P. v. Febrissy

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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent, C049033

v.

JOCELYN ERNEST FEBRISSY,

Defendant and Appellant. (Super. Ct. No. 72-002741)

Acquitting defendant Jocelyn Febrissy on three other counts (torture, forcible rape, and assault with a deadly weapon), the jury convicted him only of the infliction of corporal injury upon a cohabitant, and rejected allegations that he either inflicted great bodily injury or used a deadly or dangerous weapon in the commission of that offense. The court denied the defendant's motion to reduce his conviction to a misdemeanor, suspended imposition of sentence, and placed him on probation (conditioned on a jail term of 270 days).

On appeal, he argues he was entitled to an instruction sua sponte that apparent consent is a defense to his crime. He also contends that his conviction violates his substantive liberty interests under the federal Constitution. Finally, he asserts that the trial court erred in denying his motion to reduce the conviction to a misdemeanor. We shall affirm.

Facts

Although the parties extensively detail the facts describing the sexual relationship between the defendant and the victim both before the night in issue and the exact events of that evening (as well as facts, intimate and otherwise, about the defendant's relationships with his estranged wife and current girlfriend), we are not concerned with the sufficiency of the evidence to support his conviction in terms of the absence of consent. It will be adequate for our purposes simply to provide a general summary.

A. The victim's testimony

The victim met the defendant in an African dance class that he offered at her gym in 2003. He piqued her interest, and she accepted an invitation to join a dance troupe he was organizing. By Halloween, the defendant began a dating relationship with her; she felt they had a "crazy chemistry," and was "blown away" to have met an artistically talented and otherwise intelligent individual (the defendant having a college degree in computer science in addition to his musical and dancing skills).

Within a month, the defendant moved in with the victim. He had inquired on one occasion whether the victim had any interest in the inclusion of sadomasochistic or bondage elements in their sexual activity.[1] She told him that her former husband had tried to induce her to accommodate his interest in BDSM conduct, but she had found it an unpleasant experience.

Shortly after the start of 2004, the couple formalized their living arrangement. The defendant raised the subject again of his interest in BDSM conduct, discussing the custom of having an incongruous "safe word" that could bring things to a stop if he exceeded her comfort level.[2]During the next few months, the defendant was gradually able to convince the victim to allow the incorporation of some milder BDSM conduct, but nothing that the victim found painful.

Their relationship was not progressing well. The victim was confused because the defendant professed his love for her and his desire for marriage, then would flirt with others. By April, she found herself changing her behavior and limiting her contact with others in order to appease him.

In May 2004, the defendant complained that he was tired and was having a spiritual crisis because he was not following his "traditions," and wanted to get away. Financial backers of the dance troupe offered him the use of their vacation home in Squaw Valley. The victim felt gratified when he asked her to go with him, because she had not been getting positive attention from him otherwise.

After dinner on their first night in the vacation home, the defendant asked her to come down to the studio in the house, where he had set up some BDSM props and a video camera. After handcuffing her, the defendant began to beat her with a whip and a riding crop. The victim cried out in pain. As the beatings continued, she began to sob. When he stopped, she went into the bathroom and saw welts and black marks all over her body. The defendant told her they looked beautiful. After some further humiliation of the victim, the defendant told her to lie down on the bed and then had sexual intercourse with her. Although she did not want to engage in sexual relations at this point, the victim did not say anything to the defendant out of fear.

The defendant was distant and dismissive with her the next day. When she told him that he had far exceeded her boundaries the night before, he simply said, "thank you for telling me." They left for home later that day. During the ride, he told her that he had been having a sexual relationship since early April with another woman involved with their dance troupe.

The victim was still in pain for a couple of days after their return. During that week, the defendant spent time elsewhere. The other woman came to the victim's apartment to retrieve a sewing machine. They conversed. The victim found out that the defendant had been involved with the other woman since the previous fall, only two weeks after the defendant had begun his relationship with the victim. The other woman learned that the victim was more than just a roommate of the defendant, and heard the details of the beating. The following Sunday, the victim was able to get the defendant to return to their home. She told the defendant she did not want an "open" relationship with him. She packed a bag, took her dog, and left. She called the police about the incident a couple of days later.

The other woman provided the police with the videotape that the defendant had made. The prosecution played it for the jury at trial.[3]

B. The defense

The defense gave copies of the videotape to its two experts in BDSM conduct (one an academic, and one a BDSM therapist who had been in relationships as well that involved BDSM conduct). Both believed that the conduct they observed was typical and at the low end of the intensity spectrum for BDSM. It was not out of the ordinary for a submissive partner to be crying, and this would not normally signal the dominant partner to stop. There did not appear to be any objective indication that the conduct was against the will of the victim (such as a safe word being ignored), but the experts would need to know the partners and their limits to be certain.

The other woman also testified. She was still involved with the defendant at the time of trial. They had become intimate in November 2003. She became aware that he was involved with the victim as well, but he had assured her that it was a strictly sexual relationship. She said she would give him six months to make up his mind. In May 2004, she began to press him on this issue. She knew he had gone to Tahoe with the victim, and when he returned he gave her the impression that he had broken off with the victim. She went to the victim's home a few days after the victim and defendant returned from Tahoe to pick up a sewing machine. While there, she and the victim discussed their relationships with the defendant, and the other woman was surprised to hear that the victim still felt that the defendant was part of her life. They continued to talk with each other over the next few days about their mutual situation, in the course of which both mentioned engaging in BDSM conduct with the defendant. The victim never said anything about the Tahoe trip initially other than to describe it as beautiful. After the victim left the defendant, however, she called the other woman. In the course of her distraught conversation, the victim said that the defendant had gotten overly aggressive in their BDSM conduct (giving the particulars).

Discussion

I

People v. Mayberry (1975) 15 Cal.3d 143 concluded that a defendant's reasonable subjective belief that the victim had consented to an act of sexual intercourse amounted to a mistake of fact that negated criminal intent, and therefore a defendant was entitled to an instruction on this defense where evidence warranted it. (*Id*. at pp. 154-157.)

At the defendant's request, the trial court gave such an instruction in connection with the charge of rape, on which the jury acquitted him (the only offense, we note, that expressly includes lack of consent among its elements). The defendant did not ask for a similar instruction that expressly connected a reasonable subjective belief in consent with the offense of inflicting corporal injury on a cohabitant.

However, the court did instruct the jury that for all offenses and enhancements (except torture), "there must exist a . . . joint operation of act . . . and general criminal intent. . . . [¶] An act committed . . . by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if he commits an act . . . under an actual and reasonable belief in the existence of certain facts and circumstances which, if true, would make the act . . . lawful." There was not any instruction expressly or implicitly suggesting that consent was*not* a defense to inflicting corporal injury (or the charge of assault, for that matter). In closing argument, defense counsel from the outset repeatedly emphasized the presence

of *actual* consent, stressing in his final remarks that if the jury found consent to the beatings, "it eliminates almost every crime. It eliminates the torture. It eliminates the assault. It eliminates domestic violence." He also made explicit reference to the general "mistake of fact" instruction just quoted above. The prosecutor did not dispute the validity of either concept in his reply, focusing instead on the absence of any reasonable belief in consent.

On appeal, the defendant now asserts that since there was evidence that his subjective belief in consent to the beating was reasonable and his reliance on this defense was evident, the trial court had an obligation on its own motion to apply this defense explicitly to the count of inflicting corporal injury on a cohabitant. In the course of his argument, he makes scholarly exegesis on the role of actual consent as a defense to battery under tort and criminal law (criticizing *People v. Samuels* (1967) 250 Cal.App.2d 501, 513-514, which held that an assault victim cannot consent to BDSM conduct) and requests that we take judicial notice of the closely divided opinion of the House of Lords that refused to countenance consent as a defense to charges based on extreme BDSM behavior. The People also pursue the issue through the public policy thickets of other jurisdictions; they argue we should not recognize consent or its "mistake of fact" alternative as a defense to a beating.

Although the parties may find this issue to be compelling, ultimately it is not one that we must resolve in this appeal. The instructions and argument we have quoted above make apparent that the parties tried the case on the theory that consent *was* a defense. Whether this is actually the law is thus irrelevant (other than as an additional ground to reject the defendant's argument). Rather, we can decide the matter under the standards that govern a trial court's obligation to instruct sua sponte.[4]

A trial court's duty to instruct on particular defenses without a request is limited to general legal principles openly connected with the facts at trial; it must either appear that a defendant is relying on one of these principles in his theory of the case, or it must be a principle with substantial evidence in support that is consistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 195;*People v. Watie* (2002) 100 Cal.App.4th 866, 882.) Legal concepts that make only cameo appearances in our jurisprudence with limited speaking roles analyzing their raisons d'être are not considered "general principles" coming within the duty to instruct without a request. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126.) Consequently, the application of "imperfect duress" as a defense to a charge of robbery, or of "imperfect self-defense" to a charge of shooting at an inhabited dwelling was not within the responsibility of those trial courts. (*Bacigalupo, supra,* 1 Cal.4th at p. 126 & fn. 4 [legal rule from one intermediate appellate decision does not transform it into general principle of law]; *Watie, supra,* 100 Cal.App.4th at p. 882 [because *no* prior case supported instruction suggested on appeal, was not a general principle].)

As the parties recognize, there is scant authority on the issue of consent to a *beating* (other than *Samuels*), and these present an inchoate consensus in accord with *Samuels* outside the context of an assault with intent to commit a sexual offense. (*People v. Alfaro* (1976) 61 Cal.App.3d 414, 429 [consent not a defense to assault inflicting great bodily injury; distinguishing *People v. Gordon* (1886) 70 Cal. 467 as an assault with intent to commit rape]; *People v. Gray* (1964) 224 Cal.App.2d 76, 79-80 [consent to kidnapping and rape not relevant to intervening assault]; compare *Gordon, supra*, 70 Cal. at p. 468 [deems an assault with *intent to commit rape* an "attempt"; consent of victim relevant]; *People v. Rivera* (1984) 157 Cal.App.3d 736, 742-743 [same; the "touching" is not unlawful where reasonable belief in consent present]; *People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, 3 [simple assault; good-faith belief in consent to "offensive touching" of crotch is affirmative defense, not element].) A fortiori, the concept of a mistake of fact about actual consent to a beating could not be considered a general principle on which the defendant was entitled to an instruction without request. We therefore conclude the trial court did not err in failing to instruct the jury on the concept.

As for the defendant's incidental invocation of his trial counsel's ineffectiveness in this context, trial counsel could hardly be held incompetent for failing to request an instruction that lacked support under California law. For all we know on the record, he may have researched the issue and was aware that he did not have a strong legal basis for his defense of actual consent. Moreover, he reasonably could have considered that the instructions properly framed the issues for his argument, and preferred instructions that simply reminded the jury of the availability of the concept of mistake of fact without elaboration.

Finally, even if we were to hold that a victim can consent to a beating, making a "mistake of fact" defense on that issue viable, and were to conclude that a reasonable advocate should have requested such an instruction, any error would be harmless beyond a reasonable doubt. Viewing the instructions as a whole in connection with the arguments of defendant's trial counsel (*Middleton v. McNeil* (2004) 541 U.S. 433, 437 [158 L.Ed.2d 701]; *Boyde v. California* (1990) 494 U.S. 370, 378, 380 [108 L.Ed.2d 316]; *People v. Kelly* (1992) 1 Cal.4th 495, 525-527), there is not any possibility that the jury was unaware of mistake of fact as a defense to infliction of corporal injury on a cohabitant.

II

Citing *Lawrence v. Texas* (2003) 539 U.S. 558 [156 L.Ed.2d 508] (*Lawrence*), the defendant argues his conviction denies him substantive liberty interests that are protected under the Due Process Clause of the federal Constitution. (See *id*. at p. 565.) *Lawrence* involved the criminal prosecution of two men for engaging in a

consensual act of anal intercourse in a residence. (*Id*. at p. 563.) Declaring that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (*id.* at p. 572) because the decisions of individuals "'concerning the intimacies of their physical relationship . . . are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment'" (*id*. at p. 578), *Lawrence* concluded that the statute criminalizing such behavior was unconstitutional (*ibid*.). The court offered this caveat: "The present case does not involve minors. It does not involve persons *who might be injured* or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. . . . The case does involve two adults who, *with full and mutual consent from each other*, engaged in sexual practices . . . . The petitioners are entitled to respect for their private lives." (*Ibid*., italics added.)

Whether or not *Lawrence* applies to BDSM behavior between consenting adults even though it poses a risk of injury, the jury's verdict necessarily reflects a rejection of any claim that the victim consented or the defendant reasonably could have believed in her consent. Therefore, in the absence of full and *mutual* consent, the conviction does not transgress any protected liberty interests under the federal Constitution.

III

In the course of his argument at sentencing, defense counsel said, ". . . I actually feel that everything when you look at it points toward mitigation. I'm actually asking this . . . Court to consider not only credit for time served, but [to] consider this a [Penal Code section]17(b) motion and reduce this to a misdemeanor. [¶] First, it is an extremely unusual case for domestic violence . . . where there is actually argument that it was consensual. . . . [¶] If you even applied the normal domestic violence analysis, I believe it supports a mitigat[ed] sentence and even a reduction to a misdemeanor. [The defendant's] record is extremely minimal. It [does not] involve[] [any] violence. . . . He [does not have any] history of violence against the victim . . . . The violation of the restraining order did not involve any actual contact with the woman herself. . . . [¶] You look at the injuries in this case as compared to the average domestic violence cases, there is a picture of three bruises on her buttocks a week later. . . . There is no[t any] indication that the victim in this case is in any danger if [the defendant] is not incarcerated further. [¶] I would suggest that we look a little bit at the effects of this case on my client. . . . He lost his job. He lost his livelihood. He lost his reputation."

In response, the court remarked (vis-à-vis the acquitted charges), "That is not to say that the charge for which the defendant was convicted is not a serious charge. It's a felony and it should be treated as such. So the motion for [Penal Code section]17(b) for reduction is denied."

Under Penal Code section 17, subdivision (b), a trial court may declare a "wobbler'" offense (i.e., one that a court may sentence in its discretion either as a felony or a misdemeanor) to be a misdemeanor after granting probation. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 974.) There is "scant judicial authority explicating any criteria that inform the exercise of section 17(b) discretion"; however, the general principles guiding sentencing decisions are appropriate guides. (*Id*. at p. 978.)

The defendant first contends that the trial court failed to exercise its discretion. He portrays the court's remarks as being merely tautological, since *all* wobblers are felonies unless reduced to misdemeanors. (*People v. Balderas* (1985) 41 Cal.3d 144, 203.) But we presume the trial court was aware of the need to make a qualitative evaluation of the defendant's offense, absent an affirmative indication in the record to the contrary. Its statement can be interpreted as shorthand for a conclusion that the circumstances warranted treatment as a felony.

Alternatively, he contends that the trial court abused its discretion. In doing so, he mistakenly asserts (as did his trial counsel) that the verdict reflects the victim's assent to the beating. An absence of cruel intent, great bodily injury, or a manifestation that the act of sexual intercourse was nonconsensual can explain the remainder of the verdicts and findings on the enhancements, but the guilty verdict underlying his sole conviction necessarily reflects an *absence* of consent to the beating. Putting aside this misconception, we note he also alludes to the minimal nature of the injuries inflicted (which would warrant only misdemeanor treatment as a battery)[5] and the absence of any finding that he intended to injure the victim.[6] Finally, he adverts to his lack of a serious criminal record and his being a productive member of society before his arrest.

It may be that the injuries did not leave any long-lasting disfigurement beyond a few bruises a week later. The defendant's reliance on this circumstance, however, disregards the victim's testimony about the more extensive physical manifestations and pain that were the immediate aftermath of the beatings from the defendant. It also disregards the aggravated number of times that the defendant beat her with the crop and whip (as opposed to a single slap). As a result, the present offense is hardly at the bottom end of the spectrum and thus does not demand treatment as a misdemeanor. (Cf. *People v. Wilkins* (1993) 14 Cal.App.4th 761, 771 [redness and reported soreness from being hit in the face a few times sufficient to establish a traumatic condition].)

As for the offender, the facts of the present case and the injuries to which his estranged wife testified (which the parties adequately summarize in their briefs) show that the defendant's efforts to satisfy his BDSM appetites can become overzealous on occasion, and a felony conviction might serve to protect future partners through reminding him to curb himself, particularly as he has not demonstrated remorse

toward the victim. His record, while minor, evinces a certain indifference to rules that does not warrant indulgence from the trial court, as it includes driving under the influence, repeatedly driving without a valid driver's license, and the use of marijuana. In short, his is not so sterling a law-abiding background that the failure to reduce his offense to a misdemeanor lies outside the bounds of reason.

Disposition

The motion for judicial notice is denied. The judgment is affirmed.

DAVIS , J.

We concur:

SCOTLAND , P.J.

ROBIE , J.

Publication Courtesy of California attorney directory.

Analysis and review provided by Oceanside Real Estate Lawyers.

[1] As shorthand reference, we will use a defense expert's acronym (BDSM, for "bondage, discipline and sadomasochistic sexuality"). There is no all-embracing definition or pattern of conduct for BDSM, beyond an exaggeration and exchange of power roles inherent in sexual interactions or relationships, usually through physical abuse and humiliation.

[2] As pleas to stop can be part of the context in BDSM conduct, the word must be something entirely outside the moment (such as "palmetto"). They did not establish such a custom between them, however, because the defendant claimed he could sense intuitively where her limits lay.

[3] We have not reviewed this videotape (or the transcript that accompanies it), as their contents are not necessary to our resolution of the appeal.

[4] We will therefore deny the motion for judicial notice on the ground of lack of relevance.

[5] See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1054 (which notes felony punishment of a battery requires a serious injury).

[6] *People v. Campbell* (1999) 76 Cal.App.4th 305, 308 (conviction for cohabitant abuse does not require any intent to inflict the traumatic injury).