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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO CONTRERAS-LOPEZ, Defendant and Appellant.	B272112 (Los Angeles County Super. Ct. No. BA405906)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.

We consider whether there is substantial evidence that defendant Arturo Contreras-Lopez, aka Sergio Torres Beltran, (defendant) was compelled to commit several drug-related crimes because of "threats to [his] life (or that of another) [that were] both imminent and immediate at the time the crime[s] [were] committed" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 100 (*Coffman*)).

I. BACKGROUND

A. The Offense Conduct

In 2010 and 2011, law enforcement officers in the Los Angeles area were conducting a wiretap investigation into drug trafficking. The investigating officers learned of a large narcotics scale scheduled to take place on or about September 28, 2011.

On that day, law enforcement surveillance personnel traveled to a parking lot where some of the drug deal participants were scheduled to meet. The surveillance observed defendant arrive and converse with two other men (who had previously been heard on wiretapped calls). The two men got in defendant's car, and, after a stop at a car repair shop and a change of vehicles, defendant drove both men in a Ford Fusion to a house in Rialto. Defendant opened the house's garage to park the Fusion inside, and after a brief period, defendant and the other two men left the garage driving the same car. Police officers pulled the vehicle over and discovered approximately nine kilograms of cocaine concealed in a hidden compartment. (Separately, police officers also stopped the individual who was suspected to be the buyer of the cocaine, and officers found $374,070 concealed in a hidden compartment in his car.)

Defendant and the other two men were detained, and officers subsequently executed a search warrant at defendant's residence. There, they found another kilogram of cocaine, several baggies and plastic tubs containing methamphetamine, and $117,700 in cash.

B. The Defense Case at Trial

The Los Angeles County District Attorney charged defendant with conspiracy, transportation of cocaine, using a false compartment with the intent to conceal a controlled substance, possessing controlled substances (cocaine and methamphetamine) for sale, and possessing money (over $100,000) obtained from narcotics trafficking.

At trial on the charged offenses, defendant testified in his own defense. Defendant admitted he drove the Ford Fusion knowing there were drugs in the car and aware he was participating in a drug transaction. But his defense was that he participated in the transaction only because he felt "compelled" to do so by a drug "cartel or mafia, whatever you choose to call it."

Defendant explained he first became involved with the cartel in Arizona sometime during 2005 or 2006 when he agreed to allow drug traffickers to unload vehicles in an auto body shop where he worked. Defendant believed the cartel at some point became suspicious he might be cooperating with law enforcement, and he testified he was threatened, although those threats were never carried out. When the cartel asked defendant to move to California in 2009 to continue working for them, he agreed so as not to exacerbate the suspicion that he might be an informant.

Once in California, defendant testified the cartel was "keeping an eye on [him]" and tasked him with transporting

small amounts of money. Over the next two years, from 2009 to 2011, the cartel began to trust defendant with more significant tasks, and paid him $500 per week plus housing expenses. Defendant testified that on the day he was arrested, September 28, 2011, he agreed to drive the cocaine-laden Ford Fusion because he was afraid if he refused the cartel would conclude he was an informant and they "would call [him] quickly to go to Tijuana and the beatings would start over there." Defendant specifically claimed that a cartel associate going by the nickname "Palomo" visited him in person "some days prior" to September 28, 2011, and said "[i]f a car was detained [by the police], immediately I would be picked up and that if I would flee they would find me."[1] Defendant conceded, however, that "Palomo" was just a "messenger," that the "people who would carry through the threat would be other persons," and that he (defendant) did not call the police after the visit from "Palomo."

Defendant further testified about what occurred after he was stopped driving the Ford Fusion. He explained the police released him that same day and he offered to cooperate with the investigators before he was released. Defendant asserted he provided information about other drug dealing to law enforcement in the following days, and he claimed he was threatened by the cartel as a result. Specifically, defendant testified a cartel member called him and said the cartel was not sure if he was working as a police informant, but the cartel was

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[1] At another point during his testimony, defendant agreed when his attorney asked whether "Palomo" told defendant "that if something went wrong a message would be sent to Mexico and your brother would be burned alive."

going to investigate and if they were convinced defendant was an informant, the cartel would "burn [defendant's] brother" and take defendant back to Mexico where he "clearly would be dead." Defendant admitted he did not tell law enforcement officers about this threat at the time it was made; he said he assumed they would not have a means of investigating it.

In addition to testifying himself, defendant called Fontana Police Department Officer Chris Tusant to testify as a witness during the defense case. Officer Tusant took custody of defendant shortly after he was arrested. During his testimony, Officer Tusant confirmed defendant offered to provide information to law enforcement after his arrest—because he wanted to avoid being deported to Mexico. Officer Tusant acknowledged defendant had expressed his fear of the cartel during their interactions, and Officer Tusant agreed when asked if "narco organizations" can enforce their will using violence, including murder or torture. But Officer Tusant explained defendant expressed fear of the cartel only in connection with his post-arrest offer to work with the police, not because of any fear for his family members' safety (which he did not mention). Ultimately, Officer Tusant decided against using defendant as an informant. Officer Tusant believed defendant had an "extremely trusted position" with the cartel as a stash house manager (or load coordinator) and might be "play[ing him] from a double agent perspective."

C. The Trial Court Declines to Give a Duress Instruction

Before defendant testified, the trial court and counsel discussed whether the evidence would warrant a jury instruction on the defense of duress. The court was of the view that it could

not make that decision "until the court hears what . . . defendant says and the court would then decide whether based upon that testimony . . . there is sufficient evidence even to raise this defense."

After the defense finished presenting its case, the court ruled it would not instruct the jury on duress. The court understood defendant's testimony was that "perhaps within days of the incident in this case" he had been told that his brother would be killed or burned if defendant did not take part in the drug transaction. The court concluded that "even if you believe everything the defendant says as it relates to the threats, I still think . . . there is not substantial evidence that the threats were of an immediate nature and that's required for [a duress defense]." Citing Court of Appeal precedent, the trial court explained a person committing a crime under duress must be faced with the choice of immediate death or executing the contemplated crime. The court then found "[t]hat's clearly not present here. While [defendant] certainly engaged in a . . . business that involves danger or threats[,] that's how they do business. There is no evidence at all that this was the situation where he was under such a threat that he had to act without having time to contemplate and form the specific intent."

Although a duress instruction was not given, and the defense during closing argument did not argue duress as a legal defense, the defense did argue defendant committed the crimes because he felt compelled by fear and therefore did not have the specific intent necessary to be guilty of the charged offenses. The jury was not persuaded; it convicted defendant on all of the charges against him. The trial court sentenced defendant to 9 years and 8 months in custody.

II. DISCUSSION

No extended discussion is necessary to expose the obvious flaw in the sole argument made on appeal: that the trial court should have instructed the jury on the defense of duress. A duress instruction is required only if there is evidence from which a reasonable jury could find all the elements of a duress defense satisfied—including the element that requires proof a defendant reasonably believed he faced an immediate threat to his life (or a family member's life was in immediate jeopardy) unless the defendant participated in the charged crime. Here, defendant's testimony about a threat made by "Palomo" "some days prior" to the drug-related crimes of conviction provided no substantial evidence of the immediacy element required for a duress defense.

"The defense of duress is available to defendants who commit crimes . . . 'under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.' ([Pen. Code,] § 26; see *People v. Anderson* (2002) 28 Cal.4th 767, 780 [ ].) . . . A trial court is required to instruct sua sponte on a duress defense if there is substantial evidence of the defense and if it is not inconsistent with the defendant's theory of the case. (See *People v. Breverman* (1998) 19 Cal.4th 142, 157 [ ].)" (*People v. Wilson* (2005) 36 Cal.4th 309, 331 (*Wilson*); see also *Coffman*, *supra*, 34 Cal.4th at p. 100 [duress defense can also be invoked in case of an imminent and immediate threat to the life of a third person, for instance, the child of a defendant].) "'Substantial evidence is "evidence sufficient 'to deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.'"" [Citations.]" (*Wilson*, *supra*, 36 Cal.4th at p. 331.)

"'The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger; none depict a phantasmagoria of future harm.' [Citations.]" (*People v. Vieira* (2005) 35 Cal.4th 264, 290 (*Vieira*); accord, *People v. Bacigalupo* (1991) 1 Cal.4th 103, 125 ["Central to a defense of duress is the immediacy of the threat or menace on which the defense is premised"], judg. vacated on other grounds and cause remanded *sub nom Bacigalupo v. California* (1992) 506 U.S. 802, reaffd. (1993) 6 Cal.4th 457 (*Bacigalupo*).) "Because the defense of duress requires a reasonable belief that threats to the defendant's life (or that of another) are both imminent and immediate at the time the crime is committed [citations], threats of future danger are inadequate to support the defense." (*Coffman*, *supra*, 34 Cal.4th at p. 100; see also *People v. Condley* (1977) 69 Cal.App.3d 999, 1012 ["Because of the immediacy requirement, a person committing a crime under duress has only the choice of imminent death or executing the requested crime. The person being threatened has no time to formulate what is a reasonable and viable course of conduct[,] nor to formulate criminal intent"].)

Here, in our independent judgment (*People v. Cole* (2004) 33 Cal.4th 1158, 1206), there was no substantial evidence that defendant committed the crimes of conviction because of an immediate threat to his own life, or the life of his brother. Defendant testified the visit from "Palomo" (during which defendant was threatened with being "picked up" himself by the cartel or having his brother burned) occurred "some days prior" to the drug transaction that led to his arrest. When asked whether

he believed "Palomo" could immediately carry out the threat, defendant admitted he knew "Palomo" was just a "messenger" and "[t]he people who would carry through the threat would be other persons." Defendant also conceded he had been threatened in the past by the cartel, but those threats had never been carried out. A threat conveyed days before planned criminal activity under these circumstances is not the sort of immediate, imminent threat a jury could rely on to credit a duress defense.

Defendant's arguments to the contrary are unconvincing. He claims he was "being watched by the cartel," presumably referring to his testimony that the cartel was generally "keeping an eye" on him when he arrived in California in 2009. But defendant related no facts that would permit an inference that he was under constant surveillance (or held incommunicado) from the point he claimed he was threatened by "Palomo" until the time of his arrest, even when asked whether he called the police in response to "Palomo's" threat (his answer, of course, was no). There is accordingly no basis on which the immediacy element required for a duress defense could be stretched to include a threat made in the "days prior." Defendant also contends that Officer Tusant's testimony that "narco organizations" can enforce their will by killing "provided evidence of the credibility of the cartel's threat of violence." Overall, Tusant's testimony did more to undermine the need for a duress instruction than to support it. And even taking the contention on its own terms, a threat may be credible while still not being immediate, and it was the immediacy that was lacking here.[2]

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[2] Defendant also contends that "the immediacy requirement of the duress defense relates to the time at which the actor

In fact, courts in other cases have upheld the refusal to instruct on duress where the evidence of the immediacy of the threat was equivalent to, or even stronger than, the evidence in this case. (See, e.g., *Vieira*, *supra*, 35 Cal.4th at pp. 290-291 [no duress instruction required where, in a meeting "just before" a group left to commit murder, the leader of the group looked directly at the defendant and threatened that if any one of them "'messed up'" during the attack, that person would "'join'" the intended murder victims]; *Bacigalupo*, *supra*, 1 Cal.4th at p. 125 [the defendant's statement that the "Colombian Mafia" had threatened to kill him and his family members if he did not commit the charged crimes "did not constitute substantial evidence that the threat of death . . . was *imminent*"]; *Lo Cicero*, *supra*, 71 Cal.2d at pp. 1189-1191 [no duress instruction necessary where the defendant furnished marijuana to another at a pool hall when a lieutenant for a crime syndicate operating in the area ordered the defendant to deal the drugs].) Particularly as illuminated by these cases, there was no error here in declining to instruct on duress.

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claiming duress is subjected to the danger threatened for failing to commit the act, and is not a requirement that an explicit threat be made at the time the act is committed or immediately before." Frankly, the argument is difficult to comprehend, but insofar as we understand it, it runs contrary to law. (*Coffman*, *supra*, 34 Cal.4th at p. 100 [threats identified to support a duress defense must be "both imminent and immediate at the time the crime is committed"]; *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1191 (*Lo Cicero*).)

DISPOSITION

The judgment is affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

LANDIN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.