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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY J. SMITH,

Defendant and Appellant.

A133925

(Alameda County
Super. Ct. No. 160642)

Appellant Rodney J. Smith represented himself at trial and was convicted by a jury of one count of sexual penetration by a foreign object (Pen. Code, § 289, former subd. (a)(1), current subd. (a)(1)(A)),¹ three counts of forcible oral copulation (§ 288a, former subd. (c)(2), current subd. (c)(2)(A)), and one count of forcible rape (§ 261, subd. (a)(2)). Smith appeals, contending that the trial court abused its discretion, and violated his federal constitutional rights, by ending his direct examination after he repeatedly refused to confine his questions to relevant matters. He also suggests that the trial court impermissibly lightened the prosecution’s burden of proof when it instructed the jury on consent. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Smith does not challenge the sufficiency of the evidence supporting his convictions. We recite the operative facts to give context to his claims of prejudicial error.

¹ Unless otherwise noted, all further statutory references are to the Penal Code.

On March 19, 2009, Smith was charged by information with sexual penetration by a foreign object (§ 289, former subd. (a)(1), current subd. (a)(1)(A); count one), forcible rape (§ 261, subd. (a)(2); count three), and three counts of forcible oral copulation (§ 288a, former subd. (c)(2), current subd. (c)(2)(A); counts two, four, & five). Each count alleged that the offense was one of several involving the same victim on separate occasions. (§ 667.6, subs. (c), (d).) The rape and oral copulation counts alleged that Smith was armed with and personally used a deadly or dangerous weapon in the commission of the offense (§ 667.61, former subd. (e)(4), current subd. (e)(3); former §§ 12022, subd. (b), 12022.3). A prior robbery conviction was alleged as both a strike prior (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)) and a prior serious felony (§ 667, subd. (a)(1)).

Prosecution Case

Jane Doe testified that, on January 6, 2009, she met Smith as she walked home from a BART station. Smith asked her if she was dating anyone. Doe told Smith she had a boyfriend. When they reached her apartment, Smith eventually convinced Doe to let him inside. Nothing romantic happened during the 15 minutes or so that Smith spent in Doe's apartment. She gave him her phone number before he left.

After two phone conversations, Smith and Doe met at a Walgreens, but eventually went to Smith's home where they ate a meal, in the kitchen, and watched a movie in Smith's bedroom. As they watched the movie, Doe and Smith kissed and Smith touched her breasts, thighs, and vaginal area over her clothes. Doe said "no" and moved Smith's hand away when he tried to put his hand in her pants. Doe decided to leave around 1:30 a.m. When Smith tried to give her a kiss before she left, she refused.

On the evening of January 14, 2009, Smith and Doe met again. They went to the grocery store and then to Doe's studio apartment for dinner and a movie. As Doe cooked, Smith sat on her bed, playing music on her computer. Doe poured drinks. At one point, when she left the kitchen, she noticed that Smith was on her bed wearing only his boxer shorts. Although this worried Doe, she did not confront him or ask him to put his pants back on. Instead, she sat on the other end of the bed, ate dinner, and watched

the movie with him while maintaining distance. Although she initially rebuffed his suggestions to change into something comfortable, she eventually closed the door to the bathroom and changed into sweats.

Sometime later, Smith started to touch Doe. Doe reminded Smith of her boyfriend. Smith became increasingly upset, asked Doe why she brought up her boyfriend, and demanded that Doe answer his questions or there would be consequences. Smith asked Doe if she saw murder in his eyes and claimed that he was upset enough to pull a gun on her and then himself. Sometime thereafter, Doe asked Smith to leave. Instead, Smith went to the bathroom, put on his clothes, and went to the kitchen.

Doe thought Smith had calmed down, but he soon became upset and threw his shoes at Doe. He began talking about his past and his lack of money. He then sat down next to her on the bed and tried to force Doe's head into his groin. Doe tried to scream. Smith got on top of her and put his hand on her mouth and nose. Doe felt like she could not breathe and, panicking, told Smith that she would be quiet. Smith let go but tried to shove his hands inside Doe's pants. Doe began to resist again and scream. Smith ripped her underwear and penetrated her vagina with his fingers.

Doe tried to crawl away and tried to calm Smith down. She told him: "Okay, let's start all over. Let's do this again. Just take it slow with me. I just met you. You know, give it a chance." However, Smith went to the kitchen and returned with a steak knife in his hand. Holding the knife about a foot and a half from Doe's stomach, Smith demanded that Doe undress. Doe complied but pleaded with him to put the knife down. Smith then directed Doe to perform oral sex. Worried about disease and fearing that Smith would hurt her if she did not give in, Doe asked him to wear a condom. Although reluctant, Smith agreed, and Doe complied with his command to give him oral sex. The knife remained on a desk, within Smith's reach. After ejaculating, Smith directed Doe to perform oral sex again. She complied. Smith then performed oral sex on Doe for about two minutes before getting on top of her and putting his penis into her vagina. The condom broke, and Doe went to the bathroom.

When Doe came back out, she saw Smith sitting on her bed with the knife. Shaking, she asked him what he was going to do next. Smith asked why she was acting like a victim. He told her, “ ‘I was going to stab your ass to death. How does it feel for someone to tell you that they were going to murder you?’ ” Standing about a foot away from her, Smith told Doe she was lucky that he did not stab her. Though scared, Doe lay in bed and let Smith put a blanket over her. Smith got an orange from the kitchen, cut it with the knife, and gave it to her. He began talking about his past and how Doe had made him upset. He did not want to go back to jail. He said he would shoot himself if the police came. Doe said she was sorry. It was about 6:00 a.m.

About a half-hour or an hour later, Smith began groping Doe. After telling him she was hurting and that they needed more condoms, she convinced him to go to the store. Smith insisted on Doe coming along. After selecting condoms and drinks, they approached a cash register. Doe froze, backed up, and told Smith that she was not going to leave with him. Smith insisted and increasingly became loud and agitated. Doe screamed. Eventually, Smith picked Doe up and tried to leave, but the store doors remained closed. As more people began to take notice, Smith let Doe go and ran out a different exit.² Doe then told the store manager that Smith raped her, and the manager called the police. Doe’s sexual assault examination revealed abrasions consistent with Doe’s account of the sexual assault.³

After Doe testified at the preliminary hearing, Smith began to call Doe and sent her letters and presents in the mail. Around October 2009, Smith sent Doe two books about serial killers—*Silence of the Lambs* and *Hannibal*. Doe also received voicemails from Smith and people attempting to call her on Smith’s behalf.⁴

² The store’s video surveillance system captured Smith’s and Doe’s interactions inside the store.

³ The abrasions could also be considered consistent with consensual sexual activity.

⁴ On cross-examination, Doe testified that she received a couple of phone calls directly from Smith. She hung up on him. Doe also said that she received a call from

Defense Case

Smith elected to represent himself at trial. Smith testified that, when he first met Doe, he believed she was interested in dating him. When he visited her apartment, on the night they met, he used Doe's laptop to check his email and to look at pornography. Smith showed some of the pornography to Doe, who did not seem uncomfortable. They talked about sex. Doe refused his request for a kiss, but did give him her phone number.

They spoke on the phone three or four times. When they went to Smith's house, five or six days after meeting, they kissed. Doe also permitted Smith to touch her vagina and put his mouth on her breasts, while they watched television in his bedroom.

On January 14, 2009, they had dinner at Doe's apartment. While Doe cooked, Smith used her laptop and again showed Doe some internet pornography. Because Smith was planning on going to sleep after dinner, he stripped down to his boxers. Shortly after dinner, and while watching television, they began making out. Smith put his mouth on Doe's breasts and penetrated her vagina with his fingers.

Smith removed Doe's clothes, but Doe said that she did not want to have sex yet. They talked about Doe's boyfriend and Doe's feelings for Smith. After telling Doe that she was "nice," Smith asked: "Are you going to let me do it?" Doe thought for a minute and then said that Smith needed a condom. She found one, put it on Smith, and orally copulated him. During vaginal intercourse, the condom broke. Doe became furious, accused Smith of having a sexually transmitted disease, and asked him to leave. Smith suggested Doe might have infected him and said that he could hardly feel anything during sex with her. Smith then said that he did not think they should see each other anymore. He and Doe had been drinking . Smith testified that he "was just talking from the alcohol." Smith estimated that Doe had consumed between ten and twelve ounces of mixed drink.

someone else at Santa Rita Jail, calling on Smith's behalf. The person told Doe "how sorry [Smith was] and [that he] wanted to talk to [her.]"

Smith testified that all of the sexual activity between him and Doe was consensual. Doe never asked him to stop or screamed. He never pinned Doe down, pulled a knife on her, or threw his shoes at her. He never threatened to kill Doe or himself.

Keith Bennett testified that he and Smith became friends when they were incarcerated. At Smith's request, Bennett called a woman whose name he could not recall. The woman told Bennett to tell Smith she loved and missed him. She asked Bennett to thank Smith for the gift she had received. She also said "she wished . . . whatever happened didn't happen because she felt it was blown out of proportion." Bennett relayed the conversation to Smith.⁵

The public defender's investigator testified that Bennett had previously said that the telephone conversation was with Doe. Bennett told the investigator that Doe had said she cared for Smith, forgave him, and was thankful for his gifts.

Verdict and Sentence

The jury returned guilty verdicts on all charges and found each of the deadly weapon enhancement allegations true. Smith admitted the prior conviction allegations and was sentenced to imprisonment for a total term of 51 years to life. This timely appeal followed.

II. DISCUSSION

On appeal, Smith contends that the trial court abused its discretion, and violated his federal constitutional rights, by ending his direct examination after he repeatedly refused to confine his questions to relevant matters. He also suggests that the trial court impermissibly lightened the prosecution's burden of proof when it instructed the jury that a dating relationship between himself and Doe, and Doe's request that he use a condom, were not sufficient, standing alone, to constitute consent. Neither argument is persuasive.

⁵ Smith called another inmate, Gregory Coleman, to the witness stand to testify. Coleman's testimony was stricken, with Smith's agreement, when he refused to answer questions on cross-examination.

A. *Smith's Direct Examination*

First, Smith contends that the trial court abused its discretion when it ended his direct examination/testimony, thereby violating his federal constitutional rights to self-representation and to testify in his own defense.

1. *Procedural Background*

Smith was required by the court to conduct his own direct examination in a question and answer format. After Smith testified about the events occurring on the night of January 14, 2009, the record reflects the following exchange:

“Q. [BY SMITH]: Mr. Smith, do you see it as unfair that you don't have the same resources as the prosecutor?”

“[THE PROSECUTOR]: Objection.

“THE COURT: No. Wrong. You were doing so well. Next question.

“BY [SMITH]: Q. Mr. Smith, do you have any resources to produce phone records?”

“[THE PROSECUTOR]: Objection.

“THE WITNESS [(SMITH)]: No.

“THE COURT: Well, that's not true. That's actually false, because I've signed several subpoenas for you.

“THE WITNESS [(SMITH)]: They're not available. Those subpoenas—

“THE COURT: Hey, listen. Next question.

“[SMITH]: I haven't produced phone records.

“THE COURT: Next question.

“BY [SMITH]: Q. Do you think the laws should be fair?”

“A: Yes.

“THE COURT: Get to the night and morning of the incident.

“BY [SMITH]: Q. Do you think the law—

“THE COURT: Mr. Smith, you've got to talk about the events. You were doing just fine. Now you're going off the rails.

“BY [SMITH]: Q. Do you think the law should be fair?”

“A. Yes.

“[THE PROSECUTOR]: Objection.

“THE COURT: No. Next question.

“BY [SMITH]: Q. Mr. Smith, you have reasons to fear [for] your life in these allegations?

“[THE PROSECUTOR]: Objection.

“THE WITNESS [(SMITH)]: Yes.

“THE COURT: Mr. Smith, I’m going to cut you off and you’re not going to be able to talk about anything else unless you get back to the facts of the night or the morning after or if you want to talk about the events that involve some of these mailings or something like that the complaining witness talked about.

“[SMITH]: But I’m—

“THE COURT: But we’re not getting into your views of the law and what’s fair—or the prosecutor; no way. [¶] So if you don’t want to follow that instruction, then I’ll end this right now.

“BY [SMITH]: Q. Okay. So my question to you, Mr. Smith, is: Has it been emotionally disturbing to—

“THE COURT: Nope.

“BY [SMITH]: Q. How long have you been in jail?

“THE COURT: No.

“BY [SMITH]: Q. Is it fair to say that you take this matter seriously?

“THE COURT: No.

“[SMITH]: It’s my only chance to be acquitted in defending myself.

“THE COURT: Nope. That’s it. Finished. All done. You’re all done.

“[SMITH]: I was just trying—

“THE COURT: No, I told you. I warned you very clearly.

“[SMITH]: I was trying to get through the testimony—

“THE COURT: All done. Thank you. [¶] . . . [¶] . . . Do you have any questions about what Mr. Smith has talked about so far? Because I’m not listening to any more of

this stuff with him talking about stuff that has nothing to do with the event. [¶] So if you want to ask him, [the prosecutor], you're free to question about the events he talked about.

“[THE PROSECUTOR]: I'll stick with the events.

“THE COURT: Are you going to answer his questions?

“[SMITH]: Can I finish what I'm doing?

“THE COURT: No, because I've gone through this with you off the record, outside the presence of the jury, at great length.

“[SMITH]: But I'm not finished.

“THE COURT: I've kept them waiting at great length. I've practically written your direct exam. I warned you, Mr. Smith. And I'm not going to argue with you anymore.”

After the prosecutor concluded cross-examination of Smith, the following colloquy occurred:

“THE COURT: Do you have any redirect of yourself? Any questions on the areas covered by [the prosecutor] for points of clarification?

“[SMITH]: Yes. Can I speak about the phone conversations that we had as far as like—

“THE COURT: He didn't ask you about phone conversations.

“[SMITH]: Communication with the different—with [Bennett] and Greg Coleman.

“THE COURT: Nope. You didn't ask yourself those questions on direct examination before I cut you off when you refused to follow my instructions, so your redirect is limited to the areas [the prosecutor] asked you about.

“[SMITH]: Uh, okay. I don't really have any redirect.”

2. *Analysis*

“A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. (*United States v. Wade* (1967))

388 U.S. 218, 223–227; *Gideon v. Wainwright* (1963) 372 U.S. 335, 339–345; *Powell v. Alabama* (1932) 287 U.S. 45, 71.) At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. (*Faretta v. California* [(1975)] 422 U.S. 806, 819 (*Faretta*).)” (*People v. Marshall* (1997) 15 Cal.4th 1, 20, parallel citations omitted.) However, the *Faretta* court itself recognized: “The right of self-representation is not a license to abuse the dignity of the courtroom.” (*Faretta*, at pp. 834–835, fn. 46.) “[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. [Citation.]” (*Ibid.*)

“A defendant’s right to self-representation plainly encompasses certain specific rights to have his voice heard. The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.” (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 174 (*McKaskle*), italics omitted.) “In determining whether a defendant’s *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way.” (*Id.* at p. 177.)

Likewise, “[a] defendant in a criminal case has the right to testify in his or her own behalf. [Citations.]” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332; accord, *Rock v. Arkansas* (1987) 483 U.S. 44, 51–52; *People v. Allen* (2008) 44 Cal.4th 843, 848.) “ ‘A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.’ [Citations.]” (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294–295.) “Of course, the right to present relevant testimony is not without limitation. The right ‘may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.’ [Citation.] But restrictions of a defendant’s right to testify may not be arbitrary or disproportionate

to the purposes they are designed to serve.” (*Rock v. Arkansas*, at pp. 55–56, fn. omitted.)

Smith argues: “In this case, the trial court failed to honor [Smith]’s right of self-representation. By cutting off [Smith]’s testimony, the trial court directly inhibited [Smith]’s ability to have his ‘voice heard.’ ([*McKaskle, supra*, 465 U.S.] at p. 174.)” But, Smith’s *Faretta* rights were not limited in any way. Smith’s right to represent himself was not terminated, nor was he removed from the courtroom during any trial proceedings, which could have implicated his right to legal representation.

At base, Smith’s claim is simply that the trial court abused its discretion in limiting the evidence received and that this interfered with his rights to testify and to present a defense. “[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence . . . [citation].” (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) We find no abuse of discretion.

The trial court was rightfully concerned with keeping irrelevant testimony from the jury. “No evidence is admissible except relevant evidence.” (Evid. Code, § 350.) “ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210). Smith had no privilege, as a self-represented defendant, to ignore these rules. “There are limits on the right to act as one’s own attorney.” (*People v. Butler* (2009) 47 Cal.4th 814, 825.) The trial court has a duty to control the conduct of the trial “and to limit the introduction of evidence and the argument of counsel to relevant and material matters” (§ 1044; accord, *People v. Snow* (2003) 30 Cal.4th 43, 78; *People v. Beach* (1983) 147 Cal.App.3d 612, 628.) And, “ ‘[i]t is well within [a trial court’s] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court’s instructions, or otherwise engages in improper or delaying behavior.’ [Citation.]” (*People v. Snow*, at p. 78) “[A] defendant requesting the right of self-representation must possess the ability and willingness ‘to abide by rules of procedure and courtroom protocol.’ (*McKaskle*, *supra*, 465 U.S. at p.] 173.)” (*People v. Watts*

(2009) 173 Cal.App.4th 621, 629.) “[M]ere self-representation is not a ground for exceptionally lenient treatment.” (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984.)

Here, contrary to Smith’s assertion on appeal, he did not make an effort to comply with the Evidence Code despite the court’s explicit warnings that only evidence regarding “the events” or later communications with Doe were relevant. Instead, Smith bounced from one irrelevant topic to the next. Smith does not attempt to suggest on appeal that any of the questions he actually asked, and which the court restricted, were relevant. Although he now suggests that, before being cut off, he wanted to testify about phone conversations between several third parties and Doe, the record does not support that claim. Smith asked no questions and made no other offer of proof relating to that subject. Faced with a defendant who was unwilling to limit his direct examination to relevant matters, despite repeated warnings that his testimony would be cut short if the instructions were not heeded, the trial court was left with little choice but to enforce its warning and discontinue Smith’s direct examination. Smith does not cite any authority suggesting that the trial court is obligated to allow irrelevant and disruptive questioning to go on indefinitely. Smith has shown no abuse of discretion. (See *People v. Ducu* (1991) 226 Cal.App.3d 1412, 1413–1415 [cross-examination]; *People v. Jones* (1962) 207 Cal.App.2d 415, 421–422 [same].)

Nor are we convinced that the trial court infringed Smith’s right to present a defense. Generally, “ ‘the ordinary rules of evidence do not impermissibly infringe on the accused’s right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice.’ [Citation.]” (*People v. Jones* (1998) 17 Cal.4th 279, 305.) “ ‘[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.’ [Citations.] This latitude, however, has limits. ‘Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.” ’ [Citations.] This right is abridged by

evidence rules that ‘infring[e] upon a weighty interest of the accused’ and are ‘ “arbitrary” or “disproportionate to the purposes they are designed to serve.” ’ [Citations.]” (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324–325.) Unlike the cases upon which Smith relies, the trial court, in this case, did not exclude evidence of a third party confession or other clearly exculpatory evidence. (See *id.* at p. 325; *Crane v. Kentucky* (1986) 476 U.S. 683, 690–691; *Chambers v. Mississippi, supra*, 410 U.S. at pp. 298–302.) The trial court’s ruling did not implicate Smith’s federal constitutional rights to due process and to present a defense.

In any event, any error is subject to harmless error analysis. (*Crane v. Kentucky, supra*, 476 U.S. at pp. 691–692 [erroneous exclusion of exculpatory evidence subject to harmless error analysis]; *People v. Allen, supra*, 44 Cal.4th at p. 848 [denial of the right to testify is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18].) By the time of the challenged actions, Smith had already offered the testimony central to his consent defense. And, Smith was otherwise able to present evidence of the postarrest phone conversations with Doe. Smith is correct that the key issue at trial was whether the jury believed Smith or Doe. However, neither the record, nor Smith’s appellate briefs, suggest that Smith’s testimony regarding the calls would have made his defense more persuasive.

B. *Jury Instructions*

Next, Smith argues that several of the trial court’s instructions to the jury, specifically CALCRIM Nos. 1000, 1015, and 1045, violated his federal constitutional right to due process. Specifically, Smith claims: “The trial court impermissibly lightened the prosecution’s burden of proof beyond a reasonable doubt and violated [his] right to a jury trial when it instructed the jury that a dating relationship between [himself] and [Doe], and [Doe’s] request that [he] use a condom, were not sufficient to constitute consent.” (Capitalization omitted.)

“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*In re Winship* (1970) 397 U.S. 358, 364.) “[J]ury instructions

relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violate the defendant's due process rights under the federal Constitution. [Citations.] Such erroneous instructions also implicate Sixth Amendment principles preserving the exclusive domain of the trier of fact. [Citations.] 'Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he [or she] may not direct a verdict for the State, no matter how overwhelming the evidence. [Citations.]' [Citations.] The prohibition against directed verdicts for the prosecution extends to instructions that effectively prevent the jury from finding that the prosecution failed to prove a particular element of the crime beyond a reasonable doubt. [Citations.]" (*People v. Flood* (1998) 18 Cal.4th 470, 491–492.)

1. *Background*

In relevant part, the jury was instructed, pursuant to CALCRIM No. 1000: "The defendant is charged in Count Three with rape by force. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant had sexual intercourse with a woman; [¶] 2. He and the woman were not married to each other at the time of the intercourse; [¶] 3. The woman did not consent to the intercourse; [¶] AND [¶] 4. The defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else. [¶] . . . [¶] To consent, a woman must act freely and voluntarily and know the nature of the act. [¶] *Evidence that the defendant and the woman dated is not enough by itself to constitute consent. [¶] Evidence that the woman requested that the defendant use a condom or other birth control device is not enough by itself to constitute consent.*" (Italics added.)

The jury was also given instructions regarding oral copulation by force and sexual penetration by force, modeled on CALCRIM Nos. 1015 and 1045, that contained the

same language italicized above. Smith did not object to any of the aforementioned instructions.⁶

2. *Analysis*

“Lack of consent is an element of the crime of rape.” (*People v. Ireland* (2010) 188 Cal.App.4th 328, 336.) The challenged portion of the instructions were based on sections 261.6 and 261.7. Section 261.6 provides: “In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, ‘consent’ shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. [¶] *A current or previous dating or marital relationship shall not be sufficient to constitute consent* where consent is at issue in a prosecution under Section 261, 262, 286, 288a, or 289. [¶] Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent.” (Italics added.) Likewise, section 261.7 provides: “In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.”

Neither party cites *People v. Gonzalez* (1995) 33 Cal.App.4th 1440 (*Gonzalez*) despite the fact that the *Gonzalez* court rejected a claim almost identical to that raised by Smith. In *Gonzalez*, the jury was given a modified version of former CALJIC No. 1.23.1, which informed the jury that the existence of a dating relationship was insufficient by itself to constitute consent. (*Gonzalez*, at pp. 1442–1443, & fn. 1.) On appeal, the defendant contended the instruction violated his right to due process by shifting the burden of proof on the issue of consent. (*Id.* at pp. 1442–1443.) The Second District

⁶ We may, nonetheless, review Smith’s claim of instructional error to the extent it affects substantial rights. (See *People v. Dennis* (1998) 17 Cal.4th 468, 534–535; § 1259 [“appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby”].)

Court of Appeal disagreed, reasoning: “CALJIC No. 1.23.1 did not shift the burden of proof on consent to the defense or create a presumption of lack of consent. The instruction merely defined consent. Considered together, CALJIC No. . . . 1.23.1 [and the other instructions] clearly indicated the prosecution had the burden of proving lack of consent.” (*Gonzalez*, at p. 1443.)

Here, just as in *Gonzalez*, no presumption was applied against Smith. Nor did the trial court’s instructions shift the burden of proof to Smith. The challenged instructions clearly told the jury that the prosecution must prove Doe did not consent. Furthermore, the jury was instructed that Smith was presumed innocent and the prosecution had the burden of proving his guilt beyond a reasonable doubt.

Smith also argues that the instructions “[are] tantamount to a directed verdict” in that they “pre-empted the jury’s prerogative to decide for itself whether the evidence proved the prosecution’s case beyond a reasonable doubt and forbade them from deciding that [Smith’s] and [Doe’s] romantic relationship, or [Doe’s] request that [Smith] use a condom, was sufficient evidence to establish a reasonable doubt as to whether the sexual acts occurred against [Doe’s] will.” The challenged instructions are not amenable to this interpretation. They merely told the jury that evidence of a dating relationship between Doe and Smith or evidence that Doe asked Smith to use a condom could be considered, but was not sufficient *standing alone* to establish lack of consent. No violation of due process has been demonstrated.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Jones, P. J.

Simons, J.