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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD SCOTT THEMINS,

Defendant and Appellant.

E053886

(Super.Ct.No. BAF10000142)

OPINION

APPEAL from the Superior Court of Riverside County. Bernard Schwartz, Judge.

Affirmed with directions.

Reed Webb, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION¹

Defendant Richard Scott Themins engaged in domestic violence against his girlfriend during their tumultuous relationship. A jury convicted defendant of eight offenses arising from two incidents.

For the events occurring on December 14, 2009, defendant was convicted of four counts: witness dissuasion (§ 136.1, subd. (b)(1)); unlawfully taking a vehicle (Veh. Code, § 10851; petty theft (§ 484, subd. (a)); and misdemeanor battery (§ 243, subd. (e)(1).) For the events occurring on July 27, 2010, defendant was convicted of four additional counts: witness dissuasion (§ 136.1, subd. (c)(1); false imprisonment (§ 236); misdemeanor battery (§ 243, subd. (e)(1)); and misdemeanor violation of a protective order (§ 166, subd. (c)(1).)

Defendant was also subject to enhancements under section 667.5, subdivision (b), for committing counts 5 and 6 while charges were pending on counts 1 through 4, and under section 12022.1 for having served a prior prison term on embezzlement and not remaining free from custody for a five-year period.

The court sentenced defendant to a total prison term of 11 years four months, with custody and conduct credits.

On appeal, defendant argues his due process rights were violated by allowing the victim to use a fictitious name and because one of the jurors was sleeping during trial.

¹ All statutory references are to the Penal Code unless stated otherwise.

Additionally, defendant argues his conviction on count 3 for petty theft should be reversed because there was insufficient evidence of intent. Finally, defendant asserts the trial court committed errors in sentencing on counts 1 and 5 for witness dissuasion.

The People agree counts 1 and 5 should be remanded for resentencing. Subject to that modification, we affirm the judgment.

II

FACTUAL BACKGROUND

A. December 14, 2009

Jane Doe lived in Banning in a gated community as the residential caretaker for an elderly man named Al. Jane Doe had an intermittent relationship with defendant.

On December 14, 2009, defendant came to Jane Doe's home and entered through the garage. When Jane Doe told defendant to get out, defendant became angry and restrained her in a bedroom, to prevent her from having access to a phone. Defendant held Jane Doe down on the bed, grabbed her by the arms and neck, and pushed her. Jane Doe escaped and ran into the kitchen. Defendant followed her and grabbed her neck. During their struggle, her elbow was cut by a blue drinking glass. Jane Doe told defendant again to "Get the hell out of here."

Defendant warned Jane Doe she could not call the police or 911. Defendant took Jane Doe's car from the garage and left, taking with him a cordless house phone and Jane Doe's purse containing her cell phone and car keys.

Meanwhile, Jane Doe sought help at the guard station at the entrance to the residential community. Several days later, Jane Doe recovered her car and other personal

property from a grocery store parking lot. Jane Doe had not given defendant permission to use her car.

A Banning police officer contacted Jane Doe at the guard shack. The officer observed she was crying hysterically and bleeding badly from her elbow. A red mark was on her neck. Jane Doe did not appear intoxicated. The officer found a broken glass and spattered blood in the kitchen and living room of the house.

On cross-examination, Jane Doe admitted that, between December 2009 and July 2010, she had consented to defendant continuing to visit her. Jane Doe denied she was drinking vodka on December 14, 2009. She agreed she had recovered her car from a parking lot near the entry gate.

B. The Criminal Protective Order

The parties stipulated that, on May 10, 2010, the court granted a criminal protective order prohibiting defendant from having negative contact with Jane Doe and from trying to dissuade her from attending a hearing, testifying, or making a report to law enforcement.

C. July 2010

On July 27, 2010, defendant again came uninvited to Jane Doe's bedroom. Defendant said he wanted to get some sleep and he wanted Jane Doe to make him some dinner. After Jane Doe told defendant to leave, she went into the kitchen where she had some Arby's sandwiches she had purchased for Al. Defendant was upset and proceeded to smash the bag of sandwiches. Defendant said Jane Doe could not leave or call the police. Defendant grabbed Jane Doe by the arms, neck, and face, pushed her into the

bedroom, and held her down on the bed. Defendant made threatening statements to Jane Doe like “he could rip my face off,” he was losing control, and he would have his friends “kick your ass.” Defendant bruised her arm. Because defendant would not allow her to leave, Jane Doe remained in the room until defendant fell asleep when Jane Doe was able to leave with her dog and call the police.

A second Banning police officer contacted Jane Doe and defendant on July 28, 2010, about defendant violating the protective order. Jane Doe appeared calm and sober. Her clothes were slightly disheveled and her arm bore a small bruise about the size of a quarter, consistent with her being grabbed or punched.

On cross-examination, Jane Doe admitted that defendant had come to the house on July 26, 2010, and left when she called the police but she said he had spent the night sleeping in a hammock in the backyard. Defendant was still at the house when Jane Doe returned on the afternoon of July 27, 2010, after taking Al to the doctor.

D. Defendant's Testimony

Defendant admitted he was convicted of felony embezzlement in May 2004 and vehicle theft in September 2007.

Defendant often spent the night with Jane Doe in Banning. Defendant claimed Jane Doe had a drinking problem. Defendant came to Jane Doe's residence on December 13, 2009, and parked his truck in an Albertson's parking lot near the gated entrance. That day he performed some household chores with Jane Doe. Defendant spent the night of December 13, 2009, and made some breakfast in the morning while Jane Doe slept until the afternoon. After Jane Doe woke up, she got mad at defendant and yelled at him to

leave. She poured herself some vodka in a blue glass. When defendant reached over to hug her, she made a movement that broke the glass and cut herself. While Jane Doe yelled at defendant, he got a towel and tried to persuade her to go to the emergency room. After she threw her car keys at him, defendant took the keys and drove her car to where his truck was parked. He parked her car and locked it with the keys under the seat. He did not know her purse and cell phone were in the car.

In July 2010, defendant stayed with Jane Doe and assisted with caring for Al. About 7:00 or 8 p.m. on July 27, 2010, defendant watched television with Jane Doe in her bedroom until they had an argument. He did not restrain her or threaten her. Instead, he went to sleep. When he woke up the next morning, she told him he should hurry up and leave. Defendant started to leave through the garage when a police officer arrived.

III

JANE DOE'S FICTITIOUS NAME

Jane Doe testified using a fictitious name. Defendant contends Jane Doe's anonymity caused him prejudice because of the implication that defendant constituted a threat to her and because it raised the specter of a "lurid sexual offense" that the court was withholding from the jury.

Defendant did not object at trial to the use of a fictitious name, forfeiting any such claim on appeal. (*People v. Monterroso* (2004) 34 Cal.4th 743, 759.) Furthermore, the record does not support defendant's claim of error because the defense knew the true name of the victim and her address, and was allowed complete discovery. Even if the statute cited by defendant, section 293.5, applies in cases involving victims of sex

offenses—and not in case involving victims of domestic violence (see *People v. Ramirez* (1997) 55 Cal.App.4th 47, 53)—defendant’s right to confront and cross-examine the victim was not violated. The privacy interest of the victim and the resulting state interest in facilitating the reporting of domestic violence offenses against the minimal intrusion on an accused’s nonabsolute right of confrontation, is not constitutionally infirm, nor did its application violate defendant’s confrontation and cross-examination rights. (*Id.* at p. 57; see *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1134-1136, 1151-1152.) In summary, using a fictitious name for the victim did not impair defendant’s right to due process and a fair trial.

IV

THE SLEEPING JUROR

One of the jurors, TJ01, had trouble staying awake during opening statements and at one point during the examination of defendant. The court interviewed TJ01, asking whether she had a sleeping disorder. TJ01 admitted she fell asleep easily and was having problems staying awake because she had slept poorly the night before. TJ01 maintained she was not asleep but “fighting it.” Also she was irritated “with the whole situation.” In spite of defense counsel’s objections, the court observed that TJ01 had been nodding off but, based on her statement, the court found “it appears to be that she heard all of the evidence.” The court offered additional detailed reasons for finding the juror had heard the evidence and the court denied defendant’s motion for mistrial. At the end of the trial, the court observed that TJ01 had become more attentive and defense counsel agreed.

“The trial court has the authority to discharge jurors for good cause, including sleeping during trial.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 350, citing *People v. Bradford* (1997) 15 Cal.4th 1229, 1348-1349; *People v. Johnson* (1993) 6 Cal.4th 1, 21.) “When the trial court receives notice that such cause may exist, it has an affirmative obligation to investigate. [Citations.] Both the scope of any investigation and the ultimate decision whether to discharge a given juror are committed to the sound discretion of the trial court. [Citation.]” (*Bonilla*, at p. 350.)

Here the court based its finding on the juror’s statements and its own close scrutiny of the juror’s conduct. (*Bradford, supra*, 15 Cal.4th at p. 1349; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1233-1234.) There was little or no evidence that TJ01 had actually fallen asleep during the presentation of material evidence even if she was asleep during some part of opening statements. (*Bradford*, at p. 1349.) We conclude the trial court fulfilled its obligation to investigate and acted within its sound discretion when it refused to discharge TJ01 or to grant a mistrial.

V

COUNT 3 FOR PETTY THEFT

Defendant’s conviction on count 3 for petty theft (for which he received an eight-month sentence) was based on defendant taking Jane Doe’s purse and cell phone and the cordless house telephones with him when he drove away in her car on December 14, 2009. The statutory definition of theft is: “Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft.” (§ 484, subd. (a).)

The court instructed the jury based on *People v. Avery* (2002) 27 Cal.4th 49, 58, and CALCRIM No. 1800 (italics added): “3. *When the defendant took the property he intended to deprive the owner of it permanently or to remove it from the owner’s possession for so extended a period of time that the owner would be deprived of a major portion of the value or enjoyment of the property;*

“AND

“4. The defendant moved the property, even a small distance, and kept it for any period of time, however brief.

“For petty theft, the property taken can be of any value, no matter how slight.”

The italicized language is most significant because, in this instance, when defendant took Jane Doe’s purse and several telephones, he deprived her of the ability to contact the police and report on defendant’s conduct. Under these circumstances, defendant clearly intended to restrict temporarily Jane Doe’s value and enjoyment of her property at a time when its use was most important to her. The evidence also supports a reasonable inference that defendant may have intended to deprive Jane Doe of her property permanently. By abandoning Jane Doe’s car and possessions in a parking lot, defendant created a risk that the car might be towed or stolen and Jane Doe might never recover her property.

Based on the appropriately deferential standard of review, we hold there is substantial evidence in the record for the jury to find defendant guilty beyond a reasonable doubt on count 3 for petty theft. (*People v. Chatman* (2006) 38 Cal.4th 344,

389; *People v. Shrier* (2010) 190 Cal.App.4th 400, 412; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

VI

SENTENCING

We agree with the parties that the trial court incorrectly imposed full consecutive terms on counts 1 and 5 for dissuasion of witnesses under section 1170.15. Section 1170.15 does not apply because counts 1 and 5 are related to defendant's acts of misdemeanor battery not to any felony offenses. (*People v. Evans* (2001) 92 Cal.App.4th 664, 669-670.) The matter must be remanded for resentencing on these counts.

The court also imposed a three-year sentence on the principal count of count 2 for taking a vehicle. Defendant argues the court erred under section 654 when it did not stay sentences on count 1 for witness dissuasion, count 3 for theft, count 4 for misdemeanor battery, count 6 for false imprisonment, and count 7 for misdemeanor battery because the conduct in all those counts related to the same conduct of defendant, who was already on probation, trying to prevent Jane Doe from calling the police. Respondent counters that the counts involved different intents and objectives and the trial court properly imposed consecutive sentences on counts 1, 3, and 6 and concurrent sentences on counts 4 and 7.

The general principles for the application of section 654 are set forth in *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143-1144:

“Section 654, subdivision (a), provides in pertinent part, ‘[a]n 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.’ Section 654 therefore “precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. ‘Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.’ [Citations.] ‘[I]f all 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.’ [Citation.]” [Citation.]’ [Citations.] However, if the defendant harbored ‘multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]’ [Citations.]

“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. [Citation.]”

Here defendant’s altercations with Jane Doe occurred on two occasions during which defendant’s actions were divisible by intent and objective. On December 14, 2009, defendant’s conduct escalated as he battered Jane Doe first in the bedroom and then in the kitchen. His acts were segregated by location and by periods of time affording him an opportunity to reflect. Finally, instead of getting help for Jane Doe after

her elbow was injured, defendant took her telephones and her purse and drove away in her car. Similarly, on July 27 and 28, 2010, defendant first battered Jane Doe, then threatened her and compelled her to stay in the bedroom with him all night. Each time defendant appeared uninvited at Jane Doe's residence, he reacted violently but somewhat differently. Throughout these episodes he had time to reflect and alter his behavior instead of committing additional crimes. Substantial evidence supports a finding that defendant committed a series of divisible acts with multiple intents and objectives on both occasions. (*People v. Byrd* (2011) 194 Cal.App.4th 88, 102, fn. 9.) Under these circumstances, section 654 does not operate.

VII

DISPOSITION

The convictions are affirmed. The matter is remanded for resentencing. Following resentencing, the trial court shall amend the abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

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CODRINGTON

J.

We concur:

RAMIREZ

P. J.

RICHLI

J.