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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Colusa)

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ARTHUR CRAWSHAW, JR.,

Defendant and Appellant.

C071187

(Super. Ct. No. CR52358)

After defendant sexually assaulted a young family member, a jury found him guilty of penetration with a foreign object on a minor under 14 (Pen. Code,¹ § 289, subd. (j)), and lewd act on a minor (§ 288, subd. (a)). Sentenced to six years in prison, defendant appeals. He contends (1) there was insufficient evidence of penetration; (2) the penetration was by a penis, not an unknown or foreign object as required by section 289; and (3) the trial court erred by failing to instruct the jury that penetration with a foreign object is a specific intent crime. We find no prejudicial error and shall affirm.

¹ Further undesignated statutory references are to the Penal Code.

FACTS

Victim's Trial Testimony

Defendant went to the victim's house with his daughter and grandchild. He asked the 13-year-old victim if she wanted to go with him to watch movies. The victim, who had been grounded, said yes. They went to defendant's house and watched movies on his bed. Defendant then asked the victim if she wanted to spend the night. After getting permission from her mother, the victim said yes. It was the first time she had spent the night alone with defendant, without his daughter present.

While defendant took a shower, the victim changed into her pajamas and watched a movie. Defendant, clad in his boxers and a T-shirt, lay down next to her and extended his hand for her to cuddle under his arm. Defendant got a call from his daughter and left for a while. Defendant returned with a beer. He offered some to the victim, who refused. Defendant kept asking until she drank some.

The victim got tired and went to another room to sleep. Defendant came in and asked if she was asleep. At first, the victim did not answer, but then said she was tired. Defendant removed the blanket and told the victim to go to his room. He grabbed her wrist and lightly tugged her; he led her to his room.

The victim lay down on the bed close to the wall and defendant joined her. He kissed her forehead and her lips. The victim kept her eyes closed. Defendant whispered he was going to "take [her] virginity." He turned her over on her back and got on top of her, then pulled down her pajamas and underpants, and pulled down his boxers. He tried to put his penis in her vagina. Defendant tried to enter her vagina three or four times. Each time he tried, the victim tossed and turned. She felt his penis and felt pain.

Defendant stopped trying and went to the bathroom. The victim left the house. Defendant came outside, put an arm around her and asked if she was all right. The victim did not answer. Defendant said it was okay; she did not lose her virginity because "his tool didn't work" and then laughed.

The victim told defendant she wanted to go home. He asked if she would tell her mother; she did not respond. She asked to go to a friend's house and defendant told her it was 1:00 a.m. She went and sat in his truck, where she saw from his phone that it was only 11:00 p.m. At that point, she was "scared that something was going to happen," and ran away through the neighborhood.

The victim knocked on residences' doors until a woman answered. The victim was crying and said her uncle had molested her; she asked the woman to call the police. When the police arrived, the victim was visibly upset, crying and rocking with her arms folded. The victim said she had just been molested. The victim told the officer she kept her eyes closed during the assault and did not see defendant's penis. She did "peek" and saw defendant remove his boxers.

Other Evidence

The victim was taken to a hospital for a sexual assault examination. Her hymen was red and there was tenderness to the right of her hymen below the entrance to the vagina (the fossa navicularis). The redness and tenderness was consistent with a recent trauma. The victim described vaginal and genital pain upon penile penetration. Swabs were positive for fluorescence on the victim's inner thighs and labia, the lips of the external genitalia. Semen fluoresces, as do other substances. No sperm or semen was found. There was strong evidence that defendant was a major contributor to the DNA in saliva found on the victim's breasts.

Defendant's Testimony

Defendant denied molesting the victim. He claimed she got in his bed, rubbing his legs and licking him, and he told her to go back to her room.

DISCUSSION

I

Sufficient Evidence of Penetration

Defendant contends there was insufficient evidence of actual penetration because the victim testified she felt pain “outside.” He also notes the nurse testified the general redness of the victim’s hymen could be her own anatomy.

A violation of section 289 requires an act of sexual penetration. “‘Sexual penetration’ is the act of causing the penetration, *however slight*, of the genital or anal opening of any person. . . .” (§ 289, subd. (k)(1), italics added.) “A ‘genital’ opening is not synonymous with a ‘vaginal’ opening.” *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1367 (*Quintana*.) “The vagina is only one part of the female genitalia, which also include inter alia the labia majora, labia minora, and the clitoris. [Citations.] Thus, ‘genital’ opening does not necessarily mean ‘vaginal’ opening.” (*Quintana, supra*, 89 Cal.App.4th at p. 1367.) Sexual penetration may be proved by circumstantial evidence. (*People v. Stevenson* (1969) 275 Cal.App.2d 645, 650.)

Here, the victim described to the nurse feeling pain upon penile penetration. The nurse found redness and tenderness that was consistent with recent trauma. Specifically, the victim had tenderness on the inside right of her hymen and the nurse testified the hymen is inside the body. On this record, we hold there was sufficient evidence of penetration of the victim’s genital opening.

II

Sufficient Evidence of Unknown Object

Defendant contends that because any penetration was by defendant’s penis, not an unknown or foreign object, the elements of section 289 are not met. He contends count one must be reversed.

Section 289 requires penetration with a foreign or unknown object. (§ 289, subd. (k)(1).) A foreign object does not include a penis. (§ 289, subd. (k)(2).) *An unknown object may include a penis* “when it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body.” (§ 289, subd. (k)(3).)

Defendant was originally charged with rape. He waived a preliminary hearing. Before trial, the People, without objection by the defense, amended the information to change the charge from rape to penetration with a foreign or unknown object. Presumably, this change was due to the concern that the victim, who claimed she had her eyes closed throughout the assault, could not positively identify the penetrating object as a penis.

At trial, the victim testified defendant tried to put his penis in her vagina. She described the attack to the nurse as penile penetration. The victim testified, however, that she had her eyes closed. She told the police officer she did not see defendant’s penis; she only peeked to see defendant remove his boxers. There was no evidence that the victim was familiar with the feel of a penis. Thus, while the victim reasonably assumed defendant penetrated her with his penis, she could not be absolutely certain because she did not see his penis.

As originally enacted in 1978, section 289 provided a foreign object “shall not include any part of the body.” (Stats. 1978, ch. 1313, § 1, p. 4300.) Subsequently, a foreign object included any part of the body except a sexual organ. (Stats. 1988, ch. 404, § 1, p. 1760.) In 1994, the statute was amended to add penetration with an unknown object, *which included a penis when it was not known if penetration was by a penis or another part of the body or another object.* (Stats. 1993-94 1st Ex. Sess. 1994, ch. 39, 1,

p. 8713; ch. 40, § 4.5, pp. 8725-8726.) Where, as here, there is a lack of certainty as to whether the penetrating object was a penis, section 289 is the proper charge. This case presents the exact situation that the 1994 amendment to section 289 was designed to address.

III

Failure to Instruct on Specific Intent

Defendant contends the trial court prejudicially erred in failing to instruct that penetration with a foreign or unknown object is a specific intent crime. We find any error harmless.

Section 289 requires sexual penetration “for the purpose of sexual arousal, gratification, or abuse.” (§ 289, subd. (k)(1).) The trial court instructed the jury that sexual penetration by a foreign object was a general intent crime. In defining the elements of the crime, the court instructed that, “Sexual penetration means penetration, however, slight, of the genital or anal opening of the other person *for the purpose of sexual abuse, arousal or gratification.*”

Citing *People v. White* (1986) 179 Cal.App.3d 193 (*White*), defendant contends section 289 is a specific intent crime. In *White*, the court instructed, ““That the penetration was done with the purpose and *specific intent* to cause sexual gratification, arousal or abuse.”” (*White, supra*, 179 Cal.App.3d at p. 204, italics added.) The reviewing court found no instructional error. (*White, supra*, at p. 206.) In *People v. Senior* (1992) 3 Cal.App.4th 765, at page 776, the appellate court stated, “The only specific intent involved in foreign object penetration is ‘the purpose of sexual arousal, gratification, or abuse.’” (§ 289, subd. (a).)”

In contrast, the People cite to *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1380, where the parties agreed that “forcible sexual penetration is a general intent crime.”

None of these cases, however, squarely address the issue raised here; thus, the cases' declarations as to whether section 289 is a general or specific intent crime are dicta.

In *People v. Hering* (1999) 20 Cal.4th 440 (*Hering*), our Supreme Court considered whether certain statutes described specific intent crimes. The court noted the language “with the intent” or “for the purpose of” typically denotes specific intent crimes and cited penetration with a foreign object as an example. (*Hering, supra*, 20 Cal.4th at p. 446.) Hence, we shall assume for the sake of argument that the trial court erred in instructing that sexual penetration with a foreign or unknown object was a general intent crime.

Nevertheless, we find the error harmless beyond a reasonable doubt. First, a reasonable juror would have understood the instructions to require that defendant acted with the intent to gratify, arouse, or abuse to be guilty of the crime. Second, the evidence is not susceptible to any determination other than that defendant acted with such intent. Defendant had invited the victim alone to his house to spend the night. When she tried to go into another room to sleep, he brought her back to his bed, kissed her, and told her he would “take [her] virginity.” There could be no other explanation for his penetration of her than sexual arousal, gratification, or abuse. The error did not contribute to defendant's conviction. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324–325 [a trial court's failure to instruct on an element of a crime is federal constitutional error requiring reversal unless it can be shown “beyond a reasonable doubt” that the error did not contribute to the jury's verdict].)

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

HULL, J.