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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS ALLEN WARE,

Defendant and Appellant.

C067883

(Super. Ct. No. 10F01566)

Charged with infliction of corporal injury on a cohabitant (count one), false imprisonment (count two), and dissuading a victim (count three), defendant was convicted of false imprisonment after the prosecution dismissed count three and the trial court declared a mistrial on count one.

Defendant argues there was insufficient evidence that the victim was restrained, or, alternatively, insufficient evidence that the restraint lasted a sufficient length of time. He further argues his conviction should be reversed because the jury was not instructed that the restraint had to last an appreciable length of time. We find no merit to these contentions and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Tina Davis, lived with defendant after he was released on parole in 2009, and planned to marry him. On March 6, 2010, they argued, and Davis left to go to her cousin's house. She came back the following morning and apologized, but told him that she wanted to break up. She was in her bedroom. He demanded the keys to her car, but she refused. She started to walk out of the room, then realized she had left her cell phone. She went back in the room to get the phone.

Defendant tried to grab the phone from her. They started wrestling over the phone. They ended up on the bed. She had the phone behind her back. He put his hand over her mouth and nose so that she could not breathe. Davis could not tell how long he was suffocating her, but it was long enough for her to start seeing scenes flash before her. She kept looking at his eyes, which were bloodshot, and he was mad. Davis remembered thinking that her son was going to come home and find her dead.

All of a sudden, Davis's arm popped and defendant jumped up off of her, realizing he had gone too far. Davis started screaming and told him to call an ambulance. Defendant wanted to know what she would tell them, because he did not want to go to jail. She agreed to say she got in a fight with her girlfriend.

Davis suffered a broken humerus, which is the bone in the upper arm. She returned home with defendant, but she was afraid of him, so she left to live with her cousin on March 11. She called the police that day to report the incident.

The trial court sentenced defendant to a total term of 15 years 8 months. All but two years and eight months of the sentence were attributable to enhancements for prior convictions and for infliction of great bodily injury.

DISCUSSION

False imprisonment is defined by statute as “the unlawful violation of the personal liberty of another.” (Pen. Code, § 236.)¹ It is a felony if it is “effected by violence, menace, fraud, or deceit.” (§ 237, subd. (a).) The jury was instructed in this case: “To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant intentionally restrained or confined someone by violence or menace; and, two, the defendant made the other person stay or go somewhere against that person’s will.”

“The elements of a tortious claim of false imprisonment are: (1) the nonconsensual, intentional confinement of a person, (2) without lawful privilege, and (3) for an appreciable period of time, however brief.” (*Easton v. Sutter Coast Hospital* (2000) 80 Cal.App. 4th 485, 496.) Defendant focuses on the duration of the restraint, and citing the tort definition of false imprisonment insists: (1) the jury should have been instructed as to the duration element of the offense, (2) there was insufficient evidence of restraint or that the restraint lasted an appreciable time, and (3) if there is no duration element to the crime, his Fourteenth Amendment and equal protection rights were violated.

Webster’s Third New International Dictionary (1981) page 105 defines “appreciable” to mean “capable of being perceived and recognized.” Defendant’s mistake is in equating an “appreciable period of time, however brief” with a requirement that the restraint last a considerable period of time. There is no durational requirement to false imprisonment, but rather a limit on its brevity. The tort definition is a recognition that the brevity of the restraint resulting in a false imprisonment is limited only by the victim’s perception. It is a recognition of how short is too short. Even if the duration of

¹ References to a section are to the Penal Code unless otherwise noted.

the restraint is very brief, a false imprisonment has occurred if the restraint lasts long enough for the victim to understand that he or she is being restrained.

The elements of a tortious claim of false imprisonment were set forth in *City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810, which cited 1 Harper & James, Torts (1956) page 226, and Restatement Second of Torts, section 35. Restatement Second of Torts, explains that a person is subject to liability for false imprisonment if the victim “is conscious of the confinement or is harmed by it.” (Rest.2d Torts, § 35.) Conversely, the Restatement states that there is no liability for false imprisonment “unless the person physically restrained knows of the confinement or is harmed by it.” (Rest.2d Torts, § 42.) We do not hold that California law requires the person physically restrained to know of the confinement or be harmed by it. (See *Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1003 [contemporaneous awareness is not an essential element of the tort].) However, the restraint must not be so brief that the victim does not know he or she is being restrained.

Defendant argues the trial court was required to instruct the jury that the restraint must last an appreciable length of time because this is an element of the offense. Defendant’s claim of instructional error fails because the duration of the restraint is not an element of the crime. The instruction given to the jury required a finding that the defendant made the victim stay or go somewhere against her will. This finding necessarily meant that the jury also found Davis’s restraint lasted long enough for her to perceive it. Had she not perceived she was being restrained, the jury could not have found that she was being made to stay somewhere against her will.

Defendant also argues there was insufficient evidence that the restraint lasted an appreciable length of time. As previously explained, the requirement that the person be confined for an “appreciable period of time” is not a requirement that the confinement or restraint last any particular length of time. It is instead a recognition that no false

imprisonment has occurred unless it lasts long enough for the victim to appreciate that he or she has been detained for any period, however brief.

In this case Davis perceived that defendant was on top of her on the bed, pushing her into the bed and suffocating her by covering her mouth and nose with his hand. She perceived that he held her long enough that she started “seeing scenes flash before” her. Defendant’s actions lasted long enough for her to appreciate that she was not free to get up and leave. This evidence was sufficient to prove that the restraint, however brief, was “appreciable.” Therefore, defendant’s claim the evidence was insufficient to show the restraint lasted an appreciable length of time fails.

Defendant also argues there was insufficient evidence to show that he prevented Davis from leaving the bed. He claims Davis never testified she was unable to leave her bed, or that defendant prevented her from leaving. The evidence cited above (i.e., the fact that defendant was on top of her, pushing her into the bed and suffocating her, and that she thought she was going to die) provided evidence from which the jury could reasonably infer that Davis was unable to leave her bed, and that the inability was against her will. “Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom.” (*People v. Dooley* (2010) 189 Cal.App.4th 322, 326.)

Finally, there is no merit to defendant’s claim that a criminal conviction for false imprisonment is based upon a less stringent standard than a tortious false imprisonment because a criminal conviction does not require that the imprisonment last an appreciable length of time. As indicated, this element, which applies to both crimes and torts, is simply a recognition that the restraint last long enough for the victim to perceive it. The Penal Code definition of false imprisonment applies in both civil and criminal actions. (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715.)

Defendant is simply wrong that the civil cases have determined that a detention must last 15 minutes, or at least be more than momentary. In *Fermino v. Fedco, supra*, 7 Cal.4th at page 715, the court cited *Alterauge v. Los Angeles Turf Club* (1950)

97 Cal.App.2d 735, 736, where the detention lasted 15 minutes, and stated that the length of the detention can be as brief as 15 minutes. However, in *Fermino v. Fedco* the plaintiff was detained for more than an hour. (*Fermino v. Fedco, supra*, at p. 707.) Neither this statement by the Supreme Court, nor its repetition by other courts may be interpreted as holding that the minimum length of the detention is 15 minutes.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

ROBIE, J.