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State of California

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OPINION

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THE BOARD OF PRISON TERMS has requested an opinion on the following question:

Are the crimes of sodomy, oral copulation and rape, when committed in concert in violation of Penal Code sections 286(d), 288a(d) and 264.1, respectively, among the violent felonies included within Penal Code section 667.5(c), for the enhancement of prison terms?

CONCLUSION

The conduct specified in Penal Code sections 286(d), 288a(d) and 264.1, when sodomy, oral copulation and rape are committed in concert, constitute violent felonies within the meaning of Penal Code section 667.5(c).

ANALYSIS

In a criminal prosecution, at the time of sentencing, the trial judge has authority to increase the length of the selected base term for the substantive offense by imposing enhancements.” (Penal Code § 1170.1.)¹ Among the various enhancements are those in section 667.5. This section, in specified situations, provides for an additional three-year prison term for each prior separate prison term served by the defendant where the prior and the new offense are “violent felonies.” The governing statutory provisions are subdivisions (a) and (c) of section 667.5, which state:

“Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:

“(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior was one of the violent felonies specified in subdivision (c); provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

“.....

“(c) For the purpose of this section, ‘violent felony’ shall mean any of the following:

“(1) Murder or voluntary manslaughter.

“(2) Mayhem.

“(3) Rape as defined in subdivision (2) of Section 261.

“(4) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

“(5) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

¹All statutory references in this opinion are to the Penal Code.

“(6) Lewd acts on a child under 14 as defined in Section 288.

“(7) Any felony punishable by death or imprisonment in the state prison for life.

“(8) Any other felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5.

“The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society’s condemnation for such extraordinary crimes of violence against the person.”

The express identification of the felonies that “shall” be violent felonies for purposes of the three-year enhancement indicates that this list of felonies was intended to be an exclusive list. Under traditional rules of statutory construction, the enumeration of things coming within the operation of a statute, as in subdivision (c) of section 667.5, precludes the inclusion by implication of other things not enumerated. (*People v. Mancha* (1974) 39 Cal. App. 3d 703, 713.) Consequently, the question asked by the Board of Prison Terms requires us to determine whether or not any of the eight subdivisions of section 667.5(c) incorporates the crimes of sodomy, oral copulation or rape when committed in concert.²

Penal Code section 286(d):

The crime of sodomy when committed in concert is punishable by section 286(d):

“Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of sodomy when the act is accomplished against the victim’s will by means of force or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state

²We have no basis to relate these crimes to subdivision (1), murder or voluntary manslaughter, subdivision (2), mayhem, subdivision (6), lewd acts under section 288, and subdivision (7), felony punishable by death or life imprisonment. Accordingly, our discussion will be limited to the application of subdivisions (3), (4), (5), and (8).

prison for five, seven or nine years.”

This form of the statute was generated by Senate Bill No. 1930. (1979–1980 Reg. Sess.; Stats. 1980, ch. 915, pp. 334–335, § 1.) Prior to amendment the statute punished sodomy in concert “by force or violence and against the will of the victim. . . .” (Stats. 1979, ch. 944, p. 3253, § 6.) One effect of the 1980 change was to substitute the term “fear of immediate and unlawful bodily injury” for the term “violence”; the alternative element of “force,” however, was retained.

Section 667.5(c) includes among the definitions of the violent felonies which authorize a three-year enhancement, subdivision (4).

“Sodomy by force, violence, duress, menace, or threat of great bodily harm.”

This phraseology is not identical to that used in the several subdivisions of section 286 which set out varying punishments for sodomy based on differing factual circumstances. The wording of section 667.5(c)(4) comes closest to that used in section 286(c) (victim under 14 years of age) which includes the words “force, violence, duress, menace, or fear of immediate and unlawful bodily injury.” However, if the Legislature intended section 667.5(c)(4) to be a reference only to section 286(c) it would have used the precise language of 286(c) or have directly mentioned section 286(c) in the same manner that it confined rape, in section 667.5(c)(3), to its definition in section 261(2). We conclude, therefore, that section 667.5(c)(4) applies generally to the crime of sodomy and not to any particular subdivision of section 286.

Since sodomy accomplished “by means of force,” in section 286(d), is indistinguishable from sodomy “by force,” in section 667.5(c)(4), the conclusion is inescapable that forcible sodomy in concert is a violent felony and, thus, the three-year enhancement provision would be applicable. Nevertheless, this conclusion raises a practical problem inasmuch as section 286(d) allows for a finding by the trier of fact of either the “force” element or the “fear” element, or both. The jury’s verdict or the trial judge’s decision may not disclose which alternative fact was found. Similarly, a guilty plea or an abstract of judgment for a conviction previously served may be silent on whether the crime was accomplished by “force” or “fear.” Of course, where there is an express finding or judicial admission of sodomy in concert by force the enhancement provision would be operative

However, we do not have to resolve the above problem because we also conclude that the alternative to “force” in section 286(d), namely “fear of immediate and unlawful bodily injury,” is also a description of sodomy within the purview of section 667.5(c)(4). We believe the words “duress” and “menace,” in their common and ordinary meanings, encompass the “fear” element in section 286(d).

Duress has been defined as the “compulsion or constraint by which a person is illegally forced to do or forbear some act by actual imprisonment or physical violence to the person or by threat of such violence, the violence or threat being such as to inspire a person of ordinary firmness with fear of serious injury to the person (or loss of liberty or of life or limb), reputation, or fortune.” (*Webster’s Third New International Dictionary*, 1961 Edition, p. 703) Menace has been defined as “a show of intention to inflict harm: a threatening gesture, statement, or act against.” (*Id.*, at 1409. See *People v. Stoddard* (1964) 227 Cal. App. 2d 40, 41.)

Duress and menace are often interchangeable. (*Leeper v. Beltrami* (1959) 53 Cal. 2d 195, 203; *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 128.) In the civil law context, the words are expressly defined. (Civil Code §§ 1569 and 1570.)³ In the criminal law context, when considering duress or menace as a defense to criminal conduct [see Penal Code § 26 (Seven)], there must be proof of “a threat of imminent violence. . . .” (*People v. Killman* (1975) 51 Cal. App. 3d 951, 957.) The element of immediacy is a critical part of the definition. (*People v. Otis* (1959) 174 Cal. App. 2d 119, 125. See also 1 Witkin, *California Crimes*, §§ 155–157, pp. 149–151; Fricke-Alarcon, *California Criminal Law* (11th Ed.), pages 80–81.) In *People v. Zilbauer* (1955) 44 Cal. 2d 43, 51, in considering the felony of false imprisonment effected by violence or menace, the court in quoting from an earlier authority stated:

³Under Civil Code section 1569, duress consists in:

- “1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
- “2. Unlawful detention of the property of any such person; or,
- “3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.”

Under Civil Code section 1570, menace consists in a threat:

- “1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or
3. Of injury to the character of any such person.”

“Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty or is compelled to remain where he does not wish to remain, or to go where he does not wish to go, is false imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating on the will of the individual or by personal violence, or both. . . .”

In our opinion when the act of sodomy is accomplished against the will by inducing fear of immediate and unlawful bodily injury on the victim or another person, such is sodomy by duress and by menace. Accordingly, if a person is convicted of sodomy in concert, a violation of section 286(d), whether the act was carried out by “force” or “fear,” or both, the crime is subject to the violent felony enhancement provision in section 667.5.⁴

Under section 667.5(c)(8), where great bodily injury has been charged and proved (see Pen. Code § 12022.7) or firearm use has been charged and proved (see Pen. Code § 12022.5), and where it is the defendant who has inflicted the injury or used the firearm, the felony committed is deemed a violent felony. Consequently, a conviction under 286(d) could be subject to the enhancement if the appropriate findings were made. As we have seen, the enhancement is three years for each prior term served if the present conviction is for a violent felony defined in section 667.5(c), and if each prior is also such a violent felony. If the current conviction is under section 286(d), and the prior comes within one or more of the categories in 667.5(c), then the enhancement would be proper. By the same analysis, convictions under sections 288a(d) and 264.1 might be enhanced under section 667.5(c)(8).

Section 288a(d):

Our analysis of section 288a(d) is similar to our analysis of 286(d) above. Section 288a(d) provides:

“Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of oral copulation when the act is accomplished against the victim’s will by means of force or fear of immediate and unlawful bodily

⁴We do not construe the language “threat of great bodily harm,” found in section 667.5(c)(4), to correspond with the language “fear of immediate and unlawful bodily injury,” found in section 286(d). The latter denotes a lower threshold of violence. The term “great bodily harm” has an established meaning in the criminal law. (Penal Code § 12022.7; see *People v. Caudillo* (1978) 21 Cal. 3d 562, 575–589.)

injury on the victim or another person shall be punished by imprisonment in the state prison for five, seven, or nine years.

Oral copulation by force under section 288a(d) is indistinguishable from oral copulation by force under section 667.5(c)(5). Likewise, oral copulation accomplished against the victim's will by means of fear of immediate and unlawful bodily injury is tantamount to oral copulation by duress or by menace under section 667.5(c)(5).

With reference to 288a(d), as well as with reference to 286(d), nothing suggests that the Legislature intended that such crimes be deemed less violent because they were committed in concert. Certainly the injury to the victim is the same. An examination of the reported cases does not show that the culpability of the defendant is any less because he did not personally perform the act. (*People v. Dixon* (1979) 24 Cal. 3d 43, 46–47; *People v. Cortez* (1981) 115 Cal. App. 3d 395, 401–404; *People v. Murphy* (1980) 111 Cal. App. 3d 207, 210; *People v. Gordon* (1978) 84 Cal. App. 3d 913, 917–918.) Indeed a violation of section 288a(d) carries the highest range of punishment of all the offenses enumerated in section 288a. The same is true with respect to a violation of 286(d) when compared with the other subdivisions of section 286.

That the Legislature intended to treat violations of sections 288a(d) and 286(d) with severity is further evidenced by section 667.6 which provides in part:

“(a) Any person who is found guilty of . . . committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or threat of great bodily harm who has been convicted previously of any such offense shall receive a five-year enhancement for each such prior conviction. . . .”

The Legislature in section 667.6 did not differentiate between oral copulation and sodomy when the defendant is a participant and when the defendant acts in concert.

We believe that section 288a (d) and section 286(d) are properly characterized as violent felonies and that such characterization is consistent with the legislative scheme to impose greater penalties on violent, gang-type sexual assaults.

Section 264.1:

Rape is defined in section 261 as follows:

“Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator under any of the following circumstances:

- “1. Where a person is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent.
2. Where it is accomplished against a person’s will by means of force or fear of immediate and unlawful bodily injury on the person or another.
3. Where a person is prevented from resisting by any intoxicating, narcotic, or anaesthetic substance, administered by or with the privity of the accused.
4. Where a person is at the time unconscious of the nature of the act, and this is known to the accused.
5. Where a person submits under the belief that the person committing the act is the victim’s spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.”

A rape committed in violation of section 261 is punishable, under section 264, by imprisonment in state prison for three, six or eight years. However, under section 264.1, if the defendant voluntarily acts in concert with another person, and by force or violence and against the will of the victim, commits the rape either personally or by aiding and abetting such other person, then the defendant is confronted with a state prison term of five, seven or nine years. Section 264.1, in its entirety, states:

“The provisions of Section 264 notwithstanding, in any case in which defendant, voluntarily acting in concert with another person, by force or violence, and against the will of the victim, committed the rape, either personally or by aiding and abetting such other person, such fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, defendant shall suffer confinement in the state prison for five, seven, or nine years,”

In defining violent crimes for the three-year enhancement of section 667.5(c), the Legislature has included in subdivision (3) the crime of “[r]ape as defined in subdivision (2) of Section 261.” As we have seen, section 261(2) defines a rape accomplished against a person’s will “by means of force or fear of immediate and unlawful bodily injury on the person or another.”

We find that a rape committed in concert “by force or violence and against the will of the victim” is also a rape as defined in section 261(2) and we therefore conclude that the three-year enhancement provision of section 667.5 would apply.⁵

To reach this conclusion we compared the language of section 261(2) with the language of section 264.1. The type of rape defined in section 261(2) is one committed by means of “force” or “fear”; the in concert rape described in section 264.1 is accomplished by “force” or “violence.” Certainly, if the defendant acted in concert and the trier of fact also found, or the defendant so admitted, that he used “force” upon the victim, then this would be a rape under section 261(2). Indeed, the Legislature in using the wording “[t]he provisions of Section 264 notwithstanding. . . .” was providing for a more severe penalty for a violation of section 261(2) when the crime was carried out in concert. This is consistent with our analysis of sections 286(d) and 288(a)(d) which demonstrated a legislative intent to deal more severely with sodomy and oral copulation when committed in concert. (See *People v. Gutierrez* (1978) 80 Cal. App. 3d 829, 839.)

The question remains whether a rape committed in concert by “force” is equivalent to a rape committed in concert by “violence.” We believe that it is. As is often stated, unless otherwise intended or indicated statutes should be construed in accordance with the common or ordinary meaning of the language used. (*Standard Oil Co. v. State Bd. Of Equalization* (1974) 39 Cal. App. 3d 765, 768.) A rape by “violence” is at least as severe as a rape by “force.” The Legislature reasonably cannot be viewed as having attached a greater punishment to rape by force than to a rape by violence. In relation to assaultive conduct, the term “violence” is usually synonymous with the term “force.” (*People v. Flummerfelt* (1957) 153 Cal. App. 2d 104, 106; *People v. Whalen* (1954) 124 Cal. App. 2d 713, 720.)

The purpose of section 264.1, as determined by the courts, is to “discourage gang sexual assaults where any unlawful force is used.” (*People v. Wheeler, supra*, 71 Cal. App. 3d 902, 907; see also *People v. Gutierrez, supra*, 80 Cal. App. 3d 829, 839.) This same purpose can be found in sections 286(d) and 288a(d). Since the crimes are also violent felonies, coming within the provision of section 667.5 (c), the punishment can be enhanced based on service of prior terms for violent felonies.

⁵We do not determine that a rape in concert by force or violence within section 264.1 must always be a forcible rape as defined in section 261(2). In *People v. Wheeler* (1977) 71 Cal. App. 3d 902, 907, the court sustained an increase in punishment under section 264.1 for aiding and abetting with force and violence a rape accomplished through threat of harm.

As a practical matter, charges of rape in concert may be filed as violations of section 261(2) together with the charges and special allegations of section 264.1. This combination of charges would, where there are appropriate prior felonies alleged, call for applications of section 667.5(c)(3).

We conclude that the types of conduct described in section 286(d) when sodomy is committed in concert, or in section 288a(d) when oral copulation is carried out in concert, or in section 264.1 when rape is perpetrated in concert, trigger a possible application of the three-year enhancement provision of section 667.5(c) if the defendant has served a prior term or terms for other violent felonies.
