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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK COWART,

Defendant and Appellant.

A138633

(Alameda County
Super. Ct. No. H52430)

Defendant Mark Cowart appeals his conviction for forcible rape, forcible oral copulation, forcible sodomy, sexual penetration with a foreign object and incest. Defendant contends that there was insufficient evidence of duress to support his convictions for all charges involving force. We conclude that the evidence is sufficient to support defendant's convictions on all counts. Defendant further contends that the court erred in failing to provide him access to notes from the victim's therapy sessions. We conclude that the court's limited, in camera, review of the records was proper and defendant's rights were not violated by the court's refusal to turn over the records. Accordingly, we affirm defendant's convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

Defendant Mark Cowart began a sexual relationship with his then 14-year old daughter, Jane Doe, in 2002 that lasted for eight years until she was 22 years old. Defendant and his ex-wife, E., have seven children and Jane Doe is the third eldest

daughter. Jane Doe grew up in a two-bedroom townhouse with her parents and siblings. Defendant was the leader of the family and disciplinarian. Defendant was considered a “godly” man by his family and he lectured his children about religion. The family did not attend church because defendant believed that those at church were too “worldly” and did not practice the Bible. Jane’s mother described defendant as “controlling.” He decided what the family could wear, what kind of soap or shampoo they used, what time each person could go to sleep, what time they could eat, and what they could eat.

The children were restricted from playing in the neighborhood and could not go to other people’s houses or have friends over to their house. Jane Doe was required to come home directly after school. Defendant enforced rules about appropriate clothing and appearance. The girls were forbidden from cutting their hair and a girl’s hair, including his wife, would be cut short as punishment. Jane Doe’s mother told the children they must do what their father says.

Defendant did not work because he suffered from two medical conditions: Crohn’s disease (an inflammation of the bowel) and ankylosing spondylitis (an arthritis in his spine). Jane Doe’s mother worked full time, often leaving the house at 7:00 a.m. and returning at 7:00 p.m.

Jane Doe testified that her father was “very stern” and she did not remember him ever complimenting her or the other children. Jane’s youngest brother testified that defendant called Jane “stupid, space cadet, [and] simpleton.” When she began 9th grade, defendant told her she was pretty and she thought it was “odd” and “weird.”

When Jane Doe was 14 years old, she was approximately 5 feet tall and less than 90 pounds. At the time of trial, defendant was six feet tall and weighed 151 pounds, but weighed more when Jane Doe was caring for him.

In the fall of 2002, defendant told Jane Doe that she had to start taking care of him and she must stop going to school. At first, her duties included making him coffee and food, brushing his hair, and giving his full body massages. Defendant then instructed Jane to begin sleeping in the parents’ bedroom in case he needed something during the night. Jane’s mother began sleeping with the children and Jane slept in a bed with her

father. Defendant asked Jane Doe to wear a sundress with spaghetti straps to bed at night.

Defendant then required Jane to wash him in the shower. At first, he wore underwear but after a short period of time, he wanted her to wash him while he was naked. Defendant told Jane that as Christians it was a sin for a daughter to see her father naked so she must agree to “not be his daughter anymore.” He told her she could be unbound from being his daughter. Jane Doe testified that she agreed because: “I thought I had to. I don’t remember like ever saying no to my dad.” She explained: “my whole life we were taught he’s a man of God. He’s religious and he’s a man of God, and you’re supposed to do what you’re supposed to do if you’re a Christian, be obedient to your parents.” Jane’s youngest brother remembered overhearing Jane swearing an oath to no longer be defendant’s daughter and that she would take care of him whenever he needed her.

After the “unbinding,” defendant awakened Jane in the night and instructed her to rub his penis. Jane testified that she felt panicked and was “freaking out.” She said: “I wasn’t sure if I should run, or if I should stay, or I don’t know what to do.” Defendant held her hand against his penis with his hand and made her rub it up and down. Shortly thereafter, defendant instructed Jane to go to sleep wearing a dress but no underwear. Jane was startled awake by a stinging, burning pain in her crotch area. She felt defendant trying to push his penis inside of her. She froze and pretended to be asleep.

The following day, defendant told Jane Doe that he had sexual feelings for her and found her attractive. Defendant asked her if she found him attractive and she said yes, “because I was so scared.” She had never said no to her father and did not feel that she could. Defendant then asked her if she wanted to have sex with him. She felt panicked and that she had to tell him yes. Defendant told her that in order for them to have sex, they would need to be married as man and wife. When Jane said that she did not want to be married, defendant told her she could not stay in the house. He told her she had nowhere to go and she would have to go live on the street. He then told her that she would have to cover herself from head to toe in a burka “like women in the middle east.”

He told her she was no longer his daughter and she was just a woman and it would be hard for him because he found her attractive. Jane felt like her father was coming up with ways to punish her.

Defendant also threatened to cut Jane's hair. Defendant told her he would shave her head, like a boy. After several conversations, Jane Doe ultimately agreed to be her father's wife. She testified that she felt "exhausted" and did not know how to argue with her father. She said "I felt like I was already dirty, that he can't undo things that have already been done." She explained that in her house they were Christians and the rest of the world had been given over to Satan. "All I knew was my dad. He was someone I really looked up to and I went to for advice and I didn't know what to do. I felt so lost." She did not want to act as defendant's wife but her father "always [had] an answer for every reason why I didn't want to do it." She thought about running away but she had nowhere to go and she was worried that if she left her father might "do it to my siblings."

Defendant then had intercourse with Jane Doe. Shortly thereafter, defendant called her to his room and told her they had made a mistake. He told her that he did not want her and she should go back to school. Jane felt violated and she told him she felt used. The next day, defendant asked her if she wanted to take care of him again and she said no. Defendant responded: "I guess I'll just go away somewhere and die." She felt like her dad was trying to "make her pay" but she did not want her dad to die. He asked her if she wanted to be responsible for his death. Jane felt that he was going to do something to hurt her. She felt like she didn't have a choice. Her father told her that she was his wife and a wife must be obedient to her husband because he is lord.

Defendant began teaching Jane about different sex acts and positions. He taught her to perform oral sex on him and he performed oral sex on her. Defendant also inserted his finger into her vagina. On one occasion, defendant had anal sex with Jane Doe when she was 15 years old.

For the next eight years, defendant and Jane Doe would engage in sex approximately three to four times per week. This included both sexual intercourse and oral sex.

Jane testified that she was “scared” and “embarrassed” to tell anybody. She was ashamed of what her dad was making her do. She said that she wanted to tell someone but there was nobody else outside of her house she could tell. Her father told her that if she told her sisters, they would not dislike him but they would not like her. He also told her that women who get raped must go to court.

When she turned 18 years old, she did not leave the house because she had nowhere to go and was afraid she would never see her siblings again. Her dad told her that if she left, she could never come back and she could not talk to her siblings.

When Jane Doe was 22 years old, her mother asked her if her father was treating her like a wife. Jane knew that her mother meant whether he was having sex with her. Jane answered yes. Jane’s mother then confronted defendant. Shortly thereafter, Jane’s older sister was instructed to tell their mother she could not come home.

Defendant became cold and distant to Jane, but continued to have sex with her. He would not talk to her and told her siblings that she was arrogant. Defendant then told Jane that “they’re going to come and take you away and spread your legs and do exams on you.” Jane thought he was referring to child protective services and an exam for sexual abuse.

After Jane’s mom was forced out of the house, Jane became scared of what defendant might do to her. Defendant put Jane’s possessions including her clothes, dishes and kitchen knife that was important to her, on the street and had them thrown away. Jane then left the house and walked to a pay phone to call her mother. She testified that it “was easier to leave when I had somewhere to go.” Jane moved in with her mother and older sister. Her mother took her to a therapist. She told the therapist the “whole story” of her abuse.

Procedural History

In March 2013, the Alameda County District Attorney’s Office filed an amended information charging defendant with five counts of forcible rape in violation of Penal Code section 261, subdivision (a)(2), five counts of forcible oral copulation in violation of Penal Code section 288, subdivision (c)(2)(A), one count of sodomy by use of force in

violation of Penal Code section 286, subdivision (c)(2)(A), one count of sexual penetration by a foreign object in violation of Penal Code section 289, subdivision (a)(1)(A), and five counts of incest in violation of Penal Code section 285. All the allegations were for the time period of August 1, 2002 to March 2, 2004. (Ibid.)

Prior to trial, defendant filed a motion for disclosure of Jane Doe's psychotherapy records. The court ruled on the motion at the beginning of the trial and conducted a limited, in camera, review of the records. The court reviewed the records to see if any techniques were used to enhance Jane Doe's memory but the court declined to conduct a broader review to search for inconsistencies in Jane Doe's statements or possible coercion by her therapist. The court ruled that there was no information in the records that needed to be turned over to the defense. Trial commenced on March 21, 2013. The jury found defendant guilty of all charges.

DISCUSSION

I. Evidence of Duress

Defendant contends that there was insufficient evidence of duress to support his convictions for forcible rape, forcible oral copulation, forcible sodomy and sexual penetration with a foreign object. We conclude that given the father-daughter relationship, defendant's position of authority in the family, the victim's age, the victim's relative vulnerability and isolation, and defendant's threats to force the victim from the house, shave her hair, and prevent her from contact with her siblings, there is sufficient evidence to support defendant's convictions on all counts.

In reviewing a defendant's claim of insufficiency of the evidence of duress, we must determine whether, on the record as a whole, any rational trier of fact could find him guilty beyond a reasonable doubt. (*People v. Griffin*, (2004) 33 Cal.4th 1015, 1028 citing *People v. Barnes*, (1986) 42 Cal.3d 284, 303.) "We view the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*Griffin, supra*, 33 Cal.4th at p. 1028 citing *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The convictions for forcible rape, forcible oral copulation, forcible sodomy and forcible sexual penetration with a foreign object all require that they be committed “by means of force, violence, duress, menace or fear of immediate and unlawful bodily injury.” (Pen. Code, § 261, subd. (a)(2), Pen. Code, § 288, subd. (c)(2)(A), Pen. Code, § 286, subd. (c)(2)(A), Pen. Code, § 289, subd. (a)(1)(A).) Duress is defined as “a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.” (Pen. Code, § 261, subd. (b).) Other relevant factors include threats to harm the victim, physically controlling the victim when the victim attempts to resist, and warnings to the victim that revealing the molestation would result in jeopardizing the family. (*People v. Cochran* (2002) 103 Cal.App.4th 8, 14.) The fact that a defendant does not use force or threats does not prevent a finding of duress because the victim’s testimony should be considered in light of her age and relationship to the defendant. (*Ibid.*)

Defendant asserts that there was insufficient evidence of duress and at most, the prosecution proved psychological coercion. Defendant acknowledges that he ruled the family and expected obedience from his children, but claims there was no evidence of a direct or implied threat of any kind of harm if Jane Doe did not acquiesce to his demands. Defendant’s argument that psychological coercion does not amount to duress has been rejected by several courts. In the context of a family member with a young victim the “very nature of duress is psychological coercion.” (*People v. Cochran, supra*, 103 Cal.App.4th at p. 15; *People v. Senior* (1992) 3 Cal.App.4th 765, 775 [“duress involves psychological coercion”]; *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 238 [psychological coercion can amount to duress].)

In *People v. Cochran*, the court found sufficient evidence of duress where a father was convicted of forcible lewd conduct on his nine year-old daughter. (*People v. Cochran, supra*, 103 Cal.App.4th at p. 12.) The daughter testified that her father

instructed her to engage in various sexual acts including intercourse and forced sodomy. The daughter testified that she was not afraid of her father but he told her not tell anyone because he would get into trouble and go to jail. (*Ibid.*) The court noted that even though the defendant did not beat or punish her, he still coerced her into performing the various sex acts. (*Id.* at p. 15.) The defendant was five feet, nine inches tall and weighed 100 pounds more than his four feet, three-inch daughter. The court held that the daughter was a “vulnerable and isolated child who engaged in sex acts only in response to her father’s parental and physical authority.” (*Ibid.*) Given the age and size of the victim, her relationship to the defendant, and the implicit threat that she would break up the family if she did not comply, there was sufficient evidence of duress. (*Id.* at p. 16.)

Similarly in *People v. Senior*, the court found duress where a father forcibly molested his 14 year-old daughter. The court noted that the defendant was the victim’s father and an authority figure to her; defendant threatened to hit her, and he told her that if she did not submit to the molestation that it could result in a divorce, thus jeopardizing the family unit. (*People v. Senior, supra*, 3 Cal.App.4th at p. 775.)

In *People v. Veale*, the court held there was sufficient evidence of duress where the defendant molested his seven year-old stepdaughter, Brianna. (*People v. Veale* (2008) 160 Cal.App.4th 40.) Brianna testified that she was afraid to tell her mother because something might happen to her mother if she told or the defendant might hurt her; although defendant never said he would. (*People v. Veale, supra* 160 Cal.App.4th at p. 44-45.) Brianna stated that the defendant did not threaten her or use physical force and that on one occasion, when defendant asked her to put her mouth on his penis, she got mad and threw clothes around the room. (*Id.* at p. 46.) The court found numerous factors supported a finding of duress: defendant was an authority figure in the home; Brianna feared defendant; Brianna feared defendant might harm her mother; Brianna’s young age; and the difference in size between defendant and Brianna. (*Id.* at p. 47.)

Many of the factors identified in *Cochran* and *Veale* are present in this case. Defendant was an authority figure in the home. Defendant was considered a “godly” man by his children and they all submitted to his strict rules about everything from what

they wore to when they ate. Jane Doe was intimidated by her father and was afraid to tell him “no.” Jane was taught that Christian children are obedient to their parents. (*Ibid.*) Her father preached that they were the only Christians and the rest of the world had been given over to Satan.

Jane Doe and her siblings were isolated from others; they were not allowed to play in the neighborhood, go to friend’s homes, or have friends to their home.

Jane Doe stated that she would respond yes to her father’s questions and demands because she was too scared to say no. She was also afraid that if she ran away that her father might begin molesting one of her siblings.

While it is true that Jane Doe was older than the victims in *Cochran* and *Veale*, she was only 14-years old when the abuse began (the same age as the victim in *Senior*). In addition, Jane was a vulnerable and isolated young girl who was dominated by her father. In cases where the defendant is a family member and the victim is young, “the position of dominance and authority of the defendant and the continuous exploitation of the victim” is relevant to establishing duress. (*Kneip, supra*, 219 Cal.App.3d at p. 239; see also *People v. Cochran, supra*, 103 Cal.App.4th at p. 15 [finding duress where the victim was a “vulnerable and isolated child who engaged in sex acts only in response to her father’s parental and physical authority.”]) When a victim is young and is molested by her father in the family home, “in all but the rarest cases duress will be present.” (*People v. Cochran, supra*, 103 Cal.App.4th at p. 16 fn. 6.)

Defendant relies heavily on *People v. Espinoza* where the court found that the molestation of a twelve year-old by her father was not accomplished by duress. (*People v. Espinoza* (2002) 95 Cal.App.4th 1287.) Espinoza molested his daughter, L, on multiple occasions and she stated that she was “too scared to do anything” and she was afraid defendant “would come and do something” if she reported what happened. (*Id.* at p. 1293.) The court held that the daughter’s fear, without more, did not establish duress.¹

¹ The *Espinoza* court relied on *People v. Hecker* where the court held that psychological coercion without more does not establish duress. (*People v. Hecker* (1990) 219 Cal.App.3d 1238, 1250-1251.) This holding has been questioned by subsequent

Espinoza is distinguishable from the present case. Here, there were both direct and implied threats of hardship and retribution made to Jane Doe if she did not acquiesce to her father's demands. When Jane Doe told her father she did not want to be married to him (and have sex with him), defendant told her she could not stay in the house. He told her she had nowhere to go and she would have to go live on the street. He then told her that she would have to cover herself from head to toe in a burka "like women in the middle east." Defendant also threatened to cut Jane's hair which was a form of punishment for the girls in the family. Defendant told her he would shave her head, like a boy. Jane testified she felt her father was coming up with ways to punish her.

After the first act of sexual intercourse, when Jane told her father she felt used and she said she did not want to take care of him any longer, defendant responded that "I guess I'll just go away somewhere and die." She felt like her dad was trying to "make her pay" but she did not want her dad to die. He asked her if she wanted to be responsible for his death. Jane felt that he was going to do something to hurt her. She felt like she didn't have a choice. Her father told her that she was his wife and a wife must be obedient to her husband because he is lord.

Defendant also told Jane Doe that if she told her sisters that they would dislike her. He told her that if she left, she could never come back and could not talk to her siblings. "A threat to a child of adverse consequences, such as suggesting the child will be breaking up the family or marriage if she reports or fails to acquiesce in the molestation, may constitute a threat of retribution and may be sufficient to establish duress, particularly if the child is young and the defendant is her parent." (*People v. Cochran, supra*, 103 Cal.App.4th at p. 15.) Further such a threat can represent a defendant's attempt to isolate the victim and increase or maintain her vulnerability to his continued assaults. (*Ibid.*)

When Jane Doe's mother finally became aware of the sexual relationship and confronted defendant, he retaliated against Jane Doe by throwing away her meager

decisions. (*People v. Cochran, supra*, 103 Cal.App.4th at p. 15; *Senior, supra*, 3 Cal.App.4th at p. 775.)

possessions: some clothing, dishes and a chef's knife. Jane Doe testified that she was scared of what defendant might do to her.

All of defendant's actions are threats of hardship and retribution and are direct psychological coercion amounting to duress. These threats combined with defendant's position as not only Jane Doe's father but as the authority figure and religious leader in the family along with Jane's age and her vulnerability and isolation provide sufficient evidence of duress to support defendant's convictions.

II. Review of Jane Doe's Psychotherapy Records

Defendant contends that the trial court erred in failing to provide defendant access to the notes from Jane Doe's psychotherapy sessions. The court conducted a limited in camera review of the notes and determined they did not need to be disclosed to defendant. Defendant argues that the court's review was too limited in scope and requests independent review of the notes by this court.

Prior to trial, defendant filed a motion seeking Jane Doe's records from psychotherapy sessions between November 1, 2010 and July 11, 2012. Defendant argued that Jane Doe first indicated that she had been having a sexual relationship with her father in November 2010 when she was 22 years old. Jane Doe went to see a therapist in January 2011 where she disclosed that her father had sexually abused her beginning when she was a minor. Defendant asserted that Jane Doe's credibility was of "tantamount importance" in the case and to adequately cross examine her, he needed to know if there was any impeaching information in the psychotherapy notes. Defendant argued that there were three ways the contents of the therapy sessions might have bearing on Jane Doe's credibility: (1) if she made the statements as a result of hypnosis or guided meditation; (2) if the therapist encouraged or pressured Jane Doe to suggest the relationship began when she was child; and (3) if Jane Doe made inconsistent statements to the therapist from what she told the police about when the relationship began. Defendant further asserted that the information sought would not likely be fully contained in the therapy records and therefore requested the court perform an in camera examination of the therapist himself.

On March 7, 2013, the court held a hearing on defendant's motion.² The court stated that while it would consider defendant's motion to review the therapy records, defendant had not provided any authority for his request for the court to interview the therapist. The court expressed concern that defendant's motion was a "fishing expedition" for information and he was trying to pierce the patient-therapist privilege. The court advised counsel that defendant needed to show that "there is some evidence of [an inconsistency] before I simply go back and look and see if there is something inconsistent." The court stated that in essence defendant was asking the court:

"to go through the records to find information that you think could be used to attack [Jane Doe's] credibility. You don't have a threshold showing that she has done or said something to affect her credibility so that I could verify that occurred or didn't occur. So the court's job is to verify or not something you already know. But not to find information for you because you think the therapist is going to have a treasure trove of information."

The court stated that it would review the therapist's records to see if any therapeutic techniques were used that could have enhanced Jane Doe's memory but that it would not engage in a review for any other purpose. The court stated that reviewing "the substance of her therapy as a way of undermining her credibility when there's no indication whatsoever that anything happened in therapy That would open the door for anybody, any victim or complainant's records to be open to the defense because you might find something." The court said that defendant would have the opportunity to cross-examine Jane Doe and could question her credibility in court. Defendant had not presented a "compelling reason" for a wholesale review of Jane Doe's therapy records.

On March 13, 2013, the court stated that it had reviewed the therapist's records and that there was nothing that needed to be disclosed to defendant.

² The court and both counsel held a "long discussion in chambers" about the motion prior to the March 7th hearing.

When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court must balance the privilege against the defendant's right to cross-examination. (*People v. Abel* (2012) 53 Cal.4th 891, 931 citing *People v. Hammon* (1997) 15 Cal.4th 1117, 1127.) The court must disclose privileged records that are material. (*People v. Abel, supra*, 53 Cal.4th at p. 931.) To obtain a review, a defendant must establish "good cause" for doing so, which in this context means the defendant must describe the records sought with reasonable specificity and provide a justification for producing them. (*People v. Dancer* (1996) 45 Cal.App.4th 1677, 1691, disapproved of by *People v. Hammon, supra*, 15 Cal.4th 1117.)

In *People v. Abel*, the defendant sought access to a key witness's psychiatric records. (*People v. Abel, supra*, 53 Cal.4th at p. 930.) He argued that the records would show that the witness, Ripple, could not distinguish between fantasy and reality. The trial court reviewed the records balancing the defendant's need against the witness's privacy rights and found that the records contained "nothing of particular value to the defense." (*Ibid.*) Defendant argued on appeal that while the court properly reviewed the records in camera, it erred in failing to disclose material that could have been used to impeach Ripple. (*Ibid.*) The Supreme Court held that defendant's argument presumed that the trial court had a duty to examine the records for reasons beyond those stated in defendant's motion. Defendant "now claims he is entitled to relief because the trial court did not also comb through the records searching for anything defendant might possibly use to impeach Ripple." (*Id.* at p. 933.) The court held that the speculative nature of defendant's claims fell far short of establishing the records contained matter material to his defense. (*Ibid.*) "[D]efendant's arguments that the records were material are premised on speculation and conjecture, not actual information contained in the records. Neither his right of confrontation nor his right to due process was violated by their nondisclosure." (*Id.* at p. 935.)

Here the trial court conducted a review of the records for any information that techniques were used to enhance Jane Doe's memory in therapy. The court properly refused to comb through the records to search for other information that could be used to

impeach Jane Doe. Defendant failed to make any showing that Jane Doe had made inconsistent statements or that there was any reason to believe her therapist had encouraged or pressured her to state the abuse began when she was a minor. The court's limited in camera review was proper and defendant's rights were not violated by the court's refusal to turn over the records to the defense.

Defendant further requests that this court conduct a review of Jane Doe's therapy records. We have reviewed Jane Doe's sealed therapy records in camera and nothing contained in them alters our conclusion that the trial court did not err.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.