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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Trinity)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
ACE ORVILLE NOLAND,  
  
Defendant and Appellant.

C068081

(Super. Ct. No.  
10F0130)

Defendant Ace Orville Noland was found guilty by a jury of forcible sexual penetration. (Pen. Code, § 289, subd. (a)(1).)<sup>1</sup> On appeal, he contends there was insufficient evidence he acted without the victim's consent. We affirm.

BACKGROUND

The victim, S.N., is the biological daughter of defendant. In 1991, defendant was convicted of three counts of committing lewd and lascivious acts, for acts he committed between 1984 and

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

1986 upon S.N. when she was a child. Defendant served a three-year sentence as a result of those convictions.

As an adult, S.N. maintained a relationship with defendant and her mother. Defendant often made inappropriate sexual remarks or jokes, which she generally ignored and walked away. He also made numerous physical advances in the past, but she had just walked away.

On the evening of either August 16 or 17, 2010, defendant was at S.N.'s apartment to work on her computer. Prior to defendant's arrival, S.N. had consumed approximately two beers. She also had consumed approximately two more beers and a shot of alcohol while defendant was at her apartment. She described herself as "buzzed" but not impaired in any way, and estimated she had consumed the alcoholic beverages over the course of four or five hours.

At one point in the evening, S.N. began to feel uneasy. Defendant put his hands on her shoulders. She got up from her computer chair to walk away and, as she stood up, defendant "grabbed her pajama bottoms" and "jerked" them down. He then "pushed [her] forward," bent her over the seat of a recliner chair "real fast," and inserted something into her vagina. All of this happened within seconds.

When this happened, S.N. felt like she did when defendant molested her as a child, which she described as scared and ashamed. Within a few seconds, though, she "snapped back" and "jumped up" in order to stop defendant from continuing his actions. Defendant fixed his belt and left. At no point did

S.N. tell defendant he could touch her sexually or otherwise consent to a sexual encounter with defendant.

Defendant came back to S.N.'s apartment a couple of hours later but she refused to answer the door. He returned the following morning and sat on the couch next to her. He started to rub her arm and she grabbed his arm to make him stop. He told her that she liked him the night before, and she disagreed. He said it was a night he would never forget and stated, "[W]ho is to say what is right and wrong." He then said, in a boastful manner, that he had bruises caused by her attempts to fight him off the night before. He offered to show her the bruises and she declined. She did not recall physically fighting with defendant but stated it was possible she had fought him off.

S.N. first reported the incident to her mother. She reported it to the police about one week later. At law enforcement's suggestion, she placed a call to her mother. During that call, her mother told her defendant had admitted to having inserted three fingers in S.N.'s vagina.

Initially, S.N. had believed defendant had inserted his penis into her vagina that evening, even though she did not see his penis out of his pants afterwards. Later, after being told by her mother that defendant had admitted to inserting his fingers into her vagina, S.N. agreed that could be the case. She did not have full recollection of the details of the incident because she "went back in kid mode."

Defendant was also interviewed in August 2010. He stated that S.N. had been extremely intoxicated that night. He denied

the allegation that he had sex with S.N. and accused S.N. of "[l]ay[ing] all kinds of shit on [him]" and tearing the family apart.

#### DISCUSSION

Defendant was convicted of forcible sexual penetration within the meaning of section 289, subdivision (a), which provides "(1)(A) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years." To obtain a conviction, the prosecution must establish the sexual act was against the victim's will. The victim's nonconsent establishes the element of "'against the victim's will.'" (*People v. Giardino* (2000) 82 Cal.App.4th 454, 460.)

Defendant contends the prosecution did not present sufficient evidence to establish that his act of sexual penetration was against S.N.'s will -- or, in other words, without her consent. We disagree.

The requirement that a victim physically resist, as an objective indicator of nonconsent, was eliminated decades ago. (See *People v. Barnes* (1986) 42 Cal.3d 284, 296-303.) Instead, the focus is on the overbearing of the victim's will. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 806-807; *People v. Bermudez* (1984) 157 Cal.App.3d 619, 623.)

Accordingly, consent, in the context of rape or forcible sexual penetration, is now defined as "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."<sup>2</sup> (§ 261.6.)

"'Cooperation'" beyond "'mere submissiveness'" is necessary for a "'positively displayed willingness to join in the sexual act,'" or a free and voluntary act. (*People v. King* (2010) 183 Cal.App.4th 1281, 1321; see *People v. Giardino, supra*, 82 Cal.App.4th at p. 460, fn. 3.) The dictionary defines "positive" to mean "expressed clearly, certainly, or peremptorily with no doubt, reservation, or unclarity." (Webster's 3d New Internat. Dict. (1966) p. 1770.)

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<sup>2</sup> The jury was instructed with CALCRIM No. 1045 as follows: "In order to consent, a person must act freely and voluntarily and know the nature of the act. An act is accomplished by force if a person uses enough physical force to overcome the person's will. Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that is enough to cause a reasonable person of ordinary sensitivity to do or submit to something that he or she would not otherwise do or submit to.

"When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and her relationship to the defendant.

An act is accomplished by fear if the person is actually and reasonably afraid, or she is actually but unreasonably afraid and the defendant knows of her fear and takes advantage of it.

"The defendant is not guilty of forcible sexual penetration if he actually and reasonably believed that the other person consented to the act."

Here, there was sufficient evidence of lack of consent. First, the victim testified that she did not consent to defendant's sexual acts. She was specifically asked whether, at any point in time that evening, defendant asked if he could touch her in a sexual way or if she told him he could so touch her, and the victim unequivocally answered, "No." She was also expressly asked, "On the incident in question, did you consent to have [defendant] do anything sexual to you?" and she responded, "No."

Second, the surrounding circumstances of defendant suddenly disrobing her, pushing and bending her over a chair, and immediately penetrating her vagina, demonstrates a lack of consent and invasion of personal autonomy, as well as showing a degree of force sufficient to overcome free will, and cause a reasonable victim to feel duress and fear. Indeed, the jury could find defendant's acts were so abrupt and unexpected that the victim did not and/or could not have "expressed clearly, certainly, or peremptorily with no doubt, reservation, or unclarity" her cooperation in the act. As further evidence of lack of consent, she "snapped back" and "jumped up" to stop defendant from continuing his actions within only a few seconds from when he started. It is hardly surprising that when this happened S.N. felt like she did when defendant molested her as a child.

Third, the following day, defendant bragged to the victim that he had bruises caused by her attempts to fight him off. This, alone, is substantial evidence that the victim did not

consent to defendant's sexual acts and that he committed those acts by force.

In sum, the evidence was sufficient for the jury to find defendant's act of sexual penetration was "against the victim's will" or without her consent.

DISPOSITION

The judgment is affirmed.

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NICHOLSON, Acting P. J.

We concur:

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HULL, J.

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DUARTE, J.