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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX LACEY,

Defendant and Appellant.

B246964

(Los Angeles County  
Super. Ct. No. BA403347)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed.

Vanessa Place, under appointment of the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Seth P. McCutcheon, Deputy Attorney General, for Plaintiff and Respondent.

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## **SUMMARY**

A jury convicted appellant, Alex Lacey, guilty on one count of oral copulation by acting in concert with force (Pen. Code, § 288a, subd. (d)(1)) and was sentenced to the low term of five years in state prison.

On appeal, appellant contends that CALJIC No. 1.23.1 unconstitutionally shifts the burden of persuasion to the defense in cases where there is no proof of positive assent or cooperation. We disagree and affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Prosecution Evidence**

At the time of trial, the victim, Asia H., was a 20-year-old student. Asia had been in a dating relationship with David Dwight from about May 2011 to October 2011. Appellant was Dwight's roommate.

After the relationship between Dwight and Asia had ended, Asia drove to Los Angeles from Victorville on January 21, 2012 and visited Dwight before she left to go out with a female friend. Asia did not spend the night at Dwight's residence that night.

The next night, January 22, 2012, Asia returned to Dwight's residence with the intention of staying over. While there, Asia saw appellant was present. Asia had met appellant one time previously. Asia also noticed a third man in Dwight's home who she had never met before, as well as several women. Asia had never had phone contact with appellant, flirted with appellant or expressed a physical attraction toward him.

Asia fell asleep in Dwight's bedroom. Around 11:00 p.m., Asia and Dwight had consensual sex. Afterwards, Asia went to the bathroom to shower. Dwight followed Asia into the bathroom and asked if she wanted to "have sex with his brother." Asia was unsure who he meant by "his brother" but thought Dwight was joking and laughed. Dwight left the bathroom and then returned and asked Asia the question again. Asia told Dwight "no."

Around 2:00 a.m., Dwight and Asia had consensual sex again. While Dwight was performing oral sex on Asia, appellant entered Dwight's bedroom and approached the

bed beside Asia. Asia attempted to get up, but was unable to as Dwight moved his arms to wrap them around her legs. Appellant knelt down on the bed and placed his hands on Asia's upper chest. Asia said to appellant "[w]hat are you doing? Stop playing." Appellant responded by telling Asia "[s]hut the fuck up."

Asia tried to move or flip over but Dwight, who was no longer performing oral sex on Asia, physically prevented her from doing so. Appellant placed his penis into Asia's mouth. Asia tried to remove appellant's penis by pushing her hands at his hip area, but was unable to move him. After approximately seven to ten minutes, appellant ejaculated into Asia's mouth. Asia spit the ejaculation onto the sheet and appellant and Dwight left the room. Asia also saw the third man leave the room but had not seen him enter.

Asia called a friend to try to find a ride to her grandmother's house, which was 15 minutes away by car, but did not tell the friend what had happened, only saying she was stranded. She was unable to get a ride and Dwight returned to the room. Asia stayed in Dwight's room with Dwight and fell asleep, waking around 6:30 a.m. As she was walking out of the room, Dwight awoke and asked if she was mad and Asia replied "no."

After she left, Asia walked two blocks to a shopping plaza and called the police. Asia also called her friend Joyce Powell and told her that she had been sexually assaulted.

Los Angeles Police Detective Salvador Loera interviewed Asia and directed her to the UCLA Santa Monica Rape Treatment Center. At UCLA, Asia was examined by a nurse practitioner, Thuy Nguyen. Nguyen conducted a sexual assault examination and concluded that the results were consistent with Asia's account of the events.

Asia identified appellant from a photographic lineup. Police officers executed a search warrant on Dwight's residence and arrested appellant. Appellant was taken to the West Bureau Sexual Assaults station where, after being informed of and waiving his right to remain silent, appellant gave a recorded interview to Detective Loera. The recorded interview was played to the jury.

In the interview, appellant told Detective Loera that he and Asia were "play fighting" that night and had played around like that before. After the play fighting stopped, appellant picked out some movies, turned back and sat next to Asia and started

talking to her when “it happened.” Appellant also told Detective Loera that before “pushing” his penis into Asia’s mouth, appellant had “put it on her face” and she had “turned away” and appellant thought “let me try one more time” and when Asia turned back, appellant again “put it on her face” and “she opened her mouth” and appellant “just slipped it in.” Appellant denied knowing whether Asia was scared and claimed he would never force someone to perform oral sex. Appellant described his actions as being “in the moment” and a chance to “let me see if I can pull this off, let me see if I can do this, let me see if she would do it” without really knowing if she would. Appellant also stated that he put his hands on Asia’s face after he pushed his penis into her mouth so he could push further in.

Appellant suggested that once he had his penis in her mouth, Asia could still have backed off or “just stood up.” According to appellant, although Dwight was in the room the entire time, appellant was not paying attention to what Dwight was doing.

Loera testified that to his recollection appellant never told him that Asia had consented to the act prior to appellant entering the bedroom and if appellant had so stated, Loera would have documented the statement. No such statement was documented in Loera’s reports.

Both parties stipulated that a DNA profile taken from Asia’s neck consisted of “a mixture of at least three individuals, including at least one male.” Possible contributors to the DNA profile were Asia and Dwight. It was inconclusive whether the profile contained appellant’s DNA.

## **B. Defense Evidence**

Appellant testified that he shared the bottom floor of a townhouse with Dwight. Prior to January 2012, appellant had never met Asia before.

Appellant saw Asia in his home as she was leaving to go “clubbing” with her female friend. Appellant overheard Asia telling her friend that appellant was “cute.”

The next night, appellant saw Asia at his townhouse again. During this second time Asia was at the house, appellant went to get movies from Dwight’s room and he and

Asia engaged in “play fighting” on Dwight’s bed, where he touched Asia’s breast and Asia touched appellant’s body. Appellant then left Dwight’s room.

In the early morning of January 23, 2013, appellant entered Dwight’s bedroom and saw Dwight performing oral sex on Asia. Appellant went beside Asia and pulled out his penis. Asia turned away but then turned back toward appellant with her mouth open. Appellant placed his penis into Asia’s mouth. Appellant did not put his hands on Asia. While his penis was in Asia’s mouth, Asia was not pushing him away and was not telling him to get out or asking what he was doing. After about seven minutes, appellant removed his penis from Asia’s mouth and ejaculated and left the room.

Appellant was arrested by police later that day.

### **C. Conviction and Sentence**

Appellant was convicted by jury of one count of oral copulation by acting in concert with force in violation of Penal Code section 288a, subdivision (d)(1).<sup>1</sup>

The trial court denied probation and sentenced appellant to the low term of five years in state prison. In addition, the court imposed various fines and assessments and awarded presentence credits.

## **DISCUSSION**

On appeal, appellant contends that the jury instruction CALJIC No. 1.23.1 unconstitutionally shifts the burden of persuasion on the issue of consent onto the defense in cases where there is no proof of “positive” cooperation or assent. We disagree and affirm.

The jury was instructed that appellant was guilty of oral copulation by acting in concert with force (Pen. Code, § 288a, subd. (d)(1)) if, inter alia, appellant committed an act of oral copulation “when the act is against the will of the victim” and was also

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<sup>1</sup> Dwight was also charged with the same offense. He pled guilty to other charges.

instructed that “against the will” meant “without the consent of the alleged victim.”<sup>2</sup> The challenged instruction, CALJIC No. 1.23.1, states, “In this case, word ‘consent’ means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.”

Appellant argues that CALJIC No. 1.23.1 “creates a rebuttable mandatory presumption of lack of consent where there is not proof positive of assent” so that “the State simply has to show the absence of cooperation” and “the defendant must then overcome this presumption by proving either actual cooperation or his reasonable, good-faith belief in such cooperation.” In other words, according to appellant, “CALJIC No. 1.23.1 essentially states that absent evidence to the contrary, wrongful intent will be presumed in all sex cases where there is not proof of the complainant’s positive cooperation.”

Appellant’s failure to object to the consent instruction forfeited this argument. In *People v. Lee* (2011) 51 Cal.4th 620, the Supreme Court explained that “[a] trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal [citations].” (*Id.* at p. 638.) The defendant in *People v. Lee*, like appellant, challenged CALJIC No. 1.23.1 and argued that it “improperly reduced the prosecution’s burden of proof and denied him due process of the law.” (*Id.* at p. 638.) The Supreme Court noted that “with only minor exceptions, the challenged portion of CALJIC No. 1.23.1, which defines consent, tracks the language

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<sup>2</sup> Using CALJIC No. 10.12, the trial court instructed the jury “Defendant is accused in Count 1 of having committed the crime of unlawful oral copulation in violation of section 288a, subdivision (d) of the Penal Code. [¶] Every person who voluntarily acting in concert with another person, either personally or by aiding and abetting the other person, commits an act of oral copulation when the act is accomplished against the will of the victim by means of force or fear or immediate and unlawful bodily injury on the victim or another person, is guilty of the crime of unlawful oral copulation in violation of Penal Code section 288a, subdivision (d). [¶] . . . [¶] ‘Against the will’ means without the consent of the alleged victim.”

of section 261.6” of the Penal Code, defining consent to be ““positive cooperation in an act or attitude pursuant to an exercise of free will.”” (*Id.* at p. 638; Pen. Code, § 261.6.) Just as in *People v. Lee*, CALJIC No. 1.23.1 as given in this case “correctly expressed the law” and if appellant “believed the instruction on consent required elaboration or clarification, he was obliged to request such elaboration or clarification in the trial court.” (*Id.* at p. 638.)

Moreover, were we to address the merits of appellant’s contention that CALJIC No. 1.23.1 “creates a rebuttable mandatory presumption of lack of consent where there is not proof positive of assent” and thus unconstitutionally shifts the burden of persuasion on the issue of consent onto the defense, we would find the contention without merit. As stated in *People v. Lee, supra*, 51 Cal.4th at page 641, “CALJIC 1.23.1 does not tell a jury that it must presume lack of consent if the alleged victim has not actively expressed consent.” Rather, the “instruction simply explains what consent means in the context of forcible [oral copulation], without unconstitutionally shifting the burden of proving consent to defendant.” (*Id.* at p. 641; citing *People v. Gonzalez* (1995) 33 Cal.App.4th 1440, 1443.) Taken with the other jury instructions--telling the jury that the defendant was presumed innocent until the People proved the contrary; that the presumption placed upon the People the burden of proving beyond a reasonable doubt that appellant was guilty; that in order to prove the crime, each element must be proved including that the oral copulation was accomplished against the will of the victim; and that “against the will” meant without the consent of the alleged victim—the “instructions as a whole ensured the jury understood that the prosecution at all times bore the burden of proving each element of the charged offense.” (*People v. Lee, supra*, 51 Cal.4th at pp. 641-642.)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.