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

THE PEOPLE,

Plaintiff and Respondent,

v.

MATTHEW MALDONADO,

Defendant and Appellant.

F065913

(Super. Ct. No. 12CM7205)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Steven D. Barnes, Judge.

Michael L. Pinkerton, 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, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Gomes, J., and Detjen, J.

A jury convicted appellant, Matthew Maldonado, of vehicle theft (Veh. Code, § 10851, subd. (a); count 1), dissuading a witness (Pen. Code, § 136.1, subd. (b)(2); count 4)¹ and making criminal threats (§ 422; count 5). In a separate proceeding, appellant admitted enhancement allegations that he had served two separate prison terms for prior felony convictions (§ 667.5, subd. (b)). The court imposed a prison term of six years four months consisting of the three-year upper term on count 5, consecutive eight-month terms on each of counts 1 and 4, and one year on each of the two prior prison term enhancements.

On appeal, appellant's sole contention is that the imposition of sentence on both count 4 and count 5 violated the section 654 proscription against multiple punishment. The People essentially concede the point. We agree, and modify the judgment to provide that the sentence on count 4 is stayed.

FACTS

According to the testimony of Lucille Irven and Lynwood Johnson, in March 2012, Irven agreed to purchase a car from Johnson by paying the purchase price in installments. Pursuant to their agreement Irven made a partial payment and took possession of the car, while Johnson retained title to the car, pending payment in full.

Irven testified that appellant, who Irven knew socially, visited Irven at her apartment one night in early April 2012.² Early the next morning, after appellant had left, Irven discovered that the keys to the car were missing and the car was not where she had parked it outside her apartment.

¹ All further statutory references are to the Penal Code.

² Except as otherwise indicated, the remainder of our factual summary is taken from Irven's testimony.

Later that day, Irven spoke by telephone with appellant, who admitted he had the car but, despite her requests, refused to return it, telling her “he was using it for something very important ...” Approximately one week later, Irven reported the car stolen to the Lemoore Police Department.

At some point thereafter, while driving to Corcoran on Highway 43, she saw the car being driven. She called 911, and a police officer subsequently pulled the car over. Later that day she was at the Corcoran Police Department, in the presence of Sergeant William Smith of the Corcoran police, when appellant called her on her cell phone. She put the phone on speaker so Smith could hear. Over the phone, appellant told Irven that if she knew what was “best” for her, she would tell the police that appellant was using her car with her permission, “or else.” She asked “Or else what Matt?” and appellant said, ““Or else I am going to fuck you up bitch,”” or words to that effect.

Sergeant Smith testified that at the police station when Irven activated the speaker function on her phone, he activated a tape recorder and recorded the call. The recording was played for the jury, and the jury was also provided with a transcript of the recording. The transcript reveals that appellant told Irven to “just call [the police] right now and tell them that it was a mistake, ... that you got it back” and that “you let somebody use it.”

Smith also testified that he listened to the recording and found portions of it were incorrect. To provide a correct account of appellant’s statements, Smith further testified: “[Appellant said] ‘You have got to call the owner. Listen mother fucker, I am telling you the truth. You got my fucking kids taken away mother fucker. I ain’t playing, you tell that mother fucking dude when you get to Corcoran.’ There was an inaudible portion, I believe it says, ‘You need to call the mother fuckers now, bitch, because I am going to fuck you up.’”

DISCUSSION

As indicated earlier, appellant contends the imposition of sentence on both count 4 (dissuading a witness) and count 5 (making criminal threats) violated the section 654 proscription against multiple punishment for the same act. Respondent states “it appears” appellant is correct. As we explain below, appellant is in fact correct.

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 is intended “to insure that a defendant’s punishment will be commensurate with his [or her] culpability.” (*People v. Perez* (1979) 23 Cal.3d 545, 552.) The statute bars multiple punishment for both a single act that violates more than one criminal statute and multiple acts, where those acts comprise an indivisible course of conduct incident to a single criminal objective and intent. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Section 654 “does not allow any multiple punishment, including either concurrent or consecutive sentences.” (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

Here, appellant was convicted of criminal threats and dissuading a witness based on a single act. The conduct that was the subject of the crimes was appellant’s telephone call to Irven during which he threatened to physically harm Irven if she did not make clear to the police that appellant did not steal her car. Appellant’s threat was made expressly contingent on Irven’s failure to tell the police he had not committed a crime, and thus, it is obvious the threat was incidental to the main purpose of persuading Irven to assist him in avoiding criminal liability.

Other courts have reached the same conclusion on similar facts. In *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346, superseded by statute on other grounds as stated in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1442, the court held that the

defendant could not be sentenced for both making a threat and dissuading a witness based upon the same threat against a witness who had previously testified against his brother. Likewise, in *People v. Louie* (2012) 203 Cal.App.4th 388, 394, 399, the court held that the defendant's act of pointing a gun at the victim, calling her "a cop-calling bitch," and threatening her constituted a single act within the meaning of section 654 and, therefore, he could not be punished for both crimes.

Because appellant's actions of threatening and dissuading Irven consisted of a single act with a single intent and objective, he cannot be sentenced for both offenses. (*People v. Mendoza, supra*, 59 Cal.App.4th at p. 1346; *People v. Louie, supra*, 203 Cal.App.4th at p. 399.) Consequently, the sentence on count 4 should be stayed. We will modify the judgment accordingly.³

DISPOSITION

The judgment is modified to provide that the eight-month term imposed on appellant's conviction of dissuading a witness (Pen. Code, § 136.1, subd. (b)(2)) in count 4 is stayed pending completion of the sentence on his conviction of making criminal threats (§ 422) in count 5, the stay thereafter to become permanent under Penal Code section 654. The trial court is directed to prepare an amended abstract of judgment that is consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

³ When multiple punishments are imposed for the same act in violation of section 654, "the proper procedure is for the reviewing court to modify the sentence to stay imposition of the lesser term." (*People v. Flowers* (1982) 132 Cal.App.3d 584, 589.) However, the punishments for counts 4 and 5 are identical and therefore either count could be stayed with the same result. We agree with appellant that "Since the trial court selected count five as the base term, modifying the judgment by staying count four would be more straight forward than staying count five and recomputing the sentence using a different base term."