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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.
GUSTAVO AVILEZ IBARRA,
Defendant and Appellant.

A142236

**(Solano County
Super. Ct. No. FCR291714)**

Gustavio Avilez Ibarra was convicted of a number of offenses, including premeditated attempted murder (Pen. Code, §§ 664/187, subd. (a), 1192.7, subd. (c))¹ and making criminal threats (§ 422). He was found guilty as charged, and the trial court imposed a sentence of life as to the premeditated attempted murder count and a consecutive upper term sentence of three years for the criminal threats count. It stayed the sentences for all remaining counts pursuant to section 654.

Ibarra appeals, claiming the trial court should have stayed the sentence for the criminal threat count, because the threat was incidental to the attempted murder. We have reviewed the record, and we conclude Ibarra is correct. We will therefore modify his sentence accordingly.

¹ All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Ibarra and the victim, Sophia Ortega, had been married seven to eight years. They separated in 2010, and in March 2012, they were in the process of getting a divorce. At that time, Ortega was living in Fairfield with her boyfriend and children.

On March 15, 2012, at 4:00 p.m., Ibarra rang Ortega's doorbell and yelled out her name. She recognized Ibarra's voice and answered the door. Ibarra asked her for water and a blanket. When Ortega returned from her bedroom with the blanket, Ibarra pushed open the front door, pulled out a machete, and entered her home. When he pulled out the machete, Ibarra yelled at Ortega that he was going to kill her. He grabbed Ortega's arm and repeatedly struck her arm with the machete. Ortega was scared and tried to run away, but Ibarra held her by the arm.

Ibarra tossed the machete aside and pulled a kitchen knife out of his pocket and struck Ortega in the back of the head with it. He grabbed her hand and yelled that he was going to kill her.

Ortega testified that she suffered 13-14 total stab wounds and was hospitalized for five days. She received stitches "everywhere," including her head, arm, finger, back, left shoulder and left temple. At trial, a police officer identified photos depicting stitches to Ortega's neck and scars to the left side of her head, her left eye, and left arm.

Octavio Campos, Ortega's boyfriend, heard the doorbell ring and heard Ibarra request water and a blanket. He next heard Ortega screaming. Octavio entered the living room and saw Ibarra holding a knife and struggling with Ortega, who was covered in blood. Octavio ran to get a baseball bat, and when his nephew arrived, they threw Ibarra to the ground. Octavio and his nephew detained Ibarra until police officers arrived.

Fairfield Police Officer Adrian Quinn identified a photo of the bloody scene. Officer Quinn seized a machete and a knife there. Another officer searched Ibarra's 1998 Acura and seized a knife from the driver's side floorboard. When Ibarra was handcuffed, the police officer noticed he was sweaty and had blood on his hands. The police seized a fixed blade knife from Ibarra's pocket.

By stipulation the parties informed the jury that on March 15, 2012, at 5:50 p.m., a phlebotomist drew a blood sample from Ibarra. A criminalist ran a confirmation test on the blood sample and found amphetamine at “58 ng/ml.” and methamphetamine at “202, ng/ml.”

Ibarra testified in his own defense. He said did not intend to kill Ortega. He testified he had been ingesting prescribed medications for chronic back pain. He admitted making previous threatening phone calls to Ortega. Ibarra testified he did not remember March 15, 2012, although he was able to recall using methamphetamine that day. He said he was experiencing back pain, and a friend offered him “a line of crystal” methamphetamine. Ibarra testified the chronic pain stopped after he ingested the methamphetamine, and he began to see images that “freaked [him] out.” The next thing he recalled was being in jail, naked.

In rebuttal, Ortega testified she had applied for a change of her immigration status based on the fact she was a domestic violence victim. Ortega testified Ibarra had previously texted her that “he would kill [her] anywhere that he would see [her].”

By amended information, the Solano County District Attorney charged Ibarra with attempted murder (§§ 664, 187, subd. (a); Count 1), burglary (§ 459; Count 2), corporal injury to a spouse (§ 273.5, subd. (a); Count 3), aggravated assault (§ 245, subd. (a)(1); Count 4), false imprisonment (§ 236; Count 5), criminal threats (§ 422; Count 6), and mayhem (§ 203; Count 7). With respect to Counts 1 through 4, the information alleged the infliction of great bodily injury (§ 12022.7, subd. (e)).

Jury trial began on April 16, 2014. On April 25, 2014, the jury found Ibarra guilty as charged and found true all enhancement allegations. On May 23, 2014, the trial court imposed state prison for life with the possibility of parole, plus eight years. In sentencing Ibarra, the trial court cited section 654 in staying the sentences for Counts 2 through 5, as well as Count 7. The court explained these counts were “654 to Count [1].” As to Count 6, the court stated: “[T]he jury found the defendant guilty of a felony violation of Penal Code [section] 422. And I will select the high term of three years. I will impose the high term. Mr. Ibarra had a history of threatening this victim to kill her and he had, in fact, a

domestic violence criminal restraining order in effect that he violated and was pending a violation for that in his other case. The high term is appropriate given the fact that he had committed similar crimes prior to this terrible incident, and so the three years will be added to the determinate term. The total determinate term will be eight years to sentencing to the indeterminate term of life on Count [1]. And the aggregate term is eight years for the [section] 12022.7 enhancement and for Count [6], the [section] 422.”

Ibarra’s trial counsel did not object to the consecutive sentence on this count.

Appellant filed a timely appeal.

DISCUSSION

Ibarra raises a single issue. He claims the trial court erred in imposing a consecutive sentence for the offense of criminal threats charged in Count 6 because that offense was indivisible from the attempted murder charged in Count 1. Consequently, he contends the sentence on Count 6 should have been stayed under section 654. We agree.

I. *Governing Law and Standard of Review*

Section 654, subdivision (a), provides in relevant part: “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.” This section “precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) “The purpose of the protection against multiple punishment is to insure that the defendant’s punishment will be commensurate with his criminal liability.” (*Neal v. State* (1960) 55 Cal.2d 11, 20, disapproved on another point in *People v. Correa* (2012) 54 Cal.4th 331, 344.)

“It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f 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.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) On the other hand, if the 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.]” (*Ibid.*) In such a case, “the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Few crimes are the result of a single physical act. (*Neal v. State, supra*, 55 Cal.2d at p. 19.)

“Whether the defendant entertained multiple criminal objectives is a factual question for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to sustain them.” (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730.) We review the trial court’s findings in the light most favorable to the People, and we presume in support of the sentencing order the existence of every fact the trial court could reasonably deduce from the evidence. (*People v. Atencio* (2012) 208 Cal.App.4th 1239, 1243.) Where, as here, the trial court makes no express finding, an implied finding that the crimes were divisible inheres in the judgment and must be upheld if supported by the evidence. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) A defendant’s failure to object to the consecutive sentence in the trial court does not forfeit the section 654 issue. (*People v. Le* (2006) 136 Cal.App.4th 925, 931.)

II. *The Evidence Does Not Support a Finding that Ibarra Harbored Multiple Criminal Objectives.*

The conduct on which the prosecution relied to prove the criminal threat charge was Ibarra’s threat to kill Ortega. Ortega’s testimony was clear that this threat was made while Ibarra was assaulting her with the machete and the knife. As the prosecutor stated in closing argument, the threat was made “simultaneously with him stabbing her.” Although the temporal proximity of the offenses is not determinative (*People v. Harrison, supra*, 48 Cal.3d at p. 335), in this case the threat and the attempt to murder Ortega occurred at precisely the same time. Thus, the acts were not “separated by

periods of time during which reflection was possible.” (*People v. Trotter* (1992) 7 Cal.App.4th 363, 368 (*Trotter*).

Ibarra argues the simultaneous commission of the two acts shows “there was no independent motivation or goal for the threat.” He acknowledges the threat was an expression of intent, but he contends his intent was already clear because he had already brandished the machete and begun to stab Ortega. Thus his threat—issued in the course of attempting to achieve that objective—was merely incidental thereto. In his view, the threat was “actually a statement of fact . . . inextricably interwoven with the act itself” and it lacked any independent objective. In short, the threat and the attempted murder were acts incidental to a single criminal objective—the murder of Ortega.² Ibarra therefore contends the evidence does not justify a finding of divisible intent.

Ibarra relies principally on *People v. Louie* (2012) 203 Cal.App.4th 388 (*Louie*) and *People v. Mendoza* (1997) 59 Cal.App.4th 1333 (*Mendoza*). In *Louie*, two validated gang members set fire to the apartment of a woman who repeatedly reported gang activity in her neighborhood. (203 Cal.App.4th at p. 390.) The victim observed the defendants outside of her apartment, and when they saw her one called her a “ ‘cop caller’ ” and told her, “ ‘You’re going to get yours[.]’ ” (*Id.* at p. 392.) Shortly thereafter, her apartment was set on fire. Two to three weeks later, after the victim again reported one of the defendants to the police, he came to her back gate and told her she was a “ ‘cop-calling bitch’ ” and said she would get hers, just like the night of the fire. (*Id.* at p. 394.) Based on that statement, the defendant was convicted of witness dissuasion and making a criminal threat. (*Id.* at pp. 392, 399.) The trial court imposed sentence for both convictions. (*Id.* at p. 399.) The appellate court held section 654 prohibited multiple punishments for this statement, because “[t]he threat was merely the method employed to attain the objective of dissuading the witness.” (*Ibid.*)

² Ibarra concedes the situation would be different “if [he] had threatened [Ortega] earlier that day and then returned at a later point to assault her. In that case, and independent objective would be shown.” (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1022 [offenses of making terrorist threats and arson were divisible, because threats were intended to frighten victims and arson occurred an hour after threats were made].)

A similar situation arose in *Mendoza*. In that case, after the victim testified for the prosecution at a preliminary hearing involving the defendant's brother, the defendant, a gang member, went to her house and told her she had “ ‘fucked up his brother's testimony,’ ” and that “ ‘[h]e was going to talk to some guys from [the gang].’ ” (*Mendoza, supra*, 59 Cal.App.4th at p. 1337.) The defendant was convicted of making a terrorist threat under section 422 and with dissuading a witness under section 136.1, subdivision (c)(1). (*Id.* at p. 1338.) He argued on appeal that because the two offenses were based on the same words and actions and were both incident to the same objective, they could not be separately punished under section 654. (*Id.* at p. 1345.) The appellate court agreed, holding that the defendant's primary objective was to prevent further damaging testimony from the victim, and “[t]he method he employed to reach his objective was his implied threat of death or great bodily injury.” (*Id.* at p. 1346.) Accordingly, the concurrent sentence imposed for making a terrorist threat had to be stayed. (*Ibid.*)

In both *Louie* and *Mendoza*, the words that constituted the threat also constituted the witness dissuasion. Thus, in both cases, the two offenses were based on the very same act. Here, unlike *Louie* and *Mendoza*, the stabbing of Ortega and the oral threat were clearly different acts. But this is not fatal to Ibarra's claim; the threat and the stabbing were simultaneous. (See *People v. Martin* (2005) 133 Cal.App.4th 776, 781 [close temporal proximity of offenses was relevant consideration in determining whether defendant had single criminal objective]; *People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10 [same].) Multiple acts can be part of an indivisible course of conduct in pursuit of a single criminal objective. (See, e.g., *People v. Britt* (2004) 32 Cal.4th 944, 953 [sex offender's failure to report new address to former county and separate failure to register in new county were “the means of achieving the common end of avoiding police surveillance”]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1216 (*Latimer*) [“Although the kidnapping and the rapes were separate acts, the evidence does not suggest any intent or objective behind the kidnapping other than to facilitate the rapes.”]; *Neal v. State, supra*, 55 Cal.2d at p. 20 [punishments for arson and attempted murder violated § 654 where

“the arson was the means of perpetrating the crime of attempted murder”].) The simultaneous threat and stabbing were a single course of conduct in pursuit of a single objective — killing Ortega.

The People’s response to Ibarra’s reasoning is less than clear. They do not argue or suggest Ibarra harbored multiple criminal objectives. Instead, they note Ibarra was punished for both the premeditated attempted murder of Ortega and the terrorist threat he committed when he threatened to kill her. They contend that “[t]hese two acts were ‘volitional and calculated, and were separated by periods of time during which reflection was possible.’ (*Trotter, supra*, 7 Cal.App.4th at p. 368.)” As stated above, this contention is not supported by the evidence, and it is inconsistent with the prosecutor’s statement to the jury that the threat and the stabbing occurred simultaneously.

The People’s brief goes on to argue: “[Ibarra] had time to reflect after he used the machete. At that point, he could have left the home and no longer threaten [Ortega]. Instead, he made the choice to pull out his knife after it appeared that [Ortega] might escape further injuries when [Ibarra] abandoned the machete. He further terrorized [Ortega] with the knife and increased the threat to [her] by holding the knife to her head. Defendant committed at least two distinct, volitional acts and was appropriately subject to punishment for each act of violence.” One might read the foregoing quotation as arguing that the “two distinct, volitional acts” are Ibarra’s use of the machete and his use of the knife. If that is what is intended, it is unresponsive to Ibarra’s contention. As Ibarra correctly argues, the question before us is not “whether [he] should have been sentenced for both the assault with the machete and the assault with the knife. It is whether [he] was properly sentenced for a criminal threat that was uttered while he stabbed the victim with both the machete and the knife.”

No matter how the People’s argument is understood, they point to no evidence in the record showing Ibarra harbored more than one criminal intent. Insofar as we can discern, the evidence does not suggest the threat to kill Ortega was motivated by an intent or objective separate from that behind the attempted murder. (See *Latimer, supra*, 5 Cal.4th at p. 1216.) In the absence of any such evidence, we conclude the threat and the

assaults “were merely incidental to, or were the means of accomplishing . . . one objective[.]” (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) Ibarra appears “to have harbored a single intent and therefore may be punished only once.” (*Ibid.*; see also *Latimer, supra*, 5 Cal.4th at p. 1216 [single objective for kidnapping and rape although “[i]t could be argued that defendant had two intents”].)

Where the trial court has improperly imposed multiple punishment, the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term. (E.g., *People v. Spirlin* (2000) 81 Cal.App.4th 119, 131.) We follow this course here.

DISPOSITION

Ibarra’s sentence is modified so that execution of the sentence imposed for Count 6 is stayed pending the finality of the judgment and service of the sentence for Count 1 and the section 12022.7 enhancement, the stay to become permanent upon completion of the terms imposed for Count 1 and the section 12022.7 enhancement. In all other respects, the judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

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