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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SIMON CRUZ,

Defendant and Appellant.

D059307

(Super. Ct. No. SCD221560)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed.

A jury convicted defendant Simon Cruz of two counts of aggravated sexual assault on a child (Pen. Code,¹ § 269, subd. (a), counts 1 and 23), 29 counts of lewd acts on a child under the age of 14 (§ 288, subd. (a)), and six counts of lewd acts on a child 14 or 15 years of age (§ 288, subd. (c)(1)). On appeal, Cruz contends the evidence was insufficient to support the conviction on count 23.

¹ All further statutory references are to the Penal Code unless otherwise specified.

FACTS

A. Prosecution Evidence

In 1998, Cruz married the mother of the victims and, within a year, began molesting them. Count 23 charged that sometime between January 28, 2004, and May 1, 2007, Cruz committed an aggravated sexual assault on a child under the age of 14. This offense, based on the alleged rape of C., is the only conviction challenged on appeal. Although Cruz was also convicted of 36 other counts involving the sexual misconduct that victimized C. and her sisters, we do not discuss the evidence relating to those other counts.

The evidence relied on by the prosecution in support of count 23 was based on C.'s testimony. Cruz first molested C. when she was in third grade; he made her give him a "blow job." This occurred on multiple occasions over the years. He also touched her "private parts" on multiple occasions over the years with his hands and mouth. The molestations happened "almost every day" after the family moved to a new house on Glade Street in August 2005.

C. also described two occasions on which Cruz used his penis to touch C.'s "private parts":

"Q: What would he do?

"A: He would rub his penis against my vagina.

"Q: Would he touch his penis on the outside of your vagina, rub it along your vagina or did he put his penis in your vagina?

"A: He tried to.

"Q: Did he get any of his penis—or he tried to put it in your vagina. Did he get any part of his penis, from what you can recall, in your vagina?

"A: He—like—I don't know how to explain it. He tried to put his penis inside, like to make me not a virgin—is that how you say it—but I said, no, because I didn't want that.

"Q: How did it feel when he tried to do that?

"A: It hurt.

"Q: What did it feel like when he did that?

"A: What did it feel like? I didn't like it. It hurt me.

"Q: Did you tell him that when he did it?

"A: Yeah.

"Q: Did the defendant do that once or more than once?

"A: He tried to do it twice."

None of the victims revealed anything about the molestations until 2009 when the oldest daughter, N., sent an e-mail to her mother telling her that Cruz had molested N. When they learned of the e-mail, the other victims (C. and her sister T.) told their mother of Cruz's conduct. C. testified she had not previously told her mother of the molestations because she was scared. C. testified Cruz, in conjunction with his molestations, told C. not to tell her mother because "I would get in trouble or we would get in trouble" or "he would get in trouble."

ANALYSIS

Cruz contends that, for two reasons, the evidence was insufficient to support the conviction on count 23. First, he argues there was no evidence of penetration because C. testified Cruz "tried" to penetrate her but she said no. Second, he argues that even if there was evidence of penetration, there was no evidence it was accomplished by employing any force beyond the amount necessary to accomplish the offense.

A. Legal Principles

Substantial Evidence

When we consider a challenge to the sufficiency of the evidence to support a verdict, we view the evidence most favorably to the verdict. We draw all reasonable inferences in support of the verdict, but do not make credibility judgments or reweigh the evidence. The question we must decide is whether there is sufficient, substantial evidence from which a reasonable jury could find the charge proved beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

" "Although it is the duty of the jury to acquit a defendant if it finds that [the] evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt" " (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), and we may neither reweigh the evidence nor reevaluate a witness's credibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Where the circumstances reasonably justify the trier of fact's findings, the reviewing court's opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

Aggravated Sexual Assault

The aggravated sexual assault charge under section 269, subdivision (a), was based on the alleged rape of C.² To prove rape, the prosecution must show (1) an "act of sexual intercourse" (2) accomplished by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another." (§ 261, subd. (a)(2).) "Any sexual penetration, however slight, is sufficient to complete the crime [of rape]" (§ 263), and any penetration of the external genital organs qualifies as an unlawful sexual penetration even if the rapist does not succeed in penetrating into the vagina. (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366.)

The force or fear element includes obtaining the victim's submission to the unlawful intercourse by the use of duress. As explained in *People v. Cochran* (2002) 103 Cal.App.4th 8 (*Cochran*), disapproved on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248, footnote 12:

"[The] [d]uress [element] as used in this context means 'a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted.' (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50 . . . ; [citation].) 'The total circumstances, including the age of the victim, and [her] relationship to defendant are factors to be considered in appraising the existence of duress.' (*People v. Pitmon, supra*, at p. 51.) Other relevant factors include threats to harm the

² Although a violation of section 269 can be shown by several forms of sexual assault, the jury was instructed that the aggravated sexual assault charges in this case were based on the rape of victims under 14 at the time of the crime. We do not evaluate whether other criminal conduct by Cruz could have supported the aggravated sexual assault charges.

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." (*Cochran*, at pp. 13-14.)

B. Analysis

Cruz first argues the evidence was insufficient to support the sexual penetration element, asserting C.'s testimony was only that he "tried to" penetrate her. However, we are not persuaded by Cruz's argument because any penetration of the external genital organs, however slight, qualifies as an unlawful sexual penetration even if the rapist does not succeed in penetrating the vagina. (*People v. Quintana*, *supra*, 89 Cal.App.4th at p. 1366.) C.'s testimony, considered most favorably to the People and presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence (*People v. Smith* (2005) 37 Cal.4th 733, 738), supports a finding of some penetration, because C. testified that when Cruz "tried to put his penis inside . . . to make me not a virgin . . . it hurt" her. A jury could infer that C.'s pain was associated with the penetration of the external genitalia and, although C. was able to stop Cruz before he went far enough inside to "make [C.] not a virgin," the penetration—however slight—was sufficient to complete the crime of rape. (§ 263.)

There was also some evidence from which the jury could have inferred Cruz applied duress so that C. would " 'acquiesce in an act to which one otherwise would not have submitted.' " (*Cochran*, *supra*, 103 Cal.App.4th at p. 13.) "The very nature of duress is psychological coercion." (*Id.* at p. 15.) The molestations started when C. was barely eight years old, and continued until she was 11 years old. The jury was entitled to consider her youth, and the fact Cruz was married to her mother, in assessing duress.

(*People v. Superior Court (Kneip)* 1990 219 Cal.App.3d 235, 239 ["Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim" is relevant to determining duress.]; *People v. Pitmon, supra*, 170 Cal.App.3d at p. 51 ["The total circumstances, including the age of the victim, and his [or her] relationship to defendant are factors to be considered in appraising the existence of duress. . . . At the time of the offenses, [the victim] was eight years old, an age at which adults are commonly viewed as authority figures. The disparity in physical size between an eight-year-old and an adult also contributes to a youngster's sense of [her] relative physical vulnerability."].)

Additionally, C. testified Cruz made her engage in a variety of sexual conduct, from which the jury could infer Cruz engaged in conduct that impressed upon C. the requirement that she acquiesce in the sexual acts. Finally, Cruz warned her not to tell anyone, and she testified she was "scared" to tell anyone, which is another factor in the totality of the circumstances the jury was entitled to consider on the question of duress.

(*Cochran*, at p. 15 ["A threat to a child of adverse consequences, . . . 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."].)

As the *Cochran* court summarized:

"This record paints a picture of a small, vulnerable and isolated child who engaged in sex acts only in response to her father's parental and physical authority. Her compliance was derived from intimidation and the psychological control he exercised over her and was not the result of freely given consent. Under these circumstances, 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, the evidence amply supports a finding of duress." (*Id.* at pp. 15-16, fn. omitted.)

Cruz argues *Cochran* is distinguishable because the defendant in *Cochran* impliedly threatened the victim that reporting the conduct would jeopardize the ability of the family to remain together, while here Cruz said both he and C. would "get in trouble" if she told her mother. He argues that because C. testified she was scared she would be blamed, and never mentioned any fear of breaking up the family, *Cochran* is distinguishable. However, a warning that Cruz would "get in trouble" carries the suggestion there would be adverse consequences to the family unit. More importantly, it is not the precise *nature* of the consequences that matters, but the mere fact such consequences would be *adverse* that we deem significant. Indeed, *Cochran's* language supports this interpretation, because the *Cochran* court explained that, "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." (*Cochran, supra*, 103 Cal.App.4th at p. 15.) The italicized language demonstrates the *Cochran* court was mentioning an example, *not* rendering an exhaustive list, of the type of "threat to a child of adverse consequences" that may constitute duress. The threat that C. would "get in trouble" is a *different* adverse consequence than considered in *Cochran*, but it nonetheless remained a threat to C. of adverse consequences.

We are convinced, under the totality of the circumstances, sufficient evidence was presented below from which a jury could have found both the penetration element and the duress element, and therefore substantial evidence supports the verdict on count 23.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.