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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MILTON M. AREVALO,

Defendant and Appellant.

B241028

(Los Angeles County
Super. Ct. No. VA119753)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Higa, Judge. Affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Milton Arevalo guilty of one count of kidnapping, one count of second degree robbery and two counts of making a threat to commit a crime that would result in death or great bodily injury in violation of Penal Code section 422.¹ The jury also found true the gun use allegations as to all four counts.

Arevalo's appeal is limited to the criminal threat convictions and the sentence on the robbery and kidnapping convictions. We affirm the judgment.

FACTS AND PROCEEDINGS BELOW

Arevalo and Suyapa Morales met in August 2010, and began living together. In April 2011, Morales decided to end the relationship. She moved out of the apartment she was sharing with Arevalo and moved in with a friend, Javier Medina. Morales did not tell Arevalo she was moving out because she did not want him to look for her. Morales and Medina testified that they did not have a romantic relationship.

Arevalo tried to contact Morales, calling her 30 times a day for about a week. Morales did not answer the phone or speak with Arevalo.

Arevalo went to see the manager of a bakery in Maywood where he believed that Medina, Morales's new roommate, was employed. Arevalo told the bakery manager that he wanted to speak to him about Medina. The manager thought Arevalo was talking about another person with the last name Medina who worked at the bakery as a supervisor. Arevalo was despondent and showed the manager photographs of Morales and her son. He told the manager that Medina had kidnapped his wife and son, and asked for information about how to contact him. The manager explained that he could not give out personal information about his employees. Arevalo became insistent and told the manager that he should help him because Medina was harassing Morales's family members.

A few days later an employee of the bakery, Francisco Sanchez, finished work at approximately 2:30 a.m. and left in his car with a co-worker, Adelia Veliz, who needed a

¹ All future statutory references are to the Penal Code.

ride home. Veliz forgot some flowers at work that she meant to take home with her so Sanchez turned around and drove back to the bakery. As he drove toward the bakery, he noticed a red Toyota following him.

When Sanchez arrived at the bakery, he escorted Veliz to the door. As he walked back to his car, Arevalo got out of the Toyota, pulled out an automatic firearm and pointed it toward Sanchez. According to Sanchez, Arevalo then walked up next to him, pointed the gun directly at his head, and started swearing at him. Arevalo told Sanchez he had been looking for him and said: “This is the end of it” and “it’s going to take you. It’s going to carry you away.” Sanchez interpreted Arevalo’s statements as a threat to kill him.

Sanchez did not know Arevalo and told him so. He also told Arevalo that he had no idea who Suyapa Morales was. Arevalo pointed the gun at Sanchez and responded: “Don’t play dumb . . . You’re going to see right now what’s going to happen to you.” Arevalo grabbed Sanchez by the collar and walked him towards the car. A second person got out of the car and forced Sanchez at knife point to get into the back seat. Arevalo got in the back seat with him. Arevalo pointed the gun at Sanchez’s rib cage and ordered him to tell him where he was keeping Morales. Arevalo asked where Sanchez lived and told him again, “Don’t play dumb.” Sanchez said that he lived near Florence and Atlantic. The three men then took him to a dark alley where Arevalo told him he didn’t believe that Sanchez lived near Florence and Atlantic. When Sanchez continued to assert that he was not Javier Medina and that he lived near Florence and Atlantic, Arevalo hit him in the ribs. Sanchez was able to pull out an identification card and show it to Arevalo who took it, verified that he was not Javier Medina, and threw it back at him.

Arevalo then told Sanchez to take him to Medina’s residence and that if he didn’t “you’re going to stay here.” Sanchez interpreted this statement to mean that if Arevalo did not find Medina, he would kill Sanchez. Sanchez did not know where the person named Medina from the bakery lived but he had seen him go toward Slauson Street after work so he directed Arevalo toward an apartment building on Slauson.

Arevalo told Sanchez to use his cell phone to call Medina. Sanchez said he didn't have a cell phone. Arevalo pointed his gun to the back of Sanchez's head and told him that he was going to search him and that if he had lied he was going to "stay right here." Sanchez took this to mean that Arevalo would kill him if he lied about not having a cell phone. Arevalo searched through Sanchez's pockets and verified that he was not carrying a phone.

Using his own cell phone, Arevalo dialed Javier Medina's number and told Sanchez that when Medina answered Sanchez should tell him that he was outside waiting for him. The phone rang several times, but no one answered. Arevalo tried calling approximately four more times and then told Sanchez to go inside the apartment complex and knock on the doors to find out where Medina lived. Arevalo told Sanchez that if Medina came out, he should not make a "wrong move" or he would "stay right there." Sanchez again took this to mean that he would be killed if he failed to follow Arevalo's instructions.

Sanchez and Arevalo got out of the car and walked into the apartment complex with Arevalo pointing his gun at Sanchez's back. Sanchez knocked on doors and yelled, "Javier, this is Francisco, open, open up." It was approximately 3:00 in the morning and Sanchez hoped that by knocking and yelling loudly someone would call the police. After Sanchez knocked on three or four doors the man with the knife got out of the car and told Arevalo that they were waking up a lot of people and that they should go. The man with the knife handed Arevalo Sanchez's identification card. Arevalo told Sanchez: "Look right here. I have all your information. I know where you live. . . . [I]f you tell anything to the police, if you tell anything to Javier, I'll go to get you and your family." Sanchez interpreted this to mean that Arevalo would kill him and his family if he went to the police. Arevalo allowed Sanchez to leave but when Sanchez asked for his card back, Arevalo refused to return it.

Sanchez returned to the bakery where he learned that the manager had called the police. When the police arrived Sanchez gave them his statement. The next day the

police arrested Arevalo. In a search of Arevalo's apartment the police found Sanchez's identification card on top of a kitchen cabinet.

A jury found Arevalo guilty of one count of kidnapping, one count of second degree robbery and two counts of criminal threats in violation of section 422.² The jury also found as to the kidnapping and robbery counts that Arevalo personally used a handgun within the meaning of section 12022.53, subdivision (b) and as to the criminal threat counts that he personally used a firearm within the meaning of section 12022.5, subdivision (a). On the kidnapping count, the trial court sentenced Arevalo to the midterm of five years plus a 10-year enhancement for personal gun use. On the robbery count the court imposed a sentence of 4 years 4 months, consisting of one-third the midterm of three years plus one-third of the 10-year gun enhancement. Finally, the court imposed the midterm of two years for each of the two criminal threat convictions but stayed them both pursuant to section 654. The court did not impose gun use enhancements on the threat convictions. The total sentence was a prison term of 19 years 4 months.

² Section 422, subdivision (a) states: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

DISCUSSION

I. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT AREVALO MADE TWO SEPARATE AND INDEPENDENT THREATS AGAINST SANCHEZ. THEREFORE THE COURT'S FAILURE TO GIVE A UNANIMITY INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT.

The information charged Arevalo in identical language with two counts of making a criminal threat against Sanchez “on or about May 11, 2011.” The jury found Arevalo guilty of both counts. On appeal he contends that both convictions must be reversed because by the prosecution’s own admission Arevalo made more than two threats, the prosecution failed to elect which two statements it was relying on for the convictions and the court failed to instruct the jury it must unanimously agree on the two statements that support the convictions. (*People v. Norman* (2007) 157 Cal.App.4th 460, 464.) Alternatively, Arevalo argues that one of the two convictions must be reversed because all of the threats against Sanchez constituted just one offense. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100 [no instruction on unanimity is required when the acts alleged are so closely connected as to form a continuing course of conduct].)³

We do not agree that all of Arevalo’s threats against Sanchez constituted just one offense as a matter of law. For example, the jury could reasonably have found that the threats Arevalo made in order to persuade Sanchez to help him find Morales had a separate and independent purpose from the threats Arevalo made in order to dissuade Sanchez from going to the police and thus constituted two separate offenses.

But even assuming that the court erred in not giving a unanimity instruction that is not the end of the analysis. We agree with the People that failure to give a unanimity instruction is governed by the harmless-beyond-a-reasonable-doubt standard of

³ There is no merit to Arevalo’s contention that the court should have instructed the jury “that a defendant’s out-of-court, unrecorded oral statements should be viewed with caution[.]” (See CALCRIM No. 358.) Arevalo’s statements were the crime, not admissions of the crime as contemplated by the cautionary instruction. (*People v. Zichko* (2004) 118 Cal.App.4th 1055, 1059-1060.)

Chapman v. California (1967) 386 U.S. 18, 24. (See *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545.) Failure to give the instruction is harmless beyond a reasonable doubt if the record shows that no rational basis exists for the jury to believe that the defendant made one threat but not another. (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.) Such is the case here. Arevalo's threats occurred over a relatively short period of time (approximately one hour) and in the same location—the back seat of Arevalo's car. Finally, Arevalo offered a unitary defense of mistaken identity to both counts and the jury rejected it. Once they decided not to believe Arevalo's only defense, none of the jurors could have had a reasonable doubt that Arevalo made all the threats testified to by Sanchez. (Cf. *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188.)

II. AREVALO'S CONVICTIONS FOR KIDNAPPING AND ROBBERY WERE SEPARATELY PUNISHABLE UNDER SECTION 654.

The court imposed a sentence of five years on the kidnapping conviction and 4 years 4months on the robbery conviction. Arevalo contends that the court should have stayed punishment on the robbery conviction under section 654, subdivision (a) which 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."

The parties agree that if several offenses are incident to one objective, section 654 prohibits punishment for more than one. (*Neal v. State of California* (1960) 55 Cal.2d 11, 18-19.) They disagree about whether Arevalo's offenses of kidnapping and robbery were pursuant to one criminal objective or two. Arevalo argues the objective behind the entire episode was to locate Medina and, through him, Morales. Robbing Sanchez of his identification card was part of that single objective because it was intended to prevent Sanchez from calling the police so that Arevalo would be free to pursue his search for Morales. The People argue that the planned kidnapping of Sanchez and the opportunistic

robbery of Sanchez's identification card were the products of two separate objectives: to locate Morales and to dissuade Sanchez from contacting the police.

We believe the People have the better argument. When Arevalo kidnapped Sanchez, he believed that Sanchez was Medina and that Sanchez/Medina would lead him to Morales. Later, when Arevalo realized that he had kidnapped the wrong person he robbed Sanchez of his identification card—not to aid in the search for Morales but as part of his threat to “get” Sanchez if he reported his kidnapping to the police.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.