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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FADI HADDAD,

Defendant and Appellant.

B286159

(Los Angeles County
Super. Ct. No. KA112287)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Jr., Judge. Affirmed as modified.

Leonard Chaitin, 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, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Fadi Haddad appeals from his conviction, after jury trial, of two counts of raping his ex-wife by duress (Pen. Code, § 261, subd. (a)(2)) and three counts of molesting his step-daughter (Pen. Code, § 288, subd. (a)). On appeal, he argues: (1) his counsel rendered ineffective assistance by failing to argue that his threats to his ex-wife did not constitute duress as a matter of law; and (2) the trial court erred in denying his motion to sever the counts pertaining to his step-daughter from the counts pertaining to his ex-wife. We disagree and affirm. However, we order the abstract of judgment modified to properly reflect the sentence imposed.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant dated, and was briefly married to, Nita.¹ Nita had two children from a previous relationship – her daughter Amy was the eldest. During their relationship, Nita and defendant had two children together. While defendant and Nita lived together, defendant molested Amy on three occasions. After defendant and Nita divorced, they shared custody of the two youngest children. When Nita would meet defendant to pick the children up, defendant forced her to have sexual intercourse with him, refusing to allow her to see the children until she had done so.

1. *The Turbulent Abusive Relationship Between Nita and Defendant*

Nita starting dating defendant in 2006; she moved in with him six months later, and they married in 2010. There was violence throughout the relationship.

¹ We use pseudonyms for the victims in order to protect their privacy.

In January 2009, defendant hit Nita in the face. Neighbors heard Nita screaming for help and telephoned the police. She had injuries on her face, neck and shoulders. Defendant was arrested, but returned to the house a few days later.

In June 2009, Nita was eight months pregnant with their youngest child. Nita was not in the country legally, and the family had been living in Texas. In the course of an argument, defendant became enraged and told Nita, “Okay. You stupid, bitch. You are going to see now.” He drove the family to the Mexican border, told a border agent that Nita was in the country illegally, and demanded she be deported. Nita begged one of the agents to let her go; he agreed. Nita grabbed the children and ran. She eventually took a taxi back to their apartment building, and borrowed a neighbor’s phone to call a domestic violence shelter. In the meantime, defendant had returned to the apartment, inflicted injuries on himself, and called 911, accusing Nita of assault. The police received both calls – defendant’s report against Nita and Nita’s request for transportation to the shelter. When officers arrived to investigate, they went to the border and confirmed Nita’s story. Defendant was arrested for making a false police report. He returned to the house the next day. Defendant ultimately entered a guilty plea to a charge of false report to a police officer, and was convicted based on the plea.

Despite the abuse, Nita did not leave defendant. Being undocumented, she was afraid of being deported. Defendant had told Nita that he could do whatever he wanted because he was in the military. She believed him; he had returned to the home each time he had been arrested. It was defendant who ultimately filed for divorce in late 2012.

2. *Molestation of Amy*

While the family was together, living in California, defendant molested Nita's daughter, Amy, on three occasions.

When she was eight or nine years old, Amy was alone in the apartment with defendant and her sleeping younger sister. Amy had been reading in the girls' room and came outside the room for a break. Defendant had been lying down on the sofa and told her to lie down next to him. Amy did so. Defendant reached his hand into Amy's pajama pants and under her underwear, and touched Amy's vagina, rubbing it for several minutes.

The second incident occurred when the entire family was spending the night at a relative's house, after a party. Amy was 10 or 11 years old. The family all slept in the same room, with Amy, her brother, and defendant in a bed, while Nita and the other two children slept on the floor. Amy was awakened by the feeling of moisture on her breast. She woke up to find defendant holding her breast with his hand, while he was licking it. She had been wearing clothing and a bra; defendant had lifted her top and bra to reveal her breast. Amy thought defendant did not notice that she had woken up, as his mouth remained on her breast. This went on for 10 minutes, until Nita woke up and asked if Amy wanted to sleep on the floor with the others. She did.

Defendant molested Amy a third time, when she was 11 years old. Much like the first time, she had been alone in the apartment with defendant when he asked her to lie down next to him on the couch. This time, she felt his erect penis against her back. At the same time, he reached under her pants and underwear and rubbed her vagina for several minutes, asking

Amy if she liked it. Amy did not respond, but simply waited until defendant fell asleep.

3. *Repeated Rape of Nita*

When Nita and defendant divorced, they had joint custody of the two youngest children. Nita had physical custody of the children on weekends, so she and defendant had contact when the children were handed off. Defendant repeatedly forced Nita to have sex with him as a condition of seeing her children. This happened many times, although defendant was prosecuted here for only two of the rapes.

In 2014, their youngest son was in the hospital, with a serious infection which had moved into one of his bones. Nita was visiting the boy in the hospital, but defendant kicked her out and told her not to come back. After the boy's release, defendant called Nita and asked if she wanted to see her son; she said that she did. Nita went to defendant's apartment to see the young boy and his sister. Defendant told her that if she wanted to see the children, she had to have sex with him first. Nita told him that she did not want to have sex; he replied, "Don't talk." Nita did not want to have sex with him, but did so in order to see her son following his hospitalization. After they had sex, defendant acted like everything was fine and allowed her to see the children.

The second rape occurred after she had dropped the children off following a weekend visit. Defendant told Nita to follow him to a hotel; she did so. Defendant obtained a room and brought her to it. Nita was crying and told defendant that she did not want to be with him. He told her to be quiet. She said "no" three times; he told her that he did not want to talk about it. She complied because she was afraid.

Defendant had repeatedly made multiple threats against her, all of which, in some way, related to seeing the children. Nita had to have a driver's license in order to legally pick up the children, but believed she could not get a license because of her immigration status. Defendant repeatedly threatened that he would tell the police that she was driving without a license; she knew this would mean the police would take her car away, and she would not be able to pick up the children. Defendant had also threatened to go to court and take the children away, or to report that she was not paying child support. After the divorce, Nita never willingly had sex with defendant, but acquiesced so that he would not call the police when she picked up the children.

Amy was aware that this was happening. She would see defendant tell Nita to go into the room with him, crying, when defendant came to their apartment to drop off the younger children. Nita explained to Amy that she was only doing it so that defendant would let her see her kids.

4. *Confirmation and Disclosure*

Virginia M. was like a mother to Nita and a grandmother to her children. She overheard defendant, on speakerphone, telling Nita she had to have sex with him in order to see the children. Virginia told Nita to report the situation to police, but Nita refused because she was afraid of the police and defendant had threatened immigration consequences.

Even after defendant was no longer living with them, Amy was depressed because of defendant's previous molestation. She slept all the time, hardly ate, and would cut herself. Virginia knew something was wrong, and tried to get Amy to open up to her. Amy told her that someone had touched her inappropriately, but would not say who it was. Amy was put in counseling, where

she disclosed that defendant had been the perpetrator. She then agreed to be interviewed by police. Amy told the police that her mother was also victimized by defendant.

5. *The Charges*

Defendant was charged by information with three counts of lewd acts on a child and two counts of rape by duress. An enhancement for sex offenses against multiple victims was alleged, within the meaning of Penal Code section 667.61, subdivision (e)(4).

6. *The Pretrial Motion for Severance*

Prior to trial, defendant moved for separate trials regarding the two different victims. He argued it would be prejudicial to try him on all counts together, and that there was “no need to introduce the facts of one alleged victim in the case of the other alleged victim, since they are totally irrelevant to each other.” The trial court denied the motion on the basis of the multiple victim enhancement allegation.

7. *The Trial*

At trial, Amy, Nita, and Virginia all testified. The prosecution also presented the testimony of the El Paso Police Officer who arrested defendant for making a false report; and an expert in Intimate Partner Battery or Violence, previously called Battered Women’s Syndrome.

In his case, defendant offered the testimony of his mother, who lived briefly with the family in Texas, and confirmed that Nita and defendant had frequently argued. Defendant’s mother testified that Nita had once struck defendant, and denied that defendant would have ever hit Nita. Defendant’s mother also lived with defendant after the divorce. She claimed to have seen defendant and Nita exchange the children frequently, and denied

that Nita ever came inside at the exchanges. However, defendant's mother's testimony was impeached by her admitted desire to protect her son, even to the point of denying his guilty plea to filing a false police report.

In argument to the jury, defendant's counsel took the position that Amy was making up the allegations against defendant because she knew that Nita wanted full custody of the younger children. Counsel argued that Nita was fabricating her allegations of duress, because Nita believed Amy's allegations, so she was angry at defendant. Counsel did not dispute that Nita and defendant had sex after the divorce; the argument was only that there was no duress.

The jury found defendant guilty as charged.

8. *Sentencing and Appeal*

Prior to the sentencing hearing, defendant filed a motion to discharge his attorney and represent himself. The motion was granted. Defendant's new trial motion was thereafter denied.

Defendant was sentenced to 15 years to life on each count, to be served consecutively, for a total of 75 years to life. However, the abstract of judgment erroneously has the boxes checked for concurrent, not consecutive, sentences.

Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant argues: (1) his counsel rendered ineffective assistance by failing to argue that threats to deny Nita child visitation cannot rise to the level of duress as a matter of law; and (2) the court erred in denying his motion to sever the counts relating to each of his two victims.

1. *There was No Ineffective Assistance of Counsel Because There was Sufficient Evidence of Duress*

Defendant's initial appellate contention is that his threats to Nita, to keep her from seeing her children, were insufficient to establish duress for purposes of rape as a matter of law. He argues that his counsel rendered ineffective assistance by not raising this argument before the trial court. This argument is, in effect, a challenge to the sufficiency of the evidence that defendant committed rape by duress. This issue can be raised directly on appeal without an objection in the trial court. (*People v. McCullough* (2013) 56 Cal.4th 589, 596.) If the evidence was, in fact, sufficient to establish that defendant committed rape by duress, there could not have been any ineffective assistance for failing to make the argument. Claims challenging the sufficiency of the evidence to uphold a judgment are reviewed under the substantial evidence standard. (*In re George T.* (2004) 33 Cal.4th 620, 630-631.)

Penal Code section 261, subdivision (a)(2) provides that sexual intercourse accomplished "against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another" is rape. Subdivision (b) of the statute provides, "As used in this section, 'duress' means 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."

The jury was properly instructed on the definition of duress. There is no dispute that defendant did not threaten force, violence, or danger. The issue, then, is whether defendant's threats to keep Nita from seeing her children constituted threats of retribution. The jury was instructed, in the language of CALCRIM No. 1000, that retribution "is a form of payback or revenge."

We have no difficulty in concluding that threats to separate a mother from her children – particularly when the threatener has a history of domestic violence and controlling behavior toward the victim – is a threat of retribution sufficient to coerce a reasonable person of ordinary susceptibilities to acquiesce in an act to which she otherwise would not have submitted. In this regard, we are persuaded by the rationale of *People v. Guyton* (2018) 20 Cal.App.5th 499, in which the court upheld the defendant's conviction of human trafficking, in addition to pandering and pimping. Human trafficking depends on a "deprivation of liberty" of the victim, including a restriction of liberty accomplished through force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury. (Pen. Code, § 236.1, subd. (h)(3).) In *Guyton*, the defendant pimp had kept his victim's small child from her, allowing her to see the child only "when he determined she earned that right and after he gave his permission." (*Guyton, supra*, 20 Cal.App.5th at p. 507.) The court concluded this fact helped elevate the crime from pandering to human trafficking, noting that "the liberty interest in family privacy has its source in intrinsic human rights." (*Ibid.*) Similarly, in *In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, the wife successfully rescinded an unfavorable marital settlement agreement on the basis of duress,

because the husband had threatened and intimidated the wife that unless she signed the agreement he wanted, she would lose the children. (*Id.* at pp. 741-742.) The court was persuaded by the wife's testimony which ended with: "I was extremely distraught and worried about the possibility of losing my children the next day, and I would have signed a pact with the Devil if I'd have had to to keep my children.'" (*Id.* at pp. 745-746.)

Rather than focus on the particular facts of this case and whether they rise to the level of duress, defendant makes an argument based on legislative history and statutory construction. Originally, the term "duress" was defined the same way across all sex crimes. This was a common law definition, which included threats of *hardship*, as well as threats of force, violence, danger, or retribution. In 1990, the Legislature specifically added duress as a means by which rape could be committed, and codified the common law definition of duress, including hardship, into the statute. However, in 1993, the Legislature amended the spousal rape statute to correspond to the rape statute. In the course of doing so, it removed the word "hardship" from the definition of duress in both statutes. (*People v. Leal* (2004) 33 Cal.4th 999, 1004-1006.) The issue then arose as to whether the removal of "hardship" from the definition of duress in rape and spousal rape also removed it from the common law definition of duress used in other sex crimes. In *Leal*, the Supreme Court concluded that it did not. (*Id.* at p. 1007.) This was so even though the legislative history suggested no reason why the definition of duress should be different for rape and spousal abuse as opposed to all other sex offenses. (*Id.* at p. 1008.)

Defendant takes the position that denying Nita access to her children was, as a matter of law, a mere "hardship," and

therefore outside the legal definition of duress for the purposes of rape. Defendant reasons as follows: In the *Leal* dissent, Justice Kennard explained that one dictionary defines hardship as a “‘suffering or privation’ [citation].” Recognizing that the U.S. Supreme Court characterized a termination of parental rights as “a unique kind of deprivation,” (*Lassiter v. Department of Social Servs.* (1981) 452 U.S. 18, 27), defendant concludes that his threats to Nita were threats of a “deprivation,” which is the same as a “privation,” and therefore, only a “hardship.”

Defendant’s argument is unpersuasive. Setting to one side defendant’s unsupported inference that all “deprivations” constitute “privations,” there is simply no authority that a threat of a “deprivation” constitutes *only* a threat of a hardship and may not also constitute a threat of force, violence, danger or retribution. (See *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1254 & fn. 17 [reversing for improper instruction on duress via hardship, but remanding because the evidence could support duress on another theory], disapproved on other grounds by *People v. Leal*, *supra*, 33 Cal.4th at p. 1010.) For example, the Fourteenth Amendment to the U.S. Constitution speaks of a “depriv[ation] . . . of life,” but no court could reasonably conclude that a threat of death is a mere threat of hardship alone. A deprivation is simply an act of depriving; without knowing what the person was *deprived of*, it is not necessarily restricted to a hardship. Here, it was a threat of retribution, thus meeting the statutory definition of duress.

2. *Severance was Properly Denied*

Defendant next argues the court erred in denying his motion to sever the counts relating to each victim into separate trials.

“The law prefers trying charged offenses together because doing so ordinarily promotes efficiency. [Citation.] Penal Code section 954 embodies this preference. That section provides as relevant: ‘An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts’ [Citation.] ‘Offenses “committed at different times and places against different victims are nevertheless ‘connected together in their commission’ when they are . . . linked by a “common element of substantial importance.” ’ ”’ [Citation.]” (*People v. Anderson* (2018) 5 Cal.5th 372, 388.)

Even if joinder is proper, as in the present case, the court may exercise its discretion to try the counts separately. We review the trial court’s ruling on a severance motion for abuse of discretion. (*People v. Ochoa* (2001) 26 Cal.4th 398, 423.) “ ‘When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant’s severance motion.’ [Citation.] ‘In determining whether a trial court’s refusal to sever charges amounts to an abuse of discretion, we consider four factors: (1) whether evidence of the crimes to be jointly tried is cross-admissible; (2) whether some charges are unusually likely to inflame the jury against the defendant; (3) whether a weak case has been joined with a stronger case so that the spillover effect of aggregate evidence might alter the outcome of some or all of the charges; and (4) whether any charge carries the death penalty or the joinder of charges converts the matter into a capital case.’ [Citation.]” (*People v. Anderson, supra*, 5 Cal.5th at pp. 388-389.)

Defendant has failed to meet the burden of establishing an abuse of discretion. As to the first factor, cross-admissibility, he makes no effort to argue that the evidence was not cross-admissible, either because the multiple victim enhancement was alleged or under Evidence Code section 1108 [allowing evidence of the commission of sex offenses to be used to prove a defendant's character trait].) "Joinder is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 126.) As such, there is no abuse of discretion in denying severance when cross-admissibility is present. (*Id.* at p. 128.)

Defendant's superficial discussion of the remaining factors does not otherwise establish prejudice. The second factor asks whether some charges are unusually inflammatory. Here, while both the molestation of defendant's stepdaughter and his rape by duress of his ex-wife are vile offenses, we cannot say that one is so much more inflammatory than the other that one would unfairly prejudice the other. Indeed, both crimes, if committed individually, would subject the defendant to the same sentencing triad of three, six, or eight years in prison. (Pen. Code, §§ 288, subd. (a); 264, subd. (a).)

The third factor asks whether a weak case has been joined with a strong case, or another weak case, such that the "spillover" effect of aggregate evidence might alter the outcome. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 423.) Here, defendant argues the "rape charges were so 'weak' as to not constitute rape and the molestation charges were not reported for such a substantial period of time as to be considered a relatively weak case." We have rejected defendant's argument that the rape charges were

not supported by sufficient evidence, and defendant points to no authority that a child victim's reluctance to report molestation – particularly while she was living under the same roof as her attacker – necessarily renders her testimony “weak.”

The final factor is whether any of the charges carries the death penalty or joinder of the counts turns the matter into a capital case. Defendant argues that this factor applies because consolidating the charges subjected him to a life sentence. A life sentence is not the same as the death penalty, and defendant points to no authority that they should be considered the same for purposes of severance. (Cf. *Gardner v. Superior Court* (2010) 185 Cal.App.4th 1003, 1007 [a capital case is one in which the defendant actually risks death].)

3. *The Abstract of Judgment Must be Modified*

The reporter's transcript shows that defendant was sentenced consecutively on each count. The parties do not dispute this. However, the first page of the abstract of judgment, which lists the counts in a chart, has the boxes checked for “concurrent” rather than “consecutive” sentences. The abstract must be modified to properly reflect the sentence.

DISPOSITION

In order to conform to the trial court's sentence, the superior court shall modify the abstract of judgment to reflect consecutive rather than concurrent sentences. The court is directed to prepare an amended abstract of judgment reflecting the sentence and to forward a certified copy of the amended

abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

GRIMES, J.

DUNNING, J.*

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