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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK QIANG WANG,

Defendant and Appellant.

B164939

(Los Angeles County
Super. Ct. No. BA218607)

APPEAL from a judgment of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Reversed.

Valerie C. West, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

Frank Wang appeals from the judgment entered following a bench trial in which he was convicted of torture, false imprisonment, and two counts each of inflicting corporal injury on a cohabitant and felonious assault. He contends that the trial court erred in admitting the victim's hearsay statements, in denying his motion for continuance of sentencing, and in imposing sentence. He further contends that his torture conviction was not supported by the evidence. We agree that admission of hearsay statements constituted prejudicial error but disagree that the evidence was insufficient to support the torture conviction. Accordingly, we reverse.

BACKGROUND

The victim in this case, Ms. B., did not testify at the preliminary hearing or at trial. At trial, Los Angeles Police Officer Juan Gomez testified that at 5:30 a.m. on June 10, 2001, he and his partner received a radio call to respond to Glendale Hospital for a domestic violence investigation. The officers arrived at the hospital about 20 minutes later and went to the emergency room, where they saw Ms. B. Ms. B. had multiple bruises on her body and complained of pain in her arms, legs, upper body, and head area. She had an IV in her arm. The officers, who were in uniform and carrying their service revolvers, told Ms. B. that they were there to investigate domestic violence. They also provided Ms. B. with a form with which she, as the victim of an enumerated crime, could request that her identity not be made a part of the public record. Ms. B. initialed the line stating that she exercised her right to confidentiality pursuant to Government Code section 6254.[1]

Gomez and his partner then proceeded to interview Ms. B. for 25 to 30 minutes. They also arranged for photographs to be taken that depicted Ms. B.'s injuries. As the interview progressed, there were times when Ms. B. was crying and there were times

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[1] Government Code section 6254, subdivision (c), permits nondisclosure of "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."

when she was calm. She said she was afraid of defendant and appeared fearful to Gomez only "when she kept thinking about [defendant]."

During the interview, Ms. B. told the officers that she had been dating defendant for about three years and had been living with him at his house for the past three months. Defendant was "experiencing financial problems due to child support responsibilities from a previous marriage, and . . . he was also angry because . . . there was a restraining order against him by the victim's sister." Ms. B. and defendant had "argued continuously over that matter." While in the bedroom on the morning of June 6, defendant threw Ms. B. on the bed, "straddled her and [forced] a rag inside her mouth so she wouldn't scream." Defendant next removed his belt and began striking Ms. B. numerous times with the buckle. Ms. B. attempted to move away, but defendant continued to strike her, a total of "approximately 15 plus times." On June 7 and June 8, defendant continued to hit her with the belt buckle.

Ms. B. further told the officers that "between June 6 and June 10 of 2001 that [defendant] would not let her leave his residence, and that he would not let her use the restroom, eat or drink water." A bedpan "was the only thing that [defendant] had in the bedroom for her." During this time, Ms. B. was in fear for her life and safety. On June 10, defendant fell asleep and Ms. B. was able to escape from the house. From there, she joined her sister and went with her sister to the police station. The officers at the station called paramedics, who transported Ms. B. by ambulance to Glendale Hospital.

Detective Joseph Kalyn testified that, following the interview of Ms. B. in the hospital, he interviewed Ms. B. several times. Kalyn's testimony concentrated on Ms. B.'s injuries, including the fact that as of June 22, 2001, Ms. B. was wearing an "ankle cast that was an air brace" to help reduce swelling in her ankle.

Defendant did not present any evidence in his defense.

DISCUSSION

1. Hearsay Statements

Ms. B.'s statements to the police were admitted at trial through the testimony of Officer Gomez and Detective Kalyn pursuant to Evidence Code section 1370. The

testimony was allowed following a stipulation that Ms. B. was unavailable as a witness due to being in the hospital for observation of a potentially fatal condition, which was apparently unrelated to injuries inflicted by defendant.[2] In his opening brief, defendant contends that the statements should not have been admitted because he did not knowingly stipulate to Ms. B.'s unavailability. In his reply brief, defendant contends that the statements also violated *Crawford v. Washington* (2004) 541 U.S. ___ [124 S.Ct. 1354] (*Crawford*), which was decided after the opening brief had been filed. We find merit in the latter contention and therefore have no need to discuss the former.[3]

In *Crawford,* the United States Supreme Court held that where out-of-court "testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (541 U.S. at p. ___ [124 S.Ct. at p. 1374].) On the other hand, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid.*; see also *id*. at p. ___ [1364] ["An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not"].)

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[2] Under Evidence Code section 1370, the hearsay rule does not bar admission of a statement if, among other things, the statement purports to describe an injury and the witness is unavailable to appear at trial.

[3] We note that the Attorney General aptly does not suggest that defendant waived his right to confrontation with respect to the *Crawford* issue. (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [107 S.Ct. 708].)

“Because *Crawford* announced ‘a new rule for the conduct of criminal prosecutions,’ it applies ‘retroactively to all cases, state or federal, pending on direct review or not yet final. . . .’ (*Griffith v. Kentucky*[, *supra*,] 479 U.S. [at p.] 328 [93 L.Ed.2d 649, 107 S.Ct. 708].)” (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 781, fn. 5.)

The Attorney General concedes that Ms. B.’s statement to Detective Kalyn was testimonial but urges that *Crawford* is inapplicable to Ms. B.’s statement to Officer Gomez and his partner because, “[a]t the hospital, [Ms. B.] was merely questioned but was not interrogated.” Defendant, of course, disagrees.

This area of law will be addressed by our Supreme Court in *People v. Adams* (2004) 120 Cal.App.4th 1065, review granted October 13, 2004, S127373, and *People v. Cage* (2004) 120 Cal.App.4th 770, review granted October 13, 2004, S127344, which “include the following issue: Are all statements made by an ostensible crime victim to a police officer in response to general investigative questioning ‘testimonial hearsay’ within the meaning of *Crawford* . . . and inadmissible in the absence of an opportunity to cross-examine the declarant, or does ‘testimonial hearsay’ include only statements made in response to a formal interview at a police station?” (Supreme Court’s Summary of Cases Accepted During the Week of Oct. 11, 2004 <http://www.courtinfo.ca.gov/courts/supreme/summaries/WS101104.PDF> [as of Dec. 21, 2004], italics omitted.) In the *Adams* case, *Crawford* was held to trump Evidence Code section 1370 as to statements taken at a hospital where a sheriff’s deputy and paramedics responding to the victim’s 911 call were told that the victim’s boyfriend had abused her and the victim was then taken to the hospital where she was interviewed by the deputy.

Pending resolution from a higher court, we note that the record in this case does not establish a time line for Ms. B.’s escape from the house and her arrival at the police station or at the hospital. Nor does it reveal the nature of the questioning or the information elicited at the station. But the record is clear that once Ms. B. was at the hospital, Gomez and his partner, wearing their uniforms and carrying their service revolvers, came into the emergency room for the purpose of questioning Ms. B. as to the

incidents of domestic violence she had reported. The officers also presented, and presumably explained, a form that gave Ms. B. the option of keeping her identity confidential. (She elected to do so.) The officers then interviewed Ms. B. for 25 to 30 minutes, during which they obtained information about Ms. B.'s relationship with defendant and the abuse defendant had inflicted upon her. Under these circumstances, we conclude that Ms. B.'s statement to those officers was testimonial within the meaning of *Crawford*, having been obtained by officers operating in their investigative capacity for the purpose of producing evidence in anticipation of a potential criminal prosecution.

We further reject the Attorney General's position that Ms. B.'s statement at the hospital was admissible under the spontaneous declaration exception to the hearsay rule. (Evid. Code, § 1240.)

"'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

"'The lapse of time between the described event and the statement, although a factor in determining spontaneity, is not determinative. "'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance.'" [Citation.]' [Citation.]" (*People v. Pirwani*, *supra*, 119 Cal.App.4th at p. 789, italics omitted.)

As with the issue of whether Ms. B.'s statement was "testimonial," we again find ourselves addressing an issue that was not litigated below. Nonetheless, the record does not establish that following defendant's acts of abuse, an insufficient amount of time lapsed to deprive Ms. B. of "the opportunity for reflection and deliberation before she

spoke with [Gomez and his partner at the hospital].” (*People v. Pirwani*, *supra*, 119 Cal.App.4th at p. 790, italics omitted.) We express no opinion as to the resolution of this issue on retrial. But on this record, it cannot be said that Ms. B.’s statement was a spontaneous declaration under Evidence Code section 1240.

Finally, as to the issue of prejudice, we note that the only evidence regarding how Ms. B.’s injuries were inflicted came from her improperly admitted hearsay statements. Accordingly, defendant’s conviction must be reversed, regardless of whether prejudice is assessed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18.[4]

2. Sufficiency of the Evidence of Torture

Defendant contends that the evidence was insufficient to support his conviction of torture, thereby precluding retrial on this allegation. (See *People v. Harvey* (1984) 163 Cal.App.3d 90, 108.) We disagree.

Under Penal Code section 206, “[e]very person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.”

Torture has only recently been made a discrete offense. (Pen. Code, § 206, added by initiative measure (Prop. 115, as approved by voters, Primary Elec. (June 5, 1990)).) In urging that he did not commit this crime, defendant relies on cases affirming torture convictions which involved injuries more severe than those suffered by Ms. B. But where, as here, the question is sufficiency of the evidence to support a conviction, “comparison with other cases is of limited utility, since each case necessarily depends on

[4] Based on this conclusion, we need not address defendant’s contentions with respect to sentencing.

its own facts." (*People v. Thomas* (1992) 2 Cal.4th 489, 516; accord, *People v. Baker* (2002) 98 Cal.App.4th 1217, 1224.)

Our task in reviewing defendant's contention requires that we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) In finding defendant guilty of torture, the trial court concluded that "the evidence could not establish that the pain and suffering was inflicted upon the victim . . . for a sadistic purpose in that infliction of pain for the purpose of the defendant experiencing pleasure . . . ." Rather, stated the court, "the infliction of pain and suffering was for the purpose of persuasion" in that the testimony of Officer Gomez "reflected that the defendant pushed and/or forced the victim onto the bed, stuck a rag . . . into her mouth to silence her purportedly, and struck her about the body numerous time[s]. Over the course of the days in question, specifically four days, the victim was not fed or given water or allowed to use the bathroom facilities, was given a bed pan. Every time the victim attempted to move from the bed, leave or call out for help, the defendant would resume striking her about the body seemingly to coerce and/or persuade her to remain at the location."

Given that Ms. B. did not testify and police testimony about her statements was relatively brief, the record lacks details regarding the nature of the physical constraints imposed on Ms. B. by defendant and the injuries he inflicted upon her. But, as noted above, the record reflects that Ms. B said defendant "would not let her leave his residence, and that he would not let her use the restroom, eat or drink water," and that a bedpan "was the only thing that [defendant] had in the bedroom for her." Based on this evidence, it was not unreasonable for the court, as the trier of fact, to infer as it did that "[e]very time [Ms. B.] attempted to move from the bed, leave or call out for help, the defendant would resume striking her about the body seemingly to coerce and/or persuade her to remain at the location."

We further note that we have viewed the photographs admitted in evidence that depict Ms. B.'s injuries. The bruising and lacerations are extensive. Based on our

review, we cannot say that the evidence was insufficient to support the finding that defendant, with the intent to cause cruel or extreme pain and suffering for the purpose of persuasion, inflicted great bodily injury on Ms. B.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

VOGEL, J.

SUZUKAWA, J.[*]

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