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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT LEE EISON,

Defendant and Appellant.

A134043

(Alameda County  
Super. Ct. No. C163534)

Defendant Robert Lee Eison appeals following his conviction by a jury of several sex offenses including rape causing great bodily injury. His sole contention on appeal is that the victim's pregnancy and subsequent abortion is insufficient to support the finding of great bodily injury. We disagree and shall affirm.

**Factual and Procedural Background**

The evidence at trial presented the following facts. Defendant began molesting his stepdaughter in November 2008, when she was 14 years old. After she turned 15, defendant threatened to post nude photos of her on the internet if she did not have sex with him. Defendant had sex with the stepdaughter for the first time in May 2009. There were approximately eight instances of sexual conduct taking place in the home shared by the victim, her mother and defendant. In June 2009, the stepdaughter discovered she was pregnant. She informed defendant of the pregnancy, but he continued to have sex with her until July 2009. Then the victim's mother learned of her husband's conduct and brought her daughter to the hospital and to the police. The daughter underwent an

abortion the next day. DNA analysis and parentage testing confirmed defendant's paternity of the fetus.

Defendant was charged by information with five counts of lewd acts on a child (counts 1, 2, 4, 6 and 8; Pen. Code,<sup>1</sup> § 288, subd. (c)(1)), one count of sexual penetration by foreign object (count 3; § 289, subd. (h)), and two counts of forcible rape (counts 5 and 7; § 261, subd. (a)(2)). The fifth count charged defendant with forcible rape between May 1 and July 25, 2009. The seventh count charged defendant with forcible rape on or about July 26, 2009. Counts 6 and 8 charged defendant with lewd acts upon a child as alternative charges to the forcible rape charges. The information further alleged that defendant inflicted great bodily injury upon the victim in connection with counts 5 and 6, between May 1 and July 25, 2009. (§ 12022.8.) A jury found defendant guilty of counts 1 through 5 and 7, and found defendant not guilty of counts 6 and 8. Additionally, the jury found true the allegation that defendant inflicted great bodily injury on the victim in connection with count 5, the rape occurring between May 1 and July 25, 2009. The court sentenced defendant to the upper term of eight years for the forcible rape conviction under count 5 and a consecutive five-year term for the great bodily injury enhancement under section 12022.8. In addition, the court sentenced defendant to a consecutive eight-year term for the forcible rape conviction under count 7 and two consecutive eight-month terms on counts 1 and 4, for an aggregate term of 22 years 4 months.<sup>2</sup> Defendant filed a timely notice of appeal.

### **Discussion**

Defendant's sole contention on appeal is that the evidence of the victim's pregnancy and abortion resulting from the rape is insufficient to support the great bodily injury enhancement. Section 12022.7, subdivision (f) defines "great bodily injury" as a "significant or substantial physical injury." Whether the physical harm suffered by the victim constitutes a great bodily injury is a question of fact for the jury. (*People v.*

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<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> The court stayed the two 8-month sentences on counts 2 and 3 pursuant to section 654.

*Escobar* (1992) 3 Cal.4th 740, 750.) Proof that a victim’s bodily injury is great is commonly established by evidence of the severity of the victim’s physical injury, the resulting pain, or the medical care required to treat the injury. (*People v. Cross* (2008) 45 Cal.4th 58, 66; *People v. Harvey* (1992) 7 Cal.App.4th 823, 827-828.) “ ‘ “If there is sufficient evidence to sustain the jury’s finding of great bodily injury, [the court] is bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.” ’ ” (*People v. Escobar, supra*, 2 Cal.4th at p. 750.)

The trial court fashioned a great bodily injury jury instruction from CALJIC No. 17.20.1 and from the Supreme Court’s opinion in *People v. Cross, supra*, 45 Cal.4th 58.<sup>3</sup> The instruction advised the jury that “[a] pregnancy *may* constitute great bodily injury. You may consider the circumstances and effects of the abortion of that pregnancy in determining whether the pregnancy constituted great bodily injury in this case.” (Italics added.) Although, as the instruction also stated, “[t]he commission of the crime of forcible rape does not by itself constitute great bodily injury,” it has long been recognized that pregnancy resulting from a forcible rape or similar sex offense is sufficient to support a finding of great bodily injury (*People v. Sargent* (1978) 86 Cal.App.3d 148; *People v. Superior Court (Duval)* (1988) 198 Cal.App.3d 1121). This conclusion has recently been emphatically reaffirmed in the case of unlawful but nonforcible sexual conduct. (*People v. Cross, supra*, 45 Cal.4th 58.)

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<sup>3</sup> The jury was instructed as follows: “It is alleged [in count 5] that in the commission of forcible rape the defendant, inflicted great bodily injury on [the alleged victim]. [¶] If you find the defendant guilty of forcible rape, it then will be your duty to determine whether the defendant personally inflicted great bodily injury on [the alleged victim] in the commission of forcible rape. [¶] ‘Great bodily injury’ means a significant or substantial physical injury. The commission of the crime of forcible rape does not by itself constitute great bodily injury. Minor, trivial or moderate injuries, inherent in the crime of forcible rape, do not constitute great bodily injury. However, if the amount of force used in the commission of forcible rape resulted in a significant or substantial injury to any part or portion of the body, that injury constitutes great bodily injury. [¶] A pregnancy may constitute great bodily injury. You may consider the circumstances and effects of the abortion of that pregnancy in determining whether the pregnancy constituted great bodily injury in this case.”

In *Cross* the defendant impregnated his 13-year-old stepdaughter who subsequently had an abortion. The prosecutor urged the jurors to rely on their “common experiences” to find that the victim, a 13-year-old who had never given birth before, had suffered great bodily injury in “carrying a baby” for 22 weeks. (*People v. Cross, supra*, 45 Cal.4th at p. 66.) The court concluded that a pregnancy without medical complications may constitute great bodily injury. (*Ibid.*) The court stated that it “need not decide that every pregnancy resulting from unlawful sexual conduct . . . will invariably support a factual determination that the victim has suffered a significant or substantial injury,” but that the jury in that case could reasonably have found that the victim suffered a significant or substantial physical injury “based solely on the evidence of the pregnancy.” (*Ibid.*)

Statements appearing in some appellate decisions suggest that impregnation necessarily constitutes great bodily injury. (*People v. Sargent, supra*, 86 Cal.App.3d at pp. 151-152 [“Pregnancy resulting from rape is great bodily injury;” “ ‘the facts in this case, i.e., a pregnancy followed by an abortion, clearly support a finding of great bodily injury’ ”]; *People v. Superior Court (Duval), supra*, 198 Cal.App.3d at p. 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.”].) Justice Corrigan, joined by Chief Justice George, concurred in *Cross* to urge the adoption of such an unqualified rule. “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.” (*People v. Cross, supra*, 45 Cal.4th at p. 73 [concurring opn. of Corrigan, J.].) Justice Corrigan quoted from the *Sargent* opinion: “ ‘Pregnancy can have one of three results—childbirth, abortion or miscarriage. Childbirth is an agonizing experience. An abortion by whatever method used constitutes a severe intrusion into a woman’s body.’ ” (*Ibid.*) Justice Corrigan concluded, “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. . . . [T]he impact of any pregnancy on the physical condition of the victim is never insignificant or insubstantial.” (*Ibid.*)

While the majority in *Cross* declined to adopt such an absolute rule, it left no room to doubt that impregnation alone is sufficient to support a finding that great bodily injury was inflicted. “[W]e conclude that here, based solely on evidence of the pregnancy, the jury could reasonably have found [the] 13-year-old . . . suffered a significant or substantial physical injury.” (*People v. Cross, supra*, 45 Cal.4th at p. 66.) Evidence regarding the weight of the fetus, medical complication with the pregnancy, or specific details regarding the abortion procedure is not required. (See *People v. Meneses* (2011) 193 Cal.App.4th 1087, 1091.)

The jury in this case unquestionably was presented with sufficient evidence of the pregnancy and medical treatment obtained as a result of the sexual assault to determine that the victim suffered a substantial physical injury. The victim was impregnated at the age of 15 by her 48-year-old stepfather. This was her first pregnancy. She learned that she was pregnant in June 2009 and was pregnant for at least eight weeks. The pregnancy was terminated in July 2009.<sup>4</sup> No further evidence of pain, discomfort, or medical procedures was necessary for the jury to have reasonably found that defendant inflicted serious bodily injury upon the victim.

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<sup>4</sup> In a sexual assault examination on July 27, 2009, the examiner found two tears to the victim’s posterior fourchette. The medical examiner testified that these injuries are commonly associated with sexual assault. While vaginal tears might also be found to support a finding of great bodily injury, the prosecution presented no evidence that these injuries were associated with the specific rape underlying count 5.

**Disposition**

The judgment is affirmed.

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Pollak, Acting P.J.

We concur:

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Siggins, J.

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Jenkins, J.