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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR GUINTO,

Defendant and Appellant.

A144303

(City & County of San Francisco
Super. Ct. No. SCN221906)

Following his conviction by a jury for stalking and related crimes, Edgar Guinto asserts the prosecutor committed prejudicial misconduct during argument, that his attorney’s failure to object to the prosecutor’s comments constituted ineffective assistance of counsel, and that the court improperly imposed sentences for multiple convictions based on one course of conduct. There is no merit in Guinto’s claims of prosecutorial misconduct and ineffective assistance of counsel, but we agree his sentence must be modified to stay terms imposed for two misdemeanors. Accordingly, we modify the sentence and affirm the judgment as modified.

BACKGROUND

Prosecution Case

Guinto and Marie Geronimo had three children over the course of a 13-year relationship. By November 2012 the relationship was near its end. On November 19 Guinto sent Geronimo a text message that said “this is enough, it’s about time. You’re cheating and I will kill you, both of you.” Geronimo returned from work that evening to find her clothing had been ripped and destroyed. She testified, “I saw all my belongings,

what got destroyed. Everything is destroyed. When I open my cabinet, I don't have anything anymore, everything is destroyed at all. . . . All my clothes, my dress, everything, everything.” Guinto was not at home. Geronimo called the police. In her view, the relationship was over.

When Geronimo returned home from work the next day Guinto looked “really angry.” He accused her of “hanging out with somebody,” swore, struck her on the shoulder and slapped her face. He said, “This will be end up and I will kill you.” Afraid, Geronimo called 911.

Guinto had left the house when officers arrived in response to Geronimo's call around 8:00 p.m. Geronimo was calm but looked fearful. There were red marks on her shoulder and face.

Guinto moved out of the house soon after, but in April he returned and moved back in. Geronimo and the children moved out on July 7. After that, she saw Guinto “[e]verywhere.” “He'd show up Muni bus, bus stop. . . . in San Francisco by Muni. I saw him also when I'm taking SamTrans. That's the Daly City, that's inside the bus, and I'm also see him in front of my work and also in front of the St. Luke's Hospital because St. Luke's Hospital is beside my work.” Geronimo started changing her commute routine to avoid Geronimo. She would leave for work early and take different buses and trains.

On one occasion in July Guinto appeared near Geronimo's workplace, yelled her name and asked for money. When she refused, he got “totally mad and he said—he said a bad words in our language and I run in the [nearby] hospital to ask for help.” In the hospital, Geronimo asked a security guard to escort her across the street to her building. Guinto followed. When the guard threatened to call 911, Guinto said he needed to ask Geronimo for the key to their storage unit. Geronimo ran inside.

On August 21, 2013, Geronimo saw Guinto as she was walking from work to her BART station. Frightened, she called police. She testified: “Its not normal anymore that everyday Edgar following you, stalking you everywhere, scared, fear in there. [¶] I got this—I got really depressed on that time because of the threat, because of the things he's

doing. I'm changing my route every day not to see him, I get up early not to see him only." On August 23 she obtained a restraining order.

On the morning of August 26, 2013, Geronimo left her sister's home in Daly City with her nine-year-old daughter, Marielle. As they boarded their bus Geronimo saw Guinto seated in the second row. Geronimo and Marielle sat in the back. When they disembarked to transfer he followed them and, when the second bus approached, said "Don't get in there, don't get in there, I'm going to do something to you. Now call someone to help you." Guinto followed them onto the second bus and when they got off near Marielle's daycare. He said "Don't cross the street or else I'm going to do something to you," and he asked Marielle, "Do you want to see your mom, inside of her intestine?" When Geronimo told Guinto she had a restraining order, he said he didn't care. She took Marielle into the daycare and called the police.

During July and August Guinto sent Geronimo threatening text messages, sometimes multiple times a day, many graphic and gruesome.¹ It is sufficient to describe only a representative sampling. On July 11 Guinto texted "Be ready, I'll get dressed right now, for all the wrong doing you all did to me, your lives won't be enough, there's nowhere to hide, you sons of bitches," "You son of a bitch, your lives won't be enough to pay," and "No other route to take, I will see you, you'll be dead." On July 21 he texted "Whomever you ask for help, they can't stop me from killing you all son of bitches, you whore, I can't have peace of mind until you guys are under the ground, traitor don't worry, son of a bitch Gerry's head will be on top of your casket." On July 28 his texts included "Fuck you bitch this is your last night you son of a bitch," "Now you try to talk, I'll take your eyes out, you son of a bitch," and "Your death will give my soul peace, I'll detach your head to be an example for others of your type and your whoring vagina, no one could stop me even God, I should kill you." On July 30, Guinto texted "No matter what you die bitch you pay me sinner bitch." On August 3, "You need to say goodbye to

¹ Some of these messages were in Guinto and Geronimo's native Kapampangan, also known as Pampango, and were translated into English for the jury.

your children final mother fucker.” Six days later it was “What you son of a bitch, even worms won’t benefit from your foul and you sinner vagina, Aren’t you ashamed you son of a bitch whore, you picked a coward more than Judas, you son of a bitch, you only have a few hours, all of you will pay for what’s owed to me.”

Throughout the summer and into September Guinto’s texts continued along these same lines. (E.g., “your head will detach,” “I’ll skin you alive crazy,” I’m sharpening my (Filipino knife) for you and your son of a bitch man,” “I’ll stab your eyes you son of a bitch maniac,” “I’ll make you all taste the pain of what you did.”)

Defense Case

Guinto testified in his own defense. He denied destroying Geronimo’s clothing in November, but admitted he “cut up her lingerie” because he thought another man had given the items to her. The next night when Geronimo came home late from work they were both angry and fought with each other.

Both Guinto and Geronimo moved out of the family home in July 2013 and put their belongings into storage. Geronimo and the children moved in with her sister. Guinto stayed with friends and in shelters. Geronimo told him she would discuss moving back in together once he found a place to live, but when he found a place she said she no longer wanted to be together.

Guinto denied that he followed Geronimo on August 21. Rather, he went to her workplace to borrow her keys so he could get his clothes from storage. Nor did he threaten or follow her on August 26. He just happened to be on the same bus that day and he wanted to drop their daughter off at daycare so Geronimo could go to work. He sent Geronimo the text messages because he wanted her to know how difficult his life was and to feel his pain. He loves Geronimo and never intended to hurt her physically.

After the close of evidence the court dismissed one witness dissuasion and two child endangerment charges. The jury found Guinto guilty of stalking, stalking in violation of a restraining order, two counts of making criminal threats, two counts of making harassing electronic communications, and battery. The jury hung and the court declared a mistrial on eight remaining threat charges. Defendant filed this timely appeal.

DISCUSSION

I. Prosecutorial Misconduct

Guinto argues the prosecutor committed misconduct during rebuttal when she said defense counsel lied and made improper arguments based on sympathy and facts not in evidence because her comments “improperly disparaged appellant’s defense counsel and inflamed the jury against appellant.” He acknowledges that defense counsel forfeited the claim for appeal by failing to object (see *People v. Valencia* (2008) 43 Cal.4th 268, 281), but contends that failure constituted ineffective assistance of counsel. We disagree, and conclude Guinto has shown neither clear instances of prosecutorial misconduct nor prejudice.

Background

A main theme in defense counsel’s closing argument was that Geronimo was not afraid of Guinto and had manufactured her claims. “Maria Geronimo’s actions speak louder than any words she told you. She is not in fear of Edgar. Her reactions to these text messages at that time show you that.” “If she would have changed her cell phone, we wouldn’t have been here. She didn’t change her cell phone. Even before that, she did not change the locks on the door. Didn’t have him removed from the lease. They lived there as a family. If you’re deathly afraid of somebody, you don’t help them move, you don’t share storage with them.” Rather, counsel argued that Geronimo simply resented Guinto as a financial burden “and she doesn’t want that. And that’s why we’re here because she is annoyed and frustrated with him. [¶] She doesn’t believe that he’s somebody that’s going to harm [her] or the children.”

Defense counsel also argued, “The stalking and criminal threats are serious felonies. These are serious violent felonies. They’re strikes. It’s serious.” The prosecutor successfully objected to this statement and the court cautioned defense counsel out of the jury’s presence that her comments bordered on misconduct.²

² The court noted it was “very disturbed” that defense counsel brought up the strike law in argument. “I think it’s probably not a huge issue unless there was someone who

Defense counsel also argued Geronimo would have made use of housing and other services for domestic violence victims if she were genuinely afraid of Guinto, but that she did not. The trial court sua sponte twice cautioned her that “there’s no evidence of that.” Counsel also argued the police would have taken photographs of Geronimo’s destroyed clothing “if there were any,” but that there were no such photos.

The prosecutor responded to these remarks in rebuttal. “It’s absolutely disheartening when this defense team uses tactics of lies and inappropriate argument and breaking the rules, arguing facts that aren’t evidence, arguing punishment, appealing to sympathy. Everything you’re not supposed to do. [¶] So I’m going to ask you to disregard what is not the facts in this case. Because nothing [defense counsel] says or nothing I say are the facts in this case. It’s up to you in your good judgment to listen to the witnesses and figure out what the facts are.”

The prosecutor also commented that Guinto’s own testimony refuted defense counsel’s argument about Geronimo’s clothing: “Edgar told you he tore up Marie’s clothes. Just misrepresenting the facts. But you have the evidence. You have the actual words.”

The prosecutor addressed the argument that Geronimo could not have been afraid of Guinto because she stayed with him, by saying, “Really? That’s probably the most inappropriate argument to make about a victim of domestic violence. . . . Again, as to each event that happened here, consider what Marie Geronimo had been through, what she was perceiving, what she told you she was perceiving and whether it was reasonable. [¶] Ultimately we sat here for an hour and listened to the victim be victimized all over again. What I’m asking you to do is render a verdict based on the facts of this case and based on the law that you’ve been instructed on.”

knew what the law is. The preferable term is to refer to them as ‘serious charges’ as opposed to ‘serious felonies’ because that means something specific under the law. But the reference to the fact that these are strikes was entirely inappropriate. And you don’t have to say anything. I’m saying it was inappropriate. It borders on misconduct. You’ve been doing this a while. It calls for them to consider penalty or punishment. And I was very disturbed by that comment.”

Analysis

To establish ineffective assistance of counsel, a defendant must show both that his attorney's performance fell below an objective standard of reasonableness and a reasonable probability of resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668.) "Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) "If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'" (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

Here, counsel could reasonably have decided any objection to the prosecutor's remarks about her tactics and veracity might serve to highlight those remarks and thus bolster their significance in the jurors' eyes. (See *People v. Williams* (1997) 16 Cal.4th 153, 215.) Competent counsel would also understand that the likelihood of prevailing on such an objection was far from certain. "It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury. [Citation.] Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom. [Citations.] [¶] *Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account.*" (See *People v. Frye* (1998) 18 Cal.4th 894, 977–978, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [no misconduct where prosecutor accused counsel of making an "irresponsible" third party culpability claim]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor said counsel can "twist [and] poke [and] try to draw some speculation, try to get you to buy something"].)" (*People v. Bemore* (2000) 22 Cal.4th 809, 846, italics added.)

In *People v. Cunningham* (2001) 25 Cal.4th 926, for example, the prosecutor argued that defense counsel’s “ ‘job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies. So let’s do that.’ ” (*Id.* at p. 1002.) The Supreme Court held this was not misconduct and observed that the prosecutor’s comments “would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel.” (*Id.* at p. 1003; see also *People v. Smith* (2003) 30 Cal.4th 581, 635 [“The prosecutor did not attack defense counsel’s integrity but instead attacked the defense case and argument. Doing so is proper and is, indeed, the essence of advocacy”]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1166–1167 [references to defense counsel’s “tricks” or “moves” was not misconduct].)

Here, for the most part, the prosecutor’s comments appropriately responded to the defense tactics and account of the evidence. Notably, the court had already cautioned defense counsel about arguing facts not in evidence and had sustained an objection to her allusion to the three strikes law. It was fair for the prosecutor to also challenge those tactics in rebuttal.

We are also unpersuaded that the prosecutor’s comment about Geronimo having been “victimized all over again” disparaged or implicated Guinto for exercising his right to trial. Her complete comment was: “Ultimately we sat here for an hour and listened to the victim be victimized all over again.” The prosecutor was plainly referring to defense counsel’s closing argument—which lasted just over an hour—rather than the entire trial. In context, this reference permissibly characterized the principal theme of the defense argument to attack Geronimo’s character and veracity.

The prosecutor’s comment about defense counsel’s “tactics of lies” sails closer to the line of impermissible argument. “Casting uncalled-for aspersions on defense counsel directs attention to largely irrelevant matters.” (*People v. Sandoval* (1992) 4 Cal.4th 155, 183–184; *People v. Hill* (1998) 17 Cal.4th 800, 832 [it is misconduct to cast aspersions on defense counsel or attack counsel’s integrity].) But we cannot say with any degree of certainty that, in the context of the parties’ arguments, the trial court would have found

the comment transgressed the “wide latitude” given the prosecutor in argument. (*People v. Bemore, supra*, 22 Cal.4th at p. 846.) Nor can we say whether highlighting the prosecutor’s comment with an objection would have risked more harm than good; certainly, competent defense counsel could reasonably have decided the risk outweighed the possible benefit to be gained by objecting. Accordingly, Guinto has not shown his legal representation was inadequate.

II. Sentencing Error

Guinto contends the sentences imposed for criminal threats (§ 422, count 4 and 14) and harassing electronic communications (§ 653m, counts 15 and 16) should have been stayed pursuant to Penal Code section 654³ because the offenses were part of the same indivisible course of conduct underlying his convictions for stalking and were committed with the same, sole objective of controlling Geronimo through fear and threats. The People acknowledge the misdemeanor terms imposed for harassing electronic communications should have been stayed, but contend the court properly imposed sentences on the criminal threats convictions. We agree.

Background

As relevant here, Guinto was convicted of stalking between July 12 and September 17, 2013 (count 1), stalking in violation of a restraining order between August 30 and September 7, 2013 (count 2), making criminal threats on August 26, 2013 (count 4) and September 5, 2013 (count 14) and making harassing electronic communications on September 5 and 7, 2013, respectively (counts 15 and 16). Count 4 was predicated on Guinto’s August 26, 2013 texted threat to Geronimo that “You son of a bitch, no matter what you do, you’ll die by my hands. I won’t let someone else’s hands kill you because

³ Section 654 provides that “(a) 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.”

All further statutory citations are to the Penal Code.

you ruined a big part of my life, you son of a bitch.” Count 14 was based on his September 5 text, “Ur end is on ur way sinner u feel my vengeance in here up to hell.”

At sentencing, Guinto argued that under section 654 he could only be sentenced for one of those six counts. The court first considered whether section 654 precluded punishment for both stalking convictions. “Looking back at the 654 issue, it talks about multiple punishment for the same act, and I think these two charges can be distinguished because a course of conduct, one, it is two or more acts to have the stalking. . . . In this case, the evidence was well beyond two or more, 90 different text messages over a period of time encompassed by this. So I don’t think that multiple punishments on Count 1 and 2 are barred pursuant to 654. I do not think that 654 applies to the sentencing on Counts 1 and 2 because I think that there are numerous, multiple acts . . . that occurred while the restraining order was in effect, acts that occurred while the restraining order—before the restraining order was in effect.”

The court also rejected the view that section 654 precluded punishment for both stalking and criminal threats. “I do not believe that 654 is going to bar multiple punishments for the four felony counts in this case. 654 talks about one act or an act or omission punishable in different ways, and a defendant can[not] be punished multiple times even though he can be convicted multiple times for the same act. There were clearly separate acts in this case; and, therefore, I am going to find that 654 does not bar multiple punishment in this case.” Guinto was sentenced to five years in prison, comprised of three years for count 2, a consecutive eight months for count 1, and consecutive eight-month terms for each of the criminal threat convictions. The court also imposed concurrent six-month terms for the two harassing electronic communications convictions.

Analysis

Section 654 prohibits punishment for two offenses arising from the same act or indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207–1208.) “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.’ ” (*Id.* at p. 1208.) “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.’ ” (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1393 [no section 654 violation even if multiple objectives are simultaneous].)

Whether a defendant entertained multiple criminal objectives presents a question of fact for the trial court, and we will uphold its findings if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731.)

Here, substantial evidence supports the trial court’s decision to impose separate punishment for the four felony convictions. Although Guinto argues his crimes all had a single objective—“to control Geronimo through fear and threats”—the trial court reasonably disagreed.

Section 654 does not apply when “the defendant had a chance to reflect between offenses and each offense created a new risk of harm. [Citations.] ‘Separate sentencing is permitted for offenses that are divisible in time.’ ” (*People v. Felix* (2001) 92 Cal.App.4th 905, 915.) Applying this principle, *People v. Felix* affirmed the imposition of separate terms for two threats made at different times on the same day over a defense argument, like Guinto’s, that the crimes were “part of a pattern of anger” against the victim. “The trial court could reasonably infer that each threat was a separate crime. They were not connected because Felix made them at different times at different places” (*id.* at p. 915) and had time to reflect before he made the second threat. (*Id.* at p. 916) Moreover, “The trial court could reasonably infer that because of his anger he intended the second threat to cause new emotional harm” to his victim. (*Ibid.*) So, too, here. Guinto had time to reflect between his offenses and the trial court could reasonably infer he intended his death threats to ratchet up the fear his stalking was already inflicting. Contrary to Guinto’s assertion, nothing in the prosecutor’s argument or theory of the case

foreclosed the court's discretion to impose multiple terms as supported by the record. (See generally *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339–1340.)

The People acknowledge that the terms imposed for the harassing electronic communications convictions (counts 15 and 16, § 653m) must be stayed, conceding the offenses were premised on the same conduct as the stalking charge in count 2. Accordingly, the terms imposed on counts 15 and 16 must be stayed.

DISPOSITION

The sentences imposed on counts 15 and 16 are stayed under section 654. In all other respects, the judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.

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