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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BENJAMIN DENNIS GOODE,

Defendant and Appellant.

F061050

(Super. Ct. No. F08900831)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Edward Sarkisian, Jr., Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Benjamin Dennis Goode guilty of 20 counts of sexually molesting three young girls – his daughter and two of his girlfriend’s daughters – during 2006 and 2007 while on parole for sexually molesting his stepdaughter in 2002 and found him

guilty of two counts of threatening to kill his young sons if they told anyone about the new molestations. The court imposed an aggregate indeterminate term of 50 years to life consecutive to an aggregate determinate term of 56 years and 8 months. On appeal, he argues that the court should have stayed one of the two witness intimidation counts. We modify the judgment by ordering the stay he requests and by correcting other sentencing errors. We affirm the judgment as modified.

BACKGROUND

A jury found Goode guilty of one count of continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5, subd. (a)),¹ two counts of lewd or lascivious acts on a child 14 or 15 years of age (§ 288, subd. (c)(1)), two counts of witness intimidation (§ 136.1, subd. (c)(1)), six counts of oral copulation with a child under the age of 16 (§ 288a, subd. (b)(2)), and 11 counts of sexual intercourse with a child under the age of 16 (§ 261.5, subd. (d)). In a bifurcated trial, the court found true the allegations that in 2002 he suffered a conviction of a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a)) as a prior sex offense (§ 667.71), a prior serious or violent felony or juvenile adjudication within the scope of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and a serious felony prior (§ 667, subd. (a)(1)).²

The court sentenced Goode to an aggregate indeterminate term of 50 years to life on the continuous sexual abuse (§§ 288.5, subd. (a), 667, subd. (e)(1), 1170.12, subd. (c)(1)) consecutive to an aggregate determinate term of 56 years and 8 months. The components of the aggregate determinate term were two five-year enhancements for the

¹ Later statutory references are to the Penal Code.

² The pleading and proof of Goode's serious felony prior (§ 667, subd. (a)(1)) invoked the authorization by three strikes law that "the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided" (§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). We will correct the failure of the abstracts of judgment to acknowledge the statutory authorization.

serious felony prior (§ 667, subd. (a)(1)), a term of eight years (the aggravated term doubled) on one count of witness intimidation (§ 136.1, subd. (c)(1)), a term of six years (the middle term doubled) on the other count of witness intimidation (§ 136.1, subd. (c)(1)), a term of two years (one-third the middle term doubled) on each count of sexual intercourse (§ 261.5, subd. (d)), a term of 16 months (one-third the middle term doubled) on each count of lewd or lascivious (§ 288, subd. (c)(1)), and a term of 16 months (one-third the middle term doubled) on each count of oral copulation (§ 288a, subd. (b)(2)).³

DISCUSSION

On the rationale that both counts of witness intimidation were based on a single act with a single intent and objective, Goode argues that the court erred by not staying one of those counts. The Attorney General argues that imposition of sentence on both counts without a stay was proper since witness intimidation is an act of violence that invokes the multiple-victim exception. We agree with Goode.

The general rule is “that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction.”⁴ (*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.” (*Ibid.*) “If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for

³ Both abstracts of judgment incorrectly reflect imposition of the serious-felony-prior enhancements. (§ 667, subd. (a).) The indeterminate abstract shows none and the determinate abstract shows two, but each should show one. (See *People v. Misa* (2006) 140 Cal.App.4th 837, 845-847.) We will correct those errors in the abstracts of judgment.

⁴ “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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.” (§ 654, subd. (a).)

more than one.” (*Ibid.*) The exception to the rule is that “the limitations of section 654 do not apply to ‘crimes of *violence* against multiple victims.’” (*People v. Oates* (2004) 32 Cal.4th 1048, 1063, italics added.)

The parties agree that omission of witness intimidation from the statutory list of violent felonies does not answer the question whether the offense is a crime of violence. (§ 667.5, subd. (c).) *People v. McFarland* (1989) 47 Cal.3d 798, for example, held that vehicular manslaughter with gross negligence is a crime of violence within the exception to the rule (*id.* at p. 803), and *People v. Solis* (2001) 90 Cal.App.4th 1002 (*Solis*) held that criminal threats is a crime of violence within the exception to the rule (*id.* at pp. 1023-1024), even though neither of those crimes is on the statutory list (§ 667.5, subd. (c)).

In argument to the jury, the prosecutor characterized both witness intimidation counts as arising from the same threat. The parties agree that Goode committed both pursuant to a single objective and that the statutory definition of the crime determines whether the crime at issue is a crime of violence against multiple victims within the exception to the rule.

Rejecting the argument that a single act of driving under the influence was punishable not only as vehicular manslaughter for the one death the driver caused but also as driving under the influence and as driving with a blood alcohol level of 0.10 or above “for each of the six persons injured or killed,” *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345 (*Wilkoff*) held, “A defendant may properly be convicted of multiple counts for multiple victims for a single criminal act only where the act prohibited by the statute is centrally an ‘act of *violence* against the person.’” (*Id.* at p. 351, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 20, italics added.) Rejecting a like argument that “a single act of exhibiting a firearm in a threatening manner in the immediate presence of several peace officers” was punishable “for as many times as there are peace officers present,” *People v. Hall* (2000) 83 Cal.App.4th 1084 (*Hall*) surveyed “relevant case law since *Neal*” and found “that in each case where a criminal act qualified for the multiple-

victim exception, the criminal act ... was defined by statute to proscribe an act of *violence* against the person.” (*Id.* at pp. 1086, 1089, italics deleted, italics added).

On that foundation, we turn to the witness intimidation statute. “Subdivisions (a) and (b) of Penal Code section 136.1 require that a defendant knowingly and maliciously prevent or dissuade or attempt to prevent or dissuade a victim or witness from reporting or testifying. These offenses are wobblers. Subdivision (c)(1) of Penal Code section 136.1 adds force or an express or implied threat of force or violence as an element. Subdivision (c)(1) offenses are felonies punishable by two, three or four years in state prison.” (*People v. Neely* (2004) 124 Cal.App.4th 1258, 1261.) Crucially, the statute at issue here does not proscribe “an act of *violence*” (*Wilkoff, supra*, 38 Cal.3d at p. 351, italics added; *Hall, supra*, 83 Cal.App.4th at p. 1089, italics added) but only “*force or an express or implied threat of force or violence*” (*Neely, supra*, at p. 1261, italics added).⁵

The Attorney General seeks to analogize the criminal threats statute in *Solis* with the witness intimidation statute here. A violation of the criminal threats statute, *Solis* observed, requires that “the threat causes the listener to suffer sustained fear based upon a reasonable belief the threat would be carried out. It is therefore apparent that to sustain a conviction for this offense, the People must prove beyond a reasonable doubt that the victim was injured. In this instance, the injury is the sustained fear.” (*Solis, supra*, 90 Cal.App.4th at p. 1024.) “This constitutes a crime of *psychic violence*,” *Solis* held, “which, if directed at separate listeners (victims) who each sustain fear, can be punished separately.” (*Ibid.*, italics added.) “Similarly, by requiring force or the threat of force or violence in the intimidation of a witness,” the Attorney General argues, “section 136.1,

⁵ The statute authorizes felony punishment if “the act is accompanied by *force or* by an express or implied *threat of force or violence*, upon a witness or victim or any third person or the property of any victim, witness, or any third person.” (§ 136.1, subd. (c)(1), italics added.)

subdivision (c)(1) describes an act of *violence*.” (Italics added.) Our reading of the statute differs from hers.

Goode emphasizes that the crime of witness intimidation “does not include *any* harm to the victim or intended victim; in fact, the statute *explicitly* states that no actual harm to anyone is required.” (Italics added and in original.) Indeed, the statute reads, “The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section.” (§ 136.1, subd. (d).) The criminal threats statute, on the other hand, “*requires* the listener suffer injury.” (*Solis, supra*, 90 Cal.App.4th at p. 1025, italics added.) He analogizes the witness intimidation statute not to the criminal threats statute, but to the indecent exposure statute, which “is not statutorily defined as involving violence to the person.” (*People v. Davey* (2005) 133 Cal.App.4th 384, 392.) Noting that “the case law clearly limits the applicability of the multiple-victim exception to crimes that are so defined,” *Davey* held “that indecent exposure is not a violent crime for the purpose of the multiple-victim exception under section 654.” (*Id.* at p. 392.)

Even though “the question of whether defendant harbored a ‘single intent’ within the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The witness intimidation statute proscribes not “an act of violence” (*Wilkoff, supra*, 38 Cal.3d at p. 351, italics added; *Hall, supra*, 83 Cal.App.4th at p. 1089) but only “force or an express or implied *threat* of force or violence” (*Neely, supra*, at p. 1261, italics added) and expressly eliminates physical injury as an element of the crime. Our review of the law persuades us that the multiple-victim exception does not apply to the commission of

a single act of witness intimidation in the presence of more than one person.⁶ The court erred by not staying one of those counts.⁷

DISPOSITION

The judgment is modified with the following corrections to Goode's sentence:

(1) On the count 31 witness intimidation (§ 136.1, subd. (c)(1)), the term of six years (the middle term doubled) is stayed (§ 654, subd. (a)). That requires (a) adding an "X" to the "654 stay" column in count 31, item 1, attachment page 1, determinate abstract of judgment, (b) modifying from 35 years 4 months to 29 years 4 months the total time in item 4, attachment page 1, determinate abstract of judgment; (c) modifying from 56 years 8 months to 50 years 8 months the total time in item 8, determinate abstract of judgment; and (d) modifying from "56 years, 8 months" to "50 years, 8 months" the notations not only in item 11, page 2, determinate abstract of judgment but also in item 11, page 2, indeterminate abstract of judgment;

(2) (a) A five-year serious felony prior enhancement (§ 667, subd. (a)(1)) is added to item 3, indeterminate abstract of judgment; and (b) one of the two five-year serious felony prior enhancements (§ 667, subd. (a)(1)) is deleted from item 3, determinate abstract of judgment;

(3) (a) An "X" is added to box 8 (which acknowledges sentencing pursuant to "PC 667(e)(1)"), indeterminate abstract of judgment; and (b) an "X" is added to box 4 (which

⁶ In light of our holding, Goode's alternative request – a remand for resentencing on the witness intimidation counts on the premise that the court "apparently accepted the probation officer's position" that the law required "a full consecutive middle term" on one of the two counts – is moot, as is the Attorney General's argument that he forfeited his right to appellate review of that issue.

⁷ We will order a stay, so his sentence – an aggregate indeterminate term of 50 years to life consecutive to an aggregate determinate term of 56 years and 8 months – will change to an aggregate indeterminate term of 50 years to life consecutive to an aggregate determinate term of 50 years and 8 months.

acknowledges sentencing “pursuant to PC 667 (b)-(i) or PC 1170.12 (two strikes)”,
determinate abstract of judgment.

The clerk of the superior court is directed to so amend both abstracts of judgment
and to send a certified copy of each to the Department of Corrections and Rehabilitation.
Goode has no right to be present for the amendment. (See *People v. Virgil* (2011) 51
Cal.4th 1210, 1234-1235.)

As so modified, the judgment is affirmed.

Gomes, J.

WE CONCUR:

Wiseman, Acting P.J.

Levy, J.