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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL VARGAS,

Defendant and Appellant.

E063337

(Super.Ct.No. RIF1404722)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge.
(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to art.
VI, § 6 of the Cal. Const.) Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Barry Carlton and Heidi Salerno, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant and appellant Miguel Vargas had an affair with Jane Doe for seven years while he was dating Doe's sister. Doe wanted to end the affair and started seeing someone else. Defendant found out and asked Doe to meet with him to discuss their relationship. She agreed. Defendant drove her to a deserted parking lot and forcibly had vaginal intercourse with her. He also hit her in the face. Doe did not call the police and went home. After this incident, defendant sent several threatening texts to her. Defendant and Doe got into another confrontation that night at a party. City of Riverside police officers arrived at the party to arrest defendant; he had to be forcibly taken into custody. Defendant called Doe's sister from jail and told her to convince Doe to drop the charges.

Defendant was convicted of forcible rape (Pen. Code, § 261, subd. (a)(2));¹ corporal injury of a significant other (§ 273.5, subd. (a)); dissuading a witness (§ 136.1, subd. (a)(2)); making criminal threats (§ 422); and a misdemeanor violation of resisting arrest (§ 148, subd. (a)(1)). Defendant was sentenced to state prison for a total term of 11 years eight months.

Defendant raises two claims of instructional error on appeal. He claims the trial court violated his due process rights by omitting his *Mayberry*² defense, which would have provided that defendant was not guilty of rape if he reasonably, but mistakenly, believed that Doe consented to sex; and by failing to instruct the jury with CALCRIM

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*).

No. 1194, that the jury could consider the long-term sexual relationship between defendant and the victim in assessing his *Mayberry* defense.

FACTUAL AND PROCEDURAL HISTORY

A. PEOPLE'S CASE-IN-CHIEF

1. *THE INCIDENT AND DISCOVERY*

Doe and her sister, Mariana, lived together in a house on Harold Street in Riverside County, with Doe's three children and Mariana's daughter. Mariana had dated defendant for six or seven years; he also lived in the Harold Street house. Doe and defendant had a secret relationship for seven years. Doe never told Mariana she was having a relationship with defendant. Defendant and Mariana had a child together.

During their relationship, defendant and Doe would meet at a motel in Riverside, near Arlington and Van Buren streets (motel) to have sex. They also on occasion would have sex at the Harold Street house. Doe could not recall if they ever had sex in defendant's car. Defendant and Doe fought a lot.

In August 2014 Doe started dating another man, but kept it a secret from defendant and her family. Defendant found out on October 24, 2014. Defendant sent Doe a voice mail message advising her that she better tell him the truth about seeing someone else. Specifically, he said, "Look [Doe], you better play right by me because really, honestly, I don't know what I can do to you or what could happen, I mean, I am—I don't give a fuck about anything [Doe]. You better smarten up and tell me the truth before I find out in some other way because from now on [Doe], you will see that your

own shadow will look hollow.” Doe felt threatened by the message. She did not call him back even though he tried to contact her several additional times that night.

The next day, October 25, between 7:00 to 8:00 a.m., Doe agreed to meet defendant at a park because she did not want to discuss the matter in front of her family. She did not think about them having sex. She told defendant about the new person she was seeing. Defendant asked her how many times she had sex with her new boyfriend.

Defendant drove Doe to the motel. They did not discuss having sex. When they arrived, defendant went inside to rent a room; Doe remained in the car. Defendant was gone for approximately five minutes. She was scared of defendant but did not try to leave. Defendant returned and drove away from the motel. Doe asked where they were going but he did not respond.³ Defendant drove to a deserted parking lot near the intersections of Jurupa and Van Buren streets in Riverside.

Defendant got into the passenger seat with Doe; she was next to the console, he was next to the door. Defendant tried to pull down her pants and underwear several times but she kept pulling them back up. Doe told defendant she did not want to have sex with him. Doe struggled with defendant. Doe was turned to her left with her back facing defendant. He pulled down her pajamas and underwear and penetrated her vagina two or three times. Doe could not recall the exact position they were in so that he could

³ On cross-examination, Doe admitted that they had gone previously to the motel to have sex. She did not know why that day they did not get a room. The court asked, “Were you expecting to have sex at that motel?” She responded, “Well, yes, because why else would he take me there?” Although Doe knew defendant took her to the motel to have sex, she did not want to have sex with him.

penetrate her vagina. At some point she grabbed his penis and pushed it aside; she told him she did not want him to touch her. She had bruises on her legs from him forcing penetration.

Doe grabbed defendant's neck and squeezed it. He stopped and moved back to the driver's seat. Defendant was upset and thought that Doe had betrayed him by being with another person. He hit her in the face and the inside of her lip started bleeding.

Doe jumped out of the car and ran. She tried to dial 911 on her cellular telephone but was too nervous and could not dial. Defendant followed her. Once defendant caught up with Doe, he took her phone and threw it; defendant retrieved the phone. Doe got back in defendant's car because she did not know what else to do. Defendant drove Doe back to the Harold Street house. On the way, defendant was crying. Defendant hit her two more times in the face in the car. Her nose started bleeding. Doe was able to take her phone back. Doe never called the police.

That night, Doe was hosting her daughter's Quinceanera party at the Harold Street house. Once Doe got home, defendant sent her several messages on her cellular telephone while she prepared for the party. She saved the messages and gave them to the police.

The messages were as follows: he advised her that she was going to pay for what she did to him; he would only leave her if he saw her having sex with her boyfriend; "Whether if it's good or bad, if you are not going to leave him, tell me. It's better to know instead of waiting"; "How could you? How could you? One time is okay but many times. It's not like you were going to go out. You knew that you were going but

sooner or later, either way you're going to pay"; "You know what, you're not going to leave me fuckin' bitch, but you're going to pray to God that I don't get any money because I'm going to fuck you up big time more than you can imagine"; "You better get together with him so he'll take you out of your fucking misery you fucking whore. Hopefully, you are all proud of him because he's just using you"; "You just fucked it all up for the rest of your entire fucking life"; "What did you talk about to the fucking whore?"; "You're a fucking beggar, and I don't believe that you give a shit what could happen to your sister"; "What did you talk when you stay and talk to him you fucking bitch. You're going to pay because I know you're not going to leave him." (*Sic.*)

That night defendant attended the party. Twice during the party defendant got Doe to go with him outside in private; he slapped her both times. Toward the end of the party, Doe went inside and defendant followed her. He hit her.

Hugo Ramirez was a friend of Doe's family. Ramirez attended the Quinceanera party. Ramirez stayed and helped clean up. Ramirez was talking to Doe when defendant approached them. Defendant seemed upset and angry. Defendant told Doe that Mariana was in the bedroom crying and that Doe should take care of her. Doe told defendant that Mariana was drunk and to just leave her alone. Defendant told Doe that she was a piece of "shit" of a woman. Ramirez decided to go home and walked toward the front door to leave. As he was about to leave, he heard a noise in the hallway, like someone hitting a wall. He then heard what sounded like a door shutting. Ramirez ran to the hallway. Doe was leaning against the wall in the hallway. He brought her to the living room.

Jorge was Doe's brother; he also lived in the Harold Street house. The morning of October 25, 2014, he went out to run errands. He left at approximately 9:00 a.m. He did not see defendant or his car. When Jorge returned between 10:00 or 11:00 a.m., defendant's car was there. Jorge noticed that defendant's car was leaking oil. Jorge asked defendant about it. Defendant told him that he had driven the car "up to the hills" and he was going fast. He hit something and the car started leaking oil.

At the end of the Quinceanera party, Jorge observed defendant grab Mariana by the shoulders and push her. Jorge went after defendant; they fought for approximately two minutes. At one point, Jorge and defendant bumped heads.

Arturo was another of Doe's brothers. Arturo was also at the Quinceanera party. Arturo thought he observed defendant slap Doe but was not positive. Arturo was outside and saw Ramirez, Doe and defendant go into the house. Defendant and Doe turned down the hallway out of view. Ramirez was walking toward the front door to leave and then suddenly ran in the direction of defendant and Doe. Ramirez told Arturo that something happened. Arturo did not think defendant and Jorge got into a fight but he did see them in the bedroom together.

Approximately 20 minutes later, the paramedics were called for Jorge, who started having heart problems. Doe went to the hospital with Arturo. Arturo noticed for the first time that Doe had a swollen lip and a bruise on her nose. Arturo called the police based on what Doe told him about the injuries. Doe was taken to a different hospital. This was the first night that Arturo became aware of the affair between defendant and Doe.

2. *POLICE INVESTIGATION*

Riverside Police Officer Joseph Simpson went to the Harold Street house with three other officers to speak with defendant, after speaking with Doe at the hospital. Defendant struggled with Officer Simpson and other officers when they tried to handcuff him.

Riverside County District Attorney's Office Investigator Felipe Villalobos obtained a copy of a recording of calls made by defendant from jail after he was arrested. Defendant called Mariana from jail on October 27, 2014. He asked her what Doe had told her. She responded, "Nothing." Defendant told Mariana if Doe were not to show up to court, "they" would drop the charges against him. Also, he told Mariana to tell Doe they would not lock her up if she refused to testify. Mariana responded, "Well I'm going to tell her she's not going." Defendant told Mariana to tell Doe to drop the charges. In another telephone call, defendant told Mariana to talk to Doe and Doe's mother to get Doe to drop the charges.

In another call, defendant told Mariana that Doe had consented to go to the motel with him. He also admitted to having feelings for Doe. Defendant partly blamed the affair on Mariana. He told her she was not meeting his "manly" needs and that she was "always filthy and dirty." Defendant told Mariana to have Doe tell the truth.

Defendant was examined by a forensic nurse after he was arrested. He had a scratch on his right chest, a quarter-sized red mark on his neck and abrasions on his knee.

Doe was examined by a sexual assault nurse on the morning of October 26, 2014. Doe had bruises on both of her arms, shins, knees, thighs, on the bridge of her nose and her upper lip. The nurse conducted an external exam of Doe's vaginal area. The nurse found broken skin on the entrance to Doe's vagina. This was indicative of recent penetration of the vagina with either a finger or penis. The nurse could not determine if the penetration was by force. She also could not determine how recent the bruising had occurred. An abrasion on the vagina would heal within one to three days.

3. *PRIOR INCIDENTS*

Two or three weeks prior to October 25, 2014, Doe had sent naked pictures of herself to defendant. With the pictures, she sent the message, "Hello Miguel. I don't feel like this, but I'm going to send it to you. It makes me feel like a low-life."

Two to four weeks prior to October 25, 2014, defendant and Doe had been arguing about her wanting out of their relationship. Defendant slapped her, threw her to the ground and hit her on her head. She had a bump on her head after the incident. Doe hit him on his arm. Doe's children helped get defendant off of her. She did not call the police.

On April 25, 2013, Doe's birthday, she and defendant got into an argument about her not wanting to continue their relationship. He hit her and pulled down her pants. Defendant's daughter entered the room and Doe was able to cover herself. Defendant kept beating Doe. Doe told defendant she did not want to have sex with him. Doe had bruises on her face and a scar on her nose as a result of the beating.

At the very beginning of their relationship, they had been arguing in his truck. She said something he did not like. He grabbed her by the neck and hit her in the face with his fist.

B. DEFENSE

Defendant recalled Investigator Villalobos as a witness. Villalobos interviewed Doe three times. Doe told him that defendant was renting the room at the motel to have sex. Villalobos did not put anything in his report “regarding [defendant] wanting to and [Doe] not wanting to” have sex on that occasion. Doe was adamant she did not want to have sex in the car. Villalobos also interviewed Arturo. Arturo never mentioned that he observed defendant slap Doe.

DISCUSSION

Defendant contends he was deprived of a *Mayberry* defense, that a reasonable yet mistaken belief Doe consented to sex in the car was a defense to the rape charge. He further contends that the jury should have been instructed with CALCRIM No. 1194, that they could consider the prior relationship in assessing defendant’s *Mayberry* defense. Here, there was no testimony from defendant of his subjective belief at the time he and Doe were in the car. Further, there was no other evidence that could support a finding defendant reasonably but mistakenly believed Doe consented to have sex. The evidence did not support giving these instructions.

A. ADDITIONAL FACTUAL BACKGROUND

The parties discussed the jury instructions off the record. The trial court stated on the record that it agreed to give the instruction on the lesser offense of battery for the rape

charge. The trial court then stated, “All right. Other than what we have put on the record, do the two of you concur with the balance of jury instructions that you have gone through?” Defense counsel agreed with the instructions.

The prosecutor argued during opening argument that Doe did not want to have sex with defendant. She fought with him and finally pressed on his neck to get him to stop. Defendant had a red mark on his neck consistent with Doe’s statement. Doe had numerous bruises. There were injuries on Doe’s vagina. As for consent, the prosecutor argued, “To consent, a woman must act freely and voluntarily and know the nature of the act. Well, how do we know that she did not act freely and voluntarily? Well, she told us that she told [defendant] no, I don’t want to have sex with you. Her actions showed she was not voluntarily consenting to anything She tried to physically get him off of her. . . . [¶] The fact that they dated, not enough to show consent. Each time you have sex, you must consent. Just because you had sex in the past doesn’t mean it’s a free game for all or for him.”

In response, defense counsel argued that Doe did not want to testify. Defense counsel criticized Doe for continuously saying that she did not remember or did not recall what happened; the incident occurred just four months prior to trial. Defense counsel questioned, “Why isn’t she remembering?” and “Why is she testifying the way she is?” Defense counsel argued that Doe was a “master secret keeper.”

Defense counsel also argued it was reasonable to conclude that they went to the deserted parking lot and had consensual sex. Doe wanted to save face with her family after they learned about the affair. Doe claimed that defendant raped her in order to get

out of the relationship and to save face with her family for having an affair with Mariana's boyfriend. There was no physical evidence of forcible penetration. Moreover, there was no evidence that there were marks on her face at the party. There was absolutely no evidence as to when and how she received her injuries. The injuries to defendant could have been caused during the fight with Jorge.

The jury was instructed that in order to find defendant was guilty of rape, they must conclude, "The woman did not consent to the intercourse." They were also instructed, "Evidence that the defendant and the woman dated is not enough by itself to constitute consent." The jury was instructed with the lesser included offense of simple battery.

B. THE EVIDENCE DID NOT SUPPORT A MAYBERRY INSTRUCTION

Under *Mayberry*, a defendant's reasonable and good-faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape. (*Mayberry, supra*, 15 Cal.3d at p. 155.) The burden is on the defendant to prove a "bona fide and reasonable belief that the prosecutrix consented . . . to sexual intercourse." (*Id.* at p. 157.) Upon request, the trial court is required to give a *Mayberry* instruction when there is some evidence to support that contention. (*Ibid.*) "In the absence of a request for a particular instruction, a trial court's obligation to instruct on a particular defense arises "only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (People v. Dominguez (2006) 39 Cal.4th 1141, 1148 (*Dominguez*.)

Where the “defense evidence is unequivocal consent and the prosecution’s evidence is of nonconsensual forcible sex, the [*Mayberry*] instruction should not be given.” (*People v. Burnett* (1992) 9 Cal.App.4th 685, 690.) “The defense of consent and the *Mayberry* defense are two distinct defenses. Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of the two witnesses is telling the truth. The *Mayberry* defense, on the other hand, permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim’s state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant’s perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not. [Citation.] A defendant relying on a *Mayberry* defense must produce some evidence of equivocal conduct by the victim which led him to reasonably believe that there was consent where in fact there was none.” (*People v. Romero* (1985) 171 Cal.App.3d 1149, 1155-1156.)

In other words, “unless the evidence reveals *some way* to harmonize the conflicting accounts of defendant and prosecutrix through a mistake of fact, so that the jury can evaluate proof relating to defendant’s *belief* in consent (as distinguished from his mere *assertion* of consent), the court need not give the reasonable belief instruction *sua sponte*.” (*People v. Rhoades* (1987) 193 Cal.App.3d 1362, 1369-1370.)

The *Dominguez* case is instructive. In that case, the victim was found dead in a field; it appeared she had been forcibly raped. During trial, the defendant testified that the victim had consented to having sex with him. The defendant did not request that a mistaken belief in consent instruction be given in the lower court, but claimed on appeal that the lower court erred by failing to sua sponte instruct the jury with a *Mayberry* instruction. (*Dominguez, supra*, 39 Cal.4th at pp. 1145-1147.) The California Supreme Court rejected the instruction was appropriate. It first rejected that the defendant had relied on the defense. It found, “The defense presented no evidence suggesting the victim had refused to consent but defendant reasonably believed she had consented, nor did defense counsel present any argument relying on this theory. Accordingly, we conclude defendant did not rely on a *Mayberry* defense at trial.” (*Id.* at p. 1148.)

The Supreme Court also found there was no evidence supporting the instruction and that it conflicted with the defendant’s defense. It first noted, “the *Mayberry* defense ‘has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim’s equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant’s mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant

to have adduced substantial evidence giving rise to a *Mayberry* instruction.””

(*Dominguez, supra*, 39 Cal.4th at p. 1148.) The court rejected that the defendant had presented evidence of mistaken belief in consent as follows: “In this case, defendant presented no evidence he *mistakenly* believed [the victim] consented to have sex. Instead, he testified she had *in fact* consented. [The victim] of course could not testify, but the evidence she was killed after engaging in sexual intercourse and that she was beaten and strangled and suffered severe trauma to her vagina and cervix suggests she resisted rather than consented. . . . [T]hese contrasting scenarios ‘create no middle ground from which [defendant] could argue he reasonably misinterpreted [the victim’s] conduct.’” (*Id.* at p. 1149.)

Here, the People presented evidence that Doe had sex with defendant against her will. Doe testified that defendant initially drove her to the motel, where they had previously engaged in sexual intercourse. She thought defendant took her there to have sex; however, they did not get a room. Defendant then drove her to a deserted parking lot. Once there, he got into the passenger’s seat with her and tried to pull down her pants. She pulled them back up and told him she did not want to have sex with him. Defendant ignored her and penetrated her vagina several times. She grabbed his penis and pushed it away. She had to grab his neck and squeeze it to get him to stop.

Defendant did not testify. Defendant’s counsel argued that Doe was a liar. Defendant’s counsel made no reference to the specific details of the events that occurred in the car. Rather, defense counsel argued it was reasonable to conclude that they went to the dirt lot and had consensual sex. Defendant’s defense was that Doe claimed defendant

raped her to get out of the relationship and to save face with her family for having an affair with Mariana's boyfriend.

There simply was no evidence presented or argument made by defendant that would support the defense that defendant reasonably but mistakenly believed that Doe consented to have sex with him. The jury was asked either to conclude she had consented to sex, but lied in order to save face; or defendant had forcible sex with her. There was absolutely no argument or evidence presented in the lower court as to defendant's subjective belief when he was in the car with Doe. There simply was no way to "harmonize the conflicting accounts of defendant and prosecutrix through a mistake of fact." (*People v. Rhoades, supra*, 193 Cal.App.3d at p. 1369.)

Defendant points to the evidence that they had a seven-year relationship, and that she remained in the car, to support that Doe was equivocal in her claim she did not consent. Defendant insists that Doe's behavior was "circumstantial evidence" of his state of mind. We disagree. There was absolutely no evidence of defendant's mistaken belief. As the court held in *Dominguez*, "defendant presented no evidence he *mistakenly* believed [the victim] consented to have sex. Instead, he testified she had in fact consented." (*Dominguez, supra*, 39 Cal.4th at p. 1149.) No evidence supported that defendant had mistakenly believed Doe consented to have sex with him, even though she did not so consent. The trial court did not have a sua sponte duty to give a *Mayberry* instruction.

C. CALCRIM NO. 1194

Defendant also complains that the jury was not instructed with CALCRIM No. 1194, that they could consider the prior relationship between defendant and Doe in considering his *Mayberry* defense.

CALCRIM No. 1194 derives from section 1127d. Section 1127d was enacted as part of a legislative reform of sex offenses to counter the notion that an “unchaste woman” was more likely to have consented to sexual intercourse with the defendant. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 222 (conc. opn. of Arabian, J.)) Section 1127d limits the admissibility of evidence of the complainant’s sexual history.

CALCRIM No. 1194 states: “You have heard evidence that (<insert name of complaining witness>/Jane Doe/John Doe) had consensual sexual intercourse with the defendant before the act that is charged in this case. You may consider this evidence only to help you decide (whether the alleged victim consented to the charged act[s]/ [and] whether the defendant reasonably and in good faith believed that (<insert name of complaining witness>/Jane Doe/John Doe) consented to the charged act[s]). Do not consider this evidence for any other purpose.” Defendant only contends the jury should have been instructed that he “reasonably and in good faith believed that [Doe] consented to the charged act[s].”

“A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case.” (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) Here, as noted *ante*, defendant never testified, presented evidence or argued that he had a reasonable, but mistaken, belief that Doe consented to have sex with him. His sole theory

was that they had consensual sex and that Doe lied about it in order to save face with her family. Defendant presented no evidence as to his “mistaken belief” that Doe consented. Defendant was not entitled to this instruction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.