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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE MEDINA-SOTO,

Defendant and Appellant.

E062405

(Super.Ct.No. RIF1204292)

OPINION

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge.

Affirmed.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Medina-Soto repeatedly molested his girlfriend's 12-year-old daughter. Each time, he placed her baby brother on her lap; he then put his hand under the baby and pressed his fingers into the girl's vagina, over her clothes.

A jury found defendant guilty on three counts of aggravated sexual abuse on a child by means of sexual penetration (Pen. Code, § 269, subd. (a)(5)) and three counts of a lewd act on a child (Pen. Code, § 288, subd. (a)). The trial court dismissed two of the counts of aggravated sexual abuse in the interest of justice. (Pen. Code, § 1385.) Defendant was sentenced to a total of 15 years to life in prison, along with the usual fees, fines, and restrictions.

Defendant now contends:

1. There was insufficient evidence that defendant used force, violence, duress, menace, or fear.
2. The trial court erred by admitting evidence that, when the victim's mother called the police, defendant used the baby as hostage, holding a knife to its throat.

Finding no error, we will affirm.

I

FACTUAL BACKGROUND

As of the summer of 2012, Jane Doe¹ was 12 years old. She lived in Moreno Valley with her mother and with defendant, who was her mother's boyfriend.

¹ The trial court instructed the jury that the victim would be referred to by this fictitious name. (See Pen. Code, § 293.5.)

Defendant and Doe's mother had a baby together — a boy born in August 2011. Doe loved the baby and liked to hold him. When Doe's mother was at work, defendant stayed home with Doe and the baby.

In 2012, while Doe was home alone with defendant during summer vacation, he touched her vagina, over her clothes, more than five times. When she was sitting on the couch, he would come over and put the baby on her lap. While continuing to hold the baby, he would reach under the baby and touch Doe's vagina. She would be wearing jeans, capris, or shorts. Sometimes his hand stayed still; sometimes it moved around. It felt like it was pushing "[a] little bit inside" her vagina. It hurt "a little bit." On a scale from one to ten, the pain was about a two. Defendant would say, "Are you wet?" Doe did not know what this meant. The touching lasted roughly ten seconds.

The first time this happened, Doe felt uncomfortable, but she thought it was an accident. Each time it happened, however, she felt more and more uncomfortable. She did not feel scared, but she also did not feel "comfortable enough" to tell defendant to stop.

Finally, on or about July 17, 2012, because Doe felt uncomfortable, she told her mother about the touching. Doe's mother then confronted defendant. He did not respond at all. She did not call the police because she was afraid he would "take off" with the baby. Her plan was to make sure that Doe was never home alone with him again.

On July 21, 2012, about five days after Doe's mother first confronted defendant, they got into an argument about the molestation. Defendant had been drinking. Doe's mother said she was going to call the police. Defendant said, "Go ahead and call." She

called 911. While she was on the phone, he picked up the baby and walked around with him. He said, “Come and get me. I’m here.” He added, “I don’t have any problem doing time.” He also said, “They’re going to have to kill all of you.”

When the police arrived, they found defendant outside in the driveway. He was holding the baby “hostage-style” — with his left arm, he held the baby against his chest; with his right hand, he held a knife to the baby’s throat. Nevertheless, the police eventually managed to take him into custody. It was stipulated that, as of the time of trial, the baby was “doing well.”

On July 24, 2012, a trained forensic interviewer conducted an interview of Doe. Doe’s statements were consistent with her testimony at trial.

Doe admitted that, when her parents got divorced, it was “difficult” for her. When defendant started dating her mother, she was “jealous.” Her relationship with defendant was “awkward” because of the “language barrier” — defendant primarily spoke Spanish and Doe primarily spoke English. Defendant was “pretty nice” to her. She “wasn’t mean to him,” but she also “wasn’t . . . particularly . . . nice to him.”

Doe also admitted that the baby was “squirmy,” meaning that he moved around a lot, including when defendant put him on her lap.

Doe’s mother admitted that there was “tension” between defendant and Doe “[a]t times.” They had “issues” about cleaning and Doe’s failure to do chores.

II

THE SUFFICIENCY OF THE EVIDENCE OF FORCE

Defendant contends that there was insufficient evidence that he accomplished the sexual penetration by means of force, violence, duress, menace, or fear.

“In considering such a challenge “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] We determine “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Citation.] In so doing, a reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” [Citation.]’ [Citation.]” (*People v. Williams* (2015) 61 Cal.4th 1244, 1281.)

Aggravated sexual assault on a child, when committed by means of sexual penetration not in concert, requires that the sexual penetration be accomplished “by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person” (Pen. Code, §§ 269, subd. (a)(5), 289, subds. (a)(1)(A), (a)(1)(B), (a)(1)(C).)²

² Alternatively, it can also be accomplished “by threatening to retaliate in the future against the victim or any other person” (Pen. Code, §§ 269, subd. (a)(5), 289, subds. (a)(2).) However, the jury was not instructed on this alternative theory.

It has been held that “the amount of force necessary to commit this offense is that force which is sufficient to overcome the victim’s will.” (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200; see also *id.* at pp. 1204-1206.) Defendant agrees that this is the legally correct definition. Moreover, the jury was so instructed. (CALCRIM No. 1045.)

In this case, while Doe was sitting on the couch, defendant put the baby on her lap. He held the baby in place (presumably with one hand) while pushing against Doe’s vagina (presumably with the other). It is reasonably inferable that this immobilized Doe. Force can consist of “acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves. [Citations.]” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.) Here, defendant forcibly restrained Doe — not by holding her, but by holding the baby on her lap. Given Doe’s testimony that the touching was mildly painful and that she felt uncomfortable, the jury could reasonably conclude that this forcible restraint served to overcome her will.³

We therefore conclude that there was sufficient evidence of force. Accordingly, we need not decide whether there was also sufficient evidence of violence, duress, menace, or fear.

³ We note that there is a competing definition of force, for purposes of aggravated sexual abuse of a child by sexual penetration, as “physical force that is “substantially different from or substantially greater than that necessary to accomplish the lewd act itself.” [Citation.]” (*People v. Alvarez, supra*, 178 Cal.App.4th at p. 1004.) Because the jury was not instructed on this definition and defendant does not rely on it now, we need not discuss it in detail. However, in our view, defendant’s forcible restraint of Doe by holding the baby on her lap was also sufficient to satisfy this definition.

III

EVIDENCE THAT DEFENDANT HELD THE BABY HOSTAGE

Defendant contends that the trial court erred by admitting evidence that he held the baby hostage.

A. *Additional Factual and Procedural Background.*

In a written motion in limine, the prosecution asked the trial court to admit the evidence that defendant “put a knife to his baby in an effort to avoid capture and prosecution.” Defense counsel filed a written opposition, objecting to the evidence as more prejudicial than probative under Evidence Code section 352.

In argument on the motion, defense counsel conceded that the evidence was relevant to consciousness of guilt, but he argued that it was inflammatory: “I cannot imagine anyone who’s either a parent or not a parent [isn’t] automatically going to hate Mr. Medina for putting a knife to the baby’s neck.” He also argued that the jury was likely to speculate about whether the baby died. He asked the trial court to “sanitize” the evidence.

After hearing argument, the trial court admitted the evidence. It noted that it was relevant to show consciousness of guilt. It found no substantial danger of undue prejudice. However, it excluded the fact that the baby was cut slightly. It also excluded the fact that the police shot defendant in the leg.⁴

⁴ Apparently defendant was high on methamphetamine at the time. The trial court did not specifically exclude this fact, but the prosecution never introduced it.

The trial court instructed the jury: “*If the defendant tried to hide evidence or discourage someone from testifying against him*, that conduct may show that he was aware of his guilt. [¶] If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.” (CALCRIM No. 371, italics added.) Otherwise, defense counsel did not request, and the trial court did not give, any limiting instruction regarding this evidence. (See, e.g., CALCRIM No. 375.)

B. *Analysis.*

“[E]vidence that a person committed a crime, civil wrong, or other act” is not inadmissible “when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.” (Evid. Code, § 1101, subd. (b).) Thus, such evidence can be used to show consciousness of guilt. (*People v. Farnam* (2002) 28 Cal.4th 107, 154.)

“A ‘trial court,’ of course, ‘has broad discretion’ under Evidence Code section 352 ‘to exclude even relevant evidence “if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”’ [Citation.]” (*People v. Merriman* (2014) 60 Cal.4th 1, 60.)

The challenged evidence was probative to show consciousness of guilt. Indeed, defendant more or less concedes as much. He simply argues that it was cumulative in light of his statements, such as, “I don’t have any problem doing time,” “They’re going to have to kill all of you,” and “Come and get me. I’m here.” However, there is a powerful difference between words and actions. If defendant’s threats alone were in evidence, he could be expected to argue that he was simply upset about Doe’s false accusations of molestation and the difficulty of disproving them. Actually picking up his own baby and holding a knife to the baby’s throat while confronting the police, however, took defendant to a new level of desperation that was not so easy to reconcile with innocence.

Defendant also argues that the evidence was prejudicial because it was inflammatory. Nevertheless, it was not *unduly* prejudicial within the meaning of Evidence Code section 352. It was precisely because defendant was willing to put his own infant son at risk that the evidence was particularly probative to show consciousness of guilt. The trial court acceded to defense counsel’s request to sanitize the evidence by keeping out the fact that the baby was injured and the fact that defendant was shot. The jury was told that the baby was well at the time of trial. Thus, we cannot say that the trial court’s decision to admit the evidence was an abuse of discretion.

Defendant does not claim that the trial court misinstructed the jury in any way. We cannot say that CALCRIM No. 371 was well-tailored to the evidence of consciousness of guilt in this case, because it applied exclusively to efforts to hide evidence or to discourage testimony. Holding the baby hostage did not qualify as either. However, we can see no way in which the instruction was prejudicial. Defendant was not

entitled to any additional limiting instruction in the absence of a request. (Evid. Code, § 355; *People v. Murtishaw* (2011) 51 Cal.4th 574, 590.)

IV

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.