

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

----

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY LEE CROSLEY,

Defendant and Appellant.

C073699

(Super. Ct. No. 11F1352)

A jury found defendant Terry Lee Crosley guilty of forcible rape, criminal threats, and corporal injury to his ex-wife, the mother of his child. (Pen. Code, §§ 261, subd. (a)(2), 273.5, subd. (a), 422.)<sup>1</sup> The trial court found true allegations that defendant had served nine prior prison terms. (§ 667.5, subd. (b).) The trial court sentenced defendant

---

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

to a total unstayed prison sentence of 18 years eight months. Defendant timely filed this appeal.

On appeal, defendant first contends the trial court improperly handled his *Marsden* motion for new appointed counsel. (See *People v. Marsden* (1970) 2 Cal.3d 118.) He adds that his punishment--including fines--on two counts should have been stayed (see § 654), and the failure to instruct the jury on unanimity compels reversal of the criminal threats count. We agree the sentence on one count should be stayed, because the criminal threat and corporal injury were contemporaneous, with no time for reflection between, but we find those two counts were distinct from the rape for sentencing purposes. We shall modify the judgment and otherwise affirm.

## DISCUSSION<sup>2</sup>

### I

#### *Marsden Motion*

Defendant first contends the trial court (Curle, J.) did not adequately inquire into defendant's reasons for requesting new appointed counsel. We disagree.

#### A. *Background*

On December 19, 2011, at an in camera *Marsden* motion, trial counsel represented that defendant was going to withdraw his *Marsden* motion.<sup>3</sup> Defendant confirmed this, but sought and received assurance that he could renew his motion later. Then defendant complained about a lack of communication, and counsel responded that he had

---

<sup>2</sup> Given defendant's contentions on appeal, a detailed recitation of the facts of his offenses is not necessary. It is undisputed that on November 18, 2010, defendant threatened, cut, and raped his ex-wife. Further details will be provided where necessary, as we discuss defendant's specific contentions, *post*.

<sup>3</sup> Defendant had also withdrawn a prior, written, *Marsden* motion, confirming to the court that issues with counsel had been resolved and that he knew he could file another *Marsden* motion later, if he chose.

apologized to defendant for not answering all of his letters, and promised to keep him better informed. In response to an inquiry by the trial court, defendant said he was satisfied with counsel's response.

On March 20, 2012, at another *Marsden* hearing, the trial court instructed defendant to provide specific reasons why new counsel should be appointed. Defendant replied that he had only seen defense counsel four times in the past year, and that he had asked counsel to obtain his cell phone, which he said had text messages from the victim that would be useful to the defense, but the phone had been destroyed by the Los Angeles County Jail. Further, counsel had made no effort to get copies of the phone records or Facebook records. Defendant reiterated a lack of communication, and added that an exculpatory witness from Florida had tried to contact defense counsel so that he would know when to take time off to attend the trial, and a separate exculpatory witness had eventually left the state, after repeated fruitless efforts to contact defense counsel.

In response to defendant's allegations, defense counsel replied that he had subpoenaed records from the Los Angeles County Jail, but they had not been returned yet. He had an investigator working on a number of issues, including checking Facebook, and the investigator's report was due at the end of the month. The investigator was also going to meet with defendant to clarify exactly what the purported exculpatory witnesses would say. Counsel represented that he knew the location of the witness defendant thought had left the state, and he had spoken to the Florida witness, who was still willing to testify. Counsel was going to have the investigator interview him to find out what exactly he would say. Defendant had told counsel he had a friend who could pick up the cell phone in Los Angeles, but apparently that did not happen in time; defendant's reply to this last point was that the public defender's office should have paid to ship the phone from Los Angeles.

The trial court denied the motion and reminded defendant he was free to file another *Marsden* motion if no progress had been made by the investigator by the end of

the month, as anticipated by defense counsel. Jury trial was held before a different judge (Marlow, J.) beginning in February 2013, with no further *Marsden* motions filed.

### B. *The Law*

“[W]hen a defendant complains about the adequacy of appointed counsel, the trial court [must] permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, [must] conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. [Citations.] If the defendant states facts sufficient to raise a question about counsel’s effectiveness, the court must question counsel as necessary to ascertain their veracity.” (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695.)

“[S]ubstitute counsel should be appointed when, and only when, necessary under the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” (*People v. Smith* (1993) 6 Cal.4th 684, 696 (*Smith*).)

### C. *Analysis*

Defendant asserts the trial court minimized the fact that counsel failed to obtain the cell phone from Los Angeles in a timely manner, and reiterates defendant’s assertion that this phone contained exculpatory messages from the victim, which would tend to show she fabricated her rape claim. He suggests trial counsel should have coordinated with the public defender’s office, obtained the phone by mail, or sought funding to get it some other way.

As defendant acknowledges, the trial court pointed out the text messages contained on the phone might still be obtained from the service provider. Further, trial

counsel represented to the court that his investigator was going to report back on numerous issues by the end of the month, and the trial court reminded defendant he was free to file yet another *Marsden* motion if he failed to obtain a satisfactory result. The fact that trial counsel initially relied on defendant's own assurance that a friend of his would obtain the phone does not show that counsel was ineffective or otherwise deserving of removal from defendant's case.

In considering a *Marsden* motion, the trial court need not second guess trial counsel's investigative priorities. We cannot fault the trial court for accepting counsel's representations that the defense investigation was ongoing, and for concluding that there had been no showing any exculpatory material was irretrievably lost. Therefore, the court properly denied the *Marsden* motion, because defendant did not show counsel was performing ineffectively. (See *Smith, supra*, 6 Cal.4th at p. 696 [no error in denying *Marsden* motion where the court fully allowed the defendant to state his complaints, carefully inquired into them, and counsel responded acceptably point by point].)

## II

### *Section 654*

Defendant contends the trial court (Marlow, J.) erred in failing to stay the sentences for the criminal threats and domestic violence counts, because they "were part of an indivisible course of conduct relating to forcible rape" and were "based on the same acts." He separately argues the fines for these counts should have been stayed.

#### *A. Factual and Procedural Background*

Defendant and the victim often argued, and she had told him he had to leave her house. On November 18, 2010, as she prepared to go out, she saw him on her porch and he said that he wanted to talk to her. She told him she did not want to talk and had told him many times to leave; he became angry and offended and called her a whore. She left. When she returned and pulled into her driveway, it was dark, and she saw defendant was still on her porch. He stood up and "was zero-to-sixty angry." As she got out of her

car, he grabbed her by the shoulder from behind and grabbed her throat. He said she needed to die and used a tone of voice he had never used before, “[r]obotic.” She could feel a blade on her lower throat or “mid collarbone” and when she reached up to her neck something cut her fingers.<sup>4</sup> After she took her hand away, he put the blade to her throat. She believed he was going to kill her. “[H]e kept saying at the beginning that I needed to die so the pain would stop, that the only way that he could stop loving me and the pain for it to stop [was] that I needed to die.”

She told him to stop and to leave, but he said he was not done with her, then he back handed her across her left cheek. He called her a whore again and said she had ruined his life; then he raped her, over her continued protestations. Later, she saw a cut on her collarbone, and other witnesses--including a peace officer and a nurse--testified she had markings and blood on her neck and hands, and redness on her cheek, right after the incident.

The trial court declined to stay sentence on the criminal threat (count 3) and corporal injury (count 4) counts under section 654, finding that the crimes were independent of and not merely incidental to each other. The court further found that there were several criminal objectives involved in the crimes of criminal threats and corporal injury in addition to the crime of rape (count 1), and imposed consecutive sentences for the threat and injury counts “because the crimes involve separate acts of violence or separate threats of violence.”

#### *B. Law and Analysis*

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

---

<sup>4</sup> The jury rejected knife-use allegations and acquitted defendant of a charge of assault with a deadly weapon (count 2).

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.”

By judicial interpretation, multiple punishment is also precluded if multiple crimes are part of an “indivisible” transaction or course of conduct. (See *People v. Saffle* (1992) 4 Cal.App.4th 434, 438 (*Saffle*)). The statute thus “serves to match a defendant’s culpability with punishment.” (*People v. Vang* (2010) 184 Cal.App.4th 912, 915 (*Vang*)).

“The defendant’s intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. [Citation.] ‘We review the court’s determination of [a defendant’s] “separate intents” for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.’ ” (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641; see *Saffle, supra*, 4 Cal.App.4th at p. 438.)

Separate acts of violence against the same victim may be separately punished where there is time for reflection between the acts. (See *People v. Solis* (2001) 90 Cal.App.4th 1002, 1021-1022 [Solis left threatening messages, then burned apartment after victims fled, multiple punishment for arson and threats upheld]; *People v. Surdi* (1995) 35 Cal.App.4th 685, 688-690 [offenses “separated by considerable periods of time during which reflection was possible”]; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212 [collecting cases].)

Here, the victim testified defendant grabbed her and held her at knifepoint, cutting her, all the while telling her that she needed to die to stop his pain. In such circumstances, we cannot find a temporal separation between the threats and the injury, permitting time for reflection, nor a plausible separate criminal objective. Therefore the sentence for one of those crimes should be stayed. However, we disagree with defendant’s view that both of those first two crimes were part and parcel of the rape. The trial court could find on this record that defendant committed two separate criminal acts

each meriting punishment. First, he threatened to kill the victim as he restrained her, while cutting her. When the victim told him to stop and leave, defendant's reply was that he was not done: He called her a whore, hit her, and then raped her. Apart from different motivations (criminal threats and violence versus forcible sex), the trial court could find defendant had ample time to reflect while spurning the victim's pleas for him to stop and leave, before he changed the tone of his assault and raped her. Therefore, staying both the criminal threat and corporal injury counts would result in a sentence incommensurate with defendant's true culpability. (See *Vang, supra*, 184 Cal.App.4th at p. 915.)

We shall modify the judgment (§ 1260) to stay the sentence on count 3, criminal threats, resulting in an unstayed sentence of 18 years, leaving intact the upper term of eight years for rape, a consecutive one-third midterm of one year for corporal injury, and one year for each of nine prior prison terms.

Defendant adds that restitution and parole revocation fines (§§ 1202.4, 1202.45) may not be based on stayed counts. (See *People v. Le* (2006) 136 Cal.App.4th 925, 932-936.) The trial court calculated the fines by multiplying \$240 times the number of *whole* years of prison, or \$4,320 (18 x \$240). Therefore, staying the sentence for the criminal threats count alone, which had added only eight months to the total sentence, makes no difference to the trial court's math. Therefore the \$4,320 figure for each challenged fine is unaffected by the stay of sentence on count 3.

### III

#### *Unanimity Instruction*

Defendant contends the criminal threats count must be reversed because there was evidence of more than one threat adduced at trial, and no unanimity instruction was given. Defendant argues that, after the rape, defendant returned to the victim's house and tried to force his way in to see his son; after the victim hit defendant with a cane to repel him, defendant told her he would kill her the next time. Therefore, defendant contends, it

cannot be known whether all 12 jurors agreed on which threat constituted the offense charged and found true by the jury.

“[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.” (*People v. Norman* (2007) 157 Cal.App.4th 460, 464.) “If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction. The record must show that by virtue of the prosecutor’s statement, the jurors were informed of their duty to render a unanimous decision as to a particular unlawful act.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1539 (*Melhado*).

Here, the prosecutor during argument explicitly based the criminal threat count on the initial assault, arguing defendant’s actions “out there on [the victim’s] driveway” were different than her prior interactions with defendant for a variety of reasons, and therefore constituted a “threat” as defined by section 422. The prosecutor argued the victim’s fear at that moment was objectively reasonable, because defendant was holding a knife to her, there had been prior acts of domestic violence, and the threat was immediate and unconditional. At no time did the prosecutor reference the later incident--following the cane strike--when discussing the criminal threats count. This argument constituted adequate, although not ideal, election.

In such circumstances, no unanimity instruction was required. (See *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1291-1292 [no unanimity instruction required where the prosecutor clearly informed the jury in argument that only one of the two threats formed the basis for the section 422 charge]; *People v. Hawkins*, 98 Cal.App.4th 1428, 1455 [no unanimity instruction required where “the prosecutor’s opening argument elected what conduct by defendant amounted to the crime charged”]; c.f. *People v. Hernandez* (2013) 217 Cal.App.4th 559, 570-571 [unanimity instruction required where

evidence clearly showed two instances of gun possession and prosecutor argued each of the two could satisfy the single charge].)<sup>5</sup>

**DISPOSITION**

The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment staying count 3 and to send a certified copy thereof to the Department of Corrections and Rehabilitation.

\_\_\_\_\_  
DUARTE, J.

We concur:

\_\_\_\_\_  
BLEASE, Acting P. J.

\_\_\_\_\_  
ROBIE, J.

---

<sup>5</sup> Indeed, as the People observe, defendant agreed in his briefing (in the context of supporting the application of section 654 to the charged threats count) that “no reasonable juror could have convicted appellant of criminal threats” based on the evidence of the post-caning threat. We agree. (See *Melhado, supra*, 60 Cal.App.4th at p. 1536.)