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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. DANIEL ODE, Defendant and Appellant.	B212252 (Los Angeles County Super. Ct. No. PA052117)

APPEAL from a judgment of the Superior Court of Los Angeles County. Shari Silver, Judge. Affirmed.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback III and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Daniel Ode appeals from the judgment entered following a jury trial that resulted in his conviction of multiple sex offenses committed against several victims, all of them minors. His contentions on appeal relate to three counts involving one victim: J.B. Regarding those counts, defendant contends: (1) the great bodily injury enhancement on count 6 (forcible lewd conduct with a child under the age of 14 years) is not supported by substantial evidence; and (2) it was an abuse of discretion to exclude evidence that J.B. was associated with a criminal street gang, requiring reversal of counts 8 and 9. We affirm.

PROCEDURAL BACKGROUND

Defendant was charged with the following crimes relating to J.B.: continuous sexual abuse of a child under the age of 14 years (§ 288.5, subd. (a); count 5); forcible lewd act upon a child under the age of 14 years between October and December 2001 (§ 288, subd. (b)(1); count 6); forcible lewd act upon a child under the age of 14 years between January and August 2002 (§ 288, subd. (b)(1); count 7); forcible lewd act upon a child under the age of 14 years between September and December 2002 (§ 288, subd. (b)(1); count 8); forcible lewd act upon a child under the age of 14 years between January and April 2003 (§ 288, subd. (b)(1); count 9); and dissuading a witness (§ 136.1, subd. (c)(1); count 10).[1] In addition to guilty verdicts on all charges relating to J.B., the

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[1] All undesignated statutory references are to the Penal Code.

A second amended information charged defendant with committing a lewd act upon a child under the age of 14 years (§ 288, subd. (a); counts 1, 2, 19, 20, 21 and 22); lewd act upon a child 14 or 15 years of age (§ 288, subd. (c)(1); counts 3 and 4); continuous sexual abuse of a child (§ 288.5, subd. (a); counts 5, 23 and 24); forcible lewd act upon a child under the age of 14 years (§ 288, subd. (b)(1); counts 6, 7, 8, 9, 11, 12, 13, and 14); intimidation of a witness or victim by force or implied force (§ 136.1, subd. (c)(1); count 10); willful harm or injury to a child (§ 273a, subd. (a); counts 16 and 17). Various sentence enhancements were also alleged (§ 667, subd. (a)(1) [prior serious felony], § 667.5, subd. (b) [prior prison terms], § 667.61, subds. (b) [25-year-to-life sentence under circumstances specified in subdivision (e)], (e)(3) [great bodily injury], (e)(5) [multiple victims], § 1170.12, subds. (a)-(d) [Three Strikes law], § 12022.8 [great

jury found true great bodily injury enhancements (§ 667.61, subds. (b), (e)(3), § 12022.8) alleged on counts 6 and 9. As to these counts, defendant was sentenced as follows: 37 years to life (the 16-year high term doubled pursuant to the Three Strikes law, plus a consecutive 5 years pursuant to section 667, subdivision (a)) on count 5; 50 years to life (25 years to life doubled pursuant to the Three Strikes law) on count 6; 30 years to life (15 years to life doubled pursuant to the Three Strikes law) on count 7; 30 years to life (15 years to life doubled pursuant to the Three Strikes law) on count 8;50 years to life (25 years to life doubled pursuant to the Three Strikes law) on count 9; and 2 years (1 year doubled pursuant to the Three Strikes law) on count 10.[2]

Defendant filed a timely notice of appeal.

FACTS

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*)), the following evidence was relevant to the counts relating to J.B. (We see no reason to describe the events involving defendant's other victims.) J.B. was born on October 7, 1990. At trial, she described a number of incidents, beginning when she was 10 years old, in which defendant sexually abused her. J.B. recalled that the abuse occurred on almost a daily basis. Although J.B. could not recall the exact date of any of the incidents, she could relate them to where her family

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bodily injury]). Count 15 from the original information was not included in the amended information. A jury found defendant not guilty on count 16, but guilty on all of the remaining counts; great bodily injury enhancement on counts 6, 9, 11, 12 and 14 and the multiple victim enhancement on counts 1, 2, 5, 6, 7, 8, 9, 11, 12, 13, 14, 19, 20, 21, 22, 23 and 24, were found true. In a bifurcated proceeding, the jury found true the alleged priors. At the People's request, the trial court vacated the convictions on counts 23 and 24, pursuant to *People v. Johnson* (2002) 28 Cal.4th 240, 248 (conviction for continuous abuse of a child (§ 288.5) precludes conviction for other sexual offenses occurring during the relevant period against the same victim).

[2] Defendant was sentenced to an indeterminate term of 30 years to life on counts 1, 7, 8, 13, 14 and 19; an indeterminate term of 50 years to life on counts 6, 9, 11 and 12; plus a total determinate term of 60 years 4 months on counts 2, 3, 4, 5, 10, 17, 20, 21 and 22 and the prior conviction enhancements.

was living at the time each series of incidents occurred. Accordingly, each count charged defendant with acts occurring during specified time periods.

A. Count 5 (March 1, 2001, through October 31, 2001)

In March 2001, J.B. was 10 years old when she moved with her mother and older brother into a house in Panorama City, which J.B. knew as "Corey's house." About one month later, defendant moved into Corey's house. When J.B.'s mother worked or left the house to run errands, defendant acted as J.B.'s babysitter. At first, J.B. thought of defendant as a father figure because he treated J.B. like one of his own children. But one day, when they were home alone together, defendant forced J.B. to orally copulate him. J.B. did not tell her mother or brother what had happened because she was afraid of what defendant would do to her; before this incident, defendant had smacked J.B. in the face with an open hand "quite a few times" and she was afraid he might hit her again; she was also afraid because she had heard that he had been in jail for killing someone. J.B. described several other incidents in which defendant sodomized her or forced her to orally copulate him while they were living at Corey's house. J.B. estimated that defendant attempted to sodomize her five times and forced her to orally copulate him 20 times while they lived at Corey's house. It happened on an almost daily basis.

B. Count 6 (October 31, 2001, through December 31, 2001)

In October 2001, J.B., her family and defendant moved into an apartment in Van Nuys. Not long after they moved in, J.B. recalled that she was home alone with defendant when he forced her to have sexual intercourse. This was the first time that this ever happened. Like before, J.B. did not tell anyone what defendant had done to her because she was afraid he would hit her.

C. Count 7 (January 1, 2002, through August 31, 2002)

Defendant moved out of the apartment in Van Nuys in November 2001, but often came back to the house to check on J.B. and her brother when their mother was working.

On those occasions, he often forced J.B. to have sexual intercourse with him. J.B. estimated defendant forced her to have sexual intercourse about 30 times and forced her to orally copulate him 20 times after defendant moved out and she still lived at the apartment in Van Nuys.

D. Count 8 (September 1, 2002, through December 31, 2002)

In September 2002, J.B. and her family moved to Fillmore and lived in a rented room. Defendant did not live with them there, but he visited occasionally. J.B. recalled one visit when she was alone in the house with him because her mother and brother were at the store; on that occasion, defendant forced her to have sexual intercourse. This happened a few times. When J.B. tried to resist, defendant would get angry and raise his hand at her.

E. Count 9 (January 1, 2003, through April 30, 2003)

After a few months in the rented room, J.B. and her family moved into an apartment in Fillmore. J.B. recalled that defendant sometimes picked her up in Fillmore and drove her to Santa Clarita to spend the weekend with him in the home he shared with L.O. and her daughter, S.O. On the drive from Fillmore to Santa Clarita, defendant often forced J.B. to orally copulate him. At the house in Santa Clarita, J.B. slept on the bottom of a bunk bed in S.O.'s room. She recalled an incident in which defendant came into the room and forced J.B. to orally copulate him while S.O was asleep in the top bunk. J.B. estimated that defendant forced her to orally copulate him about 20 times and forced her to have sexual intercourse with him about 30 times while she was in Santa Clarita; she recalled that defendant forced her to orally copulate him during the drive from Fillmore to Santa Clarita about 20 times.

In January 2003, J.B. discovered that she was pregnant. In May 2003, J.B. and her family moved to Las Vegas, Nevada. She gave birth in October 2003. J.B. recalled going to the hospital at about 11:30 p.m. She described the labor pain as 10 on a scale of 1 to 10. After being in labor for a few hours, she was given an epidural for the pain. J.B.

gave birth at 6:00 a.m. and then remained in the hospital for two or three days. J.B. named the baby Daniel because that was the name defendant selected.

J.B.'s last sexual contact with defendant occurred in March 2005, when defendant brought his daughter, C.O., and son, J.O, to Las Vegas for a visit.

F. Count 10 (January 1, 2003, through April 30, 2003)

On several occasions, defendant told J.B. that if she said anything and defendant got in trouble, "people would be sent after us." After defendant learned that J.B. was pregnant, it was decided that J.B. would have the baby and falsely accuse a boy from school, who had moved away and whose last name J.B. did not know, of being the father. Defendant told J.B. that he would make her pay if she did not keep this story straight, and that he would hurt J.B. and her family if she revealed that defendant was the father of her baby.

DISCUSSION

A. The Count 6 Great Bodily Injury Enhancement Is Supported by Substantial Evidence

Defendant contends there was insufficient evidence to support the section 12022.8 great bodily injury enhancement found true as to count 6, which charged a violation of section 288, subdivision (b)(1). He argues that "ephemeral pain a victim experiences pursuant to the unwanted sexual conduct does not comprise 'significant or substantial physical injury' within the meaning of section 12022.7." We disagree.

The standard of review for sufficiency of the evidence is well known: we review the entire record, viewing the evidence in the light most favorable to the prosecution and presuming in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. We look for 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. Conflicts and even testimony that is subject to justifiable suspicion do not justify the reversal of a judgment because it is the " 'exclusive

province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] . . . [Citation.]' A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*Zamudio*, *supra*, 43 Cal.4th at p. 357.)

Section 12022.8 provides: "Any person who inflicts great bodily injury, as defined in Section 12022.7, on any victim in a violation of . . . subdivision (b) of Section 288, . . . shall receive a five-year enhancement for each violation in addition to the sentence provided for the felony conviction." Section 12022.7, subdivision (f) defines great bodily injury as "significant or substantial physical injury."

"[T]rivial, insignificant or moderate" injuries do not rise to the level of "significant or substantial" injuries constituting great bodily injury. (*People v. Caudillo* (1978) 21 Cal.3d 562, 588-589 (*Caudillo*), overruled on another point in *People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. 6.[3]) In *People v. Escobar* (1992) 3 Cal.4th 740 (*Escobar*), our Supreme Court held that, to be significant or substantial the injury need not be so grave as to cause the victim " 'permanent,' 'prolonged,' or 'protracted' " bodily damage. (*Id*. at p. 750.) But the injury must be "*beyond* that inherent in the offense." (*Id*. at p. 746.)

"[W]hether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] ' "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." ' [Citations.] Where to draw that line is for the jury to decide." (*People v. Cross* (2008) 45 Cal.4th 63, 64 (*Cross*).)

"[W]hen victims of unlawful sexual conduct experience physical injury and accompanying pain beyond that 'ordinarily experienced' by victims of like crimes

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[3] The court in *Caudillo* also held that injuries that result in "transitory and short-lived bodily distress" do not constitute great bodily injury. (*Caudillo*, *supra*, 21 Cal.3d at p. 588.) But *Escobar* disapproved *Caudillo* on this point (*Escobar*, *supra*, 3 Cal.4th at pp. 749-750).

[citation], such additional, 'gratuitous injury' will support a finding of great bodily injury." (*Cross, supra*, 45 Cal.4th at p. 66 [a pregnancy without complications from unlawful but nonforcible sexual conduct with a minor may support a finding of great bodily injury], citing *Escobar, supra*, 3 Cal.4th at p. 746.) For example, in *People v. Williams* (1981) 115 Cal.App.3d 446, the victim of a forcible rape "was a virgin and as a result suffered much pain, feeling 'tortured' during the rape. The presence and intensity of pain are circumstances relevant to the existence and extent of physical injury. Moreover, defendant was well aware of the victim's virginity and of the pain he was causing her; in fact she told him she was a virgin and complained about the pain." (*Id*. at p. 454.) The court in *Williams* concluded, "An act of forcible rape which causes severe physical pain to the victim by virtue of the infliction of physical injury to the affected parts of her body beyond that inherent in and incident to a forcible rape qualifies for the enhanced punishment called for by . . . section 12022.7." (*Id*. at pp. 454-455.)

Here, the prosecutor explained in closing argument that count 6 concerned the first incident at the Van Nuys apartment. Regarding that incident, the evidence established that J.B. was 11 years old when defendant forced her to have sexual intercourse with him. J.B. testified that she told defendant it hurt and that, afterwards, her "gut, [her] stomach was hurting" and it hurt when she went to the bathroom. From J.B.'s testimony that this was the first time "this" ever happened, it is reasonable to infer that J.B. was a virgin. J.B.'s youth, the fact that she was a virgin and her testimony that the penetration "hurt" and that afterwards it hurt when she went to the bathroom, is sufficient to support the great bodily injury enhancement.

B. No Abuse of Discretion in Excluding Evidence of J.B.'s Gang Affiliation

As to counts 8 and 9, the prosecutor argued that the forcible lewd conduct was committed by duress not physical force.[4] Defendant contends the conviction on those

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[4] The prosecutor argued to the jury: "Now, [J.B.] did not testify to any physical force when [the acts charged in count 6] happened. However, there certainly is evidence of duress which is basically psychological coercion, and also menace which is an implied

two counts must be reversed because the trial court erred in excluding evidence that J.B. was affiliated with a criminal street gang. He argues that, inasmuch as J.B. was older and not living in the same household as defendant when the acts underlying these charges occurred, "evidence that [J.B.] associated with a gang would have helped establish that [defendant] no longer had a hold over [J.B.] and could no longer use fear to achieve what he desired."

At trial, the court ruled that this gang evidence was inadmissible under both relevancy and Evidence Code section 352 principles. The court observed that the gang evidence was "totally not related to this case. This is a case involving intentional acts of a sexual nature by the defendant to a minor victim. And this is to label her a gang member so that the jury would consciously or unconsciously hold this against her." The trial court concluded: "It seems to me under [Evidence Code section] 352 there is the possibility of if this evidence came out, that the jurors would misuse the evidence because of the stigma of gang membership. [¶] And in a case like this with crimes of sex, unlawful sexual intercourse and molestation by the defendant, the fact that she may associate or be a member of a street gang really has nothing to do with this case. And one can act tough and be tough as a member of a gang, but when one does not have that

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threat to inflict injury upon another. [¶] [J.B.], as far as duress goes, consider again that she is an 11-year-old child at the time that this happened. The defendant is an adult. Consider, also, what this child is thinking and her relationship with this adult who's doing this, given the fact that she is much smaller than he was at the time in stature as evidenced by the pictures that were taken of the defendant and [J.B.] around this time. [¶] [J.B.] also testified that she considered the defendant her babysitter, an uncle, an authority figure, someone that was in charge of her. . . . [¶] . . . [¶] [J.B.] also testified that she feared the defendant for the following reasons: that by the time they moved to [Van Nuys], the defendant's hitting of [J.B.] was with some frequency, so she was afraid of physical violence that he might utilize against her. [J.B.] also testified that she believed an -- you know, in her mind that the defendant had been to jail for killing somebody, and felt very intimidated by this. [¶] So if you look at, again, their positions and the physical violence that was exacted upon [J.B.], and what she thought about defendant's past, and all of the total circumstances which you can examine, the lewd conduct with a child under 14 years by force or fear has been proved beyond a reasonable doubt." The prosecutor made the same arguments as to counts 8 and 9.

gang backing one up and he or she is the victim of an adult sexual abuse, the fear factor is very different. [¶] And I think under [Evidence Code section] 352 the prejudicial value outweighs any probative value of this particular evidence."

We find no error in the trial court's ruling.

We review a challenge to the exclusion of evidence for abuse of discretion. (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.) To establish an abuse of discretion, the complaining party must show that the trial court exercised its discretion in such an arbitrary manner that a manifest miscarriage of justice occurred. (*People v. Carrington* (2009) 47 Cal.4th 145, 195.) A miscarriage of justice may be declared only when the court, " 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.] [Citations.]" (*People v. Memory* (2010) 182 Cal.App.4th 835, 862.)

The evidentiary principles relevant to our analysis are well known. Generally, all relevant evidence is admissible. (Evid. Code, § 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Pursuant to Evidence Code section 352, trial courts have discretion to exclude even relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court's exercise of discretion under Evidence Code section 352 will be disturbed only " 'when the prejudicial effect of the evidence clearly outweighed its probative value.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

We turn now to the evidence and charges here, mindful of our limited role in reviewing evidentiary rulings.

A violation of section 288, subdivision (b)(1) makes criminal lewd or lascivious acts upon a child under the age of 14 years "by use of force, violence, duress, menace or fear of immediate and unlawful bodily injury on the victim or another person . . . ." The

element of force, violence, duress, menace or fear " ' "is intended as a requirement that the lewd act be undertaken without the consent of the victim." ' [Citation.]" (*People v. Perez* (2010) 182 Cal.App.4th 231, 243.)

The present case involves a sexual assault based on duress more so than fear. *People v. Cardenas* (1994) 21 Cal.App.4th 927, also involved a sexual assault predicated heavily on duress (although in *Cardenas* there was some evidence of physical force). (*Id*. at p. 940.) The court explained, " '[D]uress as used in the context of section 288 [means] 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.' [Citation.]" (*Id*. at p. 939.) It observed that "[t]he term 'fear' in the context of these sections has been defined as follows: '(1) "A feeling of alarm or disquiet caused by the expectation of danger, pain, disaster, or the like; terror; dread; apprehension" (American Heritage Dict. (1981) p. 480) and (2) "Extreme reverence or awe, as toward a supreme power" (*ibid.*).' " (*Id*. at pp. 939-940, quoting *People v. Montero* (1986) 185 Cal.App.3d 415, 425 [defining fear in the context of the element of force in § 261, subd. (a)(3)].) Factors such as the position of dominance and authority of the defendant over the victim and the defendant's continuous exploitation of the victim may be considered in determining the existence of duress. (*Id*. at p. 940.) Factors to be considered in assessing the presence of duress include the age of the victim; the victim's relationship to defendant; whether the defendant threatened to harm the victim, physically controlled the victim when the victim attempted to resist, or warned the victim that revealing the molestation would jeopardize the victim's family. (*People v. Veale* (2008) 160 Cal.App.4th 40, 45-46.)

As framed by defendant, the issue is whether the gang affiliation of a victim of forcible lewd and lascivious conduct with a child under the age of 14 years, is a relevant factor to consider in appraising the existence of duress--and if so, whether the evidence was nevertheless properly excluded under Evidence Code section 352.

The record revealed the following: J.B., born on October 7, 1990, would have been between 11 and 12 years old during September 1, 2002, and April 30, 2003, when the offenses charged in counts 8 and 9 were alleged to have occurred. By that time, the evidence showed that defendant had been systematically abusing J.B. for 18 months, beginning in March 2001 when J.B. was 10 years old. In this context, even assuming for the sake of argument that J.B. had become affiliated with a gang during that time period, the evidence was that the sexual abuse occurred when she was alone with defendant in her own home, in his car driving to his home in Santa Clarita, or in his home in Santa Clarita. At these times, there were no gang members present to protect her from defendant. Under these circumstances, J.B.'s purported gang membership was simply irrelevant to whether defendant accomplished his abuse by duress; i.e., whether J.B. succumbed to the abuse because she had an expectation of danger or pain. Moreover, even assuming the excluded evidence had some modicum of relevance to the element of duress, the trial court did not abuse its discretion in finding that it was more prejudicial than probative. This was a straightforward sexual assault case involving deplorable acts over a long period of time with several minors some as young as 10 years old. There were simply no gang overlays to these acts and to bring gang membership or affiliation into the trial would necessarily have distracted the jury from the task at hand. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193 [evidence of gang membership "may have a highly inflammatory impact on the jury"]; *People v. Cox* (1991) 53 Cal.3d 618, 660 [condemning introduction of gang evidence where "evidence of gang membership [is] only tangentially relevant, given its highly inflammatory impact"], (disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22).)

Defendant's reliance on cases in which evidence of gang membership was found admissible is misplaced. For example, in *People v. Harris* (1985) 175 Cal.App.3d 944, 957, it was the defendant's gang membership that was found relevant to show why the witness was afraid to testify. Here, defendant seeks to admit evidence that the victim was affiliated with a gang. While such evidence may be relevant to assessing a claim of self-defense (see, e.g., *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-447), it was not

relevant to any issue in the charge of forcible lewd and lascivious conduct upon a child under the age of 14 years.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.