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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
HANS DERIK HANSON,
Defendant and Appellant.

A136936

**(Humboldt County
Super. Ct. No. CR1201907)**

A jury convicted defendant Hans Derik Hanson (appellant) of several offenses, including assault with a deadly weapon and criminal threats, and he was sentenced to a total prison term of six years eight months. On appeal, he contends there was prejudicial error because a prosecution witness made reference to his postarrest invocation of his right to silence and the eight-month sentence imposed on the criminal threats charge must be stayed under section 654 of the Penal Code.¹ We conclude appellant’s section 654 claim has merit, and also direct the superior court to delete an indication in the abstract of judgment that the assault was a violent felony. In all other respects, we affirm.

PROCEDURAL BACKGROUND

In May 2012, the Humboldt County District Attorney filed an information charging appellant with assault with a deadly weapon (§ 245, subd. (a)(1); count one);

¹ All further undesignated section references are to the Penal Code.

false imprisonment by violence (§ 236; count two); issuing criminal threats (§ 422; count three); and misdemeanor battery on a police officer (§ 243, subd. (b); count four). The information also alleged sentencing enhancements for seven prior prison terms (§ 667.5, subd. (b)).

In September 2012, a jury found appellant guilty of the assault with a deadly weapon, criminal threats, and battery against a police officer charges. The jury acquitted appellant of felony false imprisonment, but found him guilty of the lesser offense of misdemeanor false imprisonment.

In October 2012, the trial court imposed the upper term of four years on the assault charge and a consecutive eight-month middle term on the criminal threats charge. The trial court also imposed two additional years based on two of the alleged prior prison terms (§ 667.5, subd. (b)), for a total prison term of six years eight months. This appeal followed.

FACTUAL BACKGROUND

Appellant's older sister, Constance Haynes, testified that in April 2012 appellant began staying with her in a spare bedroom in her apartment in Humboldt County. On April 27, appellant went out for the evening and returned in the early morning hours of April 28. Haynes heard banging noises coming from appellant's room. She pushed the door to his room open a little bit in order to ask him to be quiet and knocked over a pile of weights stacked against the door.

According to Haynes, appellant emerged from his room, angry and holding a knife. He held the knife to Haynes's throat and threatened to kill her. He said "I'll kill ya" and graphically described what would happen when he sliced Haynes's throat. Appellant then held the knife to his own throat and went back into his bedroom.

Haynes went to the family room and appellant emerged from his bedroom holding a machete rather than a knife. He ordered Haynes to go to her bedroom and she complied. Appellant followed and once inside her bedroom he held the machete to Haynes's throat and asked, "You want to die? You want to see some blood?" Appellant also held the machete to his own throat, and then hit the bed with the machete until

Haynes told him her dog was in the bed. Appellant stopped hitting the bed and expressed concern for the dog. Haynes took the opportunity to flee the apartment.

When Haynes ran out of her apartment, she saw a police car parked outside. She ran over to the police car and told Arcata Police Officer Fox, “my brother is trying to kill me.” Appellant had exited Haynes’s apartment and ran up stairs to a level of apartments above. After commanding appellant to submit several times, Officer Fox managed to place appellant under arrest with the assistance of additional officers. Officer Fox found a knife and machete in appellant’s bedroom; Haynes identified them as the weapons appellant had held against her throat.

Arcata Police Officer Reid arrived at the scene after appellant’s arrest. There were two other officers in addition to Officer Fox, and appellant was sitting on the ground in handcuffs. Officer Reid spoke to Haynes and then transported appellant to jail. During the trip, appellant was angry and verbally abusive, and he repeatedly kicked the divider between the front and back seats of the patrol car. Appellant spit at Officer Reid in the jail parking lot, hitting her in the forehead.

DISCUSSION

I. *There Was No Doyle Violation*

Appellant contends the trial court abused its discretion in denying his motion for mistrial based on the prosecutor’s violation of *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*). In *Doyle*, the United States Supreme Court held that using a defendant’s postarrest silence to impeach the defendant’s trial testimony is a violation of due process. (*Doyle*, at pp. 617-618; *People v. Collins* (2010) 49 Cal.4th 175, 203.) The rule was subsequently extended to more broadly prohibit the prosecution from using a defendant’s invocation of the right to remain silent against him at trial, regardless of whether the defendant testifies. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118; *People v. Champion* (2005) 134 Cal.App.4th 1440, 1447-1448 (*Champion*).) The rule is “ ‘founded on the notion that it is fundamentally unfair to use post-*Miranda* silence against the defendant at trial in view of the implicit assurance contained in the *Miranda*

warnings that exercise of the right of silence will not be penalized.’ ” (*Coffman and Marlow*, at p. 65; see also *People v. Evans* (1994) 25 Cal.App.4th 358, 367 (*Evans*).)

The background to appellant’s claim is as follows. During the direct examination of Officer Fox, after he testified to the circumstances of appellant’s arrest, the prosecutor asked the officer, “And at some point did you have further contact with [appellant] that night?” Officer Fox answered, “I did. I went . . . to interview [appellant]. I advised him of his *Miranda* rights and he did not wish to speak with me.” Defense counsel objected, and the trial court ordered the testimony stricken. The following day, defense counsel moved for a mistrial. He argued the prosecutor violated *Doyle* by eliciting testimony that appellant invoked his right to remain silent. He asserted that the prosecution’s entire case was premised on the credibility of Haynes, and that Officer Fox’s testimony created the improper inference that appellant was trying to hide something from the police. The trial court ruled there had been a *Doyle* violation, but a curative instruction to the jury would suffice to eliminate any prejudice. The court ultimately instructed the jury, “A defendant has an absolute constitutional right to remain silent when questioned by a police officer. Do not consider, for any reason at all, the fact that the defendant did not speak with the police officer. Do not discuss that fact during your deliberations or let it influence your decision in any way.”

“A trial court should grant a mistrial only when a party’s chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial.” (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

In the present case, we need not determine whether any *Doyle* violation resulted in incurable prejudice to appellant; instead we conclude that, because the trial court sustained defense counsel’s objection and struck Officer Fox’s testimony about appellant’s invocation of his right to silence, there was no *Doyle* violation. As explained in *Champion, supra*, 134 Cal.App.4th at page 1448, “To establish a violation of due process under *Doyle*, the defendant must show that the prosecution inappropriately used his postarrest silence for impeachment purposes and the trial court permitted the

prosecution to engage in such inquiry or argument. [Citations.] ‘The type of permission . . . will usually take the form of overruling a defense objection, thus conveying to the jury the unmistakable impression that what the prosecution is doing is legitimate.’ [Citation.]” (See also *Greer v. Miller* (1987) 483 U.S. 756, 763-764 (*Greer*); *Evans, supra*, 25 Cal.App.4th at p. 368.)

Appellant argues Officer Fox’s testimony violated *Doyle* because, even though the trial court sustained the objection and struck the objectionable testimony, the jury still heard that appellant invoked his right to silence. In *Greer*, the prosecutor asked the testifying defendant during cross-examination, “Why didn’t you tell this story to anybody when you got arrested?” (*Greer, supra*, 483 U.S. at p. 759.) The trial court sustained an objection to the question and denied a motion for mistrial. *Greer* held there was no *Doyle* violation because the trial court did not *permit* the prosecutor to use the defendant’s silence against him. The court reasoned, “It is significant that in each of the cases in which this Court has applied *Doyle*, the trial court has permitted specific inquiry or argument respecting the defendant’s post-*Miranda* silence. [Citations.] [¶] In contrast to these cases, the trial court in this case did not permit the inquiry that *Doyle* forbids. Instead, the court explicitly sustained an objection to the only question that touched upon [the defendant’s] postarrest silence. No further questioning or argument with respect to [the defendant’s] silence occurred, and the court specifically advised the jury that it should disregard any questions to which an objection was sustained. Unlike the prosecutor in *Doyle*, the prosecutor in this case was not ‘allowed to undertake impeachment on,’ or ‘permit[ted] . . . to call attention to,’ [the defendant’s] silence. [Citation.] The fact of [the defendant’s] postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no *Doyle* violation occurred in this case.” (*Greer*, at pp. 764-765, fns. omitted.)

Appellant has not shown that a court “permits” the use of a defendant’s silence against him, within the meaning of *Doyle* and *Greer*, where improper testimony is elicited but immediately stricken by the court. The federal Fifth Circuit has adopted the position suggested by appellant and “interpreted *Greer* as limited to situations in which

no answer is given to the improper question.” (*U.S. v. Moreno* (5th Cir. 1999) 185 F.3d 465, 474, citing *U.S. v. Carter* (5th Cir. 1992) 953 F.2d 1449, 1466.) However, neither *Moreno* nor *Carter* explained how a trial court can be said to have “permitted” the use of a defendant’s silence where the court immediately struck the objectionable testimony. In any event, the California Supreme Court interpreted *Greer* more broadly in *People v. Clark* (2011) 52 Cal.4th 856. There, an officer testified the defendant did not respond after being informed of the charges under investigation, and the trial court struck the testimony and admonished the jury to make no inference from the defendant’s silence. (*Id.* at p. 959.) The court concluded there was no *Doyle* violation, stating “The United States Supreme Court has explained that a *Doyle* violation does not occur unless the prosecutor is *permitted* to use a defendant’s postarrest silence against him at trial, and an objection and appropriate instruction to the jury ordinarily ensures that the defendant’s silence will not be used for an impermissible purpose. [Citation.]” (*Clark*, at p. 959; see also *People v. Thomas* (2012) 54 Cal.4th 908, 936; *Ellen v. Brady* (1st Cir. 2007) 475 F.3d 5, 11.)

In the present case, as in *Greer*, the trial court sustained an objection to the only question that touched upon appellant’s postarrest silence; no further questioning or argument with respect to appellant’s silence occurred; and the court advised the jury it should disregard any questions to which an objection was sustained. (*Greer, supra*, 483 U.S. at p. 764.) Additionally, the trial court instructed the jury to disregard any stricken testimony and not to consider appellant’s silence for any purpose. Although the facts in *Greer* are somewhat different because the objection in the present case *followed* rather than preceded the answer, it is clear that appellant’s silence “was not submitted to the jury as evidence from which it was allowed to draw any permissible inference.” (*Greer*, at pp. 764-765.)² The trial court properly denied appellant’s motion for mistrial.

² Although an improper question from a prosecutor may in some circumstances constitute prosecutorial misconduct denying a defendant due process (*Greer, supra*, 483 U.S. at pp. 765-766), appellant does not argue that as a basis for reversal on appeal. In any event, the single question posed by the prosecutor did not constitute prosecutorial

II. *The Sentence on Count Three Must Be Stayed*

Appellant contends the trial court erred at sentencing by imposing a consecutive term of eight months for his count three conviction for issuing criminal threats (§ 422). Appellant argues, because there is no substantial evidence he harbored multiple objectives when he assaulted and threatened Haynes, the trial court violated section 654 by failing to stay the sentence on the lesser offense.

Section 654, subdivision (a) provides, in pertinent part, “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” In addition to barring multiple punishment for a single criminal act, section 654 also prohibits multiple punishment for an indivisible course of conduct committed “ ‘with a single intent and objective.’ ” (*People v. Hester* (2000) 22 Cal.4th 290, 294.) “ ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; see also *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) Where section 654 precludes multiple punishment, the trial court should stay the sentence on the lesser offense. (*Hester*, at p. 294.) “Whether a defendant did in fact have multiple objectives is generally a question of fact for the trial court, and its decision will be upheld on appeal if supported by substantial evidence.” (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.)

In the present case, respondent argues the facts permit separate punishment for appellant’s assault on Haynes with the machete and his threat to kill with the knife. However, the prosecutor elected in her closing argument to rely on the machete incident to support both the assault and criminal threats charges. (See *People v. Jantz* (2006) 137

misconduct “ ‘ ‘of sufficient significance to result in the denial of the defendant’s right to a fair trial.’ ” [Citations.]” (*Id.* at p. 765.)

Cal.App.4th 1283, 1292 [prosecutor made election of basis for criminal threats charge in opening and closing argument]; see also *People v. Mayer* (2003) 108 Cal.App.4th 403, 418.) With respect to the count one assault charge, the prosecutor identified the deadly weapon as the machete at the start and end of her closing statement. With respect to the count three criminal threats charge, the prosecutor stated at the outset of her closing, “It’s our position that [appellant] threatened to kill [Haynes] when he held the machete to her throat.” At the end of her closing she stated with regard to that count, “if a person holds a machete to your neck and says, ‘I’m going to kill you,’ [it] is pretty reasonable to be in sustained fear.” Respondent argues that the prosecutor misspoke in referring to the machete with respect to the criminal threats charge, because the threat that she described corresponded to the knife incident.³ In fact, the prosecutor’s description of the threat did not perfectly correspond to Haynes’s testimony regarding the threats made either with the knife or machete. In light of her references to the machete at both the beginning and end of her closing statement, it is clear that the prosecutor elected to rely on the machete incident as the basis for both counts.

Haynes’s testimony showed that appellant committed two assaults and issued two series of criminal threats, with the knife in the hallway outside appellant’s room and thereafter with the machete in Haynes’s bedroom. However, in light of the prosecutor’s election, the issue is whether it was proper to punish appellant for both the assault with the machete and the threat with the machete. We agree with appellant that multiple punishment is prohibited under section 654. Because appellant did not inflict any actual physical injury on Haynes despite his ability to do so, there is no substantial evidence that appellant separately intended to frighten Haynes and harm her in the machete incident. Instead, the only reasonable inference is that the assault with the machete was the means appellant selected to communicate the seriousness of his threat. (*Harrison, supra*, 48

³ The prosecutor stated, “So in this case, it’s pretty clear, ‘I’m going to kill you,’ and more colorful thing he said, ‘You’re going to see blood. What do you think it’s going to look like when I kill you? What do you think it’s going to look like when I kill myself.’ He was pretty specific.”

Cal.3d at p. 335 [“if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once”].) That appellant’s act of holding the machete against Haynes’s throat and his verbal threat to kill her took place at exactly the same time is also a circumstance supporting application of section 654. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781; see also *People v. Evers* (1992) 10 Cal.App.4th 588, 603.) Respondent does not argue it would have been proper for the trial court to impose separate punishments for both the assault and threat with the machete.

We conclude the trial court was required under section 654 to stay the sentence on the count three criminal threats charge.

III. *A Clerical Error in the Abstract of Judgment Must be Corrected*

The abstract of judgment states that appellant’s count one conviction for assault with a deadly weapon (§ 245, subd. (a)(1)) is a “violent felony.” The parties agree this is a clerical error that this court should order corrected, because there is no finding or evidence that appellant inflicted great bodily injury on Haynes. (See § 667.5, subd. (c)(8) [identifying as a violent felony “[a]ny felony in which the defendant inflicts great bodily injury on any person other than an accomplice”].) We will direct the trial court to correct the abstract of judgment.

DISPOSITION

The judgment is modified to stay the execution of the prison sentence of eight months the trial court imposed for appellant’s count three conviction for violation of section 422. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect this modification of the judgment. The court is also directed to correct the abstract of judgment to delete the indication that appellant’s count one conviction for violation of section 245, subdivision (a)(1) was a violent felony. The court is further directed to forward a certified copy of the amended abstract to the California Department of Corrections and Rehabilitation.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.