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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.

JOHN KENNETH SEVERIN,

Defendant and Appellant.

E053912

(Super.Ct.No. SWF10001324)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

Jan B. Norman, 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, and Lise Jacobson and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

In the early morning hours of July 2, 2010, defendant John Kenneth Severin barged into his ex-girlfriend's apartment and discovered her with another man.

Defendant chased after her and, once he caught her, punched her several times. He proceeded to threaten her, punched her in the face a few more times, made her get in his car, and threatened to hurt her if she did not orally copulate him. Finally, after she insisted that she was going to jump out of the moving car to get away from him, he let her off on the side of the highway in a deserted area. She passed out and was found by a law enforcement officer.

Defendant was convicted of corporal injury to a spouse or cohabitant (Pen. Code, § 273.5),¹ simple kidnapping (§ 207, subd. (a)), and making criminal threats (§ 422).² He was sentenced to three years for the kidnapping, one year for the corporal injury to a cohabitant or spouse, and eight months for making criminal threats. The sentences were ordered to run consecutive to each other, for a total sentence of four years eight months, to be served in state prison.

1. The evidence was insufficient to find that defendant committed kidnapping in violation of section 207, subdivision (a).
2. The trial court's failure to give a unanimity instruction on the making of criminal threats charge requires reversal of the conviction.

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

² Defendant was also charged with forcible oral copulation (§ 288a, subd. (c)(2)), an allegation that he committed kidnapping for purposes of oral copulation (§ 667.61, subd. (e)(1)) and the additional allegation that movement of the victim substantially increased the risk of harm (§ 667.61, subd. (d)(2)). The jury found him not

[footnote continued on next page]

3. Section 654 bars his sentence on both the criminal threat charge and the kidnapping charge.

I

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

Destiny Johnson and Latricia Turner both lived in the Mayberry Colonies Apartments in Hemet. Turner and defendant had started dating when she was 16 years old, and they had a relationship for over four years. They had two children together. In June 2010, defendant moved out of their apartment because they broke up.

On July 1, 2010, defendant came over and gave Turner money to pay for gas so she could take the children to their grandmother's house. Turner and Johnson went out to a dance club and then to a party. Around 2:00 or 3:00 a.m., Turner and Johnson went back to Turner's apartment with two men they had met at the club.

Johnson, Turner, and the two men sat in Turner's apartment and were drinking. Turner and one of the men went into her bedroom. Around 3:00 or 3:30 a.m., defendant suddenly came through a window at the apartment. He was yelling at Johnson asking for Turner. Johnson lied and said that she did not know where Turner was. Defendant told Johnson not to go anywhere. He turned to walk into the bedroom, and Johnson ran out of

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guilty of forcible oral copulation and found the allegations not true.

the apartment. Turner heard defendant. She wrapped a sheet around herself (she was wearing only shorts and a bra) and told the man she was with that defendant was going to end up killing her. She jumped off the balcony onto the ground. The man jumped off with her. Turner hurt her knee when she jumped.

Turner was afraid of defendant because she knew he could be violent. Turner hid and saw defendant talking to the two men who had been in her apartment. Defendant was asking them, “Where the F is she?”

Turner ran to Johnson’s apartment where Johnson’s brother was also staying. She borrowed some of Johnson’s clothes. Defendant knocked on the door and was yelling. Turner jumped off the second-floor balcony at Johnson’s apartment and ran away.

Johnson tried to find Turner but could not find her. Turner was not answering her phone. When Johnson last saw Turner that night, Turner did not have any injuries.

Turner tried to run away, but defendant found her. Defendant immediately started hitting her in the face with a closed fist. She fell to the ground, and he kept hitting her. He eventually let her up. She was screaming for help, but no one came to help her. Defendant grabbed her and dragged her up the stairs to her apartment because he claimed she was making too much noise. She did not want to go with him into the apartment because she believed that he would continue to hit her. Turner told him to let go of her and was crying. Defendant ignored her pleas to stop.

They went into her bedroom, and he continued to hit her. He told her that they were going to leave because she was causing too much of a scene. He was concerned that the police were going to come to the apartment. Turner threatened her, saying, "I'm really going to fuck you up because you're going to have these Niggers in my house." Defendant promised to stop hitting her if she got in the car with him.

As they walked to the car, defendant held onto her hand but then let go. Turner did not run when he let go because she knew that he would catch up to her because her knee was hurting. Defendant walked in front of her, and she followed him. He looked back to check to see if she was there.

When they got to the car, Turner was shaking her head no and was crying. She told him that she did not want to get in because she knew what he would do to her; he would keep hitting her. He told her he was not going to do anything to her. Defendant got in the car and opened the passenger's side door. She thought about running but thought he would run her over. Defendant yelled at her to "[g]et the fuck in the car."

Once they started driving, he hit her again in the head and face. He questioned her about the two men who had been in the apartment. Turner asked him to let her out, but he refused. She opened the door to jump out (even though the car was traveling at 25 to 30 miles per hour), but he grabbed her by the hair and pulled her back into the car. Turner tried to get out of the car several other times, but he kept pulling her back into the car.

Defendant accused Turner of orally copulating one of the men, which she denied. Defendant told her that she was going to have to orally copulate him. Defendant pulled over the car, and Turner claimed that she was forced to orally copulate him or he would beat her up. At some point, defendant ripped off her shirt.

Defendant started driving and again hit her. Defendant got on Domingoni Highway in Hemet, driving away from Turner's apartment. He did not tell her where he was going. Turner begged him to let her out of the car. Defendant was driving 65 to 70 miles per hour and told her that the only way she could get out of the car was to jump out. Turner did not jump out because she was thinking about her children.

Defendant hit her several more times. She lost her eyesight for a brief period. Defendant finally stopped the car and told her to get the "hell" out of the car. Turner stumbled out of the car and tried to walk but couldn't. She fell and "blanked out."

On July 2, 2010, Riverside County Sheriff's Deputy Bradley Decker was driving on Domingoni Highway in the City of Hemet around 6:30 a.m. As he was driving, he observed what he first thought was just a pile of clothes on the side of the road. However, upon closer examination, he discovered it was Turner. Deputy Decker described Turner as wearing a ski jacket and pajama bottoms but no shoes, shirt, socks, or bra. She was face down in the dirt. She finally awoke but was incoherent. She had clearly been beat up. Deputy Decker called for paramedics. The area where he found her was an open field with no businesses or residences, about 11 miles from Turner's apartment.

Turner had facial swelling and bruising. Her eyes were puffy for almost two weeks and were black for one week. She had a cut on her lip inside her mouth and her lip was swollen. The side of her head hurt for six months after the incident. Defendant had some scrapes on his knuckles.

Turner admitted that she found out in May 2010 that defendant had cheated on her, and she had broken up with him. She was jealous. Turner and defendant had sex several times during the days leading up to this incident. She still had feelings for defendant.

B. Defense

Defendant testified on his own behalf. On June 29, 2010, defendant found out that Turner had put nude photographs of herself on the internet, so he broke up with her. He also was seeing someone else. Around 2:00 a.m. on July 1, he and Turner had sex at the apartment. He stayed the night and was working on moving out of the apartment that morning. Defendant and Turner had sex again the afternoon of July 1 despite the fact he had moved his belongings in with his new girlfriend.

Defendant went to sleep at his new apartment and woke up around 4:00 a.m. He noticed that he had a missed call from Turner. He tried to call her, but she did not answer. He was worried, so he went to her apartment. When he arrived, he peeked in the window and saw Johnson and one of the men. He went through a window because he did not have a key. He confronted Johnson and asked for Turner.

Defendant went into Turner's bedroom, but she was not there. Defendant went to Johnson's house and saw Turner jump off the balcony. Defendant caught up with her, and they started arguing about her bringing two men in the house. They walked back to her apartment; he did not drag her or pull her. She said that she was afraid that he was going to kill her, but he told her she was not worth killing.

Defendant was upset with Turner and accused her of wanting to have sex with the man in her room. When she told him that she would have had sex with the man if defendant had not interrupted them, he hit her in the face with an open hand six or seven times. He hit her because he was jealous. He felt bad about what he had done to her. He told her he was going to leave before the police came, but she asked about picking up the children. They went together to pick up the children. He did not touch her on the way to the car.

Surveillance video from the apartment complex was played for the jury.³ The video showed defendant walking toward his car, with Turner behind him a substantial distance. Defendant kept turning around to ensure she was with him. She was walking slowly, with her head down and her hands in her pockets. The last frame showed him

³ Defendant relies extensively on the surveillance video shown to the jury, which was admitted as defense exhibit A. He did not ask this court to view the exhibit or have it transferred to this court despite receiving notice pursuant to California Rules of Court, rules 8.122(b)(3)(B) and 8.224(d) to request a transfer of the exhibit. Despite this failure to comply with the court rule, we have requested the exhibit be transferred and have viewed the exhibit.

clearly yelling at her with his hands up in the air. It did not show what occurred when they got to his car. Defendant denied he threatened her. He denied there was any conversation at the car.

Turner threatened to jump out of the car, so he stopped the car and let her out. He denied that any oral copulation occurred in the car. Defendant claimed he came back to get her, but she was gone.

II

INSUFFICIENT EVIDENCE OF KIDNAPPING

Defendant contends that the evidence was insufficient to support his conviction of simple kidnapping within the meaning of section 207, subdivision (a), as the video surveillance shown to the jury showed that Turner willingly went with him in his car and because he was unaware that she did not consent to go with him.

“Our task is clear. ‘On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible, and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which

must be convinced of the defendant's guilt beyond a reasonable doubt. "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." [Citations.]' [Citation.]' [Citations.]

The conviction shall stand 'unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]' (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

A person is guilty of simple kidnapping if he "forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county . . ." (§ 207, subd. (a).)

Accordingly, in order "to prove the crime of kidnapping, the prosecution must prove three elements: (1) a person was unlawfully moved by the use of physical force or fear; (2) the movement was without the person's consent; and (3) the movement of the person was for a substantial distance. [Citation.]' [Citation.]' (*People v. Dalerio* (2006) 144 Cal.App.4th 775, 781, fn. omitted.)

"While the statute requires force as an operative act [citations] the force need not be physical. The movement is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances. [Citations.]' (*People v. Stephenson* (1974) 10 Cal.3d 652, 660, overruled on other

grounds in *People v. Pope* (1979) 23 Cal.3d 412, 426, fn. 16.) Threats of force satisfy the force element of section 207, subdivision (a). (*People v. Majors* (2004) 33 Cal.4th 321, 326-327.) The California Supreme Court has also “observed that the concepts of consent and force or fear ‘are clearly intertwined.’ [Citations.]” (*Id.* at p. 327.)

The People argued below that defendant committed the kidnapping by forcing her from her apartment to the car. They argued, “He took her from the apartment complex into that car. He moved her a substantial distance from the apartment to the car. And then once they were in the car, he took her on the joy ride from hell. She did not consent to this movement. She did not want to be in the car with him. She made it very clear.” Defendant insists on appeal that Turner went to the car voluntarily and consented to going with him.

Here, Turner had been beat up by defendant because he found her with another man. He had dragged her to her apartment and hit her again in the apartment. Although defendant said in her apartment that he would stop beating her up if she went with him in the car, she had no choice but to comply. Although she walked behind him on the way to the car, it was clear that defendant was keeping watch on her and yelling at her. At the car, she refused to get in the car, and he insisted that he would not hit her. She did not believe him, but she got in the car anyway because she knew if she tried to get away that he would beat her up.

Moreover, even if Turner initially left her apartment voluntarily, she testified that

once she got to his car, she did not believe that if she got in the car he would stop hitting her. She also knew if she ran he would catch her and beat her up. ““Even if the victim’s initial cooperation is obtained without force or the threat of force, kidnap[p]ing occurs if the accused ““subsequently restrains his victim’s liberty by force and compels the victim to accompany him further.”” [Citations.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1017, italics omitted.) Once Turner refused to go with defendant at the car, he clearly forced her to get in the car by threatening to beat her, and if she tried to run away, he would beat her.

Defendant claims that he testified that he believed that Turner went with him consensually. He relies on the video that shows him walking at least 35 feet in front of Turner. He also claims he was already in the driver’s seat of his car when Turner got into the car. However, this is not shown on the video.

Defendant essentially is arguing that the jury should have relied on his testimony that he believed that Turner consented to getting in the car. ““Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]’ [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Turner had just been brutally beaten by defendant in her apartment.

Defendant demanded that she come with him in the car because he was concerned about the noise she was making. The video shows defendant walking ahead of Turner but continually looking back at her and yelling at her. She was walking very slowly and was hunched over. Turner testified that she hesitated in getting in the car, and defendant threatened her that he would beat her up if she did not get in. The jury could reasonably conclude that Turner went with defendant out of fear or because of threats of force. Substantial evidence supports such an inference.

The People additionally argue that even if Turner voluntarily got in the car, she begged defendant to let her out and tried to get out the door several times. This evidence also supports kidnapping. Defendant asks this court to reject the People's alternative argument that, even if she got in the car voluntarily, thereafter she did not want to stay with him and that this constituted kidnapping, because the People did not rely on this theory in the trial court. Since we find that the evidence is sufficient to support the kidnapping charge when defendant used fear to get Turner in the car with him, we need not address this alternate theory.

III

UNANIMITY INSTRUCTION

Defendant contends that there were several distinct threats made to Turner that could have constituted the criminal-threats conviction. The jury should have been

instructed pursuant to CALCRIM No. 3500⁴ that they must unanimously agree as to which threat constituted the criminal threat charge. Since it is impossible to tell whether the jurors unanimously agreed on all of the threats, the conviction must be reversed.

“It is fundamental that a criminal conviction requires a unanimous jury verdict [citations].” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.) “Where the jury receives evidence of more than one factual basis for a conviction, the prosecution must select one act to prove the offense, or the court must instruct the jury that it must unanimously agree on one particular act as the offense. [Citations.] A unanimity instruction is not required if the evidence shows one criminal act or multiple acts in a continuous course of conduct.” (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) “The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

“A violation of section 422 requires: (1) the defendant willfully threatens to kill or seriously injure another person; (2) the defendant has the specific intent that the listener understands the statement to be a threat; (3) the threat and circumstances under which it

⁴ CALCRIM No. 3500 provides as follows: “The defendant is charged with ____ <insert description of alleged offense > [in Count ____] [sometime during the period of ____ to ____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which (he/she) committed.”

was made lead the listener to believe the defendant would immediately carry through on the threat; and (4) the threat causes the listener to suffer sustained fear based upon a reasonable belief the threat would be carried out.” (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1023-1024.)

Here, defendant’s threats were all similar and relatively contemporaneous in time, and neither defendant nor the People made any significant distinction between them. (*People v. Jantz, supra*, 137 Cal.App.4th at p. 1293.)

Defendant claims in his opening brief that there were three distinct threats made by him that could have constituted the criminal threat. First, defendant threatened Turner with physical harm because she had allowed two men in her apartment. Defendant later cursed at her when she hesitated to get in the car. Finally, he threatened to beat her if she did not perform oral sex. The People did not argue such distinct threats. The People argued in closing as follows: “In count 4, criminal threats, he threatened to kill her or cause great bodily injury. She understood it as a threat. It was clear, immediate and unconditional. It caused sustained fear, and her fear was reasonable. Absolutely. [¶] He repeatedly threatened that he was going to beat her ass. And after he said that, he did. He kept telling her that he was going to beat her ass if she didn’t come to the car. He was going to beat her ass if she didn’t stay in the car. He was going to beat her ass if she didn’t perform oral cop on him. He said it over and over again. [¶] She knew he was going to do it, because that’s what he had been doing the entire morning. She was

terrified. So terrified that she ultimately ended up getting out of the car 11 miles from her house with no shoes on. This poor girl was terrified of this man, and it was completely reasonable based on everything we know about what she was going through. So [defendant] is guilty of Count 4 as well.”

Defendant presented the same defense to all of the threats: he never threatened Turner, and she was lying. The jury clearly rejected this defense. There was no distinction between the various threats made by defendant to require a unanimity instruction.

Defendant contends that based on the not guilty charge on forcible oral copulation, it is unclear if they found that he did not threaten her to commit forcible oral copulation, or that defendant made this threat but she did not follow through with it. It is impossible to discern from the record why the jury did not find defendant guilty of the forcible oral copulation charge. We will not engage in speculation as to the reason. The evidence supports that defendant continually threatened Turner that he was going to beat her if she did not comply with his demands. The failure to find forcible oral copulation does not change this result.

Based on the foregoing, there is no reasonable probability that the jurors believed that one discrete threat occurred but the others did not. The evidence establishes that he continually threatened her to support his conviction.

IV

654 BARS MULTIPLE PUNISHMENT FOR MAKING CRIMINAL THREATS AND KIDNAPPING BASED ON THE SAME ACT

Defendant contends that if this court upholds his conviction for making criminal threats, he could not be sentenced to consecutive sentences on the criminal-threat charge and the kidnapping because they were based on the same act. Multiple punishment is barred by section 654.

In its tentative sentence, the trial court stated for the criminal threat charge that it was “an independent and separate event” from the kidnapping. Later, the trial court stated, “And because in Count 4 there is a violation of Penal Code Section 422, criminal threats, one-third the midterm, the Court finding that to be a separate and distinct crime that is unrelated to the kidnapping. And I agree with the comments in the probation report that once she’s in a speeding vehicle and captive, there is no need to continue the threats and the violence, and the threats to do her harm and demanding that if she wants to leave, jump out of the car. [¶] And so I believe that’s a separate and distinct crime and one-third of the midterm. The midterm is two years -- so eight months.”

Section 654, subdivision (a), provides in pertinent 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.”

“Section 654 prohibits multiple punishment for a single act or an indivisible course of conduct. [Citations.] Whether a defendant’s conduct constitutes a single act under section 654 depends on the defendant’s intent in violating penal statutes. If the defendant harbors separate though simultaneous objectives in committing the statutory violations, multiple punishment is permissible. [Citation.] This question is one of fact for the trial court, and we uphold the trial court’s finding if it is supported by substantial evidence. [Citation.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 645 [Fourth Dist., Div. Two].) Accordingly, multiple punishment is proper if the defendant entertained multiple criminal objectives which were independent of each other. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

In making criminal threats, a defendant intends that the victim suffer sustained fear. (*People v. Solis, supra*, 90 Cal.App.4th at p. 1023.) As set forth, *ante*, kidnapping is the movement of victim accomplished by the use of force or by instilling fear in the victim. (§ 207, subd. (a).)

We agree with the trial court that defendant possessed two separate intents and objectives in committing the kidnapping and making the criminal threats. In making the criminal threats, defendant clearly wanted Turner to suffer sustained fear. However, although defendant accomplished the kidnapping through the use of fear, his objective in committing the kidnapping was to hide his crime. Defendant wanted to leave the apartment complex because he was afraid the police were going to come to the apartment.

Defendant's objective was to inflict more pain on Turner, and in order to accomplish that task, he had take her away from the apartment and isolate her in his car. As such, the trial court was not precluded in this case from finding separate criminal objectives under the facts of this case. Multiple punishment was not barred by section 654.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.