

Sexual Exploitation of a Mentally Disabled Victim
People v. Vukodinovich (June 29, 2015) 238 Cal.App.4th 166
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Rule: The developmental disabilities of a person may prevent her from having the positive cooperation in act or attitude pursuant to an exercise of free will necessary for a legal consent in submitting to sex acts.

Facts: Defendant was a 73-year-old bus driver for Yolo Employment Services; a nonprofit agency providing work activity programs, job training, and job retention services for individuals with disabilities. Defendant's duties involved driving clients to and from work. "L." was a 49-year-old female client of Yolo Employment Services, who had a mental age of three or four and an IQ of 37. She was also partially blind and could not read or write. Between 2009 and 2012, defendant drove L. to and from her work at a Walgreens warehouse where she worked at affixing labels to products. During this time period, defendant coaxed L. into engaging in various acts of sexual intercourse, oral copulation, and digital penetration, with most acts occurring in the bus on the way home. L. commonly went along with this activity, although she often told him that she didn't want to engage in the sex acts. When she resisted, defendant persisted anyway. According to L., defendant would direct her to move up to the front seat, having her lie down on the floor, and then remove her clothes. He would put "[p]inky, two hand" in her "gina." L. testified that "it felt "[n]ot good." Or he would kiss her breasts and "gina." L. testified that he would tell defendant; "No more, Tom, no more, no more, stop." But defendant would push her to the floor and do things like make her lick his "peanut" and put it in her mouth. When she told defendant, "no more," defendant "[a]gain," "pushed [her] head down." On one occasion, defendant told L. to sit on his lap while he was in the driver's seat, and he put "[h]is peanut" in her "gina." Defendant told L. not to tell others about what they were doing or he might get fired. At trial, however, L's testimony showed that she was not totally resistant to the idea of participating in the alleged acts of sex. When asked if she wanted to have sex with defendant, she responded; "A little bit, not a lot." When asked why she wanted to have sex with defendant, she responded; "It's good." When asked whether she wanted defendant to put his finger in her vagina, L. responded; "Yeah, one, not two." L.'s sister eventually discovered what was going on and called the police. When interviewed by the police, defendant claimed that L. was the aggressor; that she "enjoys sex and wants it from wherever she can get it." L., on the other hand, said that she "not want it." When asked what sex meant to her, she said, "The baby. Don't wanna a baby." Defendant was charged in state court with various counts of sexual intercourse, attempted sexual intercourse, oral copulation, and penetration with a foreign object, all with a person who "is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent." (P.C.

§§ 261(a)(1), 288(g), & 289(b)) Convicted of eleven counts of the above (hanging on 46 other counts, all of which were later dismissed), defendant was sentenced to 14 years in prison. He appealed.

Held: The Third District Court of Appeal affirmed. Defendant's primary contention on appeal was that the statutes criminalizing sexual conduct with people incapable of consent due to a developmental disability are unconstitutional because they violate his (and L.'s) federal and state rights to privacy. Citing the U.S. Supreme Court case of *Lawrence v. Texas* (2003) 539 U.S. 558, where it was held that attempts to criminalize sex acts (specifically, sodomy) between consenting adults, occurring in the privacy of their home, constitutes a Fourteenth Amendment due process violation, defendant argued that the same theory applied to what he and L. were doing. The Supreme Court, in *Lawrence*, however, made it clear that due process in such a context protects only "the private sexual conduct of two consenting adults." It does not extend to the situation where a person has sex with another who is so mentally incapacitated as to be legally (even if not factually) incapable of consenting. To the contrary, the state has a duty to protect individuals with disabilities. "Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people." Defendant also argued that there was insufficient evidence that L. lacked the legal capacity to consent to his sexual advances. In rejecting this argument, the Court first noted that "legal consent" is defined as the "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." (P.C. § 261.6) The Court then compared the facts in this case with three prior decisions, all of which found a lack of consent due to the victim's "weakened intelligence." First, in *People v. Boggs* (1930) 107 Cal.App. 492, a defendant's conviction of rape was upheld where the victim had the mental capacity of a 10 or 12 year old and lacked "sufficient mentality to protect herself from the ordinary vicissitudes of life." The victim testified in *Boggs* to relenting to the defendant's advances because she had things to do and he wouldn't go away until she did. Second, in *People v. Mobley* (1999) 72 Cal.App.4th 761, the defendant's convictions of unlawful sodomy of two men in their early 20's were upheld where both victims had low IQs (80 and 75), the cognitive functioning of adolescents (14 and 11 year old), and some basic sex education. Both victims in *Mobley* testified that they consented to the sex acts. But the evidence showed that they did so only after being talked into them by a defendant who befriended them and pressured them into believing "that friends kiss, go to bed together and engage in sex." Finally, in *People v. Thompson* (2006) 142 Cal.App.4th 1426, where the victim conversed at the level of a nine or ten year old and read at the level of a seven or eight year old, and who could not cook, use a bus, or do simple arithmetic, it was found that she did not have the mental capacity to legally consent to a sex act. Compared to the victims in these cases, the Court held here that "substantial evidence" supported the jury's determination that L. also was

legally incapable of giving her consent to the sex acts committed by defendant. L. had a mental age of three or four and an IQ of 37, putting her in the “moderately disabled” category. She could not read or write. Although she could bathe herself and change herself, she did not consistently select clothes appropriate for the weather. She could not cook. As far as sex was concerned, she understood only enough to know that she didn’t “wanna a baby.” The Court found that based upon this (and other details of the victim’s lack of a true understanding of the nature of what having sex really meant), it was not shown that she had the capacity to give legal consent. Defendant, therefore, was properly convicted.

Note: I don’t often brief “sufficiency of the evidence” cases in that they are commonly so fact-specific that they don’t really aid us in evaluating the next such case to come along. But there seems to be such a spurt of sex cases in the news lately involving the issue of consent that I felt it was worth talking about. More specifically, we need to have some understanding about how the issue of consent relates to persons with mental or developmental disabilities. The Court noted that one percent of the United States population has one form or another of a developmental disability. And with a current trend towards attempting to integrate such persons into society, as opposed to sticking them away in some institution, these people are perhaps more available to predators for sexual exploitation. This particular case, for instance, tells us that just because the victim has seemingly agreed to participate in one sex act or another doesn’t mean that they are legally capable of giving such a consent. This case will help you get comfortable with what the standards are and hopefully sensitize you to the issue, if you aren’t already.