



In re Israel H.

2004 | Cited 0 times | California Court of Appeal | May 26, 2004

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OPINION

The juvenile court found true that minor committed forcible rape (Pen. Code, § 261, subd. (a)) and forcible penetration with a foreign object (Pen. Code, § 289, subd. (a)). Minor was thereafter committed to the California Youth Authority for a maximum period of 9 years 10 months 20 days. Minor's sole contention on appeal is that there was insufficient evidence to sustain his convictions because, as a matter of law, he established his defense that he reasonably believed the victim consented. We reject this contention and affirm the judgment.

I. FACTUAL BACKGROUND

In May 2003, the victim, Sara P., a woman over the age of 30, was living with her boyfriend in an apartment in Desert Hot Springs. Andrew, a juvenile who lived in the apartment next door, went to Sara's apartment with his friends Shawn and Jack, also juveniles, every day to watch television or talk.

Prior to May 5, 2003, Sara had known minor for about a month, and minor had gone to Sara's apartment twice. The first time they just sat and talked. The second time, minor and Sara boxed with each other. According to Sara, neither she nor minor won or lost. According to Shawn, however, Sara had won.

On May 5, 2003, Shawn, Jack, and minor went to Sara's apartment around noon. While they were at the apartment, Sara went into the kitchen to get minor a glass of water. As she walked by him, minor touched her buttocks, and Sara replied, "[D]on't." At some point, minor asked Sara if she liked "rough," and she responded, "Yes, I like rough." However, she was not referring to sex, but simply that she was a rough person who liked to box. Shawn testified that he never observed any flirting between minor and Sara while he was in the apartment.

When Sara came back from the kitchen, Jack and Shawn were in the process of walking out of her apartment. Sara told minor, who was still sitting on her couch, that he should leave too. Minor then



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stood up and went to the front door. Five minutes later, Shawn returned to the apartment to see if he could borrow minor's bike to ride to the store. Minor, who was standing in the doorway to the apartment, gestured for Shawn to leave. It appeared to Shawn that minor wanted to get rid of him.

While minor was standing by the front door, he touched Sara's face; told her that she was beautiful; and said that if he were her man, he would not leave her alone all the time like her boyfriend did. Sara told minor that she was faithful to her boyfriend and that she was not interested in him and again told him to leave. Minor walked back into Sara's apartment. Sara backed away from him and told him, "[Y]ou don't want to do this, back off." The front door to Sara's apartment was open, but she did not yell for help because she thought she could handle it herself.

Minor kissed Sara on the mouth two or three times. She kept her mouth closed and did not kiss him back. Minor reached inside Sara's shorts and inserted one or two fingers inside her vagina. Sara continuously told minor that he "didn't want to do this," and to "back off." Sara tried to get minor back up towards the door so that she could grab him and throw him out. However, before she was able to do so, minor pulled her shorts and underwear off.

Sara was scared, but she was not crying. At that point, things got "[K]ind of fuzzy" Sara remembered that she ended up lying on her back on the sofa and that minor had pulled his pants down. Minor pulled Sara's legs apart and penetrated her with his penis. Sara was scared and "froze up." During the rape, minor told Sara to be quiet, and Sara tried to back away. However, Sara did not yell for help. After minor finished, he told her he would be right back and left. Sara immediately locked the front door, called her boyfriend, and then called the police.

As Shawn was returning from the store, he noticed minor was running down the street around the corner from Sara's apartment. Minor had black mascara right above his mouth. Shawn asked minor how the makeup got there, and minor replied, "I made out with her." The two of them then returned to Andrew's house.

Minor testified on his own behalf. He stated that on the day of the incident he went to Sara's apartment with Shawn and Jack and that after Shawn and Jack left, he asked Sara if she liked rough sex. Sara responded, "I like everything rough" After minor pulled down Sara's shorts, she placed her hands on minor's shoulders and then stepped out of her shorts and walked with minor to the couch. The two then engaged in consensual sex. At one point, minor told Sara not to be too loud because she was "being real loud, moaning." Sara never told him that she did not want to have sex with him. In fact, Sara was moving along with minor during sex. As he was leaving, minor asked if Sara wanted him to come back the next day, and she said that she did. The front door to Sara's apartment was open, as were the shades.

Minor further testified that after he left the apartment, he walked away quickly. He began to run when he saw Shawn. The reason he was walking so fast was because he had used methamphetamine



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the previous night, and he still felt the effects of the methamphetamine. After he left, he went to Andrew's apartment, which was about 10 feet away from Sara's apartment.

II. DISCUSSION

Minor contends the evidence was insufficient to sustain his convictions for rape and penetration with a foreign object because the facts established the Mayberry¹ defense as a matter of law. We disagree.

"`The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials. [Citation.]" (In re Babak S. (1993) 18 Cal.App.4th 1077, 1088, quoting In re Jose R. (1982) 137 Cal.App.3d 269, 275.) "In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence that is, evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (People v. Rodriguez (1999) 20 Cal.4th 1, 11, citing People v. Johnson (1980) 26 Cal.3d 557, 578; see also People v. Bolin (1998) 18 Cal.4th 297, 331.) If the evidence presented below is subject to differing inferences, the reviewing court must assume that the trier of fact resolved all conflicting inferences in favor of the prosecution. (Jackson v. Virginia (1979) 443 U.S. 307, 326.) A reviewing court is precluded from making its own subjective determination of guilt. (Id. at p. 319, fn. 13.)

Given this court's limited role on appeal, minor bears an enormous burden in claiming there was insufficient evidence to sustain his convictions. If the verdict is supported by substantial evidence, we are bound to give due deference to the trier of fact and not retry the case ourselves. (People v. Ochoa (1993) 6 Cal.4th 1199, 1206.) It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (People v. Barnes (1986) 42 Cal.3d 284, 303; People v. Hale (1999) 75 Cal.App.4th 94, 105.) Minor's hurdle to secure a reversal is just as high when the prosecution's case depends on circumstantial evidence. (People v. Kraft (2000) 23 Cal.4th 978, 1053.)

In Mayberry, supra, 15 Cal.3d 143, the Supreme Court stated, "If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to . . . engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of . . . rape by means of force or threat" (Id. at p. 155.) This defense also applies to forcible penetration with a foreign object.

"The Mayberry defense has two components, one subjective, and one objective. The subjective component asks whether the defendant [here minor] 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." (People v. Williams (1992) 4 Cal.4th 354, 360-361, fn.



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omitted.) If the evidence shows the victim did not consent to the alleged acts, the events are viewed 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 defendant to assume that she consented when in fact she did not. (People v. Romero (1985) 171 Cal.App.3d 1149, 1155-1156.)

Additionally, "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." (People v. Williams, supra, 4 Cal.4th at p. 361; accord, People v. Maury (2003) 30 Cal.4th 342, 424.)² "[T]he record must contain evidence, whether direct or circumstantial, of the defendant's state of mind at the time the offense was committed." (Maury, at p. 425.)

Minor contends the evidence shows Sara acted equivocally, and he truly believed she voluntarily accompanied him to the sofa and consented to have sex. Specifically, he argues that because Sara's conduct was ambiguous, citing evidence about whether she liked "rough"; that Sara "never said no" or "don't do this,"; that she did not seek help; that she made no effort to resist or escape; and that she did nothing to indicate that she was not consenting, the Mayberry defense was established as a matter of law. We cannot agree.

In this case, no evidence supported a Mayberry defense. A trier of fact viewing the evidence from minor's perspective would have found no basis to conclude that Sara's conduct misled minor into an erroneous belief that she consented to have sex with him. His theory and evidentiary showing were quite different: that Sara instigated contact with him; that she stated she liked rough sex; that she stepped out of her shorts and walked with minor to the couch; that she moaned, kissed his face, and moved along with him during the sex; and that he acceded to her unequivocal demands. Minor did not testify that he erroneously deduced consent from Sara's lack of struggle or failure to attempt to seek help or escape, and the substance of his testimony negates that possibility. If the juvenile court had credited minor's testimony, it would have found that the prosecution had failed to prove lack of consent, and it would have acquitted on that basis. In other words, minor's theory, if believed, would have established actual consent. Contrary to minor's contention, no reasonable trier of fact reviewing the evidence could have found a mistaken but good faith belief in consent based on ambiguous conduct in this case.

Minor presented no evidence of his state of mind at the time the acts were committed and never suggested he was relying on a mistake-of-fact defense. Even though he testified, he did not present any direct evidence he honestly and reasonably, but mistakenly, believed Sara consented to sexual intercourse or digital penetration. Nor was there circumstantial evidence of his state of mind. Instead, minor challenged Sara's credibility and based his defense on Sara's actual consent, not his belief that she had consented. During closing argument, minor attacked Sara's credibility,



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characterizing her as an adult woman who was interested in minor and who allowed juveniles to come to her house to smoke cigarettes and methamphetamine, and claiming Sara consented to the sex acts. This evidence, if believed, establishes actual consent, a defense to rape. Depending on what the juvenile court believed, the sex acts were either entirely consensual or the obvious result of force. (People v. Rhoades (1987) 193 Cal.App.3d 1362, 1369.) Thus, there was no evidence from which the juvenile court could evaluate proof relating to minor's belief in consent, as distinguished from his mere assertion of consent. ³ (See Id. at pp. 1369-1370.)

The relevant inquiry under Mayberry is whether minor believed Sara consented to the sex acts they engaged in, not whether she willingly consented to sex. (See People v. Williams, supra, 4 Cal.4th at p. 363.) However, minor adduced no evidence, direct or circumstantial, that sheds light on his state of mind or whether he misunderstood Sara's conduct. Sara testified minor forced her to engage in sexual conduct against her will. Minor concedes he engaged in the sex acts with Sara but claims he did not do so against her will. These "wholly divergent accounts create no middle ground from which the jury [here the juvenile court] could conclude" minor committed the proscribed acts but lacked criminal intent because he mistakenly believed Sara willingly consented. (People v. Balcom (1994) 7 Cal.4th 414, 422; People v. Rodriguez (1997) 53 Cal.App.4th 1250, 1275-1276; People v. Burnett, supra, 9 Cal.App.4th 685, 690.)

Based on the foregoing, the facts here do not establish a Mayberry defense as a matter of law. Therefore, viewing the record in the light most favorable to the prosecution, we conclude that there was sufficient evidence to support the lower court's finding that minor committed forcible rape and forcible penetration with a foreign object. (People v. Kipp (2001) 26 Cal.4th 1100, 1128.)

III. DISPOSITION

The judgment is affirmed.

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We concur:

HOLLENHORST Acting P.J.

GAUT J.

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

2. However, 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.)



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3. We do not believe the juvenile court's comments, at the time of the dispositional hearing, suggested that it found Sara engaged in equivocal conduct or that it found minor reasonably, albeit mistakenly, believed Sara consented. Specifically, the court stated: "First, I acknowledge that this case is one of credibility of the witnesses. I acknowledged in my opening comments that the victim made serious mistakes by allowing these young people to come in there. [¶] However, the facts are clear from all the witnesses who testified that there's never been sexual activity of any kind whatsoever, there was none on the record including the boys who witnessed this. [¶] Also it's clear that the victim immediately notified her husband [then boyfriend] immediately after this incident occurred, she locked the house and called the police. It's also clear that [minor] was, when he left that house, he was running, he also admitted that he was under the influence of methamphetamine at the time of this offense. [¶] . . . [¶] While he may well believe that the woman consented, in my opinion, based on the testimony, I believe that no means no, a woman told him no, and he proceeded. He may well have thought in his own mind based upon his being under the influence of drugs that this was a matter of some interest on the part of this woman, but in my mind no meant no and I believe the facts justify the finding." We also reject minor's reliance on the juvenile court's comments to support his position that the juvenile court found that he "satisfied the subjective component" of the Mayberry defense. First, the court made its statements at the dispositional hearing, following statements made by minor's brother, minor's mother, and minor, in support of an appropriate disposition for minor. Second, there was absolutely no direct or implicit evidence presented at the time of trial to support a Mayberry defense or that minor had a reasonable and good faith, albeit mistaken, belief in the victim's consent.

