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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ULRICK K. WHITE,

Defendant and Appellant.

2d Crim. No. B189111  
(Super. Ct. No. 2003034297)  
(Ventura County)

Ulrick K. White appeals a judgment following his conviction, after trial by jury, of forcible rape (Pen. Code, § 261, subd. (a)(2))<sup>1</sup> and false imprisonment (§ 236). We conclude, among other things, that the trial court did not err by admitting a tape recording of a 911 call, but it erred by imposing the upper term for the rape conviction by relying on sentencing factors which were not tried by a jury. (*Cunningham v. California* (2007) 549 U. S. \_\_\_ [127 S.Ct. 856].) We vacate the sentence and remand for resentencing. In all other respects, the judgment is affirmed.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

## FACTS

Nancy C. went to the Bombay bar in Ventura, consumed alcoholic beverages and became intoxicated. She started to dance by herself. White, who was also dancing, approached her and briefly talked with her. Later, Nancy left the bar by herself and walked out to the street. White drove by in a mini-van and offered her a ride.

Nancy entered the van. She wanted White to drive her home. She became uneasy when White told her, "We will just hang out and I'll drive you home afterwards." She asked him several times to let her out of the vehicle, but he told her to "shut up." She tried to jump out of the van, but White grabbed her arm and prevented her from leaving.

Nancy pulled out her cell phone and dialed 911, believing that the police would be able to track her location. White drove her to a dark secluded area and stopped the vehicle. He put his hands "all over" her, and then choked her. He told her to disrobe, using the phrase "take it off," and then he pulled off her shorts and raped her.

Nancy testified that after the attack White "drove [her] to where [she] wanted to go." She was afraid he would not let her out of the van, so she told him she liked him "to appease him," and gave him her cell phone number after he requested it.

### *The 911 Tape*

The prosecution sought to introduce the tape of the 911 call Nancy made. White objected on the grounds that it was unduly prejudicial (Evid. Code, § 352) and would lead to speculation by the jury because much of the tape was inaudible. The trial court overruled the objection. The entire tape was played for the jury.

On the tape, Nancy can be heard saying to White, "Please stop the car . . . . I have to get out . . . . Stop. Please." White responds, "No." The tape contains many inaudible sounds and unintelligible responses. As the tape proceeds, Nancy can be heard saying, "What are you doing?" White responds, "Shut the hell up." She asks White, "Listen . . . do you have a wife? Before you break my neck." White responds, "No, take it off. Take this off." He then repeats the "take it off" phrase several times.

After several inaudible responses on the tape, Nancy can be heard saying, "Can you stop, please. Please, please, please. Help." White responds, "Shut the fuck

up." As the tape goes on Nancy can be heard saying, "Ow, ow, ow, ow, you're hurting me." White says, "Open up." Nancy says, "You raped me. You raped me." White answers, "I guess, I did." A short time later, Nancy says, "You stuck your dick inside me and I told you no. I told you no. You raped me. You're a rapist." White replies, "I'm not a rapist."

### *The Pretext Call*

Nancy reported the incident to the police. Police Officer Russell Robinson suggested that Nancy make a recorded "pretext call" to White. In that telephone conversation, Nancy asked White, "[Y]ou say we could still have contact but I mean how do I know that I won't see [you] and you'll choke me again?" White responded, "Honey, that's . . . a risk we all take, you know, and that's what life is about . . . it's risk and challenges." Nancy asked, "Okay, so . . . there's no telling that you won't rape me and you won't choke me again?" White said, "I could sit here and I could tell you, I could sweet talk you, sugar coat, do all the fine, sweet things you may want me to say to make you feel comfy and secured . . . but that doesn't mean . . . it's the truth." At the end of his response, White added, "For you to feel comfortable . . . around me . . . you're gonna have to see me . . . . [T]hat's the only way it's gonna work . . . telling you this . . . and the other is just wasting my time and yours. You know, it's a part of life, it's a risk you take."

Later in this phone conversation, Nancy said, "[W]hen somebody says no, it means no." White responded, "Okay. You know what? I've been there before in situations like that. On the contrary for a man, we-we, I guess we react differently towards it."

### *White's Statements to the Police*

After his arrest, White agreed to speak with Officer Robinson. White said he and Nancy had consensual sex and she never used the word "no" to any sexual activity. Robinson said that Nancy stated that she told White "no" repeatedly and he had sex with her against her will. White responded, "[I]t's all lies."

### *The Defense Case*

Jean Matthews, a sexual assault nurse, testified that Nancy came to the hospital and said she had been sexually assaulted and choked. Matthews took oral swabs and blood and urine samples from Nancy's body. Nancy refused to have a genital examination, which is unusual for a sexual assault victim. Matthews said she appeared to be tired and it was 4:40 a.m. Nancy, however, cooperated in giving her medical history, signing medical release forms and answered questions about the attack.

Dennis Peet, a prosecution investigator, testified that he interviewed Nancy on prior occasions about this incident. But during a trial preparation session, Nancy provided new details which she had not mentioned in the earlier interviews. At that session, Nancy revealed to Peet that White had allowed her to get out of the car to urinate. She said she tried to run away, but White caught her and "took her back to the car."

White did not testify.

### *Sentencing*

The court sentenced White to the upper term of eight years for forcible rape. It found as factors in aggravation that White had choked Nancy and she was a "particularly vulnerable" victim. She was inebriated and White took her to a secluded location. It was a "crime of opportunity" and White lacked any "appreciation or awareness . . . for what he did in this case." The court imposed the mid-term of two years for false imprisonment and stayed that sentence pursuant to section 654.

## DISCUSSION

### *I. Admitting the 911 Tape*

White contends the court erred by admitting the 911 tape because most of it is "inaudible or unintelligible." We disagree.

""To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness." [Citations.]"" (*People v. Polk* (1996) 47 Cal.App.4th 944, 952.) "[A] partially unintelligible tape is admissible unless the audible

portions of the tape are so incomplete the tape's relevance is destroyed. [Citations.]" (*Ibid.*) Here the audible portions of the tape were relevant as evidence Nancy was raped. The tape corroborated the prosecution's case. It also became relevant to impeach White's claim that he had consensual sex with Nancy. That there are inaudible portions, does not require exclusion of the tape where a witness testifies to explain the events on the tape. (*Id.* at p. 953.) Here Nancy testified and the jury was in a position to judge the credibility of her statements in court and on the tape.

White claims that the admission of the entire tape was unduly prejudicial to him. We disagree. The defense position was that the tape established reasonable doubt. White's trial counsel asked the jury to listen to the entire tape because he claimed it impeached Nancy's testimony about having been choked and raped. He said, "If you listen to the 9-1-1 tape in its entirety . . . you will hear nothing . . . that is consistent with somebody who has been choked . . . ." He also told the jurors, "No sex can be identified as happening on that 9-1-1 tape. Please listen to the tape carefully."

Here both the prosecution and the defense used portions of the tape to ask jurors to draw inferences favorable to their positions. The prosecution relied on White's initial answer to Nancy's statement, "You raped me," where he responded, "I guess, I did." But White's counsel referred the jury to a remark he made shortly thereafter where he said, "I'm not a rapist."

Moreover, given the strength of the prosecution's case, White is not able to show that an erroneous admission of the 911 tape constitutes reversible error. The prosecution's evidence against White was compelling. The jury could reasonably infer from White's statements in the pretext call that he did not deny that he had raped and choked Nancy. He incriminated himself when he callously told her that he did not have to respect her right to say "no" to sex and that going out with him involved "a risk." His false statements to the police showed his consciousness of guilt and impeached his claim that they had consensual sex.

## II. *Upper Term Sentence*

White contends the trial court erred by imposing an upper term sentence for rape by making findings on aggravating sentencing factors which were not tried by a jury. We agree. The United States Supreme Court has held that a judge may not impose an upper term sentence because the aggravating sentencing factors to support such a sentence must be tried by a jury. (*Cunningham v. California, supra*, 549 U. S. \_\_ [127 S.Ct. 856].) There are some limited exceptions to this rule, but they do not apply here. The trial court relied on several critical factors, including the victim's vulnerability, her "inebriated" state, the location of the crime, White's attitude and the manner by which he physically assaulted Nancy. But White had the right to a jury trial on these factors.

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Kevin J. McGee, Judge

Superior Court County of Ventura

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