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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER BIGBY,

Defendant and Appellant.

C068194

(Super. Ct. No. 10F01801)

A jury found defendant Alexander Bigby guilty of rape (Pen. Code, § 261, subd. (a)(2))¹ and he was sentenced to the upper term of eight years in state prison. Defendant's sole contention on appeal is that the trial court prejudicially erred in its response to a jury question. We find no error and affirm the judgment.

¹ Undesignated section references are to the Penal Code.

BACKGROUND²

Defendant was charged with forcible rape (§ 261, subd. (a)(2)) and forcible sexual penetration by a foreign object (§ 289, subd. (a)(1)). Defendant pled not guilty to both charges and the matter proceeded to a jury trial. Defendant argued at trial that he and the victim had a sexual relationship and the victim consented to have sex with him; the prosecution argued otherwise. The jury was then given the CALCRIM No. 1000 instruction on rape:

"The defendant is charged in Count One with rape by force in violation of . . . section 261(a)(2).

"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.

² The facts of defendant's crime are not relevant to the issue on appeal. Accordingly, we do not include them in our opinion.

"*Sexual intercourse* means any penetration, no matter how slight, of the vagina or genitalia by the penis. Ejaculation is not required.

"To *consent*, a woman must act freely and voluntarily and know the nature of the act.

"Intercourse is *accomplished by force* if a person uses enough physical force to overcome the woman's will.

"*Duress* means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do or submit to something that she would not do or submit to otherwise. When deciding whether the act was accomplished by duress, consider all the circumstances, including the woman's age and her relationship to the defendant.

"*Retribution* is a form of payback or revenge.

"*Menace* means a threat, statement, or act showing an intent to injure someone.

"Intercourse is *accomplished by fear* if the woman 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 rape if he actually and reasonably believed that the woman consented to the intercourse. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman consented. If the People have not met this burden, you must find the defendant not guilty."

During their deliberations, the jury asked the court to read back the victim's testimony as well as defendant's. The jury subsequently asked the court, "if [defendant] in his mind, truly believes she was concentrating [sic] even though she said the word 'no,' is that still considered forcible rape[?]" Defendant argued the court should respond to the question by simply rereading CALCRIM No. 1000, emphasizing the last paragraph. The trial court disagreed and provided the jury with former pattern jury instructions CALJIC No. 10.65 and CALJIC No. 1.23.1.

CALJIC No. 10.65 provides:

"In the crimes of forcible rape and forcible sexual penetration, criminal intent must exist at the time of the commission of the crime charged.

"There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse or sexual penetration. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge, unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity.

"However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim is not a reasonable good faith belief.

"If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find him not guilty of the crime."

CALJIC No. 1.23.1 provides:

"In prosecutions under . . . sections 261(a)(2) and 289(a)(1), the word 'consent' means positive cooperation in an act or attitude as 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 person who initially consents and participates in the act of sexual intercourse or sexual penetration has the right to withdraw that consent. To be effective as a withdrawal of consent, the person must inform the other person by words or conduct that consent no longer exists, and the other person must stop. The words or conduct must be sufficient to cause a reasonable person to be aware that consent has been withdrawn, forcibly continuing the act of sexual intercourse or sexual penetration despite the objection, is against the will and without the consent of the person."

The court then explained its decision to provide the former pattern instructions: "It's the court's belief that both of those CALJICs were accurate statements of the law and absolutely [are] responsive to the question.

"It's also the court's view that the CALCRIM instructions in an effort to be efficient and less wordy ha[ve] in some

regards created issues through the, quote, simple language, and it's been my experience in almost a hundred percent of the times when I've provided the jurors with CALJIC instructions they've been able to reach a verdict."

The jury found defendant guilty of the rape charge but acquitted him on the charge of forced sexual penetration. Defendant was sentenced to eight years in state prison, ordered to pay various fines and fees, and was awarded 423 days of custody credit (368 actual days and 55 conduct days).

DISCUSSION

Defendant's sole claim on appeal is that "the court's response to [the] jury[']s question was confusing and prejudicial." In support of his claim, defendant argues that by giving the jury the former pattern instructions, the jury had "three separate instructions each with differences and variations on the concept of consent in a sexual assault case." This, defendant argues, was "unnecessarily duplicative without being any more, and quite arguably less, clarifying than CALCRIM [No.] 1000."

Defendant also argues the jury's question was "specifically directed to [defendant's] state of mind," but the CALJIC instructions contained additional language "about ambiguous conduct which is not in CALCRIM [No.] 1000 and was not responsive to the jury's very narrow question." This additional language, he argues, confused the jury.

Finally, defendant argues that giving the jury CALJIC No. 1.23.1 was specifically prejudicial because, according to the California Supreme Court, the definition of consent in CALJIC No. 1.23.1 "arguably is less beneficial to defendant than its common or ordinary dictionary meaning." (*People v. Martinez* (2010) 47 Cal.4th 911, 953-954.) We are not persuaded by defendant's arguments.

Here, after reviewing the testimony of defendant and his victim, the jury asked the court to clarify the defense of consent. Rather than simply rereading CALCRIM No. 1000, which apparently had not provided the jury enough direction on the issue of consent, the trial court provided the jury with the former pattern instructions on the crime of rape and the defense of consent. While the instructions may have provided the jury with more information than they were seeking, the instructions certainly provided the jury with a more detailed explanation of consent. These additional instructions are, nevertheless, a correct statement of the law regarding consent and the defense of consent to a charge of rape. (*People v. Lee* (2011) 51 Cal.4th 620, 638 [finding CALJIC No. 1.23.1 correctly defines consent]; (*People v. Acevedo* (1985) 166 Cal.App.3d 196, 202-203 [predecessor to CALJIC No. 10.65 upheld as a correct statement of the law regarding the defense of consent in a rape trial].)

Providing the jury with additional instructions on the concept of consent in a rape trial is not error, provided the instructions are accurate statements of the law. Defendant

cites no authority to the contrary. Based on the jury instructions given, we find no error.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

RAYE, P. J.

MAURO, J.