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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. D'ANDRE MARCUS CRISS, Defendant and Appellant.	B277063 (Los Angeles County Super. Ct. No. NA103220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedemann and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant D'Andre Marcus Criss appeals from a judgment following convictions on three counts of committing corporal injury on a cohabitant, girlfriend or child's parent and two counts of forcible rape. Appellant contends his rape convictions should be reversed because the trial court committed prejudicial error in failing to give an instruction on his reasonable, good faith mistake of fact regarding the victim's consent to sexual intercourse pursuant to *People. v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*). As explained below, we conclude there was no substantial evidence to support giving a *Mayberry* instruction. Accordingly, we affirm.

STATEMENT OF THE CASE

A jury found appellant guilty of committing corporal injury on Angela P. on three separate occasions, the latest occurring on or about December 14, 2015 (Pen. Code, § 273.5, subd. (a); counts 1-3)[1] and committing forcible rape upon Angela twice, on or about December 14, 2015 (§ 261, subd. (a)(2); counts 4-5). As to counts 1 and 2, the jury found true the special allegation that appellant personally inflicted great bodily injury.

The court sentenced appellant to a total term of 12 years in prison. Appellant timely appealed.

STATEMENT OF THE FACTS

A. *Prosecution Case*

Angela testified she was in a relationship with appellant between August 2013 and December 2015. During this time,

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

appellant was married to another woman, Kayleen. In February 2014, Angela gave birth prematurely to appellant's daughter and in May 2015, Angela and her daughter moved in with appellant, Kayleen and their three children.

Angela testified appellant was physically abusive during the relationship. On March 2, 2014, he choked her, slapped her face, and pulled her hair. In January 2015, he hit her arms and back, choked her until she was unconscious, and threatened her with a handgun. On March 3, 2015, he grabbed her and shoved her face into the floor, covering her mouth to prevent her from screaming. On March 23, 2015, he hit her repeatedly with a belt and shaved her head with an electric razor. In November 2015, he repeatedly hit her in her face until her left eye was swollen shut, and also hit her arms, legs and back.

On December 14, 2015, appellant accused Angela of cheating on him and told her that they were going to talk about her cheating when she came home. Angela responded that she wanted to fix what she had done in the past, and asked appellant, "Please don't hit me anymore." Appellant subsequently picked her up from work and drove her home. During the drive home, on several occasions, appellant pulled over to a remote area, got on top of Angela and punched her repeatedly in the chest, arms, back and side.

When they arrived home, appellant continued beating Angela and asking about her past. He dragged her to the bathroom by pulling her hair. There, he shaved the hair that had grown back on her head. Appellant eventually stopped assaulting Angela and told her to make him hot tea. She did so because she "love[d] him."

Appellant told Angela he "needed to get some pussy." She responded she could not have sex with him because she was "too sore" and her "whole body hurt." Appellant nevertheless had sex with Angela. She did not resist because she did not want to be hit anymore. After appellant was done, he lay down on the floor and went to sleep. Angela lay down on the couch. Later, appellant woke up in the middle of the night, got on top of Angela, and had sex with her again. She did not want to have sex with him, but felt she could not stop him.[2]

Angela did not call the police the next day to report the assaults. However, on December 16, 2015, appellant again accused Angela of cheating and assaulted her. Appellant stopped when Kayleen came home. Angela then began to gather her belongings to take her daughter to a doctor's appointment. Appellant told her she could not take the girl. Angela handed her daughter to Kayleen, asked her to take care of the child, and left. Appellant texted Angela multiple times, trying to get her to return. Angela eventually went to a police station where she reported the assaults.

Angela was transported to a hospital for examination and treatment. Dr. George Knull testified he observed bruising "all over her body." X-rays revealed Angela had two broken ribs.

B. *Defense Case*

Appellant testified in his own defense. He stated it was Angela who was the abusive person in the relationship, and that

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[2] The two counts of forcible rape were based on these two incidents. Count 4 was based on the assault on the evening of December 14, after Angela had told appellant she could not have sex because her "whole body hurt." Count 5 was based on the assault after appellant awoke in "the middle of the night."

she had assaulted him on several occasions, including stabbing him in the leg with a knife. According to appellant, Angela would threaten to -- and actually did -- injure herself to maintain their relationship. For example, to show appellant how much she loved him, Angela shaved her own head.

Appellant testified that on December 13, 2015, appellant, his wife, and their children were at Disneyland when Angela texted him, stating that she would kill herself and hurt their daughter if he did not come home. When he arrived home, Angela had marks on her body. She told appellant she loved him and wanted to have another child with him. Appellant initially refused, but Angela kept pleading, and appellant had sex with her that night. Appellant testified Angela was always the person who initiated sex.

On December 14, 2015, while driving Angela to work, appellant and Angela got into an argument after he told her he no longer wanted to be with her. Once at work, she repeatedly texted appellant that she loved him, wanted to be with him, and was "working to be a better me." Later that evening, when appellant picked Angela up from work, she asked him if he was going to leave her. When he responded he was and that he would be taking their daughter with him, she opened the car door and tried to jump out. Appellant grabbed her and told her he would stay with her if she closed the door. Once home, Angela began yelling at appellant and Kayleen, stating, "You guys ain't leaving with my daughter. If you leave, I am going to call your [appellant's] probation officer . . . ." At some point, Angela began repeatedly hitting herself until appellant stopped her. Thereafter, appellant and Kayleen went into the bedroom. That evening (December 14), appellant had sex with his wife.

The next day, December 15, after Angela came home from work, she and appellant had a discussion about having another child. Angela pulled a knife on appellant and threatened to harm herself, Kayleen, and the children. Appellant managed to calm her down and took the knife from her. She pleaded with appellant to have another child together. Although appellant initially refused, Angela promised to let him take their daughter to Disneyland the next day if he had sex with her. They had sex that night.

The next morning, appellant noticed that Angela was packing their daughter's belongings to take her to the doctor. When appellant informed her that he was taking their daughter to Disneyland, Angela became upset, handed their daughter to Kayleen, and walked out of the door. Later that day, the police arrested him.

Appellant's wife, Kayleen, testified and corroborated much of her husband's testimony. She had seen Angela cut her own wrists with a knife multiple times and shave her head twice. She also had witnessed Angela assaulting appellant on several occasions. Kayleen testified that Angela had threatened her on multiple occasions, including once with a knife, and had said that she (Angela) should be with appellant because of their daughter.

On the evening of December 14, 2015, Kayleen, appellant and their children were preparing to go to her aunt's home. Kayleen went to pick up Angela's daughter, and Angela lunged at her. Angela told Kayleen not to touch her daughter and said they could not take the child to the aunt's home. Angela then sat on the couch and started hitting herself. When appellant told Kayleen, "Let's go," Angela threatened to call his probation officer. Appellant and Kayleen stayed, and they later had sex.

The next day, Kayleen observed Angela shaving her head. She then grabbed a knife from the kitchen and threatened to kill everyone in the house. Appellant eventually calmed her down. On December 16, 2015, Kayleen, appellant, and the children were planning to go to Disneyland when Angela started yelling that she did not want them to take her daughter to Disneyland. She handed her daughter to Kayleen and left. Later that day, police arrived and arrested appellant for domestic violence. Kayleen did not tell officers that Angela had threatened them with a knife, or that she had shaved her own head and punched herself.

City of Long Beach Police Officer Dennis Price testified that Angela flagged him down at the police station on December 16, 2015. She informed him about appellant's recent assaults. Angela told the officer that on two separate occasions on the night of December 14, appellant wanted to have sex with her and she complied. She did not tell the officer the sex was against her will, but implied that she had sex with appellant to keep him from abusing her further.

DISCUSSION

In *Mayberry*, *supra*, 15 Cal.3d 143, the California Supreme Court held that a defendant's good faith and reasonable belief that a victim consented to sexual intercourse is a defense to forcible rape. (*Id*. at p. 155.) "The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent." (*People v. Williams* (1992) 4 Cal.4th 354, 360-361, fn. omitted

(*Williams*).) "In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction." (*Id*. at p. 361.) The *Mayberry* instruction should not be given unless (1) there is substantial evidence "that the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual intercourse," and (2) there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Id*. at pp. 361, 362.)

In *Williams*, our Supreme Court found no substantial evidence supporting a *Mayberry* instruction. There, the defendant testified that the victim initiated sexual contact, fondled him, and inserted his penis inside herself. In contrast, the victim testified that the sexual encounter occurred only after the defendant prevented her from leaving, punched her in the eye, pushed her onto the bed, and ordered her to take off her clothes, warning her that he did not like to hurt people. The court found that these "wholly divergent accounts" created no middle ground from which the defendant could argue he reasonably misinterpreted the victim's conduct. Accordingly, there was no substantial evidence of "equivocal conduct" on the part of the victim warranting an instruction as to a reasonable and good faith, but mistaken, belief of consent to intercourse. (*Williams*, *supra*, 4 Cal.4th at p. 362.)

In *People v. Maury* (2003) 30 Cal.4th 342, the Supreme Court held that the trial court did not have a sua sponte duty to instruct on the *Mayberry* defense where there was neither substantial evidence of the victim's equivocal conduct nor substantial evidence of the defendant's state of mind. There, the victim agreed to accompany the defendant only after he tricked her. After the defendant drove her to a deserted area, the victim became scared and asked to be taken home. The defendant placed and tightened a rope around her neck, demanded that she take off her clothes, ordered her to lie down and raped her. This evidence showed no equivocal conduct. (*Id*. at p. 424.) Additionally, the defendant did not testify and he presented no circumstantial evidence of his state of mind at the time of the offense. "Indeed, defendant never admitted that he engaged in sex with [the victim], consensual or otherwise. . . . Thus, an instruction on the defense of reasonable but mistaken belief in consent would have been inconsistent with defendant's theory of the case." (*Id*. at p. 425.)

Similarly, in *People v. Martinez* (2010) 47 Cal.4th 911, the Supreme Court found no error in the trial court's refusal to give a *Mayberry* instruction because the record was devoid of any equivocal conduct on the part of the victim, or of any evidence that the defendant reasonably mistook her conduct for consent. (*Id*. at p. 954.) "In fact, defendant claimed that he had only met her for the first time that night and that . . . he had no contact with her at the park where she was found dead. He claimed that he was only meeting her to buy methamphetamine and otherwise never did drugs with or 'partied with her.'" (*Ibid*.)

Here, Angela testified that on the evening of December 14, 2015, after severely beating her, appellant stated he wanted to

have sex. She refused, stating that she was too sore from the beating. Appellant nevertheless had sex with her. She did not resist because she did not want to be beaten again. Appellant then went to sleep. Later, appellant woke up, got on top of Angela, and had sex with her again. Although she did not want to have sex with him, she did not resist because she felt she could not stop him. Appellant testified, but never acknowledged having sex with Angela on those two occasions. Indeed, he testified that on the night of December 14, he slept in the bedroom he and his wife shared, and had sex with her. Kayleen testified and confirmed that she and appellant had sex that evening. On this record, there was no substantial evidence of the victim's "equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not." (*Williams*, *supra*, 4 Cal.4th at p. 362.) The victim testified she did not resist appellant's sexual assaults on the evening of December 14 and later in the "middle of the night" because he had just beaten her severely. Appellant testified that on that night, he had sex with Kayleen. These two "wholly divergent accounts" created no middle ground from which appellant could argue he reasonably misinterpreted the victim's conduct as consenting to sex of the two charged occasions. (*Ibid*.)[3]

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[3] Appellant argues that evidence that on prior occasions they had sex after incidents of domestic violence supports the giving of a *Mayberry* instruction. However, in none of those incidents did the sex act immediately follow the domestic violence. Moreover, no evidence was presented that the victim's conduct on those prior occasions was similar to her conduct on these two occasions. Thus, no reasonable trier of fact could rely on the prior history between Angela and appellant to determine whether Angela's

In addition, there was no substantial evidence in the record that appellant subjectively held a good faith and reasonable belief that the victim consented to sex on those occasions. Appellant testified he did not have sex with the victim on those two occasions and presented no other evidence about his state of mind during the offenses. In sum, the record provided no support for a *Mayberry* instruction. Accordingly, the trial court did not err in failing to give an instruction sua sponte.

DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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conduct in the instant case was "equivocal" with respect to consenting to have sex.