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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PEDRO GONZALEZ, Defendant and Appellant.	G041178 (Super. Ct. No. 06CF3931) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed in part, reversed in part and remanded.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Pamela Ratner Sobeck, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was sentenced to 35 years to life in prison for committing a string of attacks against three female victims. He contends: 1) The trial court erred in failing to instruct the jury that voluntary intoxication can be a defense to the crimes of kidnapping and rape; and 2) his conviction for bringing drugs into jail should be reversed because he did not enter the jail of his own accord. We agree with his second contention and will therefore reduce his conviction from bringing drugs into jail to the lesser included offense of simple possession. In all other respects, we affirm.

FACTS[1]

Aracely V. and her boyfriend Roberto Marquez encountered appellant as they were walking back to Aracely's apartment one evening. Believing that Marquez was staring at him, appellant stopped his bicycle and confronted the couple, demanding to know what Marquez was looking at. When Marquez didn't answer, appellant shoved him. The two men fought and Marquez hit appellant in the face. Then, appellant threatened Marquez and rode off.

Believing the conflict was over, Marquez walked Aracely home before going back to his own apartment. After some time had passed, Aracely decided to call Marquez to make sure he had arrived home safely. When he didn't answer his phone, she grew worried and convinced her friend Alfonso to go out with her to search for him. A block away from their apartment, they ran into appellant.

Recognizing Aracely, appellant grabbed her by the arm and placed a knife against her stomach. He told Alfonso to leave and threatened reprisal if he called the police. Alfonso ran back to the apartment to get help. Once he was out of sight, appellant seized Aracely's cell phone and led her to a nearby garage, where he lived. Although Aracely tried to befriend appellant, he was not cooperative and instead demanded to know her boyfriend's name and address. When Aracely wouldn't provide

[1] We will limit our statement of the facts to the counts at issue in this appeal.

that information, he forced her to undress. She stood naked for five minutes as he stared at her. He then began laughing and insisted he wanted nothing to do with her. After ordering her to redress, he again demanded her boyfriend's name and address. Aracely refused to tell him and begged him to let her go. They stayed like this in the garage for two hours before appellant decided to move her to a new location.

Appellant eventually led Aracely out of the garage and down the street, carrying the knife and holding her by the arm. When a man approached from the opposite direction, he forced Aracely to crawl under a trailer parked along the side of the road. Appellant brandished the knife and threatened the stranger, telling him to turn around and go back the way he came. Aracely tried to escape while appellant's attention was on the other man, but appellant stopped her. Once the stranger was gone, he allowed her to get out from under the trailer and led her to an old house with a car parked in the backyard.

He ordered Aracely into the backseat of the car and forced her to undress. He then took off his pants and raped her. Although he had difficulty maintaining an erection and was unable to ejaculate, he was able to penetrate her vagina twice during a period of about ten to fifteen minutes. Aracely noticed that appellant smelled of alcohol. She threatened to call the police, but appellant just laughed. In fact, he burst into laughter several times during the assault. When it was over, he kept Aracely in the car for another three to four hours, while continuing to demand the name of her boyfriend.

He then took her back to his garage and held her there for three more hours, until around 5:00 a.m., before he finally gave her back her cell phone and let her go. When Aracely got home, she told her roommate about the ordeal, but she did not call the police because she was in the country illegally. Nonetheless, when appellant was arrested several months later, she identified him as her assailant.

While appellant was in custody, the police told him that, in addition to the crimes involving Aracely, he would have to face additional charges if he tried to bring

anything illegal into the jail. At the jail itself, there were signs warning of the consequences of bringing narcotics into the jail. However, when appellant was searched prior to entering the jail, deputies found 151 milligrams of methamphetamine in his shoe. Appellant said he didn't divulge the drugs because he was scared and he was saving them for later.

I

In counts 4 and 5, appellant was charged with kidnapping for rape and rape. The trial court instructed the jury it could consider the evidence of appellant's intoxication in deciding whether he committed kidnapping for rape, but not whether he committed kidnapping or rape. Appellant contends it was error to limit the jury's consideration of intoxication in this regard, but we disagree.[2]

Arguably, appellant waived this claim by failing to raise it in the trial court. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119-1120; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1734.) In any event, the claim fails on its merits.

Evidence of voluntary intoxication is relevant to the issue of whether the defendant formed the requisite intent for a specific intent crime, but it is not relevant in deciding whether the defendant is guilty of a general intent crime. (Pen. Code, § 22, subd. (b); *People v. Reyes* (1997) 52 Cal.App.4th 975, 982.) Unlike the crime of kidnapping for rape, which is a specific intent offense (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151, fn. 6), kidnapping and rape are general intent crimes (*Ibid.*; *People v. Moya* (1992) 4 Cal.App.4th 912, 916). Therefore, it follows that evidence of appellant's voluntary intoxication was not relevant to whether he was guilty of those offenses.

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[2] The only evidence appellant had been drinking is that he acted strangely, smelled of alcohol, and was unable to maintain an erection during the rape. There was no evidence as to how much appellant had to drink that evening or how it may have affected him. Nevertheless, respondent does not contest the trial court's determination there was sufficient evidence of intoxication to warrant instructions on the topic, at least as to some of the charged offenses.

Appellant argues a different result is compelled under the Supreme Court's decision in *People v. Mayberry* (1975) 15 Cal.3d 143, which held a defendant's reasonable and good faith belief the victim consented can be a defense to the crimes of rape and kidnapping. (*Id*. at pp. 153-158.) However, the *Mayberry* defense is "premised on mistake of fact." (*People v. Williams* (1992) 4 Cal.4th 354, 362.) It does not apply in the context of voluntary intoxication because a defendant's purported belief the victim consented cannot be characterized as either reasonable or in good faith when it is brought about by self-induced intoxication. (*People v. Guthreau* (1980) 102 Cal.App.3d 436, 443; *People v. Potter* (1978) 77 Cal.App.3d 45, 51.) Because "voluntary intoxication cannot be used to support a *Mayberry* defense" (*People v. Stanley* (1992) 6 Cal.App.4th 700, 706), the trial court did not err in failing to instruct otherwise. (Accord, *People v. Bishop* (1982) 132 Cal.App.3d 717, 722.)

II

Appellant also claims his conviction for bringing a controlled substance into jail must be reversed because he did not enter the jail of his own volition. This claim is well taken.

Under Penal Code section 4573, it is a felony for any person lacking authorization to knowingly bring a controlled substance into a county jail.[3] The California Supreme Court is currently considering whether this provision applies when, as here, the defendant is brought into jail as a prisoner, against his will. (See *People v.*

[3] Specifically, the statute provides, "Except when otherwise authorized by law, or when authorized by the person in charge of the prison or other institution referred to in this section or by an officer of the institution empowered by the person in charge of the institution to give the authorization, any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison, prison road camp, prison forestry camp, or other prison camp or prison farm or any other place where prisoners of the state are located under the custody of prison officials, officers or employees, or into any county, city and county, or city jail, road camp, farm or other place where prisoners or inmates are located under custody of any sheriff, chief of police, peace officer, probation officer or employees, or within the grounds belonging to the institution, any controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code, any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years." (Pen. Code, § 4573.)

Gastello (2007) 149 Cal.App.4th 943, review granted June 13, 2007, S153170 and *People v. Low* (Mar. 14, 2007, A112831), review granted June 13, 2007, S151961.) The Attorney General argues that it should. In his view, it doesn't matter that appellant did not enter the jail voluntarily; he nonetheless violated the statute by entering the jail while knowingly possessing a controlled substance. We disagree.

"'Except for strict liability offenses, every crime has two components: (1) an act or omission, sometimes called the actus reus; and (2) a necessary mental state, sometimes called the mens rea. (Pen. Code, § 20; see generally 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Elements, §§ 1, 21, pp. 198-199, 227-228.)'" (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1528.) Here, it is clear appellant knew he had drugs in his possession, which satisfies the mens rea requirement of Penal Code section 4573. However, other than failing to incriminate himself by confessing to his possession, he did nothing to facilitate the alleged offense.

Criminal liability for failing to act is only applicable where there is a legal duty to act. (*People v. Heitzman* (1994) 9 Cal.4th 189, 197-198.) And here, not only was appellant under no legal duty to act, he had a constitutional right to keep quiet about the drugs that were in his shoe. (U.S. Const., 5th Amend.) Therefore, his failure to divulge the drugs cannot trigger liability under Penal Code section 4573. Because he did not act voluntarily in bringing drugs into the jail, his conviction under that section must be reversed.[4]

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[4] Although decisions from out-of-state courts are not controlling, we note that, in reversing an enhancement for possessing drugs in jail, the court in *State v. Eaton* (Wash.App. 2008) 177 P.3d 157 made a point that is equally applicable to our case when it observed, "After all, . . . [the defendant] did not bring the methamphetamine into the county jail; a police officer brought [the defendant] and the methamphetamine into the county jail." (*Id*. at p. 164.) The *Eaton* court found support for its decision in the following cases: "*State v. Gonzalez*, 188 Or.App. 430 [] (2003) (mere possession of drugs when a defendant was taken by police to a correctional facility is not legally sufficient to prove that he voluntarily introduced contraband into that facility); *State v. Delaney*, 187 Or.App. 717 [] (2003) (even assuming that a defendant's actions were so inept that her arrest and the discovery of the contraband were readily foreseeable consequences, she did not voluntarily introduce contraband into a detention center); *State v. Cole*, [] 142 N.M. 325 [] (2007) (actus reus element of the crime of bringing contraband into jail was not met because a defendant did not voluntarily enter the detention facility); *State v. Sowry*, 155 Ohio App.3d 742 [] (2004) (holding that a defendant's possession of contraband in a jail was not the

DISPOSITION

Appellant's conviction in count 12 for knowingly bringing drugs into jail (Pen. Code, 4573) is reduced to unlawfully possessing a controlled substance (Health & Saf. Code, 11377, subd. (a)), and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.

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result of a voluntary act because officers brought him into the jail under arrest)." (*State v. Eaton, supra*, 177 P.3d at p. 164.)