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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.

DEVIN LAMAR THOMAS,

Defendant and Appellant.

E060738

(Super.Ct.No. FVI1301794)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed with directions.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne McGinnis and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Devin Lamar Thomas is serving four consecutive terms of 25 years to life after a jury found him guilty of attempted kidnapping, robbery, dissuading a witness, and assault with intent to commit rape. Defendant argues, the People concede, and this court agrees that the sentences for dissuading a witness and assault with intent to commit rape should be stayed pursuant to Penal Code section 654.

FACTS AND PROCEDURE

On the night of September 9-10, 2004, defendant and the victim had previously been in a relationship. Defendant asked the victim to come to his home, but they eventually decided to meet at a park. At the park, defendant left his car and got into the victim's car. He was angry and told her she was going to have sex with him that night and the next night. When she said "no," defendant took her car keys from the ignition and told her to get out of the car and to walk through the park. The victim did so. Defendant tried to make the victim walk to dark areas of the park, but she was afraid, so she resisted. Defendant told her that because she was not willing to have sex with him he was going to make her have sex with him for several days, and that if she refused he would add more days.

The victim got her keys back from defendant and returned to her car, but defendant followed and got into the car as well. Defendant ordered the victim to drive to his house so they could have sex. The victim began to drive, but told defendant she would call police afterward. Defendant told her she would "lose everything" if she called police. He then told the victim to hand over her phone. She did so because she was afraid.

The victim stopped the car and got out. Defendant followed her and grabbed her by the neck to drag her back into the car. The victim got away a second time and started to run. Defendant chased her, grabbed her by the hair and tried to drag her back to the car again. The victim was fighting with and yelling at defendant. A bystander intervened and allowed the victim to get back into her car and drive away.

Defendant's first trial ended in a mistrial after the jury deadlocked. On August 7, 2013, the People filed an information charging defendant with kidnapping (Pen. Code, § 207, subd. (a), count 1);¹ second degree robbery (§ 211, count 2); dissuading a witness (§ 136.1, subd. (b)(1), count 3); and assault with intent to commit rape (§ 220, subd. (a)(1), count 4). The People alleged that defendant had two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subd. (a)) from a conviction on March 1, 2004 on two counts of assault to commit rape.

On October 11, 2013, a jury found defendant not guilty of kidnapping, but guilty of attempted kidnapping (§§ 664, 207) and guilty on counts 2, 3 and 4. The jury also found true that defendant had two prior strike convictions.

On March 7, 2014, the trial court sentenced defendant to four consecutive terms of 25 years to life.

This appeal followed.

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

DISCUSSION

Defendant argues his sentence for count 3 (dissuading a witness) should be stayed pursuant to section 654 because it was part of the same act as count 2, robbery. Likewise, defendant argues his sentence for count 4 (assault with intent to commit rape) should be stayed because it was part of the same act as count 1, attempted kidnapping. The People concede and this court agrees that the sentences for both counts 3 and 4 should be stayed.

Section 654 provides that “[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.” The section bars multiple convictions and sentences based on a single act against a single victim. (*People v. Blevins* (1984) 158 Cal.App.3d 64, 68.)

Whether a course of conduct is a divisible transaction 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.’ [Citation.]” (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006 (*Alvarez*)). The section applies when there is a course of conduct which violates more than one statute but constitutes an indivisible transaction. (*Ibid.*, citing *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Here, both counts 2 and 3 were based on defendant taking the victim’s phone. Defendant had only one objective when he took the phone—to prevent her from calling police. Although defendant dissuaded the victim from calling police on two different

occasions, first by telling her not to call police or “you’ll lose everything” and second by taking her phone from her, the People elected in closing argument to base the dissuading charge on defendant’s action in taking away the phone.

Similarly, both counts 1 and 4 were based on defendant’s conduct throughout the victim’s ordeal—grabbing her twice and once forcing her to walk into the park—and he had only one objective—to rape her. The People argued this point to the jury, as the prosecutor described defendant’s actions constituting the attempted kidnapping and assault—“This whole incident was about getting her to his house to have sex with him.”

Because defendant was convicted of and sentence for four crimes that were based on two objectives—to keep the victim from calling police and to get her to defendant’s home so he could rape her—we order the sentences for counts 3 and 4 stayed pursuant to section 654.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment staying defendant’s sentence for dissuading a witness (count 3) and assault with intent to commit rape (count 4) pursuant to section 654 and to send an amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.