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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.

BENITO REYES,

Defendant and Appellant.

E056346

(Super.Ct.No. FSB1200441)

OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G.

Pace, Judge. Affirmed as modified.

Christopher Love, 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, James D. Dutton and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Benito Reyes is serving three years in prison after a jury found him guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> and criminal threats (§ 422), for following a man into the restroom of a bar, holding a knife to his throat, and threatening to kill him. Defendant argues, and the People agree, that the concurrent term for the criminal threats conviction must be stayed pursuant to section 654 because it was an indivisible part of the assault. Defendant also challenges the \$840 victim restitution order as based on insufficient evidence. As discussed below, we stay the sentence for the criminal threats conviction but affirm the victim restitution order.

#### **FACTS AND PROCEDURE**

On January 29, 2012, Rito Herrera was sitting at the bar of an establishment talking to the bartender. Herrera and an intoxicated defendant exchanged some words. Defendant followed Herrera into the men's room. At the urinal, defendant came up behind Herrera and wrapped his left arm around Herrera's neck. Defendant pulled a knife out of his boot, put the knife against Herrera's stomach, and then trailed the knife up Herrera's torso to his throat. Herrera testified that defendant said he "did not like fucking around, that everything was going to end there." Herrera pushed defendant's arms away and ran out of the bathroom, then out of the bar and into the street. Defendant followed Herrera and told him not to come back because defendant was going to kill Herrera. Defendant returned to the bar, asked the bartender for Herrera's address, and stated he was going to kill Herrera.

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<sup>1</sup> All section references are to the Penal Code unless otherwise indicated.

On February 14, 2012, the People filed an information alleging defendant committed assault with a deadly weapon and making criminal threats.

During trial, the prosecutor specified that the criminal threats charge was based on defendant's statements to Herrera in the men's room, not later as he followed Herrera into the street. On April 25, 2012, a jury found defendant guilty of both counts.

On May 22, 2012, the trial court sentenced defendant to three years in prison for the assault with a deadly weapon and two years concurrent for the criminal threats. The court also ordered defendant to pay \$840 in victim restitution. This appeal followed.

## **DISCUSSION**

### *1. The Sentence for Criminal Threats is Stayed Pursuant to Section 654*

Defendant argues that the trial court should have stayed the sentence for criminal threats pursuant to section 654, because "both crimes were committed simultaneously with one intent and one objective." The People agree, as does this court.

Although defendant did not object to the sentences at sentencing, "the [forfeiture] doctrine does not apply to questions involving the applicability of section 654." (*People v. Perez* (1979) 23 Cal.3d 545, 550, fn. 3.)

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 precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) Whether a course of

criminal conduct is divisible depends on the intent and objective of the defendant. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*)). “We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once.” (*Ibid.*)

The question of whether defendant harbored a single intent or objective within the meaning of section 654 is a factual one. (*Harrison, supra*, 48 Cal.3d at p. 335.) 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.)

The assault, accomplished by grabbing Herrera from behind and running the knife from his stomach up to his throat, was temporally close to the threat to kill Herrera. Defendant used the knife to back up the verbal threat. Defendant’s apparent objective was to make Herrera fear that he could carry out the threat. Defendant’s use of the knife enabled him to frighten Herrera. Thus, the acts of assaulting Herrera with a knife and verbally threatening him were two means of accomplishing the same objective.

Defendant argues that his sentence for the criminal threats conviction should be stayed and that he should receive a total sentence of three years. The People have no objection. We agree. Thus, the judgment is modified to stay the sentence for making criminal threats.

## 2. *Victim Restitution was Supported by Substantial Evidence*

In the probation report, victim restitution in the amount of \$840 was recommended based on a victim restitution letter and restitution claim form submitted by Herrera. At the sentencing hearing, defense counsel did not object to the restitution amount, but did remind the court that the amount was based on Herrera's missed work days during trial:

“Q THE COURT: Where does this actual restitution come from?

“A [DEFENSE COUNSEL]: Your Honor, I believe it's time that the victim missed—

“Q THE COURT: Work.

“A [DEFENSE COUNSEL]: —work during trial.

“Q THE COURT: I see. Okay. Actual restitution in the amount of \$840 to the victim, [R]ito Herrera. The amount of \$840 to be collected by the Department of Corrections.”

Defendant now argues the restitution order must be reversed because it was based on insufficient evidence. The People contend the evidence was sufficient and that, once a claim was made, it was defendant's burden to convince the trial court otherwise. We agree with the People.

Section 1202.4, subdivision (f), provides in part “in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, *based on the amount of loss claimed by the victim or victims or any other showing to the court . . . .* The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so and states them on the record.” Further,

subdivision (f)(1) allows the defendant to demand a hearing to challenge the amount of the loss claimed by the victim: “(1) The defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution.”

“The standard of review of a restitution order is abuse of discretion.” (*In re Dina V.* (2007) 151 Cal.App.4th 486, 490.) “No abuse of discretion will be found where there is a rational and factual basis for the amount of restitution ordered. “[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt.” [Citation.]” (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1542 (*Gemelli*) [Fourth Dist., Div. Two].) The trial court is entitled to consider the probation report, and even a victim’s mere statement of loss included in a probation report is sufficient to establish prima facie evidence of loss. (*Gemelli*, at p. 1543.) “Once the victim makes a prima facie showing of economic losses incurred as a result of . . . criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim. [Citation.]” (*Ibid.*)

Here, the People established a prima facie showing of economic loss with the victim restitution letter and restitution claim form that were described in the probation report. Under *Gemelli*, this established a prima facie showing of losses incurred by Herrera as a result of defendant’s crimes against him, and defendant did not request a hearing in which to disprove the amount of the claimed loss for lost wages as a result of the trial. In his appellate briefs on this subject, defendant speculates that the evidence is manifestly insufficient because the trial took place over fewer than ten days. However, the wording of the probation report was that “Mr. H. reported that he lost two weeks of

work as a carpenter, *as a result of the trial*, and is requesting \$840.00 in restitution.” The trial court did not abuse its discretion when it awarded the full amount requested because, from the record on appeal, it appears quite reasonable for the court to have concluded that Herrera missed approximately two weeks of work “as a result of the trial” other than on the actual trial dates. For example, the clerk’s transcript shows that the trial court ordered Herrera to be in court on April 9, April 11, and April 18; trial began with jury selection on April 16, and continued on April 18, April 19, April 24, and April 25, for seven total work days. In addition, Herrera may have anticipated missing work to be present at defendant’s sentencing on May 22, and the trial court could reasonably have concluded that Herrera missed work to be present at any or all of: the preliminary hearing on February 20, the arraignment on Feb. 22, and any of several other pre-trial hearings and appearances on March 9, March 23, March 26, April 6, April 9, April 10, and April 13. Further, the trial court could reasonably have concluded that Herrera missed work to meet with the prosecution to prepare for his testimony or meet with police, all of which can be covered under the broad category of “as a result of the trial.”

The point is that, under *Gemelli*, the prosecution established a prima facie case that Herrera incurred the \$840 in lost wages as a result of the trial, defendant made no effort at all to carry his burden to rebut this information, and the record in this appeal easily contains sufficient evidence to convince this court that the trial court did not abuse its discretion when it ordered defendant to make victim restitution in the amount of \$840.

**DISPOSITION**

The judgment is modified to stay the two-year concurrent sentence for the criminal threats conviction. In all other respects the judgment is affirmed.

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RAMIREZ  
P. J.

We concur:

KING  
J.

CODRINGTON  
J.