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

THE PEOPLE,

Plaintiff and Respondent,

v.

BEVERLY JANNETTE JOHNSON,

Defendant and Appellant.

C068968

(Super. Ct. No.
P11CRF0092)

This case arose out of an altercation in a psychiatric ward where defendant Beverly Jannette Johnson was a patient. She attacked facility employees Marla Moura and Debbie Herron in the men's bathroom.

A jury convicted defendant of the following crimes against Moura: sexual battery by restraint, assault by means likely to produce great bodily injury, two counts of false imprisonment by

force or menace, and battery with serious bodily injury. (Pen. Code,¹ §§ 243.4, subd. (a), 245, subd. (a)(1), 236, 243, subd. (d).) The jury also convicted defendant of battery and assault against Herron. (§§ 240, 242.) The trial court sentenced defendant to three years of probation, with a requirement to register pursuant to section 290.

Defendant timely appeals. She contends that: (1) one count of false imprisonment should be overturned because the confinement constituted a single course of conduct; (2) alternatively, one of the counts of felony false imprisonment should be reduced to a misdemeanor, because the evidence is insufficient to show violence or menace; and (3) the trial court erred in giving the jury a misleading and erroneous definition of "sexual abuse" for the purposes of section 243.4.

As we will explain, we agree with the first contention and disagree with the remainder. Accordingly, we shall strike one of the felony false imprisonment convictions and affirm the judgment as modified.

¹ Further undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL HISTORY

The Prosecution's Case

On February 20, 2011, defendant was a ward in an in-patient psychiatric facility in El Dorado County, where she had been admitted the previous day. Marla Moura, Debbie Herron and Janice Miller were on duty in the unit from 4:00 p.m. to midnight. Early in the shift, a patient told Moura that defendant was in the men's bathroom, sitting in the sink; Moura and Herron went into the bathroom to check on her. Herron asked for defendant's pants (to wash them) and asked if defendant wanted clean clothing. Defendant said yes and Herron left. Defendant gave Moura her pants, and Moura put them on the counter next to defendant and then stepped toward the door. Defendant immediately launched herself off of the counter and rushed at Moura, pushing her against the wall. Moura pushed defendant away and pushed the panic button on the waistband of her pants. It did not work.

Defendant was between the door and Moura. Defendant renewed her attack, hitting Moura in the head area before Moura could push her away again. Moura tried the panic button several more times. Defendant stepped forward, took the panic button from Moura's waistband, and tossed it under the sink. Moura tried to step around defendant, instructing her to remain in place. Defendant looked over her shoulder at the door, stepped

to the side to block the exit, then advanced toward Moura. Defendant grabbed Moura's hair and reached one hand several inches down the front of Moura's pants; Moura stopped her. Defendant then pulled down Moura's sweatshirt and shirt, reached inside Moura's clothing, and grasped her left breast, twisting it painfully. Maintaining her hold on Moura's breast, defendant grabbed Moura's hair with her other hand. Moura tried to release herself by pulling on defendant's hands and repeatedly asking her to let go, but defendant did not.

Moura grabbed defendant's hair and pushed defendant backward into a bathroom stall. Defendant fell backward onto the toilet so that she was lying across it diagonally; she released Moura's breast, but her other hand was still tangled in Moura's hair. Before Moura could pull free, defendant wrapped both of her legs very tightly around one of Moura's thighs and pulled Moura's head forward into defendant's chest. Moura called to Herron, who returned to the bathroom and freed Moura's head. Defendant then grabbed Herron's hair with one hand and pulled her forward. Moura secured defendant's other hand over her head against the wall, so that she could not grab Moura or Herron again. This position immobilized Moura.

Defendant asked to be released, but Moura and Herron said no and Herron yelled for help. Defendant and her two victims remained in a stalemate until the police arrived. Officers

pried defendant's legs from Moura's body and lifted Moura out of the stall. Moura suffered a scratch on her left breast, bruising across the bridge of her nose and on her arms and legs, sore ribs, an injury to her left shoulder, and a bruised lump above her left ear.

The Defense Case

The defense presented expert testimony from psychiatrist Charles Schaffer that defendant lacked the specific intent to commit a sexual battery because she was suffering from a psychotic episode. There was no evidence that defendant was malingering or exaggerating her illness; Schaffer opined that she had a psychotic disorder that caused delusions and thought disorganization but had no sexual component.

Defendant testified that while she was previously a patient at the same facility, she was locked in a room alone for long periods of time. She was very afraid and was forced "over and over" to take Benadryl, Haldol and Thorazine. This left her with an intense fear of the facility and forced medication. She remembers the events of February 20 as if "in a fog." When "someone" came into the bathroom, she became afraid, jumped off the counter and ran into a stall. As she tried to close the stall door, someone said, "[W]here do you think you're going," and slammed the door open; it hit her, knocking her back over the toilet seat.

She reached up to grab something to pull herself up; it was a purple shirt. She was unable to get up and was being pushed further down, so she wrapped her legs around "something" in a further attempt to regain her feet. Then someone was slamming her head against the toilet. She did not recall striking the victims, grabbing Moura's breast, or otherwise hurting anyone while she was in the bathroom. She had no memory of how long she was in the bathroom, or of the police pulling her victims out of the stall.

DISCUSSION

I

False Imprisonment--Continuous Course

Defendant first contends that one count of false imprisonment should be reversed because there was only one confinement. The People concede the point. We agree with the parties.²

A. *The Law*

Where the acts necessary to violate a statute have been committed multiple times, multiple convictions are appropriate: "[T]he number of times the act is committed determines the number of times the statute is violated." (*Wilkoff v. Superior*

² Because we agree with defendant's first claim, we need not reach her second, alternative claim.

Court (1985) 38 Cal.3d 345, 349.) Where there is only a single incident and the crime contemplates a continuous course of conduct, however, only one conviction is authorized. (*People v. Garcia* (2003) 107 Cal.App.4th 1159, 1163.) The central act of false imprisonment is the restriction of a person's freedom of movement. (§ 236.)

Kidnapping is considered a continuing offense "until such time as the kidnapper releases . . . the victim." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159.) Because false imprisonment is a necessarily included lesser offense of kidnapping (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65), it shares this characteristic. Thus, only one conviction for false imprisonment is authorized as long as a detention continues, regardless of how many separate acts are committed to keep the victim detained. We therefore agree with the parties that false imprisonment contemplates a continuous course of conduct, constituting one violation of the statute as long as the central act of restriction continues.

B. Analysis

Here, defendant was charged and convicted of two counts of felony false imprisonment, based on the People's theory, argued at trial, that defendant *first* blocked the door to keep Moura in the bathroom, and *second* wrapped her legs around Moura to hold her in the bathroom stall. But at no point did Moura manage to

escape defendant and *interrupt* her illegal confinement, resulting in the need for defendant to recapture Moura, thereby committing a second violation.

Rather, defendant confined Moura to the bathroom from the time she stepped in front of the door to the time law enforcement forcibly removed defendant's legs from around Moura's thigh. Thus, defendant committed the crime of false imprisonment only once. Conviction on one count was authorized; conviction on the other count must be reversed.

II

Definition of "Sexual Abuse"

A. Background

During closing argument, the parties presented the jury with differing explanations of the requisite intent for committing sexual battery. The People argued that defendant's deliberate grabbing and twisting of Moura's breast was sufficient evidence to prove the requisite intent. Defendant argued that sexual battery required a distinctly *sexual* purpose to the touching, which was absent in this case. The trial court instructed the jury with CALCRIM No. 938, in relevant part as follows:

"The defendant is charged in Count I with sexual battery in violation of Penal Code section 243.4. To prove that defendant is guilty of this crime, the People must prove that:

1. The defendant unlawfully restrained Marla Moura;

2. While Marla Moura was restrained, the defendant touched an intimate part of Marla Moura;
3. The touching was done against Marla Moura's will; AND
4. The touching was done for the specific purpose of sexual abuse."³

During deliberations, the jury asked for a definition of the term "sexual abuse," as it appeared in the instruction. Over defendant's objection, the court responded that sexual abuse "means the mistreatment of the person in a harmful, injurious or offensive way." This is a dictionary definition of the word "abuse", as quoted in *In re Shannon T.* (2006) 144 Cal.App.4th 618, 622 (*Shannon T.*).

B. Claim and Analysis

On appeal, defendant contends that the court's definition of "sexual abuse" was erroneous because it only defined "abuse," and as such was incomplete and overbroad, allowing the jury to convict without finding the requisite mental state. Quoting *Shannon T.*, *supra*, 144 Cal.App.4th at page 622, defendant asserts that the requisite mental state has been defined by this court as "for the purpose of insulting, humiliating, or intimidating" the victim. She argues that without instruction on this mental state, which conveys a sexual purpose separate

³ Sexual battery may also be intimate, nonconsensual touching for the purposes of sexual arousal or sexual gratification. The People's theory here, however, was that the touching was accomplished for the purpose of sexual abuse. (§ 243.4.)

from gratification or arousal, the jury could erroneously convict defendant of *sexual* battery if she touched an intimate part of her victim with solely the intent to cause a *simple* battery. We are not persuaded.

First, defendant's reading of *Shannon T.* is incomplete. Though it is the only case that squarely addresses the meaning of "sexual abuse" in section 243.4, it does not, in fact, *limit* the term's meaning to touching "for the purpose of insulting, humiliating or intimidating the woman." (*Shannon T., supra*, 144 Cal.App.4th at p. 622.) Rather, it *extends* the type of conduct that qualifies as sexual abuse to *include* touching done for those purposes, even where there is no physical harm to the victim. We set forth a more complete statement of the term's definition in the case as follows: "[T]he sexual battery statute's use of the phrase touching 'for the specific purpose of . . . sexual abuse' encompasses a purpose of insulting, humiliating, intimidating, or *physically harming a person sexually by touching an 'intimate part' of the person.*" (*Shannon T., supra*, at p. 621, italics added.) Upon careful reading, it is clear that the court added the purposes of insult, humiliation and intimidation to what it saw as the standing purpose of physically harming a person sexually by intimate touching. (*Ibid.*)

Second, we decline defendant's invitation to invent a new definition for "sexual abuse" as it appears in the statute that would require that the *purpose* of the abuse be of a sexual nature. In *People v. White* (1986) 179 Cal.App.3d 193 (*White*), the court considered the meaning of "sexual abuse" as it appeared in section 289 and held: "To 'abuse' someone is to hurt them by treating them badly, or to cause pain or injury through mistreatment. When such mistreatment is directed to a victim's sexual or 'private' parts, the resulting conduct would certainly be considered sexual abuse." (*White, supra*, 179 Cal.App.3d at p. 205.) We find the *White* court's reasoning persuasive and adopt the same definition for the purposes of section 243.4. Though sexual battery is a specific intent crime, there is no additional, sexual intent that must accompany the intent to commit what the law has defined as sexual abuse by an intimate, non-consensual touching. A plain reading of the statute indicates that the purpose need only be to accomplish what the court defines as "sexual abuse." We agree with the court in *White* that an additional requirement of sexual purpose would create a redundancy and inappropriately change the meaning of the statute. (See *White, supra*, at p. 205.)

In this case, the People's argument and the court's definition were appropriate given the facts of the case and consistent with the law. Construed in the light most favorable

to the verdict, the evidence permitted the jury to find that defendant intentionally grabbed Moura's bare breast, without Moura's consent, with the intent to cause Moura physical pain and injury, and with the result of causing physical pain and injury. "[I]t is the nature of the act that renders abuse 'sexual' and not the motivations of the perpetrator." (*White, supra*, 179 Cal.App.3d at pp. 205-206.) The trial court correctly instructed the jury that it was entitled to find defendant guilty of sexual battery if it found she intentionally and non-consensually abused Moura by touching an intimate part of her body in a painful and injurious way.

As given to the jury, CALCRIM No. 938 and the court's definition of "sexual abuse" comport with the law. The trial court has discretion to determine what additional explanations are sufficient to satisfy a jury's request for clarification or definition. (*People v. Beardslee* (1991) 53 Cal.3d 68, 97.) We find no abuse of discretion.⁴

DISPOSITION

One count of false imprisonment is reversed and ordered stricken. The judgment is otherwise affirmed. The trial court

⁴ We feel compelled to note that the commentary to CALCRIM No. 938 provides: "*Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification."

is directed to prepare an amended order of probation consistent with this opinion and provide a certified copy to the El Dorado County Probation Department.

DUARTE, J.

We concur:

ROBIE, Acting P. J.

HOCH, J.