Filed 7/17/15 P. v. Castaneda CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANA ELIZABETH CASTANEDA, Defendant and Appellant.	B254691 (Los Angeles County Super. Ct. No. VA130934)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ana Elizabeth Castaneda appeals from the judgment entered following her conviction by jury on count 2 – oral copulation of a minor under 16 years old. (Pen. Code, § 288a, subd. (b)(2).) The court sentenced appellant to prison for 16 months. We affirm.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established as follows. On April 26, 2013, T. was 15 years old. He lived with his parents and his cousin, Christopher Castillo, in Bellflower. Appellant was Castillo's wife.

On April 26, 2013, T., wearing a T-shirt and boxers, was watching television in his parents' bedroom. About 10:00 a.m., appellant came to the house and asked where Castillo was. T. replied Castillo was in Castillo's bedroom. T. returned to his parents' bedroom.

Appellant entered the parents' bedroom, sat on the opposite side of the bed, and watched television with T. T. went to his room, turned on the shower, returned to his parents' bedroom, and closed and locked its door. At some point T. took off his shirt. He wanted to "engage [appellant sexually]." T. stood in the bathroom doorway and told appellant to look at him. His erect penis was protruding through his shorts.

Appellant and T. began kissing. Appellant put her hand in T.'s shorts and tugged his penis. T. pulled down his shorts, proceeded to his parents' bathroom, and sat on the bathtub. T. gave appellant a little pull on her arm to pull her down. Appellant kneeled in front of T. and orally copulated him. T.'s hands were on the back of appellant's head. He used his hand to make appellant's head go up and down faster on his penis. Appellant began choking and gagging. T. told his best friend what had happened. T.'s mother testified that in June 2013, she learned appellant had said T. was a pervert. T.'s mother confronted T., and he told her what had happened. T.'s father called the police.

About June 27, 2013, Los Angeles County Sheriff's Detective Eugene Hatch interviewed T. and, about June 28, 2013, T., at Hatch's request, had a recorded telephone

conversation with appellant. T. told appellant he needed her to say she was sorry. Appellant replied she had apologized. He later said he kept thinking about when appellant "suck[ed] [his] dick." Appellant replied, "why the hell do you say that? Shut up!" Appellant repeatedly apologized.

T. later asked appellant what was she thinking. He told her he was 15 years old and she could have said no. Appellant told him, "shh, quiet, I know. Me, honestly, my head was not right." Appellant suggested she had committed the oral copulation in retaliation for infidelity by Castillo. Appellant apologized to T. and said all she could say was, "just fucking deny it." Appellant, laughing, indicated police would not find her anytime soon. She indicated T. should say he lied because he was angry with appellant because she was calling him a little pervert. Appellant told T. to lie to the police about what had happened.

2. *Defense Evidence.*

In defense, appellant testified as follows. Appellant was 27 years old at the time of the 2014 trial. In about 2012, appellant and T. exchanged text messages. T. sent her a photograph of his penis, and she sent him a photograph of her profile, including her bare breast.

On April 26, 2013, appellant knocked on Castillo's bedroom door to ask if he wanted to have breakfast but Castillo indicated he wanted to sleep. Appellant went to the kitchen. T. invited her to watch television upstairs with him. Appellant sat on the opposite side of the bed. T. left, quickly returned, and locked the door. Appellant tried to leave but T. grabbed her waist, tried to kiss her, and pushed her towards the bathroom. Appellant told him to stop.

After the two were in the bathroom, T. forced appellant to her knees. He sat on the bathtub, exposed his erect penis, and told appellant to suck it. Appellant refused. T. jammed his penis into appellant's mouth and pushed her head down with his hand, making her head go up and down. Appellant unsuccessfully tried to resist. Appellant gagged. Castillo knocked on the door and T. went to a separate toilet area. Appellant

opened the door and Castillo asked why it was locked. Appellant replied she did not know and T. was acting weird.

During the recorded conversation, appellant told T., "we did what you wanted to do." She meant T. made her orally copulate him against her will. Appellant told T. to lie to police about the oral copulation, because she was afraid of Castillo, afraid of losing custody of her daughter, and concerned about her status as a legal resident. Appellant thought police would not believe her if she said T. raped her or forced her to orally copulate him. On July 9, 2013, when appellant was arrested, she told Hatch that T. had raped her and "forced her" on numerous occasions. Hatch testified appellant told him that T. forced her to orally copulate T.

ISSUES

Appellant claims the trial court erred by (1) giving Special Instruction No. 2, and (2) failing to give Special Instruction No. 1.

DISCUSSION

1. *The Trial Court Did Not Err by Giving Special Instruction No. 2.*

At appellant's request, the court gave the jury Special Instruction No. 2. That instruction stated, "The defendant is not guilty of oral copulation with a minor if the minor used force to accomplish the act of oral copulation with the defendant. The People have the burden of proving beyond a reasonable doubt that the minor did not use force to accomplish the act of oral copulation with the defendant. If the People have not met this burden, you must find the defendant not guilty. [¶] An act is 'accomplished by force' if a person uses enough physical force to overcome the other person's will." The jury convicted appellant as previously indicated.[1]

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[1] Penal Code section 288a, subdivisions (a) and (b)(2) state: "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. [¶] . . . [¶] (b)(2) Except as provided in Section 288, any person over 21 years of age who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony."

Appellant claims the trial court erred by giving Special Instruction No. 2. She argues the instruction erroneously failed to advise the jury a defendant was not guilty of orally copulating a minor if the defendant orally copulated the minor as a result of the minor's psychological coercion of the defendant, i.e., because the defendant was under duress from the minor.[2]

Even if appellant's claim was not barred,[3] it is really an argument Special Instruction No. 2 did not instruct on a duress defense. "[Penal Code] [s]ection 26 describes the duress defense: 'All persons are capable of committing crimes except those belonging to the following classes: [¶] . . . [¶] Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had *reasonable cause to and did believe their lives* would be endangered if they refused.' In other words, the defense of duress negates the intent or capacity to commit the crime charged. Defendant needs to raise only a reasonable doubt that he acted in the exercise of his free will. [Citation.] In order to show that his act was not the exercise of his free will, defendant must show that he acted under an immediate threat or menace. (*Ibid*.)" (*People v. Petznick* (2003) 114 Cal.App.4th 663, 676, italics added (*Petznick*).)

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[2] Appellant argues in her reply brief a properly instructed jury "could have considered [the modicum of force used by appellant as] sufficient evidence of duress, which is also 'forcible' under the statute. In other words, that [T.]'s act of putting his hand to appellant's head . . . would have been enough to generate a sense of duress or nonphysical coercion sufficient for duress." We note the word "forcible" nowhere appears in Penal Code section 288a, subdivision (b)(2).

[3] There is no need to reach respondent's argument that, by giving Special Instruction No. 2, appellant invited the error of the complained-of instructional omission with the result his instructional claim is barred. Nor is there any need to reach the issue of whether appellant's instructional claim is barred because he failed to request a clarifying or amplifying instruction. (See *People v. Catlin* (2001) 26 Cal.4th 81, 149.)

Petznick continued, " 'Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct nor to formulate criminal intent. The unlawful acts of the person under duress are attributed to the coercing party who supplies the requisite mens rea and is liable for the crime. [Citation.]' [Citation.]" (*Petznick, supra*, 114 Cal.App.4th at p. 676.) If duress as a defense is otherwise available, the fact the defendant fears great bodily injury and not danger to life does not render the defense unavailable. (Cf. *People v. Perez* (1973) 9 Cal.3d 651, 657.)

However, a trial court is under no duty to give an instruction unsupported by substantial evidence. (Cf. *People v. Tufunga* (1999) 21 Cal.4th 935, 944.) Simply put, there was no substantial evidence in this case appellant had *reasonable cause to believe, and did believe*, her life was endangered or that she might suffer great bodily injury, if she did not orally copulate T.

Appellant, citing *People v. Leal* (2004) 33 Cal.4th 999 (*Leal*), and *People v. Pitmon* (1985) 170 Cal.App.3d 38, suggests the trial court should have instructed, "Duress is defined as 'a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do or to submit to something that . . . she would not otherwise do or submit to.' "

However, unlike the duress defense, the above definition does not include the requirement that a person have reasonable cause to believe, and believe, the person's life is in danger or the person might suffer great bodily injury. Appellant conflates the less demanding definition of duress as an *element* of Penal Code *section 288, subdivision (b)(1)* and the more demanding requirements of the duress *defense*. (See *Leal, supra*, 33 Cal.4th at p. 1004.) " '[T]he purpose served by the concept of "duress" *as a defense* is manifestly different from that served by inclusion of the term as an element of a sex offense *against* minors.' " (*Ibid.*, italics added.) The trial court did not err by failing to instruct on a duress defense, or by giving Special Instruction No. 2.

2. *The Trial Court Did Not Err by Refusing to Give Special Instruction No.1.*

During discussions regarding jury instructions, appellant asked the court to give Special Instruction No. 1. Special Instruction No. 1 stated, "The defendant is not guilty of oral copulation with a minor if the act of oral copulation was done against the will of the defendant. 'Against her will' is defined as 'without her consent.' The People have the burden of proving beyond a reasonable doubt that the defendant consented to the act of oral copulation with the minor. If the People have not met this burden, you must find the defendant not guilty." The court refused to give the instruction and appellant claims this was error. We reject the claim.

First, to the extent Special Instruction No. 1 would have advised the jury appellant was not guilty if the act of oral copulation was "against her will" *because of physical force*, i.e., because said act was the result of physical force applied by a person (e.g., T.) to appellant, Special Instruction No. 2, adequately covered that issue. Special Instruction No. 2, reasonably understood, told the jury a defendant was not guilty if the act was "accomplished by force," and that that phrase meant a person uses enough physical force "to overcome the other person's will." A trial court is under no duty to give repetitive instructions. (Cf. *People v. Wright* (1988) 45 Cal.3d 1126, 1134.)

Moreover, the jury, having been given Special Instruction No. 2, convicted appellant. To the extent Special Instruction No. 1 would have advised the jury appellant's act of oral copulation was "against her will" because of physical force, no prejudice resulted from the trial court's refusal to give Special Instruction No. 1 because the factual question posed by that omitted instruction was necessarily resolved adversely to appellant under another, properly given instruction, i.e., Special Instruction No. 2. (See *People v. Kobrin* (1995) 11 Cal.4th 416, 428, fn. 8.)

Second, to the extent Special Instruction No. 1 would have advised the jury appellant was not guilty if the act of oral copulation was "against her will" *because of psychological coercion*, i.e., because the act of oral copulation was the result of psychological coercion of appellant by a person (e.g., T.), this is really an argument the instruction would have advised about the duress defense. However, our previous analysis

that a duress defense was unavailable in this case because there was no substantial evidence of such a defense is applicable here.

Third, to the extent Special Instruction No. 1 would have advised the jury appellant was not guilty if the act of oral copulation was "without her consent," appellant cites no case holding a defendant's lack of consent to the act of oral copulation is relevant. The trial court did not err by refusing to give Special Instruction No. 1.

Moreover, the People's evidence was appellant voluntarily committed an act of oral copulation. The defense evidence was T. physically and violently forced appellant to orally copulate him against her will. The evidence of T.'s physical force and violence was arguably as probative on the issue of whether appellant committed the act of oral copulation "without her consent," as that evidence was probative on the issue of whether she committed that act against her will. The jury, having convicted appellant, necessarily rejected any evidence she committed the act against her will. It is not reasonably probable that if the court had instructed the jury appellant was not guilty if the act of oral copulation was "without her consent," the jury would have reached a result more favorable to appellant. Any instructional error was harmless. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

EDMON, P. J.

ALDRICH, J.