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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
CARNELL L. MAYFIELD,
Defendant and Appellant.

A130750
(San Francisco County
Super. Ct. No. 206608)

Experienced attorneys routinely caution clients that you can never predict what juries will do. The prosecutor in this case may have ruefully recalled the truth of that maxim when the jury trying defendant Carnell L. Mayfield decided as follows:

Count 1—Aggravated sexual assault (rape by force) against a child under the age of 14 (Pen. Code, § 269, subd. (a)(1))—*Not Guilty*, and not guilty of the lesser included offenses of forcible rape and assault.

Count 2—Forcible commission of a lewd and lascivious act against a child under the age of 14 (Pen. Code, § 288, subd. (b)(1))—*Not guilty*.

Count 3—Forcible commission of a lewd and lascivious act against a child under the age of 14, specifically “he placed his penis in her vagina” (Pen. Code, § 288, subd. (a))—*Not guilty*, and not guilty of the lesser included offenses of battery and assault.

Count 4—Forcible commission of a lewd and lascivious act against a child under the age of 14, specifically “he placed his penis in her anus” (Pen. Code, § 288, subd. (a))—*Not guilty*, and not guilty of the lesser included offense of battery and assault.

Count 5—Forcible sodomy (Pen. Code, § 286, subd. (c)(2))—*Not guilty*, and not guilty of the lesser included offense of battery and assault.

The only reason defendant did not walk free is that the jury found him guilty of committing a nonforcible lewd and lascivious act against a child under the age of 14 (Pen. Code, § 288, subd. (a)), a lesser included offense of count 2. For this he was sentenced to state prison for the middle term of six years. After defendant had commenced this appeal, he was ordered to pay restitution of \$2,000 to the victim’s family to allow them to relocate.

The offenses were alleged to occur on October 26, 2007, which was three days before the female victim’s 13th birthday. Defendant at the time was 21. In a post-arrest statement to police, defendant admitted kissing and inappropriately touching the victim, but believed her statement that she was 15-years-old.

Based on that belief, defense counsel requested that the jury be instructed with CALCRIM No. 3406 to the effect that an honest mistake of fact concerning the victim’s age required acquittal. The court refused because “the . . . law is clear when it comes to conduct involving children under the age of 14 that there is . . . no mistaken fact defense.”

The correctness of that refusal is the primary challenge of defendant’s appeal. Defendant’s appointed counsel presents a tight and logical analysis as to why a mistake of age defense should be recognized. However, standing squarely against defendant’s analysis is *People v. Olsen* (1984) 36 Cal.3d 638, where our Supreme Court rejected the identical claim:

“It is true that at common law ‘ ‘ ‘an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense.’ ’ ’ [Citation.] However, it is evident that the public policy considerations in protecting children under the age of 14 from lewd or lascivious conduct are substantial These strong public policies are reflected in several Penal Code statutes, and they compel a different rule as to section 288.

“The legislative purpose of section 288 would not be served by recognizing a defense of reasonable mistake of age. Thus, one who commits lewd or lascivious acts with a child, even with a good faith belief that the child is 14 years or age or older, does so at his or her peril.

“The trial court properly rejected appellant’s claim that his good faith, reasonable mistake as to the victim’s age was a defense to a lewd or lascivious conduct charge with a child under 14 years of age.” (*Id.* at p. 649.)

This holding eliminates any discretion we might otherwise have to entertain the merits of defendant’s contention. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant apparently means to obviate this conclusion by reframing the issue as the denial of his right to present a defense, and thus a violation of due process. However, the power to define crimes and defenses is a traditional aspect of state power generally respected by the United States Supreme Court. (*Danforth v. Minnesota* (2008) 552 U.S. 264, 280; *Clark v. Arizona* (2006) 548 U.S. 735, 749; *Rochin v. California* (1952) 342 U.S. 165, 168.) Defendant has cited no authority that the mistake of age defense exists as a matter of federal constitutional law. That accords with the authorities assessing failure to instruct on mistake-of-fact defense as a matter of state law. (E.g., *People v. Russell* (2006) 144 Cal.App.4th 1415, 1431.)

Defendant fares better with his remaining contention, which is directed against the restitution order. Although he raised a number of objections in the trial court, the only point he presses here is one of procedure and evidentiary support.

The governing statute allows restitution for “[e]xpenses incurred . . . in relocating away from the defendant,” but it specifies that such expenses “shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for emotional well-being of the victim.” (Pen. Code, § 1202.4, subd. (f)(3)(I).) Although the trial court concurred with defense counsel that “[w]e have no certification from a mental health provider,” it believed it could “take into account the testimony, the demeanor of the victim in this case in . . . its assessment. It’s

not just limited to the record before it, but the entire record, which includes the trial.” On that basis, the court concluded that “the victim’s demeanor on the stand . . . certainly evidences a young child who was exposed to a traumatic event. [¶] And for a young child not to feel safe in a home in which that event took place . . . , it’s not a far leap to understand why parents, [are] concerned about the welfare of the child, the safety of the child, physical safety from perhaps doing harm to herself or taking a tailspin . . . emotionally. . . .”

The only “evidence” before the court was a typed attachment to a “Law Enforcement Relocation Benefit Verification Form” from the Victim Compensation and Government Claims Board. As relevant here, the attachment states: “Since the crime, [the victim] and her family have found it difficult to reside in the crime location [T]he victim and her family have been harassed by neighbors about the crime. [The victim] stays inside her house to avoid inappropriate questions. In order to assist [the victim’s] recovery, it is pertinent for her and her family to relocate.” Defendant contends that this material came from a “law enforcement officer”—as stated on the form—and while competent for a physical safety relocation, is not competent to sustain an emotional well-being relocation because the statute requires verification by “a mental health treatment provider.”

The Attorney General does not disagree as a matter of strict statutory construction. However, citing the general principle that restitution is reviewed according to the extremely deferential abuse of discretion standard, she defends the court stepping outside the limited record of the hearing. But where the Legislature has specified a procedure to be used, courts are not at liberty to adopt a different mode of procedure. (*People v. Municipal Court (Runyan)* (1978) 20 Cal.3d 523, 532; *People v. Ponce* (2009) 173 Cal.App.4th 378, 384; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550; *People v. Narron* (1987) 192 Cal.App.3d 724, 737-738.) Moreover, no grant of discretion validates a court transgressing the confines of the applicable law. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 793.) As we have repeatedly stated: “Acting contrary to specific statutory command . . . is accepted as proof of discretion abused.”

(Karak Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region (2010) 183 Cal.App.4th 330, 363, fn. 25 and decisions cited.) Thus, even according to its own logic, the Attorney General's approach fails.

The restitution order is reversed and the cause remanded for further proceedings if the court and prosecution are so advised. The judgment of conviction is affirmed in all other respects.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.