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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.

ALFREDO MAGANA,

Defendant and Appellant.

E054065

(Super.Ct.No. RIF1333124)

OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge.
(Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI,
§ 6 of the Cal. Const.) Affirmed.

William D. Farber, 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 Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

On August 6, 2007, an information charged defendant and appellant Alfredo Magana with stalking under Penal Code¹ section 646.9, subdivision (b) (count 1); two counts of burglary under section 459 (counts 2 & 5); four counts of criminal threats under section 422 (counts 3, 4, 6 & 9); spousal abuse under section 273.5, subdivision (a) (count 7); and child endangerment under section 273a, subdivision (a) (count 8).

Trial by jury commenced on April 19, 2011. At the conclusion of the People's case on April 26, the trial court dismissed count 9 on its own motion under section 1118. On the same day, jury deliberations commenced. The next day, April 27, 2011, the jury found defendant guilty on counts 1 through 7, as charged; and found defendant guilty of the lesser included crime of misdemeanor child endangerment under section 273a, subdivision (b) on count 8.

On July 15, 2011, the trial court sentenced defendant to a total term of nine years as follows: four years on count 2; consecutive terms of eight months on counts 1, 3, 4 and 6; one year four months on count 5; and one year on count 7. Defendant was given credit for time served on count 8.

On July 19, 2011, defendant filed a timely notice of appeal.

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

II

STATEMENT OF FACTS

Defendant married Gloria Amaya some time after they met in 1991; they had four children. Defendant and Amaya had problems throughout their relationship. In 2001, Amaya and defendant divorced. Over the course of their relationship, defendant physically abused Amaya well over 20 times. On at least one occasion, defendant hit Amaya with a closed fist, resulting in black eyes.

Count 1 – Stalking (§ 646.9): July 27 – October 5, 2006

In July 2006, Amaya was in fear of defendant because he repeatedly threatened to kill her. Amaya obtained a restraining order against defendant. Defendant threatened Amaya that if she did not lift the restraining order and if she called the police, he would kill her. Defendant threatened Amaya on a weekly basis. At one point, Amaya moved into a hotel because she was afraid of defendant.

On October 5, 2006, after making repeated phone calls to Amaya, defendant came to her work at a beauty shop. Because of the history of threats and abuse, Amaya feared defendant and started to run away from defendant. While she was running away, defendant threatened to kill her. Amaya fled to another store. Once inside, however, defendant seized her by her hair and took her cell phone away from her. Later that day, defendant told Amaya that he had a gun. Police responded and discovered defendant with a gun in his van.

Count 2 – Burglary (§ 459): August 19, 2006

On August 19, 2006, defendant repeatedly called Amaya late at night and told her he was outside her window. Amaya told him to stop calling. Defendant then came to the house to break the window in Amaya's room; he broke through the window. While opening the window, defendant cut his hand and spilled blood on the window. Defendant admitted to police that he had broken the window and cut his hand while opening it.

Count 3 – Criminal Threats (§ 422): August 19, 2006

On August 19, after breaking into Amaya's house, defendant threatened to kill her and himself. Defendant fled before police could arrive. He later called back and stated that he would return with a gun and shoot her and the children.

Count 4 – Criminal Threats (§ 422): September 27, 2006

On September 27, 2006, defendant called Amaya's phone numerous times and demanded to be allowed to come over to the house. Thereafter, defendant broke a window at her apartment using a car-locking device called "The Club," entered the house, and threatened to kill her. Defendant said he would force Amaya to leave with him, that he would pull her hair to make her leave with him, and that they would not be separated. Later that night, defendant called and threatened to shoot Amaya and the kids. Police discovered a "club" in defendant's van.

Count 5 – Burglary (§ 459); Count 6 – Criminal Threats (§ 422); Count 7 – Spousal Abuse (§ 273.5, subd. (a)); Count 8 – Child Endangerment (§ 273a, subd. (b));
September 28, 2006

After the window incident on September 27, Amaya used furniture to block the windows to prevent defendant from entering her home and harming her. However, early in the morning of September 28, defendant pushed the furniture aside and forced his way into Amaya's apartment. After entering the apartment, defendant argued with Amaya in the bedroom.

They went to the living room where defendant slapped Amaya and pushed her backwards over her couch while she was holding onto their one-year-old daughter. Defendant then grabbed her hair; Amaya was still holding onto their daughter. Defendant attempted to drag Amaya out of the house by her hair; he ripped a chunk of hair out of her head. Defendant's other children began to hit him to stop him.

Defendant then threatened to kill the children and stated that he would not allow the family to be separated. He threatened to come back and kill Amaya and left. Amaya went to an emergency legal center and reported the incident to a police detective. Police gave Amaya a cell phone in case she feared for her safety.

III

ANALYSIS

Defendant contends that the burglary and criminal threats offenses committed on August 19, 2006 (counts 2 & 3), were part of a single indivisible course of conduct; and

that the burglary, criminal threats and spousal abuse offenses committed on September 28, 2006 (counts 5, 6 & 7) occurred during a single indivisible course of conduct.

Therefore, defendant contends that the trial court erred in failing to stay the sentences on counts 3, 6 and 7 under section 654. For the reasons set forth below, we shall affirm the trial court's sentencing order.

A. Standard of Review

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 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.]” (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.)

“The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] “We must “view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order

the existence of every fact the trier could reasonably deduce from the evidence.

[Citation.]” [Citation.]’ [Citation.]” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.)

B. Counts 2 and 3 Were Based on Separate Acts Involving Distinct Objectives

Defendant contends that the “charges, evidence at trial, and argument to the jury” demonstrate that counts 2 and 3 occurred during the same incident on August 19, 2006. In count 2, defendant was charged with burglary with intent to commit stalking. During closing argument, the prosecutor referred to the testimony of an officer and Amaya as the basis for the criminal threats charge in count 3. The prosecutor stated: “Count 3 was the threat made to [Amaya] after the defendant punched in the window when he did the tap, tap-a-roo.” Amaya testified that defendant repeatedly called her late on August 19, 2006, to tell her he was outside the window, even after she told him to stop calling and bothering her. Amaya stated that defendant broke through the window because he was mad and she would not open the door. After breaking the window, defendant then told Amaya he would kill her and himself. Defendant then fled. Later that evening, however, defendant called and threatened to come back and shoot Amaya and the children. The court sentenced counts 2 and 3 consecutively because it did not believe the criminal threats committed after the stalking was “mandatorily a 654.”

One relevant consideration in determining whether multiple crimes should be considered severable for section 654 purposes is the “temporal proximity” of the crimes. (*People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10.) Where the offenses

are ““separated by periods of time during which reflection was possible,”” section 654 does not prohibit multiple punishment. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689, quoting *People v. Trotter* (1992) 7 Cal.App.4th 363, 368.)

In *People v. Trotter, supra*, 7 Cal.App.4th 363, the defendant was convicted of three counts of assault for firing three shots at a police officer who was following him in a freeway chase. The first two shots were about a minute apart, and the third shot came a few seconds later. (*Id.* at p. 366.) The defendant argued that all three shots “manifested the same intent and criminal objective” and therefore could not be punished separately under section 654. (*Trotter*, at p. 367.)

The court rejected the argument, stating that “this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable. ‘[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.’ [Citation.]” (*People v. Trotter, supra*, 7 Cal.App.4th at p. 368.)

In *People v. Surdi, supra*, 35 Cal.App.4th 685, members of a gang beat the victim and took him inside a van, where they stabbed him. Eventually, they drove the victim to a riverbed and took turns stabbing him some more while another assailant kicked him. The defendant, one of the attackers, argued that section 654 prohibited separate punishment for kidnapping and mayhem, because the kidnapping was for the sole

purpose of beating the victim. (*Surdi*, at p. 688.)

The court rejected the argument, finding that the kidnapping and mayhem “did not arise from a single volitional act. Rather, they were separated by considerable periods of time during which reflection was possible. . . . [¶] The fact Surdi assisted *multiple* stabbing episodes, each of which evinced a *separate intent* to do violence, precludes application of section 654 with respect to the offenses encompassed within the episodes.” (*People v. Surdi, supra*, 35 Cal.App.4th 685, 689-690.)

In this case, as in *People v. Trotter, supra*, 7 Cal.App.4th 363, defendant committed each act voluntarily, by his own calculations, and each act was separated by a period of time in which reflection was possible. Over the course of the night on August 19, 2006, defendant called Amaya repeatedly, stood outside her window, demanded she open the door, smashed her window, entered her home, then threatened to kill her. Defendant committed each of his criminal acts over a much greater period of time than the one minute between the shots fired in *Trotter*. (*People v. Trotter, supra*, 7 Cal.App.4th at pp. 367-368.) The period of time during which defendant undertook his course of action gave him opportunities to reflect and renew his intent before committing the next act. Instead of stopping, defendant continued to pursue a course of conduct that became more egregious as the evening progressed; each action posing a separate and distinct risk to the victim. The trial court, therefore, properly imposed separate punishments.

C. The Trial Court Did Not Err in Imposing Separate Punishments in Counts 5, 6 and 7

Defendant contends that the “charges, evidence at trial, and arguments to the jury” demonstrate that counts 5, 6 and 7 occurred during the same incident on September 28, 2006. In count 5, defendant was charged with burglary with intent to commit stalking. During closing argument, the prosecution stated that count 5 was the burglary on September 28, 2006, when defendant entered the house; count 7 (spousal abuse) was that same day when defendant pulled Amaya’s hair and struck her while holding their child; and count 6 (criminal threats) was the threat made to Amaya after he pulled her hair out.

On September 28, defendant entered Amaya’s apartment through a broken window and began arguing with her and her sister. During the argument, Amaya fled to the living room while holding her one-year-old child. Defendant followed Amaya to the living room. He then slapped her, pushed her and grabbed her hair, ripping it from her scalp; during this incident, Amaya was still holding their child. Amaya’s children began hitting defendant in order to stop the assault. After assaulting Amaya and as he was leaving, defendant threatened to come back and kill her and her family.

As with counts 2 and 3, defendant cannot claim that his actions were part of an overly inclusive objective and intent of victimizing Amaya.

As provided above, section 654 prohibits multiple punishments for (1) a single act, and (2) a course of conduct that violated more than one statute but which constituted an indivisible course of conduct. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) “Whether a

course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [Citation.]” (*Ibid.*)

In *People v. Perez, supra*, 23 Cal.3d 545, our Supreme Court declared that an intent and objective to obtain sexual gratification “is much too broad and amorphous to determine the applicability of section 654.” (*Id.* at p. 552.) Accordingly, the Supreme Court held that section 654 “does not prohibit the imposition of multiple punishment for separate sexual offenses committed during a continuous attack, ‘even where closely connected in time.’ [Citations.]” (*People v. Hicks* (1993) 6 Cal.4th 784, 788, fn. 4.)

In this case, defendant forced his way into Amaya’s home, slapped her while she held her child, pulled Amaya’s hair out, and then threatened to kill her and her family. As in *People v. Perez, supra*, 23 Cal.3d 545, to say that defendant had a general intent to victimize Amaya would allow defendant to escape punishment for the additional crimes he committed after entering Amaya’s apartment. Because defendant was willing to commit a series of independent criminal acts against Amaya, defendant is more culpable than a defendant who commits only one act.

Moreover, as in *People v. Trotter, supra*, 7 Cal.App.4th at pages 367-368, defendant committed each act willfully and over a period of time in which reflection was possible. Defendant had ample opportunity to reflect on his actions and decide whether to renew his course of conduct: after defendant forced his way inside the apartment, after he argued with the victim, after the victim grabbed her child and tried to escape to the

living room, after defendant followed the victim into the living room, after defendant hit the victim, after defendant grabbed the victim by her hair, and after defendant's children forced him to stop beating the victim. Each of these criminal acts occurred over a much greater period of time than the one minute between shots found in *People v. Trotter*.

(*Ibid.*) Nonetheless, between each act, defendant willfully chose to pursue a course of conduct that became more egregious as it progressed; with each action posing a separate and distinct risk to the victim.

Defendant's reliance on *People v. Mendoza* (1997) 59 Cal.App.4th 1333 is misplaced. In *Mendoza*, the defendant, a local gang member, went to a witness's house to say that because of the witness's impending testimony, the defendant was going to talk to some members of his gang. (*Id.* at p. 1337.) The defendant's words made the witness afraid; she believed that the defendant and members of the gang would kill her. (*Ibid.*) The defendant was convicted of making a terrorist threat under section 422, and dissuading a witness by threat of force under section 136.1, subdivision (c)(1). (*Ibid.*) The sentence for the terrorist threat was stayed because *both* convictions arose from a single act: "'They both arise out of the same facts, out of the same conduct and words of [the defendant].'" (*Id.* at p. 1346.) The facts in this case are different. Here, there were multiple acts and words.

IV

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.