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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN DAVID HEGLIN,

Defendant and Appellant.

A131766

(Sonoma County
Super. Ct. No. SCR577828)

INTRODUCTION

Defendant John David Heglin (Heglin) appeals from his conviction of 15 counts, all arising out of his activities involving providing narcotics to, and engaging in sexual acts with, three teenage girls. He maintains no substantial evidence supported his convictions of two counts of violating Health and Safety Code section 11353, inducing a minor to violate certain controlled substance laws, and that the court's instructions to the jury on those counts were erroneous. Heglin also contends the court erred in excluding evidence of one of the victim's alleged prior false rape allegation. We agree the convictions of violating Health and Safety Code section 11353 must be reversed. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

M. Doe was 15 years old when she met Heglin in June 2009. They lived in the same apartment complex, and she went to a birthday party Heglin was throwing in the apartment clubhouse. Heglin gave her a beer, which made her "excited." Heglin told her to come to his apartment because he had something for her. M. Doe went to his

apartment, and Heglin gave her about \$100, which he said was for her upcoming birthday, which was in July.

M. Doe began sneaking out of her home and going to Heglin's apartment two to four times per week. The pair would smoke marijuana, drink alcohol, and take methamphetamine and cocaine, all provided by Heglin. She first smoked methamphetamine provided by him around her 16th birthday in July, 2009.

Heglin gave M. Doe money and narcotics in exchange for sexual favors. He and M. Doe engaged in intercourse and oral sex. Heglin told M. Doe he could make her famous by making pornographic movies, and would give her "lots of money, and lots of drugs" if she agreed to be filmed engaging in sexual activity with him. She did, and they made a DVD of the two of them engaging in sexual activity. M. Doe testified she never considered herself in a relationship with Heglin and did not find him attractive. Rather, it was "all about the money" and drugs.

A. Doe, born in September 1993, was a friend of M. Doe's. M. Doe introduced her to Heglin, and the two of them sometimes went to Heglin's apartment together and smoked methamphetamine and crack cocaine. About a month after they met, Heglin asked A. Doe to visit him alone, and said he had drugs and money for her. A. Doe told him she was 15 years old, and Heglin told her to "not tell other people about what was going on between us . . . [because] people wouldn't understand." Beginning in August 2009, A. Doe began visiting Heglin "every day to every other day." At each visit, they would use drugs together and have intercourse or oral sex. Heglin asked A. Doe if she would have sex with friends of his for money. A. Doe agreed, and she engaged in sexual activities with Heglin and another person two or three times. They negotiated the price for sexual favors in money or drugs. Heglin and A. Doe also made plans to start an escort service in which A. Doe would provide oral sex for money.

Heglin told A. Doe he had a "connection" in the pornography business, and if she agreed to make "audition videos" with him she could make "a very large amount of money." A. Doe agreed, and they made a number of videotapes of A. Doe performing "sexual favors" with Heglin. After the first videotape, Heglin told her they needed to

make another because the “sexual favors [she] was doing didn’t look real enough.” The videotapes depicted A. Doe performing oral sex on Heglin, Heglin performing oral sex on A. Doe, and the two of them engaged in sexual intercourse.

A. Doe believed she was in love with Heglin at the time of these activities, and that he was “one of the best things that ever happened to [her.]” She told a friend she thought of him as “a father figure.” She told police she was upset Heglin had been arrested, and did not want him to go to jail.

A. Doe went to school with I. Doe, born in February 1993. I. Doe often let A. Doe use her cell phone, which she used to call Heglin. Sometime in 2009, Heglin began calling I. Doe on her cell phone. He “talked about A. Doe and [I. Doe] hanging out with him.” In January 2010, A. Doe asked I. Doe if she wanted to “hang out,” and I. Doe told her she did not have a ride. A. Doe told her Heglin would pick her up. Heglin called I. Doe on her cell phone and said he would pick her up in Petaluma. Heglin arrived there, introduced himself because they had never met, and gave I. Doe a hug. I. Doe got in his car, and they drove to his apartment.

When they arrived, Heglin made I. Doe a drink with orange soda. It tasted “funny” to her, but she drank about a quarter of it. I. Doe started to feel dizzy, and “the room started to go in and out of focus.” She told Heglin she felt dizzy, and he suggested she go into his bedroom and sit on the bed, which she did. Heglin asked when she would be 18 years old, and I. Doe told him she was “16 now.” He told I. Doe he was 40 years old.¹ Heglin put methamphetamine in a pipe, put it to I. Doe’s lips, lit it and told her to inhale. She did so because she was scared. Heglin then “took a hit from the pipe,” and they passed the pipe back and forth, each smoking it, about eight times.

Heglin then told I. Doe he and A. Doe had been engaging in sexual activity, and showed her pictures of A. Doe engaging in oral sex with him. She told him she “wasn’t going to sleep with him.” Heglin responded “Oh, I know,” and then began reading sexual fantasies he told her he and A. Doe had written. Heglin then told her to take a shower

¹ The parties stipulated that at the time of the alleged offenses, Heglin was at least 21 years old and three victims were at least three years younger than he was.

and gave her some lingerie. When I. Doe came out of the bathroom, Heglin was on the bed naked. She was frightened, so she “did what he told [her] to do,” which was engage in oral sex and intercourse. Heglin also used a vibrator on her vagina.

I. Doe told Heglin she did not feel well, and went in the bathroom and vomited. She continued to vomit “[a] lot” during the course of the evening. Heglin told her it “was the happiest day of his life, and he wished [I. Doe] felt better for it.” He told her he thought A. Doe’s methamphetamine addiction was “getting out of hand,” so he wrote a note he asked her to give to the counselor both minors saw at Kaiser. Heglin also asked her “how [she] felt about filming pornography with him,” and suggested she and A. Doe have “threesomes” with him after school.

I. Doe would not give Heglin her address, so he drove her to downtown Petaluma. After she got out of the car, he screamed “this is the best day of his life, and he’s in love.” I. Doe called her mother to pick her up.

A few days afterwards, I. Doe spoke with law enforcement officers, and at their direction engaged in a pretext call to Heglin in order to obtain his address for a search warrant. Police obtained a warrant and searched his apartment, finding, inter alia, glass pipes and a baggie with methamphetamine residue, eight-millimeter films, DVDs and videotapes depicting sex acts with M. Doe, and vibrators. Heglin’s cell phone contained photographs of a girl engaged in oral sex.

The Sonoma County District Attorney charged Heglin with 20 counts involving three minors. As to victim I. Doe, Heglin was charged with two counts of rape, one by force or fear and one of an intoxicated victim (Pen. Code, § 261, subd. (a)(2)-(3)), two counts of oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)), one count of inducing a minor to violate Health and Safety Code² section 11550 (Health & Saf. Code, § 11353), one count of pandering involving a minor (Pen. Code, § 266i, subd. (b)(1)), and one count of unlawful intercourse with a minor more than three years younger (Pen. Code, § 261.5, subd. (c)).

² All further statutory references are to the Health and Safety Code unless otherwise indicated.

As to victim A. Doe, Heglin was charged with one count of pandering involving a minor (Pen. Code, § 266i, subd. (b)(1)), four counts of oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)), and two counts of unlawful intercourse with a minor more than three years younger (Pen. Code, § 261.5, subd. (c)).

As to victim M. Doe, Heglin was charged with one count of pandering involving a minor (Pen. Code, § 266i, subd. (b)(1)), one count of violating section 11353 by inducing a minor to violate section 11550, two counts of oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)), and one count of sexual penetration of a minor (Pen. Code, § 289, subd. (h)).

The district attorney also charged Heglin with one count of possession of child pornography. (Pen. Code, § 311.11, subd. (c).)

The court entered a judgment of acquittal under Penal Code section 1118.1 as to the count of pandering regarding M. Doe. The jury found Heglin not guilty of pandering regarding I. Doe, but was unable to reach a verdict on pandering as to A. Doe. Heglin was found “not guilty by operation of law” of the two rape counts regarding I. Doe because the jury found him guilty of the alternative charge of unlawful intercourse with her. The jury found Heglin guilty of all remaining counts. The court sentenced Heglin to a total term of 19 years 8 months in state prison, designating the conviction of section 11353 as the base term. This timely appeal followed.

DISCUSSION

A. Health and Safety Code Section 11353

Heglin asserts his convictions under Health and Safety Code section 11353 of inducing a minor to violate section 11550, one as to I. Doe (count 5) and one as to M. Doe (count 17), must be reversed. He maintains the court erred in instructing the jury on these offenses, and that no substantial evidence supported the convictions. The Attorney General agrees with Heglin’s contention that those counts must be reversed due to instructional error, but maintains there was substantial evidence showing Heglin violated Health and Safety Code section 11380, an uncharged crime. Thus, the Attorney General

seeks a “remand[] for retrial on counts five and seventeen or for resentencing if those counts are dismissed.”

The amended information charged Heglin with two counts of violating section 11353, “in that said defendant did unlawfully being a person 18 years of age and older and in a voluntary manner solicit, induce, encourage, and intimidate I. Doe [and M. Doe] . . . , a minor with the intent that said minor should knowingly commit UNDER THE INFLUENCE OF A CONTROLLED SUBSTANCE in violation of [section] 11550 of the Health and Safety Code.”

Section 11353 prohibits inducing a minor to violate section 11550 “with respect to either (1) a controlled substance which is specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug” (§ 11353.) None of those subdivisions include methamphetamine, which is specified as a controlled substance under section 11055, subdivision (d)(2). “[F]urnishing cocaine base and furnishing methamphetamine are distinct offenses.” (*People v. Gerber* (2011) 196 Cal.App.4th 368, 387 (*Gerber*)). Methamphetamine is not included among the controlled substances specified in section 11353. (*Ibid.*)

In *Gerber*, the defendant was charged with violating section 11353 by furnishing a minor with cocaine base. (*Gerber, supra*, 196 Cal.App.4th at p. 372.) After the case was submitted to the jury, the information was amended to allege “the controlled substance was cocaine base and/or methamphetamine,” and the jury was so instructed. (*Id.* at pp. 372, 389.) In reversing the conviction, the court explained the jury instruction “allowed each juror to conclude the controlled substance element . . . had been proven if defendant furnished either cocaine base or methamphetamine. Thus, the instruction presented the jury with a legally incorrect theory on which to convict defendant of violating Health and Safety Code section 11353.” (*Id.* at p. 390.)

The trial court in this case instructed the jury as follows: “The defendant is charged in Counts V and XVII with encouraging someone under the age of 18 years to commit the crime of being under the influence of controlled substances, in violation of Health and Safety Code section 11353. To prove the defendant is guilty of this crime, the People must prove four things: [¶] One: The defendant willfully solicited, induced, encouraged, and/or intimidated I. Doe and M. Doe to commit the crime of being under the influence of methamphetamine in violation of Health and Safety Code section 11550; [¶] Two: The defendant intended that I. Doe and M. Doe would commit that crime; [¶] Three: At the time, the defendant was 18 years of age or older; and [¶] Four: At the time, I. Doe and M. Doe were under the age of 18 years.” Heglin asserts, and the Attorney General concedes, that the convictions on counts 5 and 17 must be reversed due to instructional error.

The Attorney General disagrees with Heglin’s further assertion there was no substantial evidence to support a conviction under section 11353, claiming there was “sufficient evidence to support the jury’s findings, even though the instructions did not include the elements of *any statutory violation*.” (Italics added.) The substantial evidence test, however, is “whether . . . there is any substantial evidence of the existence of each element of *the offense charged*. [Citations.]’ [Citation.]” (*People v. Patino* (1979) 95 Cal.App.3d 11, 27 (*Patino*), italics added.) “Unless the defendant agrees, the prosecution cannot obtain a conviction for any uncharged, nonincluded offense. Hence, the prosecution must focus all its resources and efforts on the stated charges.” (*People v. Birks* (1998) 19 Cal.4th 108, 128.) The jury found Heglin committed two offenses with which the District Attorney did not charge him. And, the Attorney General concedes the instructions as given to the jury did not state even an uncharged crime,³ admitting “the evidence did not-and could not-support a non-existent crime” Thus, there was no substantial evidence of “each element of the offense charged.” (*Patino, supra*, at p. 27.)

³ Health and Safety Code section 11380 prohibits inducing a minor to violate any provision of “this article involving those controlled substances,” (which includes methamphetamine) or furnishing “those controlled substances” to a minor.

B. Exclusion of Evidence of Alleged Prior False Rape Allegation

Heglin maintains the trial court erred in excluding evidence that A. Doe told police that I. Doe had made a prior false rape allegation.

Evidence Code section 352 provides “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury.” Evidence of a prior false allegation of rape may be admissible. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457.) However, “[p]rior rape complaints . . . have no bearing on . . . credibility unless it was also established that those prior complaints were false.” (*Ibid.*)

Heglin sought introduction of evidence of A. Doe’s statements to police regarding I. Doe and a sexual encounter occurring prior to her meeting Heglin. A. Doe told police the following: “[A. Doe]: I didn’t [want] them [I. Doe and Heglin] to meet. [¶] [Police]: Okay. Um, do you mind telling me why? [¶] [A. Doe]: ‘Cause I didn’t trust [I. Doe] . . . I just knew this would happen. [¶] [Police]: [What did you think] she might do? . . . I don’t want to put words in your mouth. [¶] [A. Doe]: [I. Doe] was kind of a . . . I don’t know. She . . . got really coked out one time not too long ago and she had sex with her-, with some guy and she regretted it later and called that rape too. [¶] [Police]: Was that here in Santa Rosa? [¶] [A. Doe]: Uh, I don’t know. She told me about it, but she told me she did a whole bunch of drugs with somebody, she had sex, and she regretted it later. . . . She blows things out of proportion. When they’re her fault.”

The court excluded the proffered evidence, ruling “ The part about the making a false claim of rape and so forth is too vague, too attenuated; and the fact of the matter is, is that someone who is drugged out cannot give consent, even if they’re an adult. So I don’t know how A. Doe’s comments about making, getting drugged out and having sex with someone and calling it rape would ever be, would ever be more probative than prejudicial. So that part is off limits.” The court earlier explained “this sounds like girl badmouthing girl for some reason that is probably unrelated to anything to do with this

case.” The court did, however, admit evidence I. Doe told A. Doe she went to Heglin’s home to trade sex for drugs.

Even if I. Doe had a sexual encounter while “coked out” and described it as rape to A. Doe, there was no evidence that statement was false. A. Doe did not indicate, either in her statement to police or her testimony, that she had any knowledge of whether I. Doe’s characterization of the prior sexual encounter as rape was true or false. Indeed, A. Doe testified at the Evidence Code section 402 hearing regarding I. Doe’s reputation for honesty that “I’d suppose she was [a] pretty honest person.” And, as the trial court noted, rape can be accomplished where an individual is prevented from resisting by any intoxicating or controlled substance. (See Pen. Code, § 261, subd. (a)(3).) I. Doe’s alleged statement to A. Doe, even if not describing a forcible rape, was consistent with rape pursuant to section 261, subdivision (a)(3). The evidence sought to be admitted did not demonstrate I. Doe had made a prior false accusation of rape.

Heglin has likewise failed to demonstrate any prejudice. He was not convicted of the two counts of rape or the count of inducing a minor to become a prostitute in relation to I. Doe. The jury convicted him of unlawful sexual intercourse and two counts of oral copulation with a minor, crimes to which consent is not a defense. (See Pen. Code, §§ 261.5, 288a, subd. (b)(1).) “Generally, evidence of prior sexual conduct goes to the question of the victim’s credibility concerning lack of consent.” (*People v. Tidwell*, *supra*, 163 Cal.App.4th at p. 1455.) Thus, exclusion of evidence of I. Doe’s characterization of a prior sexual encounter as rape, even if false, could not have prejudiced Heglin, whose defense was that I. Doe engaged in sexual acts with him in exchange for drugs. We find no abuse of discretion in the trial court’s ruling.

Heglin also asserts exclusion of this evidence violated his constitutional rights. “As a general proposition, the ordinary rules of evidence do not infringe on a defendant’s right to present a defense.” (*People v. Frye* (1998) 18 Cal.4th 894, 946, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) “ ‘[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a

prototypical form of bias on the part of the witness, and thereby, “to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.” ’ [Citations.] However, not every restriction on a defendant’s desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations] . . . Thus, *unless the defendant can show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment.*” (*Ibid.*, italics added.)

Given the evidence of I. Doe’s statement she traded sex for drugs as well as her own testimony, Heglin has not shown the excluded evidence would have produced “a significantly different impression” of I. Doe’s credibility. Heglin’s Sixth Amendment rights were not violated.

DISPOSITION

Heglin’s convictions of violating Health and Safety Codes section 11353 in counts 5 and 17 are reversed, and the case is remanded for resentencing. In all other respects, the judgment is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.