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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY MCLEOD,

Defendant and Appellant.

D058174

(Super. Ct. No. FSB702860)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Donna G. Garza, Judge. Affirmed.

Defendant Kelly McLeod (Defendant) appeals a judgment following his jury conviction of first degree murder (Pen. Code, § 187, subd. (a))¹ and kidnapping (§ 207, subd. (a)). On appeal, he contends the trial court erred by imposing consecutive sentences for his two offenses in violation of section 654. He argues that because his

¹ All statutory references are to the Penal Code.

offenses were committed with the same intent and objective, section 654 bars punishment for his kidnapping offense.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of July 22, 2007, a group of friends were having a party at Andrew Baker's (Andrew) apartment in Yucaipa. The group included Defendant, Christopher DaCosta (Chris), Kelsey Angell (Kelsey), Courtney Otis (Courtney), Lauren Parsons (Lauren), Jade, Holly, Elysse, Luke McLeod (Luke), Richard Hamilton (Richard), Aaron Dixon (Aaron), Mary Jo Dixon (Mary Jo), and Mark Smith (Mark).²

Mark became intoxicated and began inappropriately grabbing the young women at the party. When Mark grabbed Lauren inappropriately, they fell to the ground. Kelsey went outside and informed Aaron of Mark's actions. When Aaron went inside the apartment, he saw Mark lying on top of Lauren, who appeared upset. Lauren got up and ran to the bathroom. Aaron told Mark to leave the party, but he refused. Mark and Aaron fought. After Aaron hit Mark at least two or three times, Mark fell to the floor. Aaron then left to check on Lauren.

Aaron told Defendant something to the effect of "[g]et [Mark] out of here, I don't want to see him again." Defendant dragged Mark out of the apartment and placed him face up on the driveway. Mark was alive and breathing at the time. Aaron kicked Mark in the head a couple of times. Defendant and Chris then picked up Mark and loaded him

² Andrew left his apartment before noon, returned for a short time at about 5:30 or 6:00 p.m., and returned at about 7:30 p.m.

onto the bed of Courtney's truck.³ Defendant and Chris then left in the truck. Defendant drove and Chris sat in the passenger's seat.

Meanwhile, Luke drove the young women (Kelsey, Courtney, Lauren, Jade, Holly, and Elysse) to Joe's house. They arrived at about 6:00 or 7:00 p.m.

Defendant arrived at Joe's house about one hour later. When asked what happened to Mark, Defendant replied he "took care of" Mark without providing any details. When Courtney asked Defendant why he did not take Mark to a hospital, he replied that they would all get in trouble if he did. He said he had hidden Mark, but did not say where. Defendant said he had "wiped down" the truck.

At about 9:00 or 10:00 p.m., Courtney dropped Defendant off at his house. He told her he needed to go "check on" Mark. Courtney then returned to Joe's house.

Defendant returned to Joe's house at about midnight. He had Mark's wallet and stated he had it to prevent police from identifying Mark. When Courtney asked Defendant what happened, he replied that she did not need to worry about it and that he "took care of it." She asked him what that meant and he stated, "I killed him." Defendant described using a lead pipe to kill Mark.

One day later, Defendant and Chris told some people at Andrew's house that they took Mark to the woods, stripped him of his clothes, and took care of it. They stated that if everyone kept their mouths shut, no one would discover that Mark was missing.

³ Defendant had the keys to Courtney's truck because Courtney believed she was too drunk to drive.

At about 9:00 a.m. on July 23, a hiker found Mark's body lying in a culvert near a private dirt road. San Bernardino County Sheriff's Detective Samuel Fisk responded to the hiker's 911 call. Fisk saw Mark's body lying face down in the culvert, with a large amount of blood on the back of his head and shoulders. Mark was not wearing a shirt and his pants were pulled half-way down his buttocks. He had vomit on his nose, mouth, shoulders, and chest. Fisk found an area where he believed Mark was dropped and rolled down into the culvert. Fisk saw indications that someone other than Mark had also been in the culvert.

A crime scene specialist examined the scene and, based on blood spatter around Mark's head and shoulders, concluded Mark received multiple strikes to the head at that location. An autopsy by a forensic pathologist showed Mark had extensive abrasions on his face, knees, thighs, lower back, and buttocks. The pathologist believed Mark was alive when he sustained those abrasions. Mark also had four parallel, linear lacerations on the right side of his head. They had the appearance of multiple blows, consistent with being struck by a bat, pipe, or other round and small object. Mark had two superficial fractures of the skull underneath those lacerations. There was significant hemorrhaging in the area between his skull and dura (covering of brain), and blood inside the ventricles of his brain. The pathologist concluded the blows to Mark's head (i.e., blunt force trauma) that resulted in those injuries were the cause of Mark's death. Based on the large amount of blood in Mark's hair and on the ground near his body, the pathologist concluded Mark was alive when he sustained those blows to his head and for some time thereafter.

On July 31, Detectives Fisk and Bessinger interviewed Defendant, who waived his *Miranda*⁴ rights and then described what happened on July 22. Defendant described how he broke up a fight between Aaron and Mark, placed Mark in Courtney's truck, drove him to the private road and threw him into the ditch, and then drove to Joe's house. He said he believed Mark was alive when he placed him in the truck because he heard Mark moan and make gurgling noises. Later, while at Joe's house, he cleaned up Courtney's truck and then Courtney drove him to his house. While at home, Defendant took a lead pipe from his father's garage and drove a car (that he shared with his brother) back to the ditch where Mark was. He stood at the top of the embankment and threw a rock at Mark. He then went down into the ditch and struck Mark's head three times with the pipe. He took Mark's wallet and cell phone. Defendant said he went back to the ditch "to make sure [Mark] was done." He said he did not take Mark to the hospital because he was scared and concerned that Mark would go after him, believing he (Mark) had connections with white supremacists. Defendant later showed the detectives where he left the pipe. The pipe was about five feet long and made of galvanized steel.

An information charged Defendant with first degree murder and kidnapping. At trial, the prosecution presented evidence substantially as described above. In his defense, Defendant testified that he tried to break up the fight between Aaron and Mark. Chris helped Defendant carry Mark out of the apartment by his arms and legs. They put Mark face-up on the driveway. Aaron came over and stomped on Mark's head "quite a few

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

times." Mark's head was "a mess" and covered in blood. Mark appeared unconscious. Defendant thought Aaron told him, "Get [Mark] out of here. I don't want to see him anymore." He testified he felt Aaron was going to get into trouble, and thought he had to move Mark. He and Chris drove Mark in the bed of Courtney's truck to the culvert. Defendant testified that he did not take Mark to a hospital because he did not know whether Mark was dead and was afraid he or Aaron would get into trouble. When he "flung" Mark into the culvert, Defendant thought he was dead. Although Defendant thought Mark was dead, he later returned with Chris to the culvert because he was paranoid that Mark might come after him, Aaron, or Chris. Defendant brought along a metal pipe in the event Mark was not dead. After prodding Mark with the pipe, Defendant, suddenly angry about Mark grabbing Lauren, and about his (Defendant's) involvement in the situation, hit Mark in the head with the pipe a couple of times. He then handed the pipe to Chris who hit Mark with the pipe two or three times. Defendant took Mark's wallet and later threw it into a dumpster behind a convenience store. Defendant returned to Joe's house after his second trip to the culvert. Defendant testified his actions that night were to protect and keep Aaron from getting in trouble.

In rebuttal, the prosecution presented Fisk's testimony that during the first few hours of his interview, Defendant claimed he left Andrew's apartment when Mark and Aaron first began to fight. Fisk also testified that when he took Defendant back to the culvert, Defendant reenacted what he and Chris did to Mark (i.e., throwing rocks at and then going down to Smith and striking him with the pipe). Defendant told Fisk that he and Chris threw rocks at Mark because they thought he was still alive. During a follow-

up interview, Defendant told Fisk that after the fight, Aaron told Chris and him to make Mark leave. He and Chris then took Mark to the ditch and left him there.

The jury found Defendant guilty of first degree murder and kidnapping. The trial court sentenced him to five years for the kidnapping offense and a consecutive indeterminate term of 25 years to life for the first degree murder offense. Defendant timely filed a notice of appeal.

DISCUSSION

I

Section 654 Generally

Section 654, subdivision (a), prohibits multiple punishment for the same act, stating:

"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 largest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

Section 654 prohibits only multiple punishment, not multiple convictions, for the same act. (*People v. Britt* (2004) 32 Cal.4th 944, 951.)

"The test for determining whether section 654 prohibits multiple punishment has long been established: '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.'
(*Neal v. State of California* [(1960) 55 Cal.2d 11, 19, disapproved on another ground in

People v. Correa (2012) 54 Cal.4th 331, 334].) A decade ago, we criticized this test but also reaffirmed it as the established law of this state. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1209-1216 [23 Cal.Rptr.2d 144, 858 P.2d 611].) We noted, however, that cases have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted. [Citation.] . . . [¶] Section 654 turns on the *defendant's* objective in violating both provisions"⁵ (*People v. Britt, supra*, 32 Cal.4th at pp. 951-952.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

"[T]he power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for

⁵ We note that on June 21, 2012, the California Supreme Court issued its opinion in *People v. Correa, supra*, 54 Cal.4th 331, which involves section 654. Based on our review of *Correa*, we conclude its holding does not apply to the circumstances in this case. Accordingly, we do not discuss its circumstances or holding.

those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

II

Trial Court's Imposition of Multiple Punishment

Defendant contends the evidence is insufficient to support the trial court's determination that his kidnapping and first degree murder offenses were committed with separate intents and objectives, and therefore imposition of multiple punishments for those offenses violated section 654. He asserts his sole intent and objective in committing both offenses was to protect Aaron, Chris, and himself from getting in trouble with law enforcement or Mark and therefore section 654 prohibits multiple punishment for his offenses. He argues that, pursuant to section 654, the trial court should have stayed the five-year term imposed for his kidnapping offense.

A

At sentencing, the trial court imposed a determinate term of five years in prison for Defendant's kidnapping offense and a consecutive indeterminate term of 25 years to life in prison for his first degree murder offense. The court stated that Defendant's "total commitment for state prison will be a five year[] determinate [term], plus [an] indeterminate term of 25 [years] to life." The trial court did not make any express finding that the two offenses were committed with separate intents and objectives or that section 654 did not preclude multiple punishments. However, by imposing consecutive terms for

the two offenses, the trial court implicitly found they were committed with separate intents and objectives and section 654 did not preclude punishment of Defendant for each offense.

B

We conclude there is substantial evidence to support the trial court's implied finding that section 654 did not preclude multiple punishment for Defendant's kidnapping offense and first degree murder offense because they were committed with separate intents and objectives. Considering the evidence, and all reasonable inferences, favorably to the People, we conclude the trial court could have reasonably inferred Defendant had a separate intent and objective in committing each offense.

The evidence showed that after the fight between Aaron and Mark, Aaron requested that Defendant get Mark out of the apartment because he did not want to see Mark any more. Defendant complied with Aaron's request by dragging Mark outside (apparently with Chris's assistance) and leaving Mark face up on the driveway. After Aaron came outside and kicked Mark a few times in the head, Defendant and Chris loaded Mark onto the back of a truck, drove to the private dirt road, and dumped Mark in the culvert. Defendant left Mark there and went to Joe's house. After two to three hours, Defendant went home, found a metal pipe, and drove with Chris back to the culvert. There, Defendant first threw a rock at Mark and then went down into the culvert and struck him a few times on the head with the pipe. The expert testimony supported the conclusion that it was Defendant's final blows with the pipe that caused Mark's death.

Based on the above evidence, it could be reasonably inferred that Defendant committed a kidnapping when he, pursuant to Aaron's request, dragged Mark out of the apartment and placed him on the driveway (i.e., that Defendant used force to take Mark outside without Mark's consent). The trial court could reasonably infer Defendant, in committing that kidnapping, acted with the sole intent and objective of merely complying with Aaron's request that he move Mark out of his sight and *not*, as Defendant argues, with an intent and objective of protecting Aaron, Chris, or himself from getting into trouble with law enforcement or Mark.

Alternatively, there is substantial evidence to support a conclusion that Defendant committed a kidnapping when he drove Mark to, and dumped him in, the culvert (i.e., that Defendant used force to take Mark to the culvert without Mark's consent). The trial court could reasonably infer that Defendant, in committing that kidnapping, acted with the sole intent and objective of merely complying with Aaron's request that he move Mark out of his sight and *not*, as Defendant argues, with an intent and objective of protecting Aaron, Chris, or himself from getting into trouble with law enforcement or Mark.

There is also substantial evidence to support a conclusion that Defendant did not commit first degree murder until he returned to the culvert a few hours later and angrily struck Mark a few times in the head with a metal pipe. At trial, Defendant testified that, after prodding Mark with the pipe during the return trip, he became suddenly angry about Mark grabbing Lauren, and about his (Defendant's) involvement in the situation and then hit Mark in the head with the pipe a couple of times. The trial court could reasonably

infer that, in committing that murder, Defendant acted with the sole intent and objective of mortally harming Mark because of his anger toward Mark for his actions toward Lauren and his (Defendant's) own involvement in the situation and *not*, as Defendant argues, with an intent and objective of protecting Aaron, Chris, or himself from getting into trouble with law enforcement or Mark.⁶

Although, as Defendant argues, he testified at trial that his actions that night were taken with the sole intent and objective of protecting Aaron, Chris, or himself from getting in trouble with law enforcement or Mark, the trial court could have reasonably rejected that explanation as incredible, self-serving testimony. Likewise, the trial court need not accept the truth of Defendant's subsequent explanations (e.g., at Joe's house and to detectives) that his intent in "taking care of" Mark and/or in not taking him to the hospital was to protect everyone at the party from getting in trouble. Because a defendant's intent in committing an offense may not be obvious or expressly stated by a defendant at the time of the offense, triers of fact (e.g., a trial court) must often, as in this case, infer from the defendant's actions and the surrounding circumstances what the defendant's intent or objective was in committing an offense. In this case, the trial court could have reasonably rejected Defendant's proffered explanation of his intent in

⁶ Alternatively, we also conclude there is substantial evidence to have supported a reasonable inference by the trial court that Defendant acted with dual intents and objectives in committing the first degree murder (i.e., (1) out of anger toward Mark and for his (Defendant's) involvement in the situation, and (2) to protect Aaron, Chris, or himself from trouble with law enforcement or Mark). In the event the court made that inference, there still would not be a single intent and objective for Defendant's kidnapping and first degree murder offenses.

committing his two offenses and, instead, reasonably inferred that he had separate intents and objectives in committing the kidnapping and first degree murder offenses. To the extent Defendant cites evidence and inferences favorably to his position, he either misconstrues and/or misapplies the substantial evidence standard of review that we apply in reviewing the trial court's implied finding in this case. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143; *Bowers v. Bernards, supra*, 150 Cal.App.3d at p. 873-874.)

Because there is substantial evidence to support the trial court's implied finding that Defendant's kidnapping and first degree murder offenses were committed with separate intents and objectives within the meaning of section 654, we conclude the trial court did not err by imposing multiple punishments for those offenses.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.