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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BROCK ALLEN TURNER,

Defendant and Appellant.

H043709

(Santa Clara County

Super. Ct. No. B1577162)

A jury convicted defendant Brock Allen Turner of assault with intent to commit rape, sexual penetration of an intoxicated person, and sexual penetration of an unconscious person. On appeal, defendant challenges the sufficiency of the evidence supporting his convictions.¹ We shall affirm.

I. FACTUAL BACKGROUND

A. *The Fraternity Party*

In January 2015, Jane Doe 1 was a 22-year-old recent college graduate living with her parents in Palo Alto. On Saturday, January 17, 2015, her younger sister, Jane Doe 2, was home from college for the weekend.² That night, the sisters attended a fraternity

¹ Defendant’s appellate briefs also raised claims of evidentiary error, instructional error, prosecutorial misconduct, and cumulative error. However, after briefing in the case was complete, he withdrew those claims of error because, “if successful, [they] would provide the District Attorney an opportunity for a re-trial of the case in whole or in part, or for a re-sentencing on one or more counts.”

² We refer to the victim as Jane 1 and her sister as Jane 2, which is consistent with the terminology in the trial transcripts and used by the Attorney General on appeal. Rule 8.90(b) of the California Rules of Court requires this court to “consider referring to”

party at Stanford University with Julia M., a Stanford student and Jane 2's friend from high school; Colleen M., one of Jane 2's college friends; and Colleen's friend Trea.

Before the party, Colleen, Trea, Jane 1, and Jane 2 drank at the sisters' home. They started drinking at about 10:00 p.m. Jane 1 testified that she drank four shots of whiskey and a glass of champagne in about 45 minutes. The sisters' mother drove the group to Stanford at 10:45 or 11:00 p.m.

The party was at the Kappa Alpha fraternity house. Jane 1 and the others met Julia at the fraternity shortly after 11:00 p.m. In the basement of the house, Jane 1 drank what she estimated was three or four shots of vodka. Later, the group went out on the patio. Julia was "very drunk" by that time of the night. Jane 1 testified that she "was very out of it at this point." Jane 1 drank beer on the patio; her last memory of the night was being on the patio while her sister was talking to some guys.

Jane 2 testified that she spoke with someone named Tommy on the patio. Tommy was standing with two friends, including defendant, but Jane 2 did not recall having a conversation with defendant. At some point, defendant came up to Jane 2 and kissed her "out of nowhere." Jane 2 laughed, because she was confused and felt awkward, and as a result their teeth hit. She found it "extremely weird" that defendant kissed her; she walked away. Colleen confirmed that defendant kissed Jane 2 "out of the blue" while the group was on the patio. Jane 2 testified that defendant approached her again later and tried to kiss her, but she walked away.

At 11:54 p.m., Jane 1 called her boyfriend of a few months, Lucas M., who was living on the East Coast. The two were still dating at the time of trial. Lucas testified that during the 11:54 p.m. call, which woke him because it was nearly 3:00 a.m. where he

certain individuals "by first name and last initial or, if the first name is unusual or other circumstances would defeat the objective of anonymity, by initials only," in order to protect those individuals' privacy. Accordingly, we refer to the lay witnesses by their first name and last initial, and thereafter by first name only.

lived, Jane 1 was slurring and incomprehensible. She did not respond to anything he said and the call ended after a couple of minutes because he could not communicate with her.

Shortly after midnight, Jane 2 and Colleen went to put Trea to bed in Julia's dorm room. Jane 2 told her sister that she was leaving and would be right back. Jane 2 testified that she, Julia, and Jane 1 were all "very drunk" at this point. Jane 2, Colleen, and Trea took an Uber to Julia's dorm. The Uber receipt shows the Uber picked them up at 12:17 a.m.

Lucas received another call from Jane 1 at 12:16 a.m., which he let go to voicemail. He listened to her voicemail message immediately and became concerned because it sounded like she was alone. He could only understand some of what she said and her breathing sounded heavy and irregular. Jane 1's 12:16 a.m. voicemail was played for the jury and admitted into evidence. It includes long pauses and bouts of giggling. When Jane 1 does speak, her words are drawn out, as if she is having difficulty forming them. Lucas called Jane 1 back, hoping to keep her on the line until she found someone who could take care of her. Lucas recalled putting the phone on his pillow and testified that he must have fallen asleep because he did not recall how the conversation ended.

At 12:29 a.m., Jane 2 received a call from Jane 1. Jane 2, who was at Julia's dorm at the time, could not make out what Jane 1 was saying. At trial, Jane 2 could not remember whether she could not understand her sister because it was too loud on the other end or because Jane 1 was slurring her words. Jane 2 and Colleen took an Uber back to the party. The receipt shows the Uber dropped them off at 12:48 a.m. They could not find Jane 1. After searching for her for an hour and calling and texting her without response, they went home.

B. Two Graduate Students Encounter Jane 1 and Defendant

Carl A. and Peter J., Stanford graduate students, biked to the Kappa Alpha party in the early hours on January 18. As they approached the fraternity house, they saw two

people on the ground between a basketball court and a wooden shed. The area was unlit, but lights from the nearby fraternity house allowed them to see the pair. The person on top began thrusting in a sexual manner. Peter noticed that the person on the bottom wasn't moving and decided to make sure everything was okay. Both men got off their bikes and walked towards the pair. Peter asked loudly, "[h]ey . . . is everything all right here?" The person on top, who Peter identified at trial as defendant, looked at Peter, stood up, and backed away. The woman, later identified as Jane 1, remained on the ground. Her arms and legs were spread out, her dress was hiked up around her waist, and she appeared to be asleep. After seeing Jane 1's condition, Peter yelled at defendant "[w]hat the fuck are you doing? She's unconscious." Defendant turned and ran. Peter chased, tackled, and sat on defendant to restrain him. Peter testified that defendant smiled and tried to get free.

Carl checked on Jane 1. She was breathing but unresponsive when he shook her and said "hey." Carl then helped Peter restrain defendant, who was still struggling. Carl testified that, at some point, defendant said "I didn't do anything." Defendant was not slurring his words. The men restrained defendant for approximately 10 minutes until campus police arrived.

At trial, both graduate students identified several photographs of the area where they first observed defendant and Jane 1, which were admitted into evidence. Those photographs depict a sloped patch of ground between a wooden enclosure and a basketball court surrounded by trees and covered with sticks and leaves.

C. Jane 1 Receives Medical Treatment and Undergoes a SART Exam

Jeff Taylor, a deputy sheriff with the Stanford University Department of Public Safety, responded to a call about an unconscious person with possible alcohol poisoning at just after 1:00 a.m. He found the female subject, later identified as Jane 1, lying on the ground behind a dumpster enclosure. Her dress was gathered around her waist and her buttocks and vagina were exposed. A pair of women's underwear was on the ground

next to her. One of her breasts was exposed. Her hair was disheveled and full of pine needles. After confirming that Jane 1 had a pulse, Taylor asked her if she was okay, but he received no response, even to yelling.

Paramedics transported Jane 1 to Valley Medical Center and began administering intravenous fluids during the ride. She regained consciousness at 4:15 a.m. She did not know where she was or what had happened to her.

Kristine Setterlund, a Sexual Assault Response Team (SART) nurse, performed a SART exam on Jane 1 on the morning of January 18, 2015 at Valley Medical Center. Setterlund testified that Jane 1 had abrasions on her buttocks, shoulders, clavicle, and inside her labia minora. Unidentified debris also was found inside Jane 1's labia minora. Setterlund collected swabs from Jane 1's body to undergo DNA testing.

Setterlund also performed a SART exam on defendant early on the morning of January 18. Among other things, she collected swabs from his palms, fingers, and beneath his fingernails.

D. The Investigation

Detective Mike Kim, a Sheriff's deputy and investigator with the Stanford University Department of Public Safety, investigated the case. In October 2015, he walked through the scene with the graduate students, at which time he took measurements. Based on his measurements, Jane 1 was found 116 feet from Kappa Alpha's back patio.

Craig Lee, a forensic biologist and criminalist with the Santa Clara County District Attorney's Crime Laboratory, testified as a DNA expert. Lee testified that he performed DNA analysis on evidence in this case. Lee concluded that defendant's DNA was not found on the waistband of Jane 1's underwear, although he testified that did not mean defendant did not touch the underwear. Lee also concluded that Jane 1's DNA was found under defendant's fingernails on both hands and on his finger swab.

E. Blood Alcohol Content Evidence and the Alcohol Experts

The parties stipulated that Jane 1's blood was drawn at 7:15 a.m. or 7:45 a.m. on January 18 and her blood alcohol content (BAC), at that time, was 0.127/0.129 percent. The parties also stipulated that defendant's blood was drawn at 3:15 a.m. on January 18 and his BAC, at that time, was 0.133/0.130 percent.

Alice King, a criminal analyst and supervisor of the toxicology unit at the Santa Clara County District Attorney's Crime Laboratory, testified for the prosecution as an expert on the effects of alcohol on the human body. Based on Jane 1's height, weight, and BAC on the morning of January 18, King determined that Jane 1's BAC at 1:05 a.m. was between 0.241 and 0.249 percent. She testified that a person with that amount of alcohol in her system would experience "a lot of mental impairment" and could pass out. King noted that Jane 1's BAC may have been even higher than 0.249 percent at 1:05 a.m. because King's calculation did not account for the fact that Jane 1 received intravenous fluids before having her blood drawn.

King also calculated defendant's BAC at 1:05 a.m. based on his BAC later that morning and his physical characteristics. She determined that his BAC was 0.171 percent, a level at which she said a person would experience mental impairment.

Kim Fromme, Ph.D., a professor of clinical psychology at the University of Texas at Austin, testified for the defense as an expert in the field of clinical psychology with expertise on alcohol and its effects on human cognition, memory, and behavior. Dr. Fromme testified that when a person is in an alcoholic blackout, they are conscious and making voluntary decisions but are not forming memories. She testified that most blackouts occur at a BAC of 0.20 percent or above. Dr. Fromme testified that studies show people are not very good at assessing the intoxication level of others and opined that people cannot tell when someone else is in an alcoholic blackout. She further opined that Jane 1 experienced an alcoholic blackout on the night she met defendant.

F. Defendant's Testimony

Defendant was a 19-year-old Stanford freshman in January 2015. He testified that, on the night of January 17, he drank five beers and a couple of sips of Fireball whiskey at a dorm room party before going to the Kappa Alpha fraternity party, where he had two more beers. Defendant remembered talking with Jane 2 and his friend Tom at Kappa Alpha. Defendant testified that he and Jane 2 were laughing about something and looked into each other's eyes. Thinking she was flirting with him, he leaned in and kissed her. Their teeth hit. They pulled away, laughing, and she walked away. He did not recall approaching Jane 2 a second time, as she testified.

Defendant said he approached Jane 1, who was dancing alone, at about 12:30 a.m. They danced together and kissed. He asked her if she wanted to go back to his dorm room with him and she said yes, so they left the party together. Outside, she lost her footing and fell, pulling him down with her. On the ground, they laughed about having fallen and began kissing again. He asked if she wanted him to "finger her" and she said yes. According to defendant, he then removed Jane 1's underwear; she lifted her hips to allow him to do so. He then put his finger in her vagina. After about a minute, he thought she orgasmed so he stopped "fingering her." According to defendant, they began "dry humping," which defendant described as grinding their hips against each other. His pants were on and his fly was zipped; he had an erection. Defendant testified that Jane 1 was conscious and responsive to him the entire time they were together and that he did not intend to rape her.

Defendant started feeling sick and told Jane 1 he thought he was going to throw up. She responded, "Oh, okay." He got to his feet and stumbled down the incline towards the basketball court. At that point, he noticed Peter standing next to him. Peter said something along the lines of "what the fuck, man, . . . you're sick." Defendant testified that he responded, "I didn't do anything." Peter then tried putting defendant in an "arm lock," which scared defendant, so he ran. Peter chased defendant and tackled

him to the ground. While restraining defendant, Peter kept calling defendant “sick” and said “Do you think that’s okay,” although defendant never heard Peter say Jane 1 was unconscious. Defendant initially testified that he had no idea what Peter was talking about. However, on cross-examination, defendant said he thought the graduate students were accusing him of taking advantage of Jane 1. Defendant testified that he did not try to tell them his side of the story because they didn’t seem to care.

Also on cross-examination, defendant acknowledged that where he and Jane 1 fell to the ground was not “the most ideal place to hook up” and that he could have “finger[ed] her” without removing her underwear completely. Defendant testified that Detective Kim interviewed him several hours after his arrest. Defendant acknowledged that he told Detective Kim that he did not run away from the graduate students and admitted that was a lie. Defendant agreed that Jane 1 was more drunk than he was but said “[s]he didn’t appear any more drunk than anybody else I had been with.”

G. Defendant’s Character Witnesses

Andrew C., a 21-year-old college student, testified that he and defendant were good friends and swim club teammates in middle and high school. Andrew testified that defendant would never sexually assault someone. Andrew acknowledged on cross-examination that he had never been with defendant when defendant was drinking.

Gary G., defendant’s swim club coach when defendant was in high school, testified that defendant is respectful and courteous, knows right from wrong, and would not engage in sexually assaultive behavior. Gary had never been with defendant when defendant was drinking.

Lydia P. dated defendant in high school, was one of his swim club teammates, and remained his close friend at the time of trial. She testified that defendant has high moral character and was always respectful of her during their sexually intimate encounters. She had never been with defendant when defendant was drinking.

Jennifer J. was defendant's high school French teacher for three years, coached his high school swim team, and was a close friend of defendant and his family. She testified that she would not associate sexually assaultive behavior with defendant. She had never been with defendant while he was drinking.

H. Rebuttal

Detective Kim testified on rebuttal that he interviewed defendant at 6:35 a.m. on January 18. A recording of the interview was played for the jury. In the interview, defendant told Detective Kim that he met Jane 1 outside the fraternity house, where they were drinking beers. He did not mention dancing with her at the party. He explained that they ended up where they did because "you aren't gonna make out with a girl in front of a group of people." He did not say they were on their way back to his dorm room. Defendant said he and Jane 1 made out and that he "finger[ed] her" and felt her breasts. He did not mention "dry humping" her. He said he ended the encounter because he was dizzy and did not want to throw up on her. He denied raping Jane 1 or intending to do so and said she was responsive to him while they were together. He denied running away. Defendant estimated that he and Jane 1 were on the ground for "not even like 5 minutes."

Peter testified on rebuttal that he did not touch defendant before defendant ran away.

II. PROCEDURAL HISTORY

The Santa Clara County District Attorney charged defendant by information filed on October 6, 2015 with assault with intent to rape (Pen. Code § 220, subd. (a)(1);³ count 1); sexual penetration of an intoxicated person (§ 289, subd. (e); count 2); and sexual penetration of an unconscious person (§ 289, subd. (d); count 3).

The case went to a jury trial in March 2016. After hearing about six-and-a-half days of testimony, the jury began deliberating on the morning of March 29, 2016. Jurors

³ All further statutory references are to the Penal Code unless otherwise indicated.

returned guilty verdicts on all counts late on the afternoon of March 30. At a June 2, 2016 sentencing hearing, the trial court suspended imposition of sentence, placed defendant on three years' formal probation, and ordered him to serve six months in county jail. Defendant timely appealed.

III. DEFENDANT'S CONVICTIONS ARE SUPPORTED BY SUFFICIENT EVIDENCE

Defendant argues none of his convictions is supported by sufficient evidence. That argument lacks merit.

A. *Standard of Review*

“ ‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.’ ” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

B. *Defendant's Conviction for Assault with Intent to Commit Rape is Supported by Substantial Evidence*

Defendant was convicted, in count 1, of assault with intent to rape in violation of section 220, subdivision (a)(1). An element of that crime is intent to commit rape. (*People v. Cook* (2017) 8 Cal.App.5th 309, 313; CALCRIM No. 890.) Defendant argues the evidence was insufficient to prove he intended to rape Jane 1. We disagree.

At the time defendant met Jane 1, she was slurring her words. Within minutes of meeting, they left the crowded party together. On the ground outside, away from other

partygoers, defendant completely removed Jane 1's underwear and pulled her dress up around her waist, exposing her vagina. Defendant conceded at trial that doing so was not required to "finger" her. When the graduate students interrupted, defendant was thrusting in a sexual manner on top of a partially naked Jane 1. Upon being confronted, defendant ran. During the 10 minutes the graduate students restrained him, he made little or no effort to explain or defend himself, despite having surmised that they suspected he had taken advantage of Jane 1. Defendant lied to Detective Kim about attempting to run away. The jury could reasonably have inferred from the foregoing evidence that defendant intended to rape Jane 1.

Defendant contends evidence that he was fully clothed and engaged in forms of sexual conduct other than intercourse—namely, "fingering" and "dry humping"—negate an inference of intent to rape. We are not persuaded. While it is true that defendant did not expose himself, he was interrupted. Jurors reasonably could have inferred from the evidence described above that, if the graduate students had not stopped defendant, he would have exposed himself and raped Jane 1. *People v. Meichtry* (1951) 37 Cal.2d 385 is instructive. There, a defendant convicted of assault with intent to rape argued there was insufficient evidence he intended to rape the victim because "there was no testimony that he was exposed so as to be able to complete the act." (*Id.* at p. 389.) Our Supreme Court rejected that argument, reasoning that "[t]he stated test for the determination of the existence of the intent [to rape] does not include exposure as an element." (*Ibid.*)

The fact that defendant was engaging in a different sexual act at the time the encounter was interrupted (namely, "dry humping") does not foreclose the inference that he intended, ultimately, to rape Jane 1. Neither the evidence nor common sense supports defendant's contention that "dry humping" "is mutually exclusive to actual intercourse." And even assuming defendant's alternative interpretation of the evidence—that his intent was to continue to "dry hump" Jane 1 to the point of ejaculation and nothing further—is reasonable, that does not compel reversal. (See *People v. Lindberg* (2008) 45 Cal.4th 1,

27 [“If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding”].)

C. Defendant’s Conviction for Sexual Penetration of an Intoxicated Person is Supported by Substantial Evidence

Defendant contends there was insufficient evidence to support his conviction, in count 2, of sexual penetration of an intoxicated person (§ 289, subd. (e)). The elements of that crime are (1) the defendant committed an act of sexual penetration with another person; (2) the penetration was accomplished by using a foreign object; (3) the victim was prevented from resisting by any intoxicating substance; and (4) the defendant knew or reasonably should have known that fact. (*Ibid.*; CALCRIM No. 1047.) At trial, defendant admitted putting his finger into Jane 1’s vagina, but denied that she was too intoxicated to resist or consent. On appeal, he says there was insufficient evidence that Jane 1 was prevented from resisting by any intoxicating substance or that he knew or reasonably should have known that fact.

In defendant’s view, the only evidence that was probative of those elements was his own exculpatory testimony that Jane 1 was coherent and consenting and the absence of his DNA on the waistband of her underwear, which he says shows she cooperated in its removal, meaning she consented to the digital penetration. As discussed below, defendant overlooks considerable circumstantial evidence indicating Jane 1 was too intoxicated to resist and that he knew or reasonably should have known that fact. And defendant overstates the significance of the absence of his DNA on Jane 1’s underwear.

As the jury was instructed here, “[a] person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by

someone who knows the nature of the act involved.” (CALCRIM No. 1047; *People v. Giardino* (2000) 82 Cal.App.4th 454, 461-462 [“prevented from resisting” element of rape of an intoxicated person requires proof that victim was “not capable of giving legal consent because of intoxication”].)

Jane 1 testified that she drank four shots of whiskey, a glass of champagne, three or four shots of vodka, and some beer over the course of about two hours. She did not remember a significant portion of the night, including her sister telling her she was leaving the party, calls to her sister and boyfriend, and any conscious interaction she may have had with defendant. Jane 1’s boyfriend, Lucas, testified that she was slurring and incomprehensible at 11:54 p.m. A voicemail Jane 1 left for Lucas at 12:16 a.m., which jurors heard, corroborated his testimony. Jane 1’s BAC was at least 0.241 percent at 1:05 a.m. She passed out from the amount of alcohol in her system and remained unconscious for hours despite receiving intravenous fluids. She was found lying half-naked on a patch of dirt covered with sticks and pine needles; her hair was full of pine needles and she had abrasions on her buttocks. The jury reasonably could have inferred from the foregoing evidence that, at the time of Jane 1’s interaction with defendant between 12:30 and 1:00 a.m., she was too intoxicated to exercise reasonable judgment, understand and weigh the physical nature of the act of digital penetration, its moral character, and probable consequences, and thus could not give legal consent.

There also was substantial evidence that defendant should have known Jane 1 was too intoxicated to consent to sexual activity. Lucas’s testimony and the voicemail she left for him support the inference that Jane 1’s extreme intoxication should have been apparent to those with whom she interacted between 12:30 and 1:00 a.m. That Jane 1’s incapacity was apparent to passersby likewise supports the inference that defendant, who was on top of her, should have been aware that she was too intoxicated to resist.⁴

⁴ In his reply brief, defendant argues the graduate students’ observations regarding Jane 1’s level of intoxication were irrelevant because “[t]here may well have been a

Defendant notes that Jane 2 and Julia did not appreciate Jane 1's level of intoxication. But they were very drunk themselves and they last saw Jane 1 around midnight. Therefore, evidence of their assessments of Jane 1's intoxication did not prevent the jury from reasonably inferring that defendant knew or should have known Jane 1 was too intoxicated to consent to sexual activity between 12:30 and 1:00 a.m.

As noted, defendant places great significance of the absence of his DNA on Jane 1's underwear as proof of consent. But the DNA expert testified that the absence of defendant's DNA "may not mean" that defendant did not touch the underwear. And, indeed, defendant testified that he *did* touch Jane 1's underwear to remove it, with her assisting only by lifting her hips. In view of the DNA expert's testimony, the absence of defendant's DNA on Jane 1's underwear is not proof she consented—or was capable of giving legal consent—to the digital penetration.

D. Defendant's Conviction for Sexual Penetration of an Unconscious Person is Supported by Substantial Evidence

Defendant was convicted, in count 3, of sexual penetration of an unconscious person (§ 289, subd. (d)). The elements of that crime are (1) the defendant committed an act of sexual penetration with another person; (2) the penetration was accomplished by using a foreign object; (3) the victim was unable to resist because he or she was unconscious of the nature of the act, including due to unconsciousness; and (4) the

passage of 10 or 15 minutes or more between the fingering and the arrival of [Peter] and [Carl], during which time [Jane 1's] state of intoxication may have reached the point of unconsciousness well after the fingering had occurred." The evidence, including defendant's own testimony and statements, contradict the timeline he now proposes. Defendant testified that he "fingered" Jane 1 for a minute and began "dry humping" immediately after he stopped "fingering" her. He told Detective Kim in his initial interview that he and Jane 1 were on the ground for "not even like 5 minutes." The graduate students testified that they saw defendant start thrusting on top of Jane 1. Accordingly, that Jane 1 appeared to the graduate students to be unconscious was probative of whether defendant should have known she was too intoxicated to resist the digital penetration that the evidence indicates occurred in the preceding few minutes.

defendant knew that fact. (*Ibid.*; CALCRIM No. 1048.) Defendant maintains there was insufficient evidence of the third and fourth elements—that Jane 1 was unconscious at the time he digitally penetrated her and that he knew that fact.

The evidence at trial established that Jane 1 was unconscious when first responders arrived on the scene at 1:05 a.m. and when Carl contacted her about 10 minutes earlier. The graduate students' testimony strongly supports an inference that she was unconscious when they observed defendant thrusting on top of her. Defendant's own testimony and statement to Detective Kim indicate that he fingered Jane 1 shortly before the graduate students arrived. And the digital penetration occurred outside on a bed of dirt and pine needles, which jurors reasonably could have inferred was so rough it left the abrasions the SART nurse observed on Jane 1's buttocks. Based on the foregoing evidence, jurors reasonably could have inferred that Jane 1 lost consciousness before defendant digitally penetrated her. While defendant testified that she was awake and responsive, the jury was free to disregard that portion of his testimony.⁵

On appeal, defendant points to “the undisputed fact that [Jane 1] walked with [defendant] for approximately 116 feet from the patio of the Kappa Alpha house to the open area adjacent to the basketball court” as evidence that she was conscious at that time. In fact, apart from defendant's own testimony, there is no evidence as to how Jane 1 got from the party to the location between the basketball court and wooden enclosure. Even assuming she walked, that fact would not prevent jurors from reasonably inferring that she had lost consciousness by the time of the digital penetration.

There also was substantial evidence that defendant knew Jane 1 was unconscious at the time he sexually penetrated her with his finger. As previously discussed, there was

⁵ Jurors were instructed with CALCRIM No. 226 that “[y]ou may believe all, part, or none of any witness's testimony.” Consistent with that instruction, jurors were entitled to credit portions of defendant's testimony, including as to the timing and duration of his encounter with Jane 1, but to disbelieve others, including his claim the encounter was consensual.

evidence the digital penetration occurred shortly before the graduate students showed up, at which point Jane 1 appeared, even from a distance, to be unconscious. When the graduate students confronted defendant, he ran. He did not explain or defend himself to them. And he lied to police about running. Jurors reasonably could have inferred from the foregoing evidence that defendant knew Jane 1 was unconscious when he digitally penetrated her.

IV. DISPOSITION

The judgment is affirmed.

ELIA, ACTING P. J.

WE CONCUR:

GROVER, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.