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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SOPHIA C. MELENDREZ,

Defendant and Appellant.

A133771

(San Francisco County
Super. Ct. No. 215499)

Sophia C. Melendrez appeals from a judgment upon a jury verdict finding her guilty of first degree burglary (Pen. Code, § 459); receiving stolen property (Pen. Code, § 496, subd. (a)); and petty theft (Pen. Code, § 484, subd. (a)). She contends that the judgment convicting her of burglary and receiving stolen property must be reversed because the trial court erred in refusing to instruct on the defense of duress. We affirm.

I. FACTS

On the evening of April 24, 2011, Loren Umbertis returned to his home at 2608A Sutter Street in San Francisco to discover that his flat had been burglarized while he was away for the weekend. He noticed that the front door's window pane was broken and that there was glass on the floor as he entered his home. He found clothes strewn about in the living room and his computer and other electronic equipment were missing. In addition, Umbertis found that a steel sword, a leather machete case, two external hard drives, two cameras, his passport, personal bank checks, speakers, clothing, shoes, jewelry, and other items were missing.

Umbertis reported the incident to the police. As he was cleaning up his living room, he found a Hello Kitty wallet. The wallet contained an unemployment check with a social security number and defendant's name and a bank statement. Umbertis gave these items to the police.

Yahaira and James Cetina lived in the flat next door to Umbertis's unit. At about 2:00 or 2:30 a.m. on April 23, 2011, they were watching television when they heard loud noises as if someone was moving things next door. The Cetinas looked out the window and saw defendant taking things out of the flat and putting them in the driveway.¹ About 15 to 20 minutes later, they saw defendant place several bags she had taken from the flat into a taxicab. Defendant told the taxicab driver that she was moving from her boyfriend's house.

Sergeant Andrew Cox interviewed defendant upon her arrest. An audiotape of the interview was played for the jury. Defendant first denied any participation in the burglary, but subsequently explained that her friend, Precious, a prostitute, and James Sinay, a methamphetamine dealer, took her identification, debit card, phone, and \$200, because Precious was angry at her for having referred her to a potential client who turned out to be an undercover cop. Defendant told Cox that she committed the burglary because Precious and Sinay wanted collateral in exchange for her belongings.

In defense, defendant testified that she suffered from a generalized anxiety disorder. Defendant had been using marijuana since she was 18 for her anxiety, and in May 2010, she met Sinay, who introduced her to methamphetamine. Through Sinay, she met Precious. She and Precious became friends.

On April 23, 2010, defendant was living with her boyfriend, Brian Ortiz. Ortiz wanted to meet her friends so defendant took him with her to Sinay's house. Defendant directed Ortiz to go buy some beer while defendant checked with Sinay to make sure he was alright with the visit. On the way to Sinay's house, an older man approached her and

¹ The Cetinas identified defendant in a photographic lineup as a person that resembled the burglar.

offered her \$300 for sex. Defendant declined but told the man that she had a friend who might be interested; the man gave her his phone number.

When she got to Sinay's house, Precious and her pimp, Rasta, were there. Defendant told Precious about the man's offer and gave her his phone number. Precious left, and defendant soon left to get Ortiz. Defendant returned about five minutes later with Ortiz. Defendant introduced Ortiz to Sinay and Rasta and they made small talk. About a half hour later, Precious returned and was angry. She punched defendant in the face and started hitting her. She accused defendant of setting her up with an undercover cop. Defendant tried to explain that she did not know the man was a cop but Precious continued to hit her. Ortiz tried to intervene, but Rasta pulled him back.

Precious eventually stopped hitting defendant. Sinay subsequently took Ortiz's cell phone and demanded his wallet. Sinay took \$10 out of Ortiz's wallet and returned the wallet to him. Ortiz left, but defendant opted to stay because she wanted to get Ortiz's phone back.

Defendant pleaded with Sinay to return Ortiz's phone to no avail. Precious then took defendant's cash, driver's license, California identification card, and debit card out of her wallet. Her license and identification card listed her family's home address. Precious told defendant that she owed her \$300 since she lost \$300 as a result of her bad referral. Precious said, "you owe me a couple of racks, and I don't care if you've got to pull a lick, rob a house, sell your ass, do whatever you need to do because I'm charging you interest." Precious also threatened defendant's family if she failed to pay by the following day. She told defendant that if she went to the police, she would just make a call from jail and say "take care of that."

Defendant demanded her identification back; she was concerned that it had her family's home address on it. Precious hit defendant again, and defendant hit her in the face. At that point, Rasta intervened and started to hit defendant. They pushed her out of the house.

Defendant went to the apartment of D'Boy, another methamphetamine dealer, to get his advice on Precious. D'Boy offered her some valium and defendant took six pills.

D'Boy told her that nothing was going to happen and not to worry. Defendant fell asleep for about an hour. When she woke up, she asked D'Boy if he would loan her money, but he declined.

Defendant left D'Boy's apartment and wandered the streets. She saw a house that didn't have any lights on and that had a door with glass panels. She thought she might be able to break in and take some things to sell so she could pay Precious. She rang the doorbell but no one answered. She decided to burglarize the place. She threw a brick into one of the glass panels, and waited to see if there was a response. She waited about half an hour before entering the house. She took a computer, a machete, clothes, shoes, and other items that might be of value. She filled up a garbage bag and used a sheet to carry items and placed them outside on the driveway. She then hailed a cab and told the cab driver that she was moving some stuff out of her boyfriend's house.

She decided to go back to D'Boy's place because he buys stolen goods. D'Boy was not there. Defendant waited in the lobby with the things she had stolen and tried to sell them to people walking by. When D'Boy arrived, he became upset with her and ordered her out. She took another cab to Ortiz's apartment.

Defendant managed to get into Ortiz's apartment and woke him up to get help to bring the stolen items inside. Defendant told Ortiz she would get rid of the things the following day.

After sleeping for a few hours, defendant and Ortiz went to Seventh Street to try to sell the items. They were unsuccessful; Ortiz opted to leave because he did not want to be involved.

Defendant was able to sell a camera for \$20, but was unable to sell anything else. She met a man named Christopher, and together they decided to try to cash a check for \$600 at a check cashing store. But Christopher was unable to cash the check.

Defendant left Christopher and decided to go to Sinay's house, because she thought he might be interested in buying the passports. Sinay was not interested and told her to get out.

Defendant walked back to Market Street and went to Walgreen's. She was thirsty. She tried to use a check to buy a bottle of wine but without any identification, Walgreen's would not accept the check. Defendant decided to steal the wine. She put the bottle in her bag, picked up a 12-pack of beer, and walked out of the store. As she exited from the store, she was chased down by three Walgreen's employees who called the police.

Ortiz testified at trial and confirmed that Precious assaulted defendant, and that his wallet and phone were taken from him at Sinay's place.

Sinay testified and acknowledged that defendant and Precious fought because Precious was upset that she was almost arrested for prostitution. He denied assaulting defendant or Ortiz or taking any of their property. He also denied that Precious threatened defendant's family or ordered defendant to commit a burglary or robbery.

Amanda Gregory, a clinical psychologist, testified that defendant had a generalized anxiety disorder and suffered from severe anxiety. As a result, her expectation of harm or seeing threats was much higher than people without the disorder. She thus might over-perceive or misperceive the gravity of a threat.

II. DISCUSSION

Defendant contends that the trial court erred when it refused her request to instruct on the defense of duress. We conclude that the trial court properly refused to give the instruction.

“A defendant, upon proper request . . . has a right to an instruction to direct the jury's attention to evidence from which a reasonable doubt of his guilt could be inferred.” (*People v. Jeffers* (1996) 41 Cal.App.4th 917, 924–925.) “In determining whether a requested instruction must be given, the trial court must first evaluate the evidence to determine if the theory proffered by the defendant is supported by substantial evidence. Only if the theory is supported by substantial evidence is the refusal to give a requested instruction erroneous.” (*People v. Randolph* (1993) 20 Cal.App.4th 1836, 1841.)

The trial court denied defendant's request for a duress instruction, reasoning that there was insufficient evidence of an immediate and imminent harm to justify a duress

instruction, and that defendant’s fear of a future harm did not relieve her of responsibility for the crime.

“Penal Code section 26 declares duress to be a perfect defense against criminal charges when the person charged ‘committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.’ ” (*People v. Viera* (2005) 35 Cal.4th 264, 289–290.) “ ‘A fear of *future* harm to one’s life does not relieve one of responsibility for the crimes he commits.’ [Citations.]” (*People v. Heath* (1989) 207 Cal.App.3d 892, 900.) “The duress defense, through its immediacy requirement, negates an element of the crime—the intent to commit the act. The defendant does not have the time to form criminal intent because of immediacy and imminency of the threatened harm and need only raise a reasonable doubt as to the existence or nonexistence of this fact.” (*Id.* at p. 901.) In contrast, the necessity defense, which the trial court gave,² contemplates a threat in the immediate future. (*Ibid.*) With the necessity defense, the defendant has the time, however limited, to consider alternative courses of conduct. (*Ibid.*)

Here, as the trial court found, defendant was not faced with an immediate or imminent threat of harm. Although there was evidence that Precious threatened defendant and her family, the threat contemplated a future harm that might occur should defendant fail to pay Precious money within a day. There was no evidence that defendant or her family were under any immediate danger of harm. Nor was there any evidence that defendant was directed to commit the burglary of Umbertis’s home. An essential element of the defense of duress is that the defendant be faced with a threat to commit the charged crime. “ ‘The defense of duress, unlike the necessity justification, requires that the threat or menace be accompanied by a direct or implied demand that the defendant commit the criminal act charged.’ [Citation.]” (*People v. Saavedra* (2007) 156

² The court instructed the jury on the defense of necessity in the language of CALCRIM No. 3403.

Cal.App.4th 561, 567; see also *People v. Steele* (1988) 206 Cal.App.3d 703, 706 [duress instruction properly refused where there was no evidence that the threat of bodily harm was accompanied by a demand that the defendant commit the crime of escape].)

While there was evidence here that Precious threatened to harm defendant and her family if she did not pay her \$300, there was no evidence that Precious demanded that defendant commit the charged burglary. Rather, Precious simply wanted the money and did not care about the means defendant employed to get it. Hence, although there was evidence that defendant faced a future threat, it was insufficient to establish that she was under an immediate or imminent threat of harm or that she was under duress to commit the burglary of Umbertis's home. Indeed, the evidence showed that defendant had ample time in which to report the threat to the police. On this record, the court was not required to instruct on the defense of duress.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.