Filed 7/3/12 P. v. Benitez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GREGORIO BENITEZ, Defendant and Appellant.	B236454 (Los Angeles County Super. Ct. No. VA116956)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dewey Lawes Falcone, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Blythe J. Leszkay and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Gregorio Benitez appeals from the judgment following a jury trial in which he was convicted of four felony counts of lewd acts upon a child under 14 years (counts 1, 2, 3, and 5) (Pen. Code, § 288, subd. (a)).[1] The jury found true the allegation that appellant personally inflicted great bodily injury upon the victim, his stepdaughter who became pregnant (§ 667.61, subds. (b) & (e)). The trial court sentenced appellant to a total of 21 years to life, consisting of 15 years to life on count 5 (principal count), and consecutive terms of two years each on the remaining three counts. Appellant contends there was insufficient evidence to support the finding of great bodily injury. We disagree and affirm the judgment.

FACTS

Appellant began living with A.C. and her mother (mother) when A.C. was about seven years old. A.C. called him "Daddy," and he and mother had a son when A.C. was eight or nine years old.

Appellant first sexually abused A.C. when she was 10 years old and in the fifth grade. During this first incident, A.C. was wrapped in a towel after having taken a shower when appellant asked her if she wanted to have sex with him. Appellant followed A.C. into her bedroom and told her that she had a nice body. A.C. told appellant that she did not want to have sex with him, but appellant proceeded to put his penis inside her vagina. A.C. put a pillow over her face during the incident because she did not want to see him. A.C. testified that she did not want to have sex with appellant and felt that it was wrong.

Appellant had sexual intercourse with A.C. a second time while she was still in the fifth grade and a third time while she was in the sixth grade, both times putting his penis inside her vagina. Both times she told him she did not want to have sex.

The final incident occurred around Christmas in 2009 when A.C. was 13 years old. Appellant told A.C. they were going to have sex, but A.C. said, "I don't want to." She

---

[1] All statutory references shall be to the Penal Code unless otherwise noted.

had sex with appellant after he offered to buy her an "iPod" and threatened to tell mother about A.C.'s boyfriend, with whom she was not having sex.

A.C. became pregnant after this last incident. She told appellant she was not menstruating, and he responded that he might have gotten her pregnant. A.C. did not tell mother about the sexual incidents or being pregnant because she was afraid of mother knowing and was also afraid mother would send her to Mexico. On the evening of September 21, 2010, A.C. had "bad stomachaches" and thought she might have urinated on herself. A.C. had "no idea" what was happening. Mother noticed A.C. going back and forth to the bathroom and took her to the doctor the next morning, who discovered she was in labor. A.C. was transferred to the hospital where she delivered a healthy boy without any painkillers at 11:33 a.m. on September 22, 2010. She was 14 years old when she gave birth and found the delivery a "little" traumatic.

Appellant later admitted to the police that he had sexual relations with A.C. four times, he knew she was pregnant, and he knew he was the baby's father. Appellant was 36 years old at the time of the police interview. DNA testing revealed there is a 99.9999 percent chance that appellant is the baby's father.

DISCUSSION

Appellant contends there was insufficient evidence to support the jury's finding that he personally inflicted great bodily injury. We disagree.

Great bodily injury is defined by section 12022.7, subdivision (f), as "significant or substantial physical injury." (See also *People v. Cross* (2008) 45 Cal.4th 58, 63 (*Cross*).) The determination of whether a victim has suffered physical harm which amounts to great bodily injury is a question of fact to be resolved by the jury. (*Ibid*.) On appeal, we must view the evidence in the light most favorable to the judgment below, and draw all reasonable inferences in support of the judgment. (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. DePriest* (2007) 42 Cal.4th 1, 44.)

In *Cross*, the defendant impregnated his 13-year-old stepdaughter, who had an abortion with the defendant's encouragement at 22 weeks. (*Cross, supra*, 45 Cal.4th. at

pp. 61–62.) A jury convicted the defendant of a lewd act on a child under age 14 and found that he personally inflicted great bodily injury. (*Id*. at p. 63.) The defendant argued that a pregnancy without medical complications that results from unlawful, but not forcible, intercourse can never constitute great bodily injury. (*Ibid*.) Our Supreme Court rejected this argument: "We need not decide in this case whether every pregnancy resulting from unlawful sexual conduct, forcible or otherwise, will invariably support a factual determination that the victim has suffered a significant or substantial injury, within the language of section 12022.7. But we conclude that here, based solely on evidence of the pregnancy, the jury could reasonably have found that 13-year-old K. suffered a significant or substantial physical injury." (*Id*. at p. 66.)

Justice Corrigan elaborated in her concurring opinion: "Pregnancy is categorically different. By its nature it will always impose on the victim a sufficient impact to meet the great bodily injury standard. Pregnancy as an injury, a physical impact imposed by a crime, cannot be parsed out along a continuum. A woman is either pregnant or she is not. . . . Because the impact of any pregnancy is so great, it is illogical to treat some pregnancies as trivial, or to suggest that juries could, somehow, determine that any criminally imposed pregnancy can be considered minor. Factors such as the age of the victim, as well as the outcome, duration, or problems associated with a pregnancy may make its impact even *more* substantial. The fact remains, however, that the impact of any pregnancy on the physical condition of the victim is never insignificant or insubstantial. Normally, the determination of great bodily injury is a question of fact for the jury. [Citation.] Unlike other potential injuries, however, there is no additional factual calculus for the jury to perform when a criminally imposed pregnancy is the basis for the injury." (*Cross, supra,* 45 Cal.4th at p. 73.) Justice Corrigan further stated: "Because pregnancy must result in childbirth, miscarriage or abortion, its infliction during a sexual assault is, by definition, a substantial or significant injury." (*Id*. at p. 74.)

Some courts of appeal have stated that a pregnancy in and of itself may qualify as a great bodily injury. (See *People v. Sargent* (1978) 86 Cal.App.3d 148, 151 ["Pregnancy resulting from rape is great bodily injury"]; *People v. Superior Court*

(*Duval*) (1988) 198 Cal.App.3d 1121, 1131 ["Pregnancy, abortion, or venereal disease constitute injury significantly and substantially beyond that necessarily present in the commission of an act of unlawful sexual intercourse"].) Recently in *People v. Meneses* (2011) 193 Cal.App.4th 1087, a 12-year-old victim was impregnated by her cousin in his late 20's. The jury convicted the defendant of a lewd act on a child under age 14 and found that he had inflicted great bodily injury. In challenging the great bodily injury finding, the defendant argued the evidence showed the victim was unaware of her pregnancy until a few months before giving birth, and that she had a normal pregnancy and delivery. (*Id*. at p. 1091.) The appellate court was not persuaded, finding the defendant's "act resulted in the impregnation of the victim when she was 12," and that she "endured the self-evident trauma and suffering that accompanies a pregnancy until she delivered, at age 13." (*Ibid*.) The court found the fact that the victim did not immediately realize she was pregnant was simply conflicting evidence for the jury to weigh. (*Ibid*.) In reaching its conclusion that it was reasonable for the jury to find the victim suffered great bodily injury, the court was influenced by Justice Corrigan's concurring opinion in *Cross*. (*People v. Meneses, supra*, at pp. 1091–1092.)

Likewise here, we reject appellant's attempts to minimize A.C.'s injury by labeling her pregnancy as "a fact (or facet) of human existence, and a relatively normal state of human embodiment," and by pointing out that her pregnancy and delivery did not have complications. An involuntarily impregnated child who carried and went through the pain of labor to give birth to another child is no trivial matter. We are satisfied the jury could reasonably have found that A.C. suffered great bodily injury when she experienced the inherent trauma of a pregnancy and childbirth at the age of 14.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ