said defendant's mother, Dorothy Johnson, was willing to pay B.F. to keep her from testifying.

After defendant's arrest, Detective Jayne Stabler entered the house and examined the room where B.F. said she was raped. Detective Stabler observed what appeared to be blood in different areas of the bedroom. There were stains on the carpet and spatter on the walls. The detective defined spatter as blood that is cast off after an impact. She looked for evidence of blood on the mattress, and noticed that the mattress appeared to be new.

Nand Hart-Nibbrig, a criminalist with the Los Angeles Police Department, also examined the crime scene. He tested various stains in the bedroom and determined that they were bloodstains.

Detective Lake was present when defendant was arrested. Defendant initially refused to come out of the house he had run into, and police officers had to enter the house to extract him. Defendant was taken to the Newton Station, where Detectives Lake and Villegas tape-recorded an interview of defendant. The tape was played to the jury.

In the interview, defendant said he went to the store to buy some cigarettes and was on his way home when someone whistled. A woman approached him. She said she was "working" and asked if he wanted "to come and kick it like before?" He did not remember being with the woman before. She knew his first name and said she was acquainted with his brothers and other family members from the neighborhood. They went to his house and had sexual intercourse in the living room. Defendant said that when the sexual encounter began, he was wearing a condom, but the woman took it off and performed oral sex on him. They again engaged in intercourse. After he ejaculated, he went into the bathroom. When he returned, the woman was gone.

About 15 or 20 minutes later, the woman returned with a man. She appeared to be high from smoking rock cocaine. She said she came to retrieve some items she had left in the house. He let her in, but told the man to wait outside. Defendant said that he was trying to get her to leave when she asked, "Where's my 20?" He told her he had already paid her. At this point, the man came through the door and asked defendant if he was going to give the woman her money.

The man pulled out a knife and demanded money. The three started wrestling and struggling over the knife. Defendant was cut on the leg and the woman received a wound on one of her arms. Defendant was able to take control of the knife, but the blade broke. He then grabbed a crowbar and chased the man out of the house. The woman remained. She said she was sorry and left. During the fracas, defendant was hit in the face and was bleeding from the nose and lip.

Detective Lake testified that on the date of defendant's arrest, eight days after the incident, defendant did not have any sign of an injury to his face. The detective opined that the victim, a seasoned prostitute, would have insisted on the use of a condom during sex acts with a man, including oral sex.

The Defense Case

Amfram Swazi was in custody awaiting trial on a murder charge. He testified that B.F. used to be his girlfriend. She told him about a time when she was forced into a home and had sex against her will. She said more than one man was present in the home. The men cut her near her breasts and lower abdomen to get blood in order to burn it as part of a sacrificial rite. Swazi testified he had never seen defendant before and denied being at defendant's house on the night B.F. was raped.

Detective Lake testified that on February 24, when B.F. returned to the hospital to get her bandages changed, she told the doctor that she did not know whether she wanted to live any longer because of the nightmares she was having. The doctor thought she was suicidal and arranged to have her held for 72 hours pursuant to Welfare and Institutions Code section 5150.

Arthur Corona, an attorney employed by defendant's trial counsel, testified that Dorothy Johnson called him to say that B.F. was on Johnson's porch asking for money. Johnson asked Corona what she should do. When Corona asked Johnson if she wanted him to speak to B.F., Johnson said yes, and gave her phone to B.F.

The person to whom Corona was speaking identified herself as B.F. She told Corona that "Gary didn't do cutting. Gary didn't cut." She said she was homeless and needed money. When B.F. said she wanted to do the right thing, Corona suggested that she come to his office and prepare a declaration. When B.F. told him she would only come if she was paid, he told her that he would not give her any money. Corona admitted he did not tell the detectives assigned to the case about his conversation with B.F.

DISCUSSION

Alleged Instructional Error

Defendant claims the trial court erred by not giving, sua sponte, the unanimity instruction contained in CALJIC No. 17.01.[3] He asserts error resulted in that it was

---

[3] The instruction reads:

possible the jury convicted him of violating section 288a, without agreeing on which act he committed. While defendant correctly states when the instruction is applicable, he is mistaken when he concludes the instruction was necessary in this case.

"When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

The case cited by defendant, *People v. Smith* (2005) 132 Cal.App.4th 1537, provides an example of when the unanimity instruction is required. Smith was charged with 10 counts of child molestation. However, the prosecution elicited testimony from the victim that she was molested on over 20 occasions during an approximate two-year period. (*Id.* at pp. 1541-1542.) The jury found Smith guilty of only one count of molestation. The court concluded, "it is certainly reasonably possible that this jury concluded that as long as each juror believed beyond a reasonable doubt that defendant had molested [victim] at least once, it did not matter that they differed on what act of molestation actually occurred." (*Id.* at p. 1546.) As a result, the trial court's failure to read CALJIC No. 17.01 constituted prejudicial error. The scenario in our case is different.

Defendant acknowledges that although B.F. testified she orally copulated him three times, she "fleshed out only two incidents with sufficient specificity to suggest [he]

"The defendant is accused of having committed the crime of ____ [in Count ____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ____] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

used coercion." Defendant was charged with two counts of forcible oral copulation. Unlike the *Smith* case, defendant's jury was not presented with a situation where the evidence showed more than one act which could constitute one charged offense.

Notwithstanding the fact that this case involved two charges coupled with two discrete incidents, defendant argues the instruction was necessary because he presented two separate defenses. He asserts his defense to one act of oral copulation was consent, while his claim as to the second act was that it did not occur. He argues "some jurors may have believed Green's statement only one act occurred and disbelieved [B.F.]; others may have been convinced two acts occurred, but may have been convinced one was voluntary." Defendant is incorrect when he claims that he presented two distinctly different defenses to the jury.

Defendant did not testify at trial. As noted, the prosecution played a tape recording of defendant's interview with detectives. Defendant said he had consensual intercourse with B.F. He claimed that he paid B.F. $20 prior to engaging in the sex act. He was wearing a condom when he placed his penis in B.F.'s vagina. B.F. took the condom off and began to orally copulate defendant. The interview proceeded as follows:

> "Detective Lake: Okay.
>
> "[Defendant]: And then we ended up going right back over the same thing.
>
> "Detective Villegas: Okay.
>
> "[Defendant]: You know, doing it again."

Defendant asserts this exchange clearly signaled to the jury that he was claiming only one act of oral copulation took place. He is mistaken. The words are too ambiguous to suggest any clear meaning. Moreover, throughout the interview, the questioning was directed at defendant's claim that the sex acts were consensual. The issue of *how many* different sex acts were performed was never clearly discussed, and at no time did defendant claim that any particular sex act did not occur.

Defendant's trial attorney argued to the jury that B.F. was a prostitute and the sex acts were consensual. Counsel emphasized the fact that B.F. and defendant had engaged

in a prior act of prostitution. The gist of the defense was that B.F. was a liar, not that the alleged sex acts did not take place. The jury was asked by the defense to answer one question: Did B.F. and defendant engage in consensual sex? Defendant did not rely on two separate defenses. As we noted, since the jury heard evidence of two acts of oral copulation and was presented with two counts, the unanimity instruction was unnecessary. The trial court properly denied defendant's motion for new trial, as there was no instructional error.

Alleged Sentencing Error

Defendant argues the trial court erred when it imposed the high term for the assault charge. He asserts the record does not support the court's finding that he was on probation at the time the offense was committed. Defendant acknowledges the probation report, upon which the court relied, listed the fact that he was on probation as an aggravating factor. He claims further investigation would have revealed that he was placed on probation for a misdemeanor, and that the term of probation expired prior to the commission of the new offense.

The Attorney General argues that defendant forfeited any right to appeal from the alleged error by failing to object below. We agree. When the court asked defense counsel if she wanted to be heard prior to the imposition of sentence, she only asked that the court not impose the high term. The court specifically referred to the aggravating factor that defendant was on probation at the time of the offense when it sentenced defendant to the high term. Counsel could have objected and requested that the court conduct further inquiry into defendant's probationary status. "However, defendant did not exercise his right to present any materials or call any witnesses to contradict, explain or otherwise rebut materials in the probation report, and he is now foreclosed from raising such issues." (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 725, internal citations omitted, disapproved on another point in *People v. Green* (1980) 27 Cal.3d 1, 34.)

Even assuming error, there is no prejudice. As the Attorney General points out, there were four other circumstances in aggravation the court could have cited to support the imposition of the high term. The court found no circumstances in mitigation. "Only a single aggravating factor is required to impose the upper term [citation]." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) A new sentencing hearing is not required.

Finally, defendant argues the court erred when it imposed the high term, citing *Blakely v. Washington*, *supra*, 542 U.S. 296. He concedes that we are bound by the decision of the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238,[4] which held that our sentencing scheme does not violate the rule in *Blakely*.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P.J. MANELLA, J.

---

[4] We acknowledge the decision is pending review in the United States Supreme Court. (*Cunningham v. California*, No. 05-6551, cert. granted Feb. 21, 2006, 126 S.Ct. 1329.)