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Court, Rules 8.500, 8.1105 and 8.1110,
8.1115, 8.1120 and 8.1125)
Court of Appeal, Sixth District.

The PEOPLE, Plaintiff and Respondent,
v.
Gary Wendell CROSS, Defendant and Appellant.

No. H027519. | Nov. 28, 2005.
| Review Granted March 1, 2006.

Synopsis

Background: Defendant was convicted in the Superior Court, Santa Clara County, No. CC319761, Alden Danner, J., of nonforcible lewd act on a child under 14 with sentencing enhancement for personal infliction of great bodily injury, and nonforcible oral copulation on a child under 14, as perpetrated against defendant's 13-year-old stepdaughter, and sentenced to a prison term of 15 years to life under the one strike law. Defendant appealed.

Holdings: The Court of Appeal, Elia, J., held that:

[1] evidence of victim's pregnancy and late-term abortion was sufficient to establish that defendant personally inflicted "great bodily injury," as required for application of enhancement;

[2] sua sponte instruction on meaning of term "personally inflict" was not required;

[3] jury unanimity was not required as to whether the abortion or the pregnancy constituted the great bodily injury;

[4] instruction that pregnancy or abortion may constitute great bodily injury was not so vague as to violate due process; and

[5] indeterminate 15-years-to-life sentence was not cruel or unusual.

Affirmed.

Attorneys and Law Firms

***97** Stephen B. Bedrick, in association with The Sixth District Appellate Program, Under Appointment by the Court of Appeal, for Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Assistant Attorney General, Stan Helfman and Christopher J. Wei, Deputy Attorneys General, for Respondent.

Opinion

ELIA, J.

Appellant was tried for sexual misconduct with his 13–year–old stepdaughter who became pregnant and had an abortion. The jury convicted him of two non-forcible sex offenses and found true an enhancement for the personal infliction of great bodily injury. Appellant contends that there was insufficient evidence that he personally inflicted great bodily injury, that the trial court erred in its instructions to the jury, and that his state prison sentence of six years plus a consecutive 15–years–to–life term was cruel and unusual punishment. We affirm.

The information in this case charged: count 1, forcible lewd act on a child under 14 with an enhancement for personal infliction of great bodily injury (Pen.Code, §§ 288, subd. (b)(1), 12022.7); count 2, aggravated sexual assault on a child under 14 by means of forcible oral copulation (Pen.Code, § 269); and counts 3 and 4, aggravated sexual assault on a child under 14 by means of rape (Pen.Code, § 269). The jury acquitted appellant of counts 3 and 4. The jury found appellant guilty in count 2 of the lesser included offense of non-forcible oral copulation on a child under 14. (Pen.Code, § 288a, subd. (c)(1).) On count 1, the jury found appellant guilty of the lesser included offense of a non-forcible lewd act on a child under 14 and also found true the enhancement that appellant had personally inflicted great bodily injury. (Pen.Code, §§ 288, subd. (a), 12022.7.)

Evidence at Trial

K. lived with her mother, her younger sister and brother, and appellant, who was her stepfather. Her mother worked the night shift as a dispatcher for tow trucks. K. testified that when she was 13 years old and just after school started for the 2002 ***98** term, appellant came into the bedroom that she shared

with her siblings. Appellant woke her up and whispered to her to go to his room. K. thought she was going to be punished for not doing her chores. Instead, appellant had her lie on his bed, took off her clothes, and had sexual intercourse with her. Appellant told K. not to tell her mother what had happened or K. would be sent to a foster home.

Over the next several weeks, appellant had sexual intercourse with K. once or twice a week when her mother was away at work. K. testified that occasionally she would pretend she was asleep, but that sometimes appellant would then get angry and punish her by taking away her cell phone or telling her that she could not see her friends. Appellant put his penis in her mouth three or four times. K. said that she did not tell her mother about any of this because she believed she would be taken away from her mother if she did.

K. told appellant that she had missed her menstrual period and he took her to Planned Parenthood where a pregnancy test confirmed that she was pregnant. K. testified that appellant told her that she "had to get an abortion."

On December 17, 2002, appellant drove K. to San Francisco General Hospital for an abortion. K. testified that appellant told her to lie about her age and to use the last name "Cross" instead of her own last name. After some preparations, including the insertion of cervical dilators, K. went home and returned to the hospital the next day for the actual surgery. K. testified that before she was given an anesthetic her stomach was "hurting." After the surgery, she felt "tired and hurt and sick." K. testified that she did not tell her mother about the abortion because she "didn't want her to have the police take me away or want her to hate me."

Appellant testified that K. was 3 years old when he married her mother. In the summer of 2002, he would often find K. in his bed watching television when he came home from work. One night, appellant told her that she did not need "to be laying in bed with a grown man. You need to get up and leave here." K. responded, "You're not my dad." Because the other children were going to come into the room to watch television, K. and appellant went to the living room. Appellant testified that K. said she "wanted" appellant. K. took off her clothes and she and appellant had sex on the living room floor.

Appellant denied ever telling K. that she would be taken away if she told anyone that they were having sex. Appellant testified that their sexual relationship was "a mutual thing" and that when K. did not want to have sex he would leave her alone. He testified that he stopped having sexual relations with his wife because K. told him, "you can't fuck me and my mother at the same time." He said that their relationship was romantic, that he fell in love with her, and that "we said we loved each other." He testified that they had shopped for condoms together but that he stopped using them when she said that she was sore. [1]

Appellant testified that when K. became pregnant he felt that he "would rather have her have the child than go through an abortion." He testified that K. insisted on the abortion. He said that after the abortion, K. did not complain of pain or nausea and that she had the chips, sandwich, and soda that they had brought in a cooler.

***99** One night, appellant's wife (Wife) caught appellant naked in bed with K. K.'s mother picked up the phone to call the police but appellant and K. convinced her that they were not having sex. About two weeks later, Wife found some old papers related to the abortion. When she confronted K., K. admitted that she had been pregnant and had had an abortion. Wife testified that K. said that appellant had told her not to tell because she would be taken away from her mother.

K.'s sister testified that appellant had asked K. to come to his room at night more than 10 times. The sister described various pleasant family outings. She said that sometimes K. and appellant got along well and that other times they had arguments. Appellant's stepfather testified that appellant was like a father to K. and that the two did not seem to have any problems with each other. Appellant's mother testified that sometimes K. stole.

A nurse from the "women's options division" of San Francisco General Hospital testified that K. was five-and-one-half months pregnant at the time of the surgical abortion, also known as a "D and E" for dilation and extraction. The dilation is accomplished by inserting into the cervix dilators which expand. The first day, medical personnel administered a paracervical block, in which an anesthetic agent was injected into K.'s cervix. Five medium-sized dilators were inserted into K.'s cervix. The nurse testified that even with the anesthetic, this procedure can very often be a painful one. When K. returned the next day, she received another paracervical block with a vasoconstrictor to reduce bleeding, and the five dilators were removed. Medical personnel inserted an additional 12 extra-large dilators. Various other medications were administered as well.

For the extraction part of the procedure, medical personnel used a rigid, curved instrument to vacuum and aspirate K.'s uterus. Because of the advanced stage of the pregnancy, the medical staff also used foot-long forceps to grab the fetal tissue and pull it out. When K. regained consciousness after the 13–minute procedure, she continued to bleed. As a result of this surgery, K. lost about 55 ccs, approximately one cup, of blood.

An ultrasound that was performed shortly before the abortion determined that the fetus was over 22 weeks old, consistent with the measured dimensions of the fetus's head and foot. The aborted fetus was oval-shaped and about the size of two-and-a-half softballs. Based on DNA testing, there was a greater than 99.9 percent probability that appellant was the father of the fetus.

The Great Bodily Injury Enhancement

The prosecutor's theory of this case was that appellant had committed four acts of forcible sexual conduct on K. Addressing the great bodily injury enhancement, the prosecutor argued "that [appellant] inflicted this great bodily injury on her by having sexual intercourse with her, getting her pregnant." He referred to the definition of great bodily injury and said "the judge will say the pregnancy count is injury, not pregnancy to term or 22 weeks. Any pregnancy can count as injury if you find it's substantial or significant. And the question you have to ask yourself is carrying a baby for 22 weeks or more than 22 weeks significant in a 13–year–old body; clearly it is.... [¶] The abortion counts as injury. Let's say you were to find, and I don't think you can, we're not sure the pregnancy itself was substantial or significant; the abortion counts as injury.... [¶] The abortion itself, even though there is no infection or complication is an injury because ***100** that abortion, in particular a surgical abortion, was substantial and it was significant." The prosecutor hypothesized a situation that might not qualify as great bodily injury in which a very brief pregnancy ended with a miscarriage or early abortion and contrasted that situation with the evidence in this case. He said, "this pregnancy was [of] a length and kind to warrant that seriousness ... and you can also find it's true for the abortion because it was a surgical abortion."

The defense argued that none of the sexual conduct was forcible and invited the jury to convict appellant on two lesser included charges. The defense argued that the "really big issue" in the case was the great bodily injury enhancement. Counsel argued that the enhancement "puts the district attorney in a very difficult situation because he's saying the operation is an injury." Counsel argued that the issue for the jury was "whether [K.]'s body was injured, not whether her body was changed, not whether she was undergoing changes because of the pregnancy, but whether there was injury to her anatomy, to her physiology, not to her emotions." The jury acquitted appellant of all of the forcible sexual conduct charges and convicted him of non-forcible oral copulation and a non-forcible lewd act, finding true the great bodily injury enhancement attached to that charge.

Sufficiency of the Evidence of Personal Infliction

[1] Appellant contends, "There was insufficient evidence that appellant 'personally inflicted' great bodily injury by means of the abortion." Appellant argues, "Because 'personally inflict' requires a more direct level of causation, and a more direct level of involvement, than 'proximately cause' ... there was insufficient evidence that he 'personally inflicted' [great bodily injury] with the abortion."

Penal Code section 12022.7, subdivision (a) authorizes additional punishment for "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony...." " '[G]reat bodily injury' means a significant or substantial physical injury." (Pen.Code § 12022.7, subd. (f).)

In *People v. Cole* (1982) 31 Cal.3d 568, 183 Cal.Rptr. 350, 645 P.2d 1182, the defendant had directed another person to attack the victim. The Supreme Court held that an enhancement under section 12022.7 may be imposed "only on those principals who perform the act that directly inflicts the injury" and not on an aider and abettor. (*Id.* at p. 571, 183 Cal.Rptr. 350, 645 P.2d 1182.) "[T]he enhancement applies only to a person who himself inflicts the injury.... It is doubtful that the Legislature could have enacted the statute in question more tersely to express the intended limitation on the class of individuals who may be exposed to an enhanced sentence for inflicting great bodily injury. Among the several dictionary definitions of 'personally,' we find the relevant meaning clearly reflecting what the Legislature intended: 'done in person without the intervention of another; direct from one person to another.' (Webster's New Internat. Dict. (3d ed.1961).) No other expression could have more clearly

and concisely expressed what we interpret to be the plain meaning of the Legislature: that the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*Id.* at p. 572, 183 Cal.Rptr. 350, 645 P.2d 1182.)

***101** *People v. Rodriguez* (1999) 69 Cal.App.4th 341, 81 Cal.Rptr.2d 567 specifically held that proximate cause is an insufficient basis for a great bodily injury enhancement. In *Rodriguez,* a police officer was injured when he hit his head on the ground or a lamppost while tackling the defendant, who was attempting to escape from jail on a bicycle. The jury found this prior conviction for resisting a police officer was a "serious felony" because the defendant had personally inflicted great bodily injury upon the officer. *Rodriguez* reversed the jury's finding because the instructions it had been given erroneously equated "personally inflict" with "proximate cause." As *Rodriguez* explained, to " 'personally inflict' an injury is to directly cause an injury, not just to proximately cause it. The instruction was wrong because it allowed the jury to find against Rodriguez if the officer's injury was a 'direct, natural and probable consequence' of Rodriguez's action, even if Rodriguez did not personally inflict the injury." (*Id.* at pp. 347–348, 81 Cal.Rptr.2d 567.) *Rodriguez* reasoned that while *Cole* was concerned with application of a great bodily injury enhancement to an aider and abettor, the court addressed the issue of causation by requiring "that the defendant have acted personally and directly to inflict or cause the injury." (*Id.* at p. 349, 81 Cal.Rptr.2d 567.) "To 'personally inflict' injury, ... [t]he defendant must directly, personally, himself inflict the injury." (*Ibid.*)

Appellant is correct in his assertion that he did not personally perform the abortion. No one suggested that he had. Testimony concerning the medical procedures used to treat the victim of an injury is routinely admitted into evidence in cases in which a great bodily injury enhancement is alleged. Typically, once the evidence establishes that a defendant has committed a criminal act inflicting injury, such testimony is introduced for the purpose of establishing the substantiality of the inflicted injury by describing the medical treatment, such as sutures, bone-setting or surgery, that the victim of that injury received. Historically, such testimony was crucial to establishing the enhancement because the original version of section 12022.7 "spelled out in some detail" the level of injury necessary to trigger the enhancement stating, " ' " 'great bodily injury' means a serious impairment of physical condition, which includes any of the following: [¶] (a) Prolonged loss of consciousness. [¶] (b) Severe concussion. [¶] (c) Protracted loss of any bodily member or organ. [¶] (d) Protracted impairment of function of any bodily member or organ or bone. [¶] (e) A wound or wounds requiring extensive suturing. [¶] (f) Serious disfigurement. [¶] (g) Severe physical pain inflicted by torture." ' " (*People v. Escobar* (1992) 3 Cal.4th 740, 747, 12 Cal.Rptr.2d 586, 837 P.2d 1100.) The current definition is simply "significant or substantial physical injury."

When the commission of a criminal act causes a pregnancy, the physical consequences are miscarriage, abortion, or the birth of a child. (See *People v. Superior Court (Duval)* (1988) 198 Cal.App.3d 1121, 1131–1132, 244 Cal.Rptr. 522.) The prosecutor did not argue that appellant had personally inflicted the abortion, or that appellant was liable under a proximate cause theory. Rather, the prosecutor's argument was that appellant "inflicted this great bodily injury on her by having sexual intercourse with her, getting her pregnant." The significance and substantiality of this injury was shown by evidence of the resulting pregnancy and the late-term surgical abortion. The medical evidence concerning the abortion was introduced and argued as proof of the significance of the injury caused by appellant when he impregnated K. during the commission of a criminal offense.

***102** Appellant contends, "Abortion does not qualify as an injury, let alone as great bodily injury." Appellant, citing *Duval, supra,* 198 Cal.App.3d 1121, 244 Cal.Rptr. 522 and *People v. Sargent* (1978) 86 Cal.App.3d 148, 150, 150 Cal.Rptr. 113, recognizes, "A handful of cases declare that pregnancy and abortion constitute[s] a sufficient injury to qualify as great bodily injury, within the meaning of Penal Code § 12022.7." Appellant argues that the statements in these cases "do not survive the Supreme Court's holding in [*People v.*] *Bland* [(2002) 28 Cal.4th 313, 121 Cal.Rptr.2d 546, 48 P.3d 1107]."

In *Bland, supra,* 28 Cal.4th 313, 121 Cal.Rptr.2d 546, 48 P.3d 1107 the defendant was prosecuted for murder and an enhancement was alleged under Penal Code section 12022.53, which provides additional punishment for a defendant who intentionally and personally discharges a firearm proximately causing great bodily injury or death. The Supreme Court held that it was error not to advise the jury that " '[a] proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces

as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred.' " (*Id.* at p. 335, 121 Cal.Rptr.2d 546, 48 P.3d 1107.) In so ruling, the court said, " 'To "personally inflict" an injury is to directly cause an injury, not just to proximately cause it.' " (*Id.* at p. 337, 121 Cal.Rptr.2d 546, 48 P.3d 1107.)

We do not read the discussions in *Duval* and *Sargent* about pregnancy as great bodily injury as being predicated on a failure to distinguish between personally inflicting an injury and proximately causing one. Neither case contains a discussion of these concepts. In each case, the crime victim was injured when the defendant directly acted by committing a sex offense that impregnated her. In *Sargent,* the trial court instructed the jury that forcible rape itself constituted great bodily injury. On appeal, the *Sargent* court held that, although this was error because significant or substantial physical injury must exist apart from the act of rape in order to demonstrate great bodily injury, this error was harmless because the jury could have found great bodily injury based on the crime victim's pregnancy and abortion. (*Sargent, supra,* 86 Cal.App.3d at p. 151, 150 Cal.Rptr. 113.) In *Duval,* a vice principal was prosecuted for oral copulation with a minor and unlawful sexual intercourse. At the time, Penal Code section 12022.7 required that the defendant have the specific intent to cause great bodily injury. The *Duval* court held that the trial court did not err in dismissing an allegation that the defendant had inflicted great bodily injury because nothing in the record "even remotely suggested that defendant desired" to impregnate his student victim. (*Duval, supra,* 198 Cal.App.3d at p. 1124, 244 Cal.Rptr. 522.)

The *Duval* court, quoting in part from *Sargent,* said: "Pregnancy, abortion, or venereal disease constitute injury significantly and substantially beyond that necessarily present in the commission of an act of unlawful sexual intercourse. [Citations.] 'Pregnancy cannot be termed a trivial, insignificant matter. It amounts to significant and substantial bodily injury or damage.... [¶] Pregnancy can have one of three results—childbirth, abortion or miscarriage. Childbirth is an agonizing experience. An abortion by whatever method used constitutes a severe intrusion into a woman's body. A miscarriage speaks for itself.... We find that the facts in this case, i.e., a pregnancy followed by an abortion, clearly support a finding of great bodily injury.' [Citation.]" ***103** (*Duval, supra,* 198 Cal.App.3d at pp. 1131–1132, 244 Cal.Rptr. 522.) Although appellant characterizes this language as "dictum or surplusage," we agree with *Duval* and *Sargent* that a pregnancy followed by an abortion may support a true finding on a great bodily injury enhancement.

Appellant urges this court to decline to follow *Duval* and *Sargent* because "abortion is not an injury in the classic sense." Appellant asserts that abortion "is a valid medical procedure.... It is performed by trained medical personnel, over whom the defendant has no control." We would not expect a criminal to have control over the medical personnel who treat his victim, using valid medical procedures, for the injury that the defendant has inflicted. Testimony about the medical procedures used demonstrates the significance and substantiality of the original injury to assist the factfinder in assessing whether it qualifies as great bodily injury.

Appellant contends, "[T]he trial court erred in instructing on the abortion and [great bodily injury] when it failed to draw the distinction between personally inflicting and proximately causing." Appellant argues, "When, as here, a case is submitted on two alternate theories, one arguably supported by correct instructions (personally inflicting pregnancy could be [great bodily injury]), and one premised upon invalid instructions (personally inflicting abortion could be [great bodily injury]), and when it cannot be determined whether the jury relied upon the valid instructions or the invalid ones, a new trial is required."

The trial court instructed the jury, "If you find the defendant guilty of count one or the lesser crime thereto, you must determine whether the defendant personally inflicted great bodily injury on [K.] in the commission or attempted commission of the crime charged in count one or the lesser crime thereto. [¶] The term great bodily injury as used in this instruction means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury. [¶] A pregnancy or abortion may constitute great bodily injury. You are the exclusive judges of whether the defendant personally inflicted great bodily injury in this case." There was no need for the instructions here to draw a distinction between personal infliction and proximate cause. Neither the instructions nor the arguments of counsel suggested that appellant inflicted the abortion, or that he should be held liable for anything that was not part of the injury that he inflicted. Pregnancy and abortion are mentioned in the instruction in the context of describing the degree of harm from the injury sufficient to qualify as great bodily injury. In determining whether an injury constitutes great bodily injury, the jury may consider what medical

intervention the victim received, and often it is the degree of this intervention that distinguishes a moderate injury from a significant or substantial one. Sufficient evidence supported the true finding that appellant personally inflicted great bodily injury.

Instruction on the Meaning of "Personally Inflict"

[2] Appellant contends, "The trial court erred when it failed *sua sponte* to instruct the jury on the meaning of the term 'personally inflict,' which is a necessary element of the [great bodily injury] enhancement." Appellant recognizes, "Ordinarily, it is sufficient if a trial court instructs the jury in the terms of a statute, if the jury would have no difficulty understanding the words of the statute without guidance. [Citation.] Ordinarily a trial court has no *sua sponte* duty to define terms that are commonly understood by ***104** those familiar with the English language." Appellant argues, citing *Bland,* that the term "personally inflicts" has a technical meaning which differs from common parlance and differs from "proximately causes." Appellant argues, "Under such circumstances, a trial court errs when its instructions fail correctly to define an important term, such as 'personally inflicts.' " Appellant does not supply this court with his idea of a correct definition.

Nothing in *Bland* suggests that this trial court was obliged to define the term "personally inflicts." In *Bland,* the issue was whether the court erred in failing to instruct *sua sponte* on the meaning of "proximate cause" when the defendant was prosecuted for charges that included an enhancement for one who intentionally and personally discharges a firearm proximately causing great bodily injury or death. The Supreme Court said that "proximate causation *does* have a meaning peculiar to the law, and that a jury would have difficulty understanding its meaning without guidance." (*Bland, supra,* 28 Cal.4th at p. 335, 121 Cal.Rptr.2d 546, 48 P.3d 1107.) The court approved the definition of proximate causation set forth in CALJIC No. 17.19.5. (*Id.* at p. 335, 121 Cal.Rptr.2d 546, 48 P.3d 1107.) The court found that the error in failing to define proximate cause was harmless. [2]

Appellant argues, "the jury might have incorrectly applied the layperson's much broader concept of causation in general, or the somewhat broader concept of 'proximately caused,' rather than applying the narrower and more specific concept of direct causation, as expressed by the particularized term, 'personally inflicted.' " The instructions and argument here do not suggest to the jury that it should impose some vicarious or derivative liability on appellant. We do not share appellant's concern that this jury might have taken a term which is understandable to a layperson without further definition and broadened it to include concepts peculiar to the law. The trial court did not err in its instructions on the elements of the enhancement.

Unanimity Instruction

[3] Appellant contends, "The trial court erred when it failed to instruct the jury *sua sponte* that the jury must be unanimous as to which condition, the pregnancy, or the abortion, constituted [great bodily injury]."

[4] "In a criminal case, a jury verdict must be unanimous. [Citation.].... Additionally, the jury must agree unanimously the defendant is guilty of a specific crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, 108 Cal.Rptr.2d 436, 25 P.3d 641.) However, "[a] requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Maury* (2003) 30 Cal.4th 342, 422, 133 Cal.Rptr.2d 561, 68 P.3d 1.) Where "the evidence shows only a single discrete crime but leaves room for disagreement as ***105** to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo, supra,* 25 Cal.4th at p. 1132, 108 Cal.Rptr.2d 436, 25 P.3d 641.) Here, appellant complains that the jurors could have found the great bodily injury inflicted to be the abortion, the pregnancy, or both. However, this jury was not required to agree on a theory underlying the finding supporting the enhancement. There was no room for disagreement that appellant's single discrete crime, committing a lewd act by having sexual intercourse with K., was the act that inflicted the injury. An individual juror could determine that five and one-half months of pregnancy, or the late-term surgical abortion, or both, sufficed to fulfill the requirement of substantial or significant injury. [3] The unanimity requirement demands only that the jury unanimously find that the injury sustained by K. was significant or substantial. (*People v. Robbins* (1989) 209 Cal.App.3d 261, 257 Cal.Rptr. 60.) Due process was served

by the requirement that the jury render a unanimous verdict on the penalty enhancement provision, whether or not it agreed on the theory underlying that finding. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1184, 9 Cal.Rptr.2d 834, 832 P.2d 146; *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591–592, 112 Cal.Rptr.2d 401.) The trial court had no *sua sponte* obligation to instruct the jury that it must be unanimous as to what condition constituted great bodily injury.

Evidence of Pain

Appellant contends, "There was insufficient evidence here of pain, such that either K.'s pregnancy or K.'s abortion constituted great bodily injury within the meaning of Penal Code [section] 12022.7." Appellant asserts, "The standard dictionary definition of 'injure' is 'to give pain,' or 'to inflict bodily hurt.' (Merriam Webster College Dictionary, 10th Ed. (Merriam Webster 1999, p. 602).)" Appellant argues, "There was no evidence that [K.]'s pregnancy caused any pain or hurt. Under such circumstances there was insufficient evidence that [K.]'s pregnancy constituted an injury at all, let alone 'great bodily injury' or a 'significant or substantial physical injury,' as required by Penal Code § 12022.7 and CALJIC 17.20."

The dictionary appellant cites does not support his argument that there must be evidence of pain to support a true finding on a great bodily injury enhancement, defining "injury" as "an act that *damages* or hurts." (Merriam Webster College Dictionary (10th ed.1999) p. 602, italics added.) Penal Code section 12022.7 does not require that the victim of an injury experience pain. As discussed earlier, we agree with the observations made in *Duval* and *Sargent* concerning the significance of the injury when a defendant impregnates a victim through a criminal sex act. K.'s menstrual cycle was disrupted, she gained weight, and her bodily resources were diverted to support the growing fetus for five and one-half months before the pregnancy was terminated by surgery requiring a general anesthetic, considerable cervical dilation, and blood loss. This evidence supports the finding that K. was injured to a significant and substantial degree by appellant's criminal offense.

Appellant states, "neither an abortion nor a pregnancy qualifies as [great bodily injury] in a case of consensual sex, simply ***106** because normal physical conditions and valid medical procedures do not constitute an 'injury' within the meaning of Penal Code § 12022.7." Appellant argues that "the pregnancy was not a[n] 'injury' at all, because pregnancy is not an injury in the traditional sense. Instead, it is ordinarily a joyous physical event.... It brings joy to millions of women." We question whether included in those millions of women are 13–year–old girls who have been molested by their stepfathers. In any event, the fact that some women do seek to become pregnant, or to have abortions, does not relieve appellant of criminal liability for impregnating a 13–year–old any more than the fact that some people have elective rhinoplasty would defeat this enhancement when a crime victim has suffered a broken nose requiring plastic surgery. The dramatic physical consequences here, a second-trimester pregnancy and surgical abortion, support the jury's true finding on the enhancement that this injury, inflicted during the commission of a criminal sex act, was sufficiently significant to be great bodily injury.

Vagueness of the Instructions

[5] Appellant contends, "The instruction that 'a pregnancy or abortion *may* constitute great bodily injury,' was so vague as to violate due process; the jury's discretion on whether to find [great bodily injury] was so unguided that its decision was arbitrary." The trial court instructed the jury, "A pregnancy or abortion may constitute great bodily injury." During the conference on the instructions, defense counsel objected saying, "We don't tell them that a gunshot wound can constitute great bodily injury, you may decide that. So I would object to customizing [CALJIC] 17.20 in this case when we don't do it in other cases."

Appellant argues, "This instruction was improperly vague, (1) because it did not tell the jury how to determine whether pregnancy or abortion constituted an 'injury' at all, and (2) because it did not tell the jury how to determine whether any such injury was 'significant or substantial,' as opposed to 'minor, trivial, or moderate,' so as to constitute [great bodily injury.]" Appellant argues, "[T]he [great bodily injury] instruction was improperly vague because it did not help the jury determine whether, or how, a normal physical phenomenon, pregnancy, or a legally-proper surgical procedure, abortion, could constitute an injury of any kind, let alone great bodily injury." Appellant does not proffer an instruction designed to cure these perceived flaws.

The argument that a jury instruction is vague is different from an argument that a statute is void for vagueness. "[A]n instruction does not establish the elements of a crime, but

merely attempts to explain a statutory definition." (*People v. Raley* (1992) 2 Cal.4th 870, 901, 8 Cal.Rptr.2d 678, 830 P.2d 712.) "[W]hen it is argued the instruction is so vague and confusing as to violate fundamental ideas of fairness, 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' (*Estelle v. McGuire, supra,* 502 U.S. at 72, 112 S.Ct. at 482 [116 L.Ed.2d at p. 399].)" (*Ibid.*)

Appellant argues that when "there is the additional, major question of whether the physical result even constitutes an injury, then CALJIC 17.20 is inadequate, and too vague, to guide or channel the jury's determination.... [¶] In the instant case, the ordinary definition of 'injure' is to inflict hurt or pain. This common definition does not automatically apply to [K.]'s pregnancy or an abortion, because there is no evidence ***107** that either involved 'substantial or significant' pain."

The instructions were not vague. The jury was told that " '[g]reat bodily injury' ... means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury." These instructions directed the jury to apply the common definition of injury to appellant's impregnation of K. and its physical consequences. The prosecutor argued "that [appellant] inflicted this great bodily injury on her by having sexual intercourse with her, getting her pregnant." Neither the instructions as given nor the arguments of counsel lead us to conclude that the jury was reasonably likely to determine, even if it did not consider K. to have been injured within the ordinary definition by the pregnancy and resulting abortion, that a true finding on the enhancement would nevertheless be an appropriate verdict.

Cruel and Unusual Punishment

[6] Before sentencing, one juror wrote to the trial court stating, "I do not believe much good can come from locking [appellant] away in the criminal system and forgetting about him. I think he can still contribute to society. While I know he must pay for his crime, there must be alternatives to a lengthy prison term."

Defense counsel argued that a life term would constitute cruel and unusual punishment because, "In this case, we have Mr. Cross, who has a distinguished military record, who has a record of gainful employment, who at this time in his life has suffered not even one misdemeanor, not even one felony prior to these charged offenses. [¶] We have a jury who basically accepted his entire testimony in that all of the sexual offenses were consensual, none involved any force, violence, duress, menace, threat. So we have a person being sentenced to a life sentence where he had a completely clean criminal record." The trial court rejected defense counsel's arguments and specifically found that the proposed sentence was not cruel and unusual under either the California or federal Constitution. The trial court said that appellant was ineligible for probation and that even if he were eligible, probation would be denied because "the likelihood that the defendant would succeed on a probationary grant is extremely poor."

The true finding on the Penal Code section 12022.7 enhancement made appellant's conviction for violating Penal Code section 288, subdivision (a) (non-forcible lewd act on a child under 14 years of age) punishable by a term of 15 years to life under Penal Code section 667.61, the one-strike law. The trial court sentenced appellant to an indeterminate term of 15 years to life for lewd conduct with a child, consecutive to a midterm sentence of six years for non-forcible oral copulation on a child. Appellant contends, "Sentencing [a]ppellant to a life term for non-violent, consensual sexual activity violates the constitutional proscriptions against cruel and unusual punishment."

[7] The Eighth Amendment of the federal Constitution, applicable to the states through the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.) Likewise, article I, section 17, of the California Constitution declares "[c]ruel or unusual punishment may not be inflicted or excessive fines imposed."[4] The selection of a proper ***108** penalty for a criminal offense is a "legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will." (*In re Lynch* (1972) 8 Cal.3d 410, 423, 105 Cal.Rptr. 217, 503 P.2d 921.)

[8] "It is well settled a statutory punishment may violate the constitutional prohibition against cruel and unusual punishment not only if it is inflicted by a cruel or unusual method, but also if it is grossly disproportionate to the offense for which it is imposed. [Citation.] In the case of *In re Lynch* (1972) 8 Cal.3d 410, 105 Cal.Rptr. 217, 503 P.2d 921 ... the Supreme Court held a punishment may violate the California constitutional prohibition 'if, although not cruel or unusual in its method, it is so disproportionate to the crime for

which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*Id.* at p. 424, 105 Cal.Rptr. 217, 503 P.2d 921.)" (*People v. Thompson* (1994) 24 Cal.App.4th 299, 304, 29 Cal.Rptr.2d 847.)

In *People v. Dillon* (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697, the California Supreme Court expanded its analysis of crimes and proportional punishments. The court explained that the trial court must consider the specific facts of the crime in question, as compared with only considering the crime in the abstract. (*Id.* at p. 479, 194 Cal.Rptr. 390, 668 P.2d 697.) In addition, the court must consider the nature of the offender and ask whether the punishment is grossly disproportionate to the defendant's culpability, taking into account factors such as age, prior criminality, personal characteristics, and state of mind.

Since *Dillon*, "[f]indings of disproportionality have occurred with exquisite rarity in the case law. Because it is the Legislature which determines the appropriate penalty for criminal offenses, defendant must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196–1197, 2 Cal.Rptr.2d 714.)

Appellant argues, "Appellant had no prior criminal record. He served 10 years in the U.S. military and received an honorable discharge. He was gainfully employed for most of his post-military life, working as a security guard, and as a bus driver, most recently for VTA. [¶] Uncontradicted evidence established that [a]ppellant, prior to these sexual activities, was a normal and excellent father to his natural son and an excellent stepfather to Wife's two daughters by another man. Appellant helped support all the children. He took them on vacations, he took them shopping at the mall, and he played sports and games with them."

Appellant argues, "The only factor which statutorily provides for life imprisonment for a consensual [Penal Code section] 288(a) is the [great bodily injury] enhancement.... [I]t violates the cruel and unusual punishment clause to sentence [a]ppellant to life imprisonment because of the aggravating factor of pregnancy, over which he had no control. Whether or not sexual intercourse results in pregnancy is a matter of chemistry, the time of the ***109** month, and fortuity. Counsel knows of no crime where mere fortuity turns a crime with the relatively ordinary sentencing range of 3–6–8 years into a crime with a life sentence."

According to appellant's testimony at trial, he had intercourse with K. more than 100 times, a fact that considerably weakens his "fortuity" argument. Appellant's claim here that he had been an exemplary parent until he began having sex with K. is consistent with the tone of that testimony. He testified that he wrote to K. to say that he was sorry about "just the whole situation." He testified "I knew me and her shouldn't have had a relationship, but I got screwed up." He testified, "Like I told them, I was the adult, blame everything on me." He said, "We just been through a lot together. I know she loves me, I told her I love her." Appellant's position, that he "violated social mores," makes it sound as if he and K. were star-crossed lovers and that he has committed a romantic breach of etiquette, the moral equivalent of giving a minor a can of beer. Appellant demonstrates an appalling lack of appreciation for the anguish of an eighth grader facing either having a late-term surgical abortion or carrying through labor and delivery her "normal and excellent" stepfather's child. Although the great bodily injury enhancement applies to physical injury rather than psychological or emotional trauma, in reviewing this sentence we are mindful, as was the trial court, of the devastating impact of appellant's selfish behavior on K. and the rest of her family.

Appellant argues, "Appellant's 15–life sentence is the same as that imposed for much more serious offenses, such as second degree murder .... [a]ppellant knows of no other state which imposes life imprisonment on a first offender for a non-violent, consensual sexual offense." Appellant argues his sentence is cruel and unusual because, "The California statutory scheme under section 667.61 does not allow for any judicial discretion at all in sentencing."

Appellant's repeated references to what occurred between him and K. as "consensual" is troubling. K.'s purported "consent" does little to lessen appellant's level of culpability for violating a statute the purpose of which is to protect children and young teenagers from sexual exploitation. (See *People v. Olsen* (1984) 36 Cal.3d 638, 205 Cal.Rptr. 492, 685 P.2d 52.) Growing concern about the sexual abuse of children has led to increases in sentencing for this type of offense. The sentence here is undeniably severe, but our society has decided, as appellant invited the authorities to do, to "blame everything on [him]." Consistent with this sentiment, the Legislature has increased the state prison sentence for violations of section 288. In 1978, the penalty for section 288 was increased from three, four or five years to three, five or seven years. (Stats.1978, ch. 579, § 17, p.1984.) In 1981, the punishment was increased to the present three-, six- or eight-year term.

(Stats.1981, ch. 1064, § 1, p. 4093.) At the time *Sargent* and *Duval* were decided, the great bodily injury enhancement at issue was punishable by a three-year term. (*Duval*, *supra*, 198 Cal.App.3d at p. 1133, 244 Cal.Rptr. 522.) The Legislature has now chosen, in fashioning the one-strike law, to punish with a 15–years–to–life term appellant's precise offense: a non-forcible lewd act with a child under 14 in violation of Penal Code section 288, subdivision (a) in which the defendant inflicts great bodily injury. It is difficult to imagine how one could inflict great bodily injury in the commission of a non-forcible lewd act other than by impregnating the victim or by passing on a sexually transmitted disease. In enacting this statute, the Legislature intended to isolate people such as appellant in order to prevent ***110** them from molesting and harming another child. The sentencing court stated clearly that, even if it had had the discretion to impose a lesser sentence by granting probation, it would not do so. Thus, the views of the modern society, the sentencing court, and the Legislature are at odds with appellant's assertion that "[t]raditional consecutive sentencing would more than adequately punish [a]ppellant for his crimes." Appellant's sentence here is not out of proportion to the offenses he has committed. Accordingly, after considering the totality of the circumstances, we conclude that appellant's punishment does not shock the conscience of this court or offend fundamental notions of human dignity.

Disposition

The judgment is affirmed.

RUSHING, P.J., and PREMO, J., concur.

All Citations

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Footnotes

1 The parties stipulated that on the day appellant was arrested, police found a dozen condoms in his backpack.

2 The *Bland* court reasoned that the jury could not have misunderstood the term "proximate cause" in a way that would have resulted in a finding of proximate causation on an improper basis. The court said that a proper instruction would not have required the jury to find that the defendant personally caused injuries or death in order for his actions to have been the proximate cause of injuries or death, that the defendant personally used a firearm, and that such personal use was a substantial factor contributing to the injuries and death.

3 Of course, a juror who considered the abortion significant enough to constitute great bodily injury necessarily determined that K. was pregnant.

4 Inasmuch as the California Constitution's ban against cruel and unusual punishment arguably affords defendant broader protection than the United States Constitution, we analyze appellant's claim only under the California standard. A punishment that satisfies this standard necessarily also satisfies the federal standard. (Cf. *People v. Anderson* (1972) 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 880.) California case law recognizes that the federal prohibition against cruel and unusual punishment offers no greater protections than the analogous state constitutional provision. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510, 84 Cal.Rptr.2d 638.)