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

THE PEOPLE,

Plaintiff and Respondent,

v.

SABRINA RENEE ROBINSON,

Defendant and Appellant.

F064249

(Super. Ct. No. MCR041215)

OPINION

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In anticipation of a sexual experience, on the evening of June 15, 2011, appellant Sabrina Renee Robinson, convinced her boyfriend Jason Barnet to allow her to handcuff his wrists and ankles. Once Barnet was restrained, appellant told him that she had discovered his infidelity. Appellant hit Barnet several times and burned him with hot candle wax. She armed herself with a loaded shotgun, threatened to kill him and hit him with the gun butt. She got some knives from the kitchen and stabbed Barnet. She threatened to cut him into pieces and dump his body on a friend's property. Barnet eventually escaped from the house and hid, naked, in a nearby eucalyptus grove until the police arrived.

Robinson was convicted after jury trial of assault with a firearm (count 1), assault with a deadly weapon and by means of force likely to produce great bodily injury (count 2), making a criminal threat (count 3), false imprisonment (count 4) and petty theft (count 5). (Pen. Code, §§ 245, subd. (a)(1), (2), 422, 236, 484, subd. (a).)¹ The jury found true enhancement allegations that appellant personally used a firearm during the commission of counts 1, 3 and 4 and personally used a deadly and dangerous weapon during the commission of counts 3 and 4. (§§ 12022.5, subd. (a)(1), 12022, subd. (b)(1).) She was sentenced to an aggregate term of 12 years' imprisonment.

Appellant argues the prosecutor engaged in misconduct. She also contends that the court erred during sentencing by failing to stay imposition of punishment on counts 3 and 4 and by ordering the sentences to run consecutively. None of these arguments is convincing. The judgment will be affirmed.

¹ Unless otherwise specified all statutory references are to the Penal Code.

FACTS

I. **Barnet's Testimony.**

Appellant and Barnet began dating in 2010. Without appellant's knowledge, Barnet also dated Kim Atkins and had a sexual encounter with "Shelly." Barnet exchanged text messages with Atkins and Shelly.

At approximately 7:30 p.m. on June 15, 2011, Barnet drove appellant to his house, which is located in rural Madera. After watching television and drinking a couple beers, they decided to go to bed. Appellant went down the hallway and was gone for a few minutes. They went into the master bedroom. Appellant convinced Barnet to allow her to handcuff him. Barnet disrobed and appellant handcuffed his hands behind his back. Then she placed a pair of handcuffs on his ankles and used a third pair of handcuffs that had a long chain to connect the ankle and wrist restraints.² Barnet complained that the handcuffs were too tight and he wanted out of them. Appellant hit him in the chest with a jar that contained a burning candle, causing hot wax to spill on his chest, arms and legs.

Barnet demanded that appellant remove the restraints. She refused. She left the room and returned a few minutes later holding Barnet's cell phone; it had been charging in another room. She screamed at Barnet, telling him that she knew he was seeing Atkins. She punched Barnet in the face and head.

Appellant retrieved a shotgun that Barnet kept between the bedpost and the wall. Barnet kept the gun fully loaded with a round in the chamber and the safety on. She pointed the shotgun at Barnet's torso, fumbled with the safety and said, "I am going to kill you." Barnet was terrified and said, "Hey, that thing will go off, it's loaded, the safety is off. Trigger doesn't take much to fire it off."

² The handcuffs belonged to Barnet, who kept a box of restraints in a closet.

Appellant ordered Barnett to walk down the hallway and he shuffled in that direction. Appellant walked behind him, still holding the shotgun. While they were in the hall, appellant called someone on Barnett's cell phone and left a voicemail message. As they entered the living room Barnett yelled for help. He moved towards the front door. Appellant punched him in the head and pushed him away from the door. When Barnett tried to reach the door again, she struck him twice with the butt of the shotgun, knocking him to the floor.

Appellant went into the kitchen, set the shotgun on the counter and pulled a knife out of a drawer. She brandished it at Barnett, who pleaded with her to put it away. She poked Barnett several times in his left arm with the tip of the knife and then slashed him across the chest and right arm.

She went back into the kitchen and got a butcher knife. She brandished the knife at Barnett and directed him to sit on a chaise lounge. She stabbed him in the back of his right leg. She made another stabbing motion towards Barnett's leg. He moved out of the way and appellant cut an 18-inch long slash in the upholstery.

Appellant threw a burning candle at Barnett from across the room. It struck Barnett, splashing his left shoulder with hot wax. She threw other things at him.

Appellant used her cell phone to call her friend "Curt." Barnett heard her say that she knew Barnett cheated with Atkins and she was going to get him. Barnett began yelling for help and said that appellant had chained him up and was torturing him. After appellant ended the conversation she told Barnett that "she was going to cut me up like—she had gone deer hunting ... and ... Curt said she could dump me on his property."

Barnett was terrified. Out of desperation, he told appellant that he was having a heart problem and needed his medication. She replied, "[T]hat's too bad," and that she hoped he "died from it." Barnett continued to talk about his heart problem. Eventually, appellant went into the kitchen and grabbed several pill bottles. She unscrewed the caps and threw the bottles at Barnett, scattering the pills all over the floor.

Appellant called another friend and then left the room. She returned with a hunting knife. She brandished it at Barnett and threatened to cut him up. She swung it at Barnett and the flat part of the blade hit his face.

Appellant called her estranged husband, Terry Yarbrough. Barnett overheard her say that if she let Barnett have the key to the handcuffs then he would overpower her. Barnett told appellant to leave him cuffed and use his car to drive away.

After she completed the call, appellant went into the master bedroom and took Barnett's keys from his pants. She called Yarbrough again. After she completed the call, she and Barnett briefly conversed. She punched Barnett on the face and head. She called Yarbrough again.

Appellant told Barnett to go to the bathroom and brandished the knife at him. She directed him to get into the bathtub. Fearing that she was going to cut him up, Barnett did not comply. She pointed the knife at Barnett and forced him into the tub. She turned on the water and removed items from Barnett's reach, saying that she did not want to leave anything that he could use against her. Then she left the bathroom and shut the door. Using his back, Barnett turned off the water and then climbed out of the tub. Barnett heard appellant talking on the phone. After appellant completed the call, she returned to the bathroom. She discovered that she had accidentally locked the bathroom door. Barnett heard her manipulating the shotgun. He quickly got back into the tub to protect himself from a shotgun blast but she did not fire.

Barnett sat on the edge of the tub and brought his hands over his feet to the front of his body. Appellant began talking to Barnett through the bathroom door. She asked if the blue pills were his anti-anxiety pill. Barnett told her the blue pills were his heart medication and the yellow pills were for anxiety. She shoved a blue pill under the bathroom door and walked away.

Barnett unlocked and opened the bathroom door. He saw the cord with the keys to the cuffs lying on the hallway floor. He retrieved the key and returned to the bathroom.

Barnet uncuffed himself, left the bathroom and exited the house through a side door.

Barnet partially opened the garage door and slid under it.

Barnet hid in a grove of eucalyptus trees for an hour. He headed for a neighbor's house but heard a noise and returned to the safety of the trees. Eventually he tried again. He saw a police vehicle and called out to the police officers.

Barnet eventually reentered his house with some police officers. His wallet, keys and a pill vial were missing from his pants. The wallet contained over \$420. Barnet did not give appellant permission to take his money.

Barnet sustained candle wax burns on his chest and bruises on his back, arms, wrists and ankles. He had a bruise on his back in the shape of a shotgun butt. He had cuts on one side of his buttocks and on the back of a knee. One of his elbows swelled. Some of Barnet's injuries were photographed. Barnet declined medical treatment for the physical injuries but had a few sessions with a mental health therapist.

II. Testimony Of Law Enforcement Officers.

Madera County Sheriff's Deputy Jose Torres³ testified that at approximately 3:00 a.m. on June 16, 2011, he was dispatched to an address in Madera regarding a possible imprisonment. After receiving additional information, he drove to Barnet's house. He heard a male voice yelling for help. A naked man walked towards him. The man said, "Help me, help me, she has a shotgun."

Police officers found appellant hiding inside Barnet's house. She had an injury to her nose and some bruising on her lip, right arm and right hand. Torres interviewed appellant after she was secured in a patrol car. Appellant said that she confronted Barnet about the fact that he was cheating on her and he slapped her. Appellant was transported

³ Solely to enhance readability titles such as deputy and officer will be omitted after the first reference. No disrespect is intended or implied by this informality.

to the station and booked. During the booking process Torres asked appellant what occurred with Barnett. Appellant said that she was just trying to scare him.

Police officers found appellant's purse inside Barnett's house. Her wallet had \$422 stuffed into a side pocket and \$46 in the center compartment. In the master bedroom, officers found a large hunting knife and a loaded shotgun with the safety off. The gun was recovered from behind the headboard of Barnett's bed. A red candle was found underneath the bed. Officers found two sets of handcuffs, a pair of leg restraints and a pink and white cell phone in the bathroom.

III. Other Prosecution Witnesses.

Terry Yarbrough testified that appellant called him six times during the night of June 15th and early morning hours of June 16th. He heard a man screaming and calling out for help during the first four calls. During the first call appellant said that she "had restrained her boyfriend because he was cheating on her." During the fourth call, Yarbrough heard appellant say that she ought to shoot Barnett. Yarbrough screamed at her not to do it. She lowered her voice and said she wasn't going to kill him, "she was messing with his head to find out what was going on." During another conversation appellant said that "she should just hit him in the head with the butt of the shotgun." Appellant sounded scared during the sixth call, which occurred around 4:00 a.m. She said "he was loose and she didn't know whether or not he had a gun." Appellant's sister was staying with Yarbrough and she called the police after the second call but was unable to provide the dispatcher with Barnett's last name or address.

Kim Atkins testified that she was awakened by a call to her cell phone at 3:00 a.m. on June 16th. Her phone identified the caller as Barnett but the person who placed the call was female. The caller identified herself as Sabrina and said that she had been dating Barnett for about a year. Sabrina told Atkins that she was calling from her home in Fresno and that that Barnett had gone to a house belonging to a friend named "Jim."

Atkins was in shock; she had been dating Barnett for over three years and did not know that he was seeing someone else.

About an hour later, appellant called Atkins again and asked if she had heard from Barnett. Appellant told Atkins that she “beat his ass. I hurt him.” Atkins said she would have expected Barnett to return home by now and appellant replied, “Oh, he knows better than to go to his house,” and “[h]e knows what’s waiting for him there.”

Atkins noticed that she had a voicemail message, which she retrieved at 5:11 a.m. In the message appellant identified herself and said, “I am Jason’s girlfriend. He seems to have forgotten who you are.” Barnett could be heard yelling for help in the background.

After listening to the message, Atkins drove to Barnett’s house. The police were present at the house. Barnett was wrapped in a blanket. He showed Atkins his injuries. He had cuts and burns on his chest and arms, a large burn on one side of his buttocks, a bruise in the shape of a shotgun butt on his back, and an injury to his elbow. Atkins sent a copy of the voicemail message appellant left on her cell phone to a police officer’s phone.

IV. Defense Evidence.

Appellant testified that she and Barnett had a sexual encounter in the living area of his house. Barnett suggested wearing handcuffs and she placed them on him. She went into another room to get Barnett some marijuana and sex toys. She heard his cell phone make a noise and picked it up. She noticed a text message from Shelly and read it. Then she scrolled through the text messages and read several messages from Shelly and Atkins.

She had the phone in her hand when she returned to Barnett. Barnett became angry with her for looking at his phone. She questioned Barnett about his intimacy with Atkins and Shelly. They argued for a long time. She refused to release Barnett from the handcuffs because he has a violent temper. She called Atkins several times and left a voicemail message on Atkins’s cell phone. She also called Curt and Yarbrough.

Yarbrough told her to take Barnett's car keys and leave. Barnett told her that she could use his car.

She went into the kitchen gave Barnett a heart pill and threw some pill bottles at him. She and Barnett continued arguing. She tossed the keys to the handcuffs onto the floor and went outside. She decided not to leave because Barnett might have heart failure or accuse her of stealing the car.

Appellant returned to the house and called Atkins several times. She removed Barnett's restraints. He attacked her and they fought. During the fight she sustained bruises on the left side of her jaw, a knee, a toe, a thumb and a wrist.⁴

She ran into the bathroom and locked the door. Then she ran into a room where Barnett grew marijuana and locked the door. After a while she did not hear Barnett any longer. She left the room, grabbed her purse, cell phone and the handcuffs. She returned to the room and hid behind a tarp. She called Yarbrough and 911. She lied to the dispatcher by saying that she had been the one who was handcuffed and that Barnett had driven her to Fresno and dropped her off at a truck stop. Appellant remained in the bedroom where the marijuana plants were growing until the police found her.

Appellant denied handling a shotgun or knife that evening. She said that she never threatened to kill Barnett. She denied forcing him to get into the bathtub.

⁴ Barnett denied fighting with appellant and said he did not cause any injuries to her nose, hand or arm. He testified that appellant did not have any injuries when he last saw her.

DISCUSSION

I. The Prosecutorial Misconduct Claims Lack Merit.

A. Any prosecutorial misconduct during examination of Deputy Torres was forfeited and, in any event, it was harmless.

1. Facts.

During direct examination of Torres, who was the investigating officer, the prosecutor asked why he did not send the shotgun for forensic testing. Torres replied, “Just the amount of evidence that was there to implicate Robinson and her statement to me, telling me that she was just trying to scare him. I didn’t have a doubt that it was her who had committed the crimes.”

Defense counsel objected to “the last statement with regard to his doubt as being a legal conclusion” and moved to strike it. The court sustained the objection pursuant to Evidence Code section 352 and admonished the jury not to consider it.

The prosecutor asked Torres if he requested evidence to be tested for fingerprints or DNA when “identity was part of your investigation.” Torres answered, “When I have absolutely no idea who committed the crime I will request fingerprinting or DNA.” The prosecutor asked, “Did you have any of those doubts in this case?” Torres answered, “No, I did not.” Defense counsel said, “Same objection.” The court responded, “Same ruling, ladies and gentlemen.”

During cross-examination, defense counsel elicited testimony from Torres that forensic testing on the shotgun or the knife would have been useless because any fingerprints would have been already obscured by people handling the gun without gloves.

During redirect Torres testified that he handled the gun. The prosecutor asked if “the reason why you didn’t have it tested [was because it had been handled by people without gloves] or because of what you said earlier on redirect?” Torres responded, “Because of the entirety of all the evidence that we had located and her statement to me

and just the entire call, how dispatch had spoken to her, her lying to dispatch, the message to --” Defense counsel object on the ground of “Nonresponsive. Hearsay.” The court sustained the objection on the ground that the answer was nonresponsive and directed the jury to disregard the answer.

During further cross-examination, defense counsel asked, “So you chose not to do additional investigation because of your feelings about the state of the evidence in this case, right?” Torres answered, “Because of the statement she was just trying to scare him.”

2. This prosecutorial misconduct claim was forfeited.

Appellant contends the prosecutor engaged in misconduct by intentionally eliciting inadmissible testimony concerning Torres’s personal opinion of appellant’s guilt. Respondent argues that this prosecutorial misconduct claim was forfeited because objection was not interposed on this ground at trial. We agree with respondent.

““A prosecutor’s misconduct violates the Fourteenth Amendment to the United States Constitution when it “infects the trial with such unfairness as to make the conviction a denial of due process.” [Citations.] In other words, the misconduct must be “of sufficient significance to result in the denial of the defendant’s right to a fair trial.” [Citation.] A prosecutor’s misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” [Citations.]” (*People v. Clark* (2011) 52 Cal.4th 856, 960.)

“““As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]” [Citation.]” (*People v. Thomas* (2011) 51 Cal.4th 449, 491-492.)

“The foregoing, however, is only the general rule. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to

request the jury be admonished does not forfeit the issue for appeal if “an admonition would not have cured the harm caused by the misconduct.” [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if ‘the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.’ [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Defense counsel did not object to the challenged portion of Torres’s testimony on the ground of prosecutorial misconduct or assert that the prosecutor engaged in misconduct by eliciting inadmissible testimony. Defense counsel specified “legal conclusion” as the basis for his objection. “[T]he record fails to disclose grounds for applying any exception to the general rule requiring both an objection and a request for a curative instruction.” (*People v. Frye* (1998) 18 Cal.4th 894, 970.) An objection would not have been futile because the judge conducted the trial in an evenhanded manner and appropriately ruled on counsel’s objections. Consequently, we hold that this claim of prosecutorial misconduct was forfeited. (*Ibid.*; *People v. Thomas, supra*, 51 Cal.4th at p. 492; *People v. Clark, supra*, 52 Cal.4th at p. 960.)

3. Appellant was not prejudiced by the alleged misconduct.

In any event, if the alleged misconduct had been preserved for appellate review, we would have found it to be harmless under either the state law standard (see *People v. Watson* (1956) 46 Cal.2d 818, 836) or the federal constitutional standard of review (see *Chapman v. California* (1967) 386 U.S. 18, 24). (*People v. Booker* (2011) 51 Cal.4th 141, 186 [assuming misconduct, prejudice not shown under state or federal standard].)

When a prosecutor has engaged in misconduct, the reviewing court considers the record as a whole to assess prejudice. (*People v. Duncan* (1991) 53 Cal.3d 955, 976-977.) Having conducted the requisite review, we conclude that the alleged prosecutorial misconduct during examination of Torres was harmless under both state law and federal constitutional standards. The jury was admonished not to consider Torres’s testimony that there was no question in his mind that appellant was guilty. “A jury is presumed to

follow its instructions.” (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.) Torres’s testimony on this point was not so inflammatory that the jury likely would have been unable to follow the court’s instruction to disregard it. Also, the evidence of appellant’s guilt is overwhelming. In addition to Barnett’s testimony, the jury heard testimony by Yarbrough and Atkins about the phone calls she made to them during the attack and Barnett’s pleas for help. Therefore, if the alleged prosecutorial misconduct had been preserved for appellate review we would have found it to be harmless.

B. No misconduct occurred during cross-examination of appellant.

1. Facts.

During cross-examination of appellant the prosecutor asked if, during the booking process, she was aware of the charges filed against her. Appellant testified that Torres told her that Barnett was pressing charges but he did not tell her the specific crimes. The prosecutor asked appellant about each of the charges and appellant either denied that she was advised of the charge or asserted that she was advised of the Penal Code section but was unaware of its meaning. Then the prosecutor asked if she remembered “Torres explaining to you [that] you are also being charged with robbery, [section] 211?” Defense counsel objected on grounds of relevance and Evidence Code section 352. The court overruled the objections. Appellant answered, “That wasn’t brought up until the next day. We didn’t find out about the whole robbery thing until Jason took the stand in July.”

Defense counsel moved for a mistrial on the ground of prosecutorial misconduct during the next break in the proceedings. He said, “And whether it’s intentional or not, [the prosecutor] referred to Deputy Torres asking my client at the booking whether she knew she was being charged for [Penal Code section] 211 when, in fact, that count wasn’t added until July 21st and it’s not being charged right now. And I think that allegation, at least in the form that it was presented, is so prejudicial to my client that she cannot have a fair trial at this point.”

The prosecutor opposed the mistrial motion. He pointed out that the robbery charge was listed on the booking sheet which he used as reference for his questions.

The court denied the mistrial motion but admonished the jury, as follows:

“Ladies and gentlemen, before we took the break [the prosecutor] asked [appellant] about the deputy advising her of the charges. And one of the charges he mentioned was robbery in violation of [Penal Code] Section 211. [The prosecutor] was mistaken about that and so please disregard any mention of robbery. That should not come into consideration. She was not arrested for that.”

2. There is no evidence indicating that prosecutor’s error was intentional.

Appellant argues that the prosecutor’s question about appellant’s awareness of a robbery charge “improperly sought to inform the jury of a very serious charge unsupported by any evidence, which apparently [was] considered briefly but abandoned prior to trial.” This argument fails because the record does not support appellant’s underlying premise that the prosecutor intentionally asked about robbery with knowledge that this crime had not been charged at the time appellant was booked. Further, appellant has not demonstrated prejudice.

The record supports the trial court’s determination that the prosecutor’s mistake about the robbery charge was unintentional. The prosecutor explained that the robbery charge was referenced in the booking sheet, which he used as the basis for his questions. There is nothing in the record casting doubt on the prosecutor’s explanation for the basis of his questions or indicating any bad faith or dishonesty. In fact, defense counsel said that he did not know if the prosecutor’s error was “intentional or not.” Accordingly, we conclude that the prosecutor’s query about a robbery charge did not constitute misconduct.

3. The question about a robbery charge was harmless.

Appellant was not prejudiced by the prosecutor’s question about a robbery charge under either the state law or federal constitutional standard. The jury was admonished

that the prosecutor's reference to robbery was a mistake and directed to disregard any mention of robbery. The jury is presumed to follow its directions. (*Weeks v. Angelone, supra*, 528 U.S. at p. 234.) Also, the jury would not have been shocked or inflamed by the question concerning a robbery charge. Evidence was presented proving beyond a reasonable doubt that appellant is a violent thief. Appellant stole over \$400 from Barnett and the jury found her guilty of theft. Appellant brandished a gun at Barnett, threatened to kill him, and hit him with the gun butt. She poked and stabbed him with knives. She threatened to cut him up into pieces. In light of the entirety of the circumstances, the prosecutor's question about a robbery charge was not prejudicial under either the state law standard or the federal constitutional standard of review.

II. Appellant Was Properly Sentenced.

A. Facts.

The probation officer recommended an aggregate term of 12 years' imprisonment. It recommended consecutive sentencing because appellant "had time to reflect on her actions between handcuffing the victim, poking and cutting the victim with the knives, striking him with the butt of the shotgun, and falsely imprisoning him."

Appellant was sentenced on January 5, 2012. Defense counsel urged the court to "consider imposing concurrent terms for the underlying offenses in that these events all occurred in one location over a series of a couple of hours.... I think that they were substantially committed closely in time and place as to indicate a single period of aberrant behavior"

Barnet gave a victim impact statement. In relevant part, he "ask[ed] that [appellant] is not allowed to serve her sentence concurrently for these crimes. They were separate attacks that occurred over many hours throughout the night. She took the time to make phone calls. She took the time to change weapons multiple times. At any time during those hours she could have chosen not to do any or all of these actions."

The court sentenced appellant to an aggregate term of 12 years' imprisonment, calculated as follows: the three-year middle term for count 1 plus one year on count 2, plus eight months each for counts 3 and 4, plus four years for the firearm enhancement attached to count 1, and 16 months each for the firearm use enhancements attached to counts 3 and 4. She was sentenced to 159 days for count 5 with credit for 159 days of time served. The sentences imposed for the deadly weapon use enhancements attached to counts 3 and 4 were stayed pursuant to section 1170.1, subdivision (f). The court ordered all of the terms to run consecutively. It ruled: "As to criteria affecting concurrent or consecutive sentences, the Court finds that while these crimes were committed closely in time and may indicate a single period of aberrant behavior that they were independent of each other. And each of these acts involved separate acts of violence or threats of violence or both."

B. Section 654 does not require stay of the sentences imposed on counts 3 and 4.

Appellant contends the trial court erred in failing to stay the sentences on counts 3 and 4 pursuant to section 654. We disagree.

1. Section 654 claims may be raised for the first time on appeal.

Defense counsel did not argue during the sentencing hearing that section 654 required the court to stay the sentences imposed for counts 3 and 4. Notwithstanding this omission, the forfeiture rule does not bar consideration of this sentencing challenge on appeal. "Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as errors on appeal." [Citation.] (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Yet, "on direct appeal the reviewing court is confined to the record. We cannot remand a case to the trial court for the purpose of trying an issue raised for the first time on appeal." (*People v. Sparks* (1967) 257 Cal.App.2d 306, 311.)

2. Each crime was separate for purposes of section 654.

Appellant asserts that the false imprisonment was the means by which she committed the assaults and the criminal threat “and was indivisible from them.” She also asserts that “the assaults were part and parcel of the criminal threat with the use of a gun and knife, for, without the fortification of the gun and knife, the explicit threat would have been empty words.” Based on these assertions, she argues that all of the crimes are part of one indivisible course of conduct and, therefore, the punishment for false imprisonment (count 4) and making a criminal threat (count 3) must be stayed. Relying on *People v. Nubla* (1999) 74 Cal.App.4th 719 (*Nubla*), respondent argues that appellant’s interpretation of section 654 is too broad. We agree with respondent that *Nubla* is on point and that each crime was separate for purposes of section 654.

“As relevant, section 654, subdivision (a), provides: ‘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.’” (*People v. Jones* (2012) 54 Cal.4th 350, 353.) “Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

The divisibility of a course of conduct depends upon the intent and objective of the defendant. “[I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” [Citations.]” (*People v. Akins* (1997) 56 Cal.App.4th 331, 338-339.) The determination whether a defendant entertains multiple criminal objectives is a factual question for the trial court. Its findings on this question will be upheld on

appeal if there is any substantial evidence to sustain them. (*Nubla, supra*, 74 Cal.App.4th at p. 730.)

In *Nubla, supra*, 74 Cal.App.4th 719, the defendant and his wife got into an argument that escalated to the point that the wife attempted to call the police and screamed for help. The defendant put his hand over her mouth and pushed her face down onto the bed. He put a gun to the back of her head, turned her face up and put it into her mouth. A few minutes later, he took the gun out of her mouth and told her to shoot him. He went to the bathroom and took a hand full of pills. A short time later the wife was able to escape. He was convicted and separately sentenced for assault with a deadly weapon, corporal injury on a spouse and false imprisonment. The appellate court rejected the defendant's argument that the assault and corporal injury were part of an indivisible course of conduct. It reasoned that the defendant's conduct was analogous to a sexual assault in which several crimes were committed over a period of time. Separate punishment was permissible in such cases because an offender who attempts to achieve sexual gratification by committing a number of sex acts on his victim is substantially more culpable than an offender who commits only one such act. Similarly, "[defendant's] act of pushing his wife onto the bed and placing the gun against her head was not done as a means of pushing the gun into her mouth, did not facilitate that offense and was not incidental to that offense." (*Id.* at p. 731.)⁵

Likewise, in this case none of appellant's crimes were incidental to or facilitated any other offense. Appellant had two separate objectives. She first sought to confirm that he was cheating on her and then sought to punish him for doing so. Appellant subjected Barnett to an ordeal that spanned several hours. Her restraint of Barnett ensured her complete control over him and enabled her to vent her fury in any manner she chose

⁵ Appellant did not argue in her reply brief that *Nubla* was wrongly decided or factually inapposite.

for as long as she wished. She had many opportunities over the course of the night to discontinue her actions. Each time, she chose to continue abusing Barnett. She terrorized him with the shotgun and used it as a bludgeon. She tortured him with the knives. Her explicit threats to kill him were separate and distinguishable from the assaults with the shotgun and knives. For all of these reasons, we conclude that each crime constituted a separate act for purposes of section 654.

C. Consecutive sentencing was not an abuse of discretion.

Appellant argues that consecutive sentencing was an abuse of discretion because the trial court's conclusion that the crimes involved separate and independent violent acts is unsupported by the evidence. We are not convinced.

The decision whether to order sentences to run concurrently or consecutively is vested to the trial court's exercise of discretion. (*People v. Bradford* (1976) 17 Cal.3d 8, 20.) This decision is reviewed under the deferential abuse of discretion standard. "Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered." (*Ibid.*)

We discern no abuse of discretion. The four offenses involved separate acts of violence or threats of violence. (Cal. Rules of Court, rule 4.425.) Appellant's attack spanned several hours during which she had numerous opportunities to reflect upon and discontinue her actions. Appellant's contention that the same acts were relied upon for multiple convictions is not convincing. As we have explained, each crime was based upon a separate act.

DISPOSITION

The judgment is affirmed.

LEVY, J.

WE CONCUR:

WISEMAN, Acting P.J.

KANE, J.