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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME RODRIGUEZ RIVERA,

Defendant and Appellant.

G044392

(Super. Ct. No. 06SF1211)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gregg L. Prickett, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, William M. Wood and
Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Jaime Rodriguez Rivera was convicted of 10 counts of various sexual crimes, committed against his own daughter when she was between the ages of 11 and 15. Defendant appeals from the convictions for aggravated sexual assault on a child by forcible sodomy, forcible rape, and sodomy by force, on the grounds there was insufficient evidence defendant used force to overcome the victim's will. However, there was substantial evidence that defendant overcame the victim's will by means of duress, and we therefore affirm defendant's convictions on counts 2, 4, 6, 9, and 10.

Defendant also argues the trial court committed prejudicial error by failing to instruct the jury regarding sodomy with a child under 14 years of age, as a lesser included offense of aggravated sexual assault on a child under 14 years of age. We conclude the trial court had a sua sponte duty to instruct the jury on the lesser included offense on counts 2, 4, and 6. However, it is not reasonably probable a more favorable outcome would have been obtained if the error had not occurred. Therefore, we affirm.

Defendant also argues the trial court's failure to state its reasons for imposing the upper term on the conviction for committing a forcible lewd act on a child requires reversal and remand for resentencing. However, given the trial testimony, the statements of the victim and defendant at sentencing, the probation officer's report, and the sentences imposed on the other counts, we conclude any error was harmless.

Finally, we find no merit in defendant's argument that the abstract of judgment contains an error.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The victim is defendant's daughter. At the time of the incidents in question, the victim was between 11 and 15 years old. Defendant worked cleaning offices at night, and sometimes brought his wife, the victim, or the victim's younger brother with him.

*Count 1—forcible lewd act on a child (Pen. Code, § 288, subd. (b)(1))*¹

When the victim was 11 years old, she was helping her parents clean a church. When the victim was cleaning the bathroom, defendant began touching her on the shoulders and breasts. The victim became frightened when defendant did not stop. Defendant put the victim on the floor and held her arms with one hand while he undid his belt buckle and tried to pull down her pants with his other hand. The victim cried and told defendant to stop; she struggled against him for about five minutes, but defendant was on top of the victim and much larger than she was. When defendant stood up and left the bathroom, the victim went looking for her mother, but did not tell her mother what had happened because she was afraid.

Counts 2 and 3—aggravated sexual assault on a child by forcible sodomy (§§ 269, subd. (a)(3), 286); lewd conduct with a child (§ 288, subd. (a))

A few months after the first incident, the victim was helping defendant clean inside an electric company, when defendant gave her three cans of beer to drink. The victim felt “a little unconscious.” In an office, defendant removed the victim’s clothes, made her bend over, and sodomized her. The victim did not tell her mother what happened because she “[d]idn’t know how.”

Counts 4 and 5—aggravated sexual assault on a child by forcible sodomy (§§ 269, subd. (a)(3), 286); lewd conduct with a child (§ 288, subd. (a))

When the victim was 12 or 13 years old, one night after cleaning a race car business, defendant again gave the victim alcohol, making her feel “drunk,” and played “spin the bottle” while removing her clothes. Defendant and two other men then took turns sodomizing her, and touching her breasts and body. Defendant had told the two other men, in the victim’s presence, that she was 17, she was not his daughter, and she wanted to have sex with them. It made her sad and scared that defendant would say this. The victim was afraid of defendant and felt powerless to resist him. She did not feel she

¹ All further statutory references are to the Penal Code.

could fight or resist him. The victim was always nervous and scared when she went with defendant to clean buildings, because she never knew when a forced sexual act would occur. Defendant told the victim not to tell anyone what had happened, which made her more scared.

Counts 6 and 7—aggravated sexual assault on a child by forcible sodomy (§§ 269, subd. (a)(3), 286); lewd conduct with a child (§ 288, subd. (a))

When the victim was 13, at a bookstore in Lake Forest, defendant again gave the victim alcohol, and played spin the bottle with her while undressing her. Defendant and two men, who were not the same men involved in the sexual acts in counts 4 and 5, took turns touching and sodomizing the victim.

Count 8—lewd act upon a child (§ 288, subd. (a))

On two occasions, at their home in Laguna Hills, when the victim was 13 or 14, defendant touched her breasts and put his finger in her vagina.

Count 9—forcible rape (§ 261, subd. (a)(2))

The day after the victim's 15th birthday, defendant took her to the Lake Forest City Hall at night on the pretense of cleaning it, but instead raped her. The victim could not remember whether she said "no," but testified defendant ignored her every time she told him "no" before. She was very scared of defendant.

Count 10—forcible sodomy (§ 286, subd. (c)(2))

One night while the victim was cleaning the women's restroom "in the office with books," defendant walked in and told her he wanted to have sex. Defendant removed the victim's shirt and bra, and left them in the sink. Defendant sat on the toilet in a stall, and made the victim sit on his lap, while he sodomized her. While this was happening, the victim's brother opened the door to the bathroom stall; defendant ordered him to leave. Defendant told the victim to stop crying, and that her "brother wouldn't know what he saw." Defendant said he would tell his son that he was giving the victim a back massage. When her brother did ask her about it, the victim said, with tears in her

eyes, that she “couldn’t tell him, that it was true what my dad was saying.” The acts of sodomy caused the victim pain and bleeding.

The victim was afraid to tell her mother what had happened to her, because she thought she would get in trouble or her mother would not believe her. After the very first incident, the victim became afraid of defendant, and felt insecure and constantly worried about defendant touching her again. The victim felt unable to refuse defendant’s sexual advances because he always ignored her when she said “no,” and forced her to do what he wanted and said he would hurt her. She was always scared when these incidents were happening. The victim testified that on one occasion, defendant told her that if she told anyone what was happening, she would never see her brother or sisters again. Defendant told her more than five times not to tell anyone what he was doing to her. Defendant tried to convince the victim his conduct was alright “because people back there . . . would have sexual relations with their relatives,” and he loved her as “more than” a daughter. Defendant also told the victim he wanted her to be his girlfriend and then his wife.

After a jury trial, defendant was convicted of all 10 counts. The jury found true allegations that during the commission of the crimes charged in counts 3, 5, 7, 9, and 10, defendant burglarized a building closed to the public within the meaning of section 667.61, subdivision (e)(2). Defendant was sentenced to 10 years, plus 75 years to life, for a total prison term of 85 years to life. The trial court imposed the upper term of eight years on count 1, plus a consecutive term of two years on count 8. The court also imposed five consecutive 15-year-to-life terms for counts 2, 4, 6, 9, and 10. Concurrent sentences of 15 years to life were imposed on counts 3, 5, and 7. Defendant timely appealed.

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE

Defendant argues the convictions for aggravated sexual assault of a child by forcible sodomy, forcible rape, and sodomy by force (counts 2, 4, 6, 9, and 10) must be reversed because there is insufficient evidence that the crimes were committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury. “When considering a challenge to the sufficiency of the evidence to support a conviction, 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 presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility. [Citation.]” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

The terms “force,” “violence,” “duress,” “menace,” and “fear of immediate and unlawful bodily injury” in sections 261, subdivision (a)(2) and 286, subdivision (c)(2) are used in the disjunctive.² Thus, the evidence must disclose substantial evidence of one, but not all, of these means of accomplishing the sexual act against the victim’s will. On appeal, the Attorney General relies only on duress to support the convictions.

² Section 269, subdivision (a)(3) does not use those terms, but cross-references section 286, subdivisions (c)(2) and (3) and (d).

Duress “mean[s] 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. [¶] The total circumstances, including the age of the victim, and his relationship to defendant are factors to be considered in appraising the existence of duress.” (*People v. Pitmon* (1985) 170 Cal.App.3d 38, 50-51, fn. omitted.)

In this case, the victim was between the ages of 11 and 15 when the acts occurred. A photograph of the victim at age 15 was admitted in evidence to show the jury “how slight and frail” she was;³ there was a great disparity between defendant and the victim in terms of age and size. Defendant is the victim’s father, and, therefore, was in a position of authority over her. The victim testified she was scared of defendant, and always nervous that he might commit more sexual acts against her. The victim stopped trying to say “no” to defendant, because he always ignored her requests that he stop. Defendant threatened that the victim would never see her brother and sisters again if she told anyone what he had done to her, and repeatedly told her not to tell anyone what had happened, which made her more scared. The victim was afraid to tell anyone, including her mother, what had happened. She felt unable to refuse defendant, and powerless to resist him. Defendant allowed two other men to molest and sodomize the victim, after telling them she was 17 years old and was not his daughter, which caused her to be more scared and sad. Defendant told the victim that their relationship was special, that he loved her as more than a father, and that one day they would be husband and wife. Defendant also tried to convince the victim that sexual relations between a parent and child were okay.

³ This photograph was admitted to rebut defendant’s testimony that he was unable to get the victim off him when she made sexual advances.

Given the totality of the circumstances, the evidence supported a finding that defendant used duress to coerce the victim into acquiescing to acts to which she would not otherwise have submitted. (*People v. Pitmon, supra*, 170 Cal.App.3d at p. 50.)

II.

FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE

Defendant next argues that the trial court prejudicially erred by failing to instruct the jury that sodomy with a child under 14 years of age, and 10 or more years younger than defendant, was a lesser included offense of aggravated sexual assault of a child by forcible sodomy. “An appellate court applies the independent or de novo standard of review to the failure by a trial court to instruct on an uncharged offense that was assertedly lesser than, and included, in a charged offense. Whether or not to give any particular instruction in any particular case entails the resolution of a mixed question of law and fact that, we believe, is however predominantly legal. As such, it should be examined without deference.” (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

An offense is a lesser included offense of another if the greater offense cannot be committed without committing the lesser, because all the elements of the lesser are included in the greater. (*People v. Parson* (2008) 44 Cal.4th 332, 348-349.) At the time these crimes were committed, the elements of aggravated sexual assault of a child by forcible sodomy were (1) defendant committed sodomy, (2) by use of force or fear, (3) against a child under 14 years of age, (4) who was at least 10 years younger than defendant. (*People v. Glass* (2004) 114 Cal.App.4th 1032, 1036.)⁴ The elements of sodomy in violation of section 286, subdivision (c)(1) are (1) defendant committed

⁴ In 2006, section 269 was amended, and now requires that the victim be under 14 years of age and at least seven years younger than the defendant. (Stats. 2006, ch. 337, § 6; CALCRIM No. 1123.) The crimes of aggravated sexual assault were alleged to have occurred between June 2003 and June 2005.

sodomy, (2) against a child under 14 years of age, (3) who is at least 10 years younger than defendant. (See CALCRIM No. 1090.) The crime of sodomy against a child is a lesser included offense of aggravated sexual assault on a child by forcible sodomy.

The trial court has a sua sponte duty to instruct the jury on lesser included offenses “whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present.” (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) The Attorney General does not dispute that the trial court had a sua sponte duty to instruct the jury on the lesser included offense. Instead, the Attorney General argues the failure to instruct the jury on the lesser included was not prejudicial. The failure to instruct the jury on a lesser included offense is reviewed to determine whether it is reasonably probable a more favorable outcome would have been obtained if the error had not occurred. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Defendant argues that the error was prejudicial because whether the acts had been accomplished by means of duress was a close issue. As described *ante*, there was evidence that all of the sexual acts by defendant against the victim were accomplished by means of duress. The victim testified that after the first incident in the church bathroom, she always felt afraid of defendant, she was always nervous because she never knew when defendant might engage in further sexual acts with her, and she was always scared when the acts of molestation were occurring. Defendant always ignored the victim’s pleas that he not touch her sexually, to the point that she stopped saying “no” to him. Defendant told the victim not to tell anyone what had happened, and threatened her if she did tell; despite the opportunity to tell her mother what had happened, the victim acquiesced for four years. Defendant tried to make the victim believe his sexual molestation of her was acceptable or even appropriate. Defendant demeaned the victim by allowing other men to sexually abuse her, while lying about his relationship to her. The foregoing is the quintessence of duress.

We conclude the trial court erred in failing to instruct the jury regarding the lesser included offense of sodomy in violation of section 286, subdivision (c)(1). However, given the totality of the evidence, it is not reasonably probable that defendant would have obtained a more favorable outcome absent this error. Therefore, we affirm defendant's convictions on counts 2, 4, and 6.

III.

SENTENCING ERROR

The trial court imposed the upper term of eight years for count 1, without stating any reasons on the record. California Rules of Court, rule 4.406(b)(4) required the court to state its reasons for selecting the upper term for this count. (See *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1324-1325 [“In imposing an upper term, the court must set forth on the record . . . the “ultimate facts that the court deemed to be circumstances in aggravation.” [Citation.]”].) Defendant therefore argues the case should be remanded to the trial court for resentencing.

“However, where the sentencing court fails to state such reasons, remand for resentencing is not automatic; we are to reverse only if ‘it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.’” (*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.)

In this case, we conclude the error was harmless. The trial court heard the testimony, and “read and considered the 16-page probation report.” The probation officer noted no factors in mitigation, and four factors in aggravation: (1) the crimes involved a high degree of cruelty, viciousness, or callousness, in that defendant sexually molested his own daughter, beginning when she was 11 years of age (Cal. Rules of Court, rule 4.421(a)(1)); (2) the victim was particularly vulnerable, as she was only 11 years old when the acts of molestation began, and defendant was her own father, who should have been her “protector” (*id.*, rule 4.421(a)(3)); (3) the crimes were carried out in a way that

indicates planning, because defendant took the victim to closed commercial buildings at night (*id.*, rule 4.421(a)(8)); and (4) defendant took advantage of a position of trust or confidence as the victim's natural father (*id.*, rule 4.421(a)(11)).

The trial court's sentence on the other charges indicates it is not reasonably probable a different sentence would be imposed if the case were remanded. The court imposed the maximum 15 years to life sentence on eight of the 10 charges against defendant.

Additionally, the court had heard testimony that defendant intimidated and threatened the victim, and that he tried to get his son to lie to the police both by falsely telling them defendant's wife had molested him, and by telling them the victim was lying about being molested because of a boyfriend. Defendant also testified in his own defense that the victim was the sexual aggressor.

At the sentencing hearing, the victim addressed the court, and described how defendant's actions had caused her to suffer "physically, mentally, emotionally, and even spiritually." The victim also told the court how defendant had caused the rest of the family to suffer as well. Defendant also addressed the trial court at sentencing; he expressed no remorse, but again blamed the victim for having "started it."

Given the testimony at trial, the statements of the victim and defendant at the sentencing hearing, the probation officer's recommendation, and the court's imposition of the maximum sentence on other charges, it is not reasonably probable the court would have imposed a different sentence if it had explicitly made findings on the record of its reasoning in imposing the upper sentence on count 1.⁵

⁵ The Attorney General contends defendant forfeited this argument by failing to request a statement of reasons from the trial court at sentencing. Even if the issue were forfeited, we would nevertheless address it to avoid the inevitable claim of ineffective assistance of counsel.

IV.

ERROR IN ABSTRACT OF JUDGMENT

Defendant contends that the abstract of judgment must be corrected, because it imposes an additional 30 years in prison beyond what was imposed by the trial court. Having reviewed the abstract of judgment, we conclude defendant is incorrect. The abstract of judgment notes that the total indeterminate term imposed on defendant is 75 years to life, and the determinate term is 10 years. No correction of the abstract of judgment is required.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.