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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH KIYOSHI KAKUGAWA,

Defendant and Appellant.

A141035

(Humboldt County
Super. Ct. No. CR1304136)

This appeal raises only issues related to the subordinate eight-month term imposed on defendant Keith Kiyoshi Kakugawa following his guilty pleas to two felony charges. The pertinent background is as follows:

On November 5, 2013, the date set for defendant's preliminary examination, the court was advised that a negotiated disposition had been reached. Pursuant to that agreement, defendant waived his right to a preliminary examination and, after being advised that the maximum sentence could be eight years and eight months, entered pleas of guilty to charges of sexual penetration with a foreign object (Pen. Code, § 289, subd. (a)(1)) and false imprisonment effected by violence and menace (Pen. Code, § 236). Other charges and enhancement allegations were dismissed, but with a reservation that they could be considered for sentencing. (*People v. Harvey* (1979) 25 Cal.3d 754.)

Following preparation of a report by the probation officer recommending that defendant be sentenced to the aggregate term of eight years and eight months (eight years for the assault county, eight months consecutive for the false imprisonment count), the case came on for sentencing on February 10, 2014. After the court indicated in a

tentative sentence that it was inclined to accept this recommendation, defense counsel argued that defendant should be admitted to probation after sentence was imposed but suspended, or sentenced to the midterm instead of the aggravated term on the penetration count, and that the subordinate term for the imprisonment count should be ordered served concurrently instead of consecutively. After the court heard brief argument from the prosecution in favor of the probation officer's recommendation, the court sentenced defendant in accordance with the tentative sentence: to the aggravated term of eight years on the penetration count, and a consecutive term of eight months on the imprisonment count.

Having perfected this timely appeal, defendant now attacks only the eight-month consecutive term imposed for the false imprisonment count. He contends it was imposed without the required statement of reasons, or, alternately, should have been stayed pursuant to Penal Code section 654 (section 654).

A statement of reasons is required for imposition of a consecutive term. (Cal. Rules of Court, rule, 4.406(b)(5).) That did not occur here, and thus the trial court erred. The Attorney General does not argue to the contrary, but asserts the point is forfeited by defendant's failure to object, and in any event was harmless. Both points are sound.

“[A] defendant waives review of error, such as a sentencing court's reasons or asserted lack of reasons for imposing an upper or consecutive term, by failing to object at the time of sentencing.” (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311; accord, *People v. Scott* (1994) 9 Cal.4th 331, 355; *People v. Neal* (1993) 19 Cal.App.4th 1114, 1117-1124.) Had defendant brought the error to the court's attention, it could have been easily prevented or corrected. (*People v. Scott, supra*, at p. 353.) This is particularly true when the trial court provided its proposed sentence at the start of the sentencing hearing.

But the error does not require a remand for resentencing. “Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation].” (*People v. Osband* (1996) 13 Cal.4th 622, 728-729.) In other words, only two factors in aggravation were needed. Here, the trial court identified five, with only one factor in mitigation. The aggravating

circumstances would not incline a sentencing court to leniency, not in light of these comments: “We have rule 4.421(a)(1), the crime did involve a significant or great amount of violence disclosing a high degree of cruelty and viciousness or callousness. Rule 4.421(a)(3), the victim was particularly vulnerable. We have rule 4.421(b)(1), Mr. Kakugawa has engaged in violent conduct which indicates a serious danger to the community. We have rule 4.421(b)(3), the defendant has served prior prison terms. And we have rule 4.421(b)(5), prior performance on probation and parole [was] unsatisfactory.” In these circumstances, it is highly unlikely “the trial court would impose a different sentence if we were to remand for resentencing. Accordingly, we find the trial court’s failure to state reasons for imposing [a] consecutive sentence[] to be harmless.” (*People v. Champion* (1995) 9 Cal.4th 879, 934.)

Defendant’s second contention, that the court was required to stay execution of any term on the imprisonment count, is based on this statutory command: “An 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.” (§ 654, subd. (a).)

This contention is not forfeited by defendant’s failure to object at the time of sentencing. (*People v. Scott, supra*, 9 Cal.4th at p. 354, fn. 17 and authorities cited.) The Attorney General tries to achieve the same result by arguing that defendant is “estopped” on this point because he cannot challenge a sentence, even one that is unauthorized, if he agreed to it. “The common theme of these cases,” including *People v. Jones* (1989) 210 Cal.App.3d 124, and *People v. Otterstein* (1987) 189 Cal.App.3d 1548 cited by the Attorney General, “is that when defendant knowingly, intelligently and expressly agrees to certain aspects of a proposed negotiated disposition, i.e., sentencing irregularities, to obtain the overall benefits of a negotiated disposition, he is stopped to complain.” (*People v. Velasquez* (1999) 69 Cal.App.4th 503, 506.) The principle is now rule 4.412(b) of the California Rules of Court: “By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one

abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.”

The principle is not applicable here. Defendant did not agree to a specified term, but to an “open plea” with a lid on the possible sentence. This was made explicit by the trial court prior to accepting defendant's pleas of guilty:

“THE COURT: . . . Mr. Kakugawa, the charge in count number one, a violation of Penal Code section 289 subdivision (a)(1) carries a potential range of prison sentencing as following: There is a low or mitigated term of three years. There is a middle term of six years. There is a high or aggravated term of eight years.

“As to count number five which alleges a violation of Penal Code section 236, that offense carries the range of commitment as follows: There's a low or mitigated term of sixteen months in custody. There's a middle term of two years. There's a high or aggravated term of three years.

“As to count five with the consecutive sentencing law in the state of California, your potential commitment on count five is one-third of the midterm of two years, which means eight months. Taking counts one and five together then *the maximum potential commitment is eight years and eight months*.

“Do you understand that, sir?

“DEFENDANT: Yes, sir.

“THE COURT: And do you understand, Mr. Kakugawa, that *your plea is an open one. Which means, the Court at sentencing would have the ability to commit you to possibly that maximum commitment of eight years and eight months?*

“DEFENDANT: Yes, sir.” (Italics added.)

The court was not recognizing or accepting a stipulated sentence that was part of a plea bargain. It was simply satisfying its duty under *In re Yurko* (1974) 10 Cal.3d 857 to advise defendant of the possible range of penal consequences. The Attorney General's estoppel argument fails accordingly. We therefore proceed to the merits of defendant's contention.

“It is well settled that section 654 protects against multiple punishment, not multiple conviction. [Citation.] The statute literally applies only where such punishment arises out of multiple statutory violations produced by the same ‘act or omission.’ [Citation.] However, because the statute is intended to ensure that defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.] [¶] It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that 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. [Citation.] [¶] If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.] Although the question of whether defendant harbored a ‘single intent’ within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) “In the absence of any reference to Penal Code section 654 during sentencing, the fact that the court did not stay the sentence on any count is generally deemed to reflect an implicit determination that each crime had a separate objective.” (*People v. Tarris* (2009) 180 Cal.App.4th 612, 626.)

In light of the timing of defendant’s change of plea, there is no trial transcript, and there is no preliminary examination transcript. The only record we have is what is in the probation officer’s report. As this source is utilized by both defendant and the Attorney General in their respective briefs, they appear to accept that the situation is one with “ ‘conceded facts,’ ” making resolution by this court appropriate. (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) The salient sordid details from the probation officer’s report are as follows:

“Defendant both punched the victim with a closed fist and slapped her face. The victim estimated defendant struck her approximately 15 times before he threw her to the floor. Once the victim was on the floor, defendant grabbed her by her hair and repeatedly slammed her head on the floor. The victim stated defendant also continued to punch her face and head while she was on the floor. Further, defendant also choked the victim with his forearm around her throat while both on top of her body and while behind her.

“The victim struggled to her feet and tried to escape by running into the kitchen. Defendant stopped her by grabbing her foot, and the victim fell to the floor. At that point, the victim was afraid for his life and she recalls thinking, ‘People die this way.’ *The victim was able to get to her feet and run into a narrow hallway, but the defendant followed her and forced her against the wall and proceeded to slam her head against the wall.* He ordered her to take off her robe, and he said something to the effect of ‘fucking her ass.’

“While still restraining her and striking her, defendant forced his fist into the victim’s vagina.” (Italics added.)

The sentence we have italicized is the essence of the false imprisonment count. Most of the overt physical violence is subsumed within the sexual assault count and the dismissed counts (which included assault by means of force resulting in the infliction of serious bodily injury).

People v. Saffle (1992) 4 Cal.App.4th 434 directly held that a sexual assault and false imprisonment of the same victim can support separate consecutive terms without contravening section 654. There, the sexual assault occurred first, to be followed by the false imprisonment because the attacker “was seeking to prevent [the victim] from reporting the incident.” (*Id.* at p. 440.) Here, the false imprisonment preceded the sexual assault. The issue is close. In light of the penultimate sentence of the probation officer’s narrative, the two offenses could be found indivisible. But we cannot conclude that they must be as a matter of law.

The latest word on section 654 from our Supreme Court is that “Our case law has found multiple criminal objectives to be a predicate for multiple punishment only in

circumstances that involve, or arguably involves, multiple acts.” (*People v. Mesa* (2012) 54 Cal.4th 191, 199.) Here, there were undoubtedly multiple acts, namely, the acts of overt violence, the holding the victim in place, and the sexual assault. There was evidence from which it may be concluded that defendant entertained separate intents when committing the two offenses, which were not part of an indivisible course of conduct. In other words, the intent to inflict physical pain was replaced with the objective of personal degradation.

The judgment of conviction is affirmed.

Richman, J.

We concur:

Kline, P.J.

Stewart, J.