Filed 8/23/12 P. v. Bazan CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL BAZAN, Defendant and Appellant.	G045442 (Super. Ct. No. 10CF00822) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

John L. Dodd, 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, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Miguel Angel Bazan of the following crimes: kidnapping (Pen. Code, § 207, subd. (a); count 1);[1] false imprisonment by violence (§§ 236, 237 subd. (a); count 2); assault with a firearm (§ 245, subd. (a)(2); count 3); child abuse (§ 273a, subd. (a); count 4); exhibiting a firearm in the presence of a peace officer (§ 417, subd. (c); count 5); possession of a firearm by a convicted felon (§ 12021, subd. (a)(1); count 7); and possession of a concealed firearm by a convicted felon (§ 12025, subds. (a)(2), (b)(1); count 8). The jury also found true allegations he personally used a firearm to commit the kidnapping (§ 12022.53, subd. (b)) and personally used a firearm to commit false imprisonment, assault with a firearm, and felony child abuse (§ 12022.5, subd. (a)). After a court trial, the court found true allegations Bazan served a prior prison term (§ 667.5, subd. (a)) and had been convicted of a serious or violent felony within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.1, subds. (b)(i)).

The court sentenced Bazan to a total prison term of 25 years, 4 months. The court made count 1 (kidnapping) the principle term and imposed the midterm sentence of 5 years (§ 208, subd. (a)), which was doubled pursuant to the Three Strikes law, and added a 10-year term for personal use of a firearm during the kidnapping. Bazan received a concurrent 6-year term for assault with a firearm (count 3). He was sentenced to 16 months for exhibiting a firearm in the presence of a peace officer and being a convicted felon in possession of a firearm, and received a 16-month term for child abuse, plus an additional 16 months for personal use of a firearm in the commission of that crime. The jury acquitted Bazan of possession of a firearm in a school zone (count 6), and the court dismissed count 2 (false imprisonment) and its related gun-use enhancement because false imprisonment by violence is a lesser included offense of kidnapping. (*People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 819-820.)

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1 All further statutory references are to the Penal Code.

On appeal, Bazan challenges the sufficiency of the evidence to support the exhibiting a firearm in the presence of a peace officer conviction, and he claims section 654 bars punishment for both kidnapping and assault with a firearm. We conclude sufficient evidence supports the jury's verdict. Moreover, the record supports the trial court's implied finding Bazan committed kidnapping and assault with a firearm with different criminal objectives. Consequently, the trial court correctly imposed a concurrent 6-year term for assault with a firearm, and we affirm the judgment.

FACTS

We present the facts in the light most favorable to the judgment in accord with established rules of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142-143.)

Bazan shared a house with Denise Moreno, their daughter C.B., and their landlord, Maria Orozco. One night, Moreno came home from work around 6:00 p.m. to find Bazan had a friend visiting and learned C.B. was at the home of another family member. They all went to retrieve C.B. and then the visitor left.

Around 9:00 p.m., Bazan, who had been abusing methamphetamine daily for about a week and was suffering auditory and visual hallucinations, suddenly told Moreno, "We need to get out of here because somebody's going to come and torture us. I need to take you girls to a safe place." Based on his appearance and statements, Moreno was convinced Bazan was under the influence of a drug. She suggested they go to her brother's home.

Bazan drove Moreno to her brother's house and left her and C.B. at the door. He drove around for about an hour before Moreno called him for a ride home. About 30 minutes later, he called her back and said he was waiting for her outside. Moreno and C.B. got into the car and the three of them drove around for another two hours. Bazan repeatedly told Moreno people were out to get him and they were being followed. At some point, she noticed he had a gun between his legs.

After driving around aimlessly for awhile, Bazan finally agreed to take Moreno and C.B. home. He carried C.B., who had fallen asleep, into the house and put her to bed. Moreno changed into her pajamas and lay down next to C.B. Gun in hand, Bazan paced the floor and looked out the window. He repeatedly said somebody was outside and claimed he heard noises, although Moreno testified she did not hear anything. Periodically, he would point the gun at his head and threatened to shoot himself.

At 2:00 or 3:00 a.m. on April 2, Bazan's paranoia prompted him to call 911. When there was no immediate response, he made a second 911 call. C.B. woke up around 4:00 a.m. and started to cry. She saw her father pacing and agitated, and she watched him kneel down on the floor and point the gun to his head. Bazan asked Moreno to go look for the police officers he thought should have responded to his 911 emergency calls, but she tearfully declined.

Around 7:00 a.m., Bazan grabbed Moreno by the neck, pressed the gun to her head, and carried her outside.[2] He forced her into his car. Moreno told C.B. to stay with Orozco, the landlord, who had heard C.B. "screaming for her mommy." Orozco followed C.B. outside and made eye contact with Moreno. She testified that Moreno looked terrified as Bazan drove away so she went back inside the house and called police.

Bazan told Moreno he was going to get help. He drove around for about 30 minutes, made a 911 emergency call requesting assistance "because he was scared and he was going to kill himself," and then drove to the Santa Ana police station. He and Moreno went inside the station. He told the desk officer, Tanya Irwin, someone was following him and they wanted to kill him. Irwin noticed that Bazan was "very agitated," "hyper," and waving his arms around. She directed him to go back outside and move his

[2] C.B. told Orozco and the police her father threatened to kill himself and pressed the gun against her mother's ribs. At trial, she testified he never took the gun out of his pocket. Bazan admitted putting the gun to Moreno's head during his police interview.

car. While he was outside, Moreno told Irwin, "He has a gun. He's going to kill himself." Irwin alerted other officers to the situation, and several officers went outside to investigate.

Bazan faced the officers and pointed the gun at his forehead. He then sat down and put the gun on the ground. Although the officers told him to move away from the gun and put his hands in the air, Bazan instead picked up the gun and threw it into the street. One of the officers testified he might have shot Bazan but for the fact there were other people behind him. The officer also testified he had been trained "that a person who's suicidal is also homicidal. If they have no regard to their own life, you're way past the point that they . . . have any regard for anybody else's life. Them holding a gun even to their own head, that puts yourself at a greater risk. Because [if] they feel you're going to obstruct them committing suicide, they'll kill you in the process."

After his arrest, Bazan gave a statement to police. He admitted daily ingestion of methamphetamine during the previous week. He also admitted forcing Moreno to come with him, and he acknowledged that she had tried to persuade him to get rid of the gun. He said he held the gun to her head and forced her into their car, but he had to return to the house to get his keys before he could drive away. At trial, he acknowledged his repeated 911 calls and actions, explaining that he was scared, paranoid, and hallucinating. He said he had the gun for self protection and the protection of his family. His attorney argued voluntary intoxication prevented Bazan from forming the requisite mental state for kidnapping or exhibiting a firearm in the presence of a peace officer.

DISCUSSION

Sufficiency of the Evidence

Section 417, subdivision (c) provides, "Every person who, in the immediate presence of a peace officer, draws or exhibits any firearm, whether loaded or unloaded, in

a rude, angry, or threatening manner, and who knows, or reasonably should know, by the officer's uniformed appearance or other action of identification by the officer, that he or she is a peace officer engaged in the performance of his or her duties, and that peace officer is engaged in the performance of his or her duties, shall be punished by imprisonment in a county jail for not less than nine months and not to exceed one year, or in the state prison . . . ."

Bazan challenges the sufficiency of the evidence to prove he exhibited or drew a firearm in "a rude, angry, or threatening manner," arguing neither the "brief act of picking the gun up and then tossing it away," nor the mere creation of a potentially "'threatening situation'" are sufficient to sustain the conviction. We disagree with Bazan's assessment of the evidence and his conclusion.

The determination of whether a weapon has been brandished in a rude, angry, or threatening manner must be made with the purpose of the statute in mind. "'The thrust of the offence is to deter the public exhibition of weapons in a context of potentially volatile confrontations.' [Citation.]" (*People v. Booker* (2011) 51 Cal.4th 141, 189-190 [defendant participated in a verbal argument that escalated into a physical confrontation involving other people and then decided to draw a knife during the fray].) "'For purposes of the conduct which [section 417] is meant to deter, it is enough that the brandishing be in public, in the presence of the victim, where some third party happening along might get the idea that either the victim or brandisher needs help, or might think a brawl is in the making which he might join.'" (*Ibid.*)

Here, Bazan drove to the Santa Ana police station in a drug-induced paranoid state. Moreno alerted the desk officer to Bazan's gun, his desire to kill himself, and the fact that he forced her to come with him. When a group of officers went outside to investigate, Bazan faced the officers and pointed a gun at his forehead. According to the officers' training, a suicidal gun toter threatens everyone within range. When the officers directed him to move away from the gun, Bazan instead picked it up before

throwing it away. His failure to follow directions exponentially increased the volatility of an already dangerous situation. Under these facts, the evidence is more than sufficient to support the jury's verdict.

Section 654

Bazan contends the court's imposition of sentence for kidnapping and assault with a firearm violates section 654's proscription against double punishment. We disagree.

Section 654, subdivision (a) states, 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." This provision has been interpreted to preclude separate punishment where multiple convictions arise from a "course of conduct" with a single criminal objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 638 (*Beamon*); see also *Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*), disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 341; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) However, when criminal acts are committed "with multiple criminal objectives that were independent of and not merely incidental to each other," a defendant may be separately punished for these acts "even though the violations were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. (*Beamon, supra,* 8 Cal.3d at p. 639.) This determination is a question of fact for the trial court, and its discretion is broad. Its finding will be upheld on appeal if there is any substantial evidence to support it. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Coleman* (1989) 48 Cal.3d 112, 162.)

As noted above, the court imposed a 10-year sentence for kidnapping Moreno and a concurrent 6-year term for assaulting her with a firearm. To violate section

245, subdivision (a)(2), the defendant must willfully perform an act with a firearm with the present ability to apply force with that firearm. At trial, the prosecutor told the jury "when [Bazan] had [Moreno] and he was choking her, and had the gun against her, he had the present ability to go ahead and assault her with that. He was doing it." At the sentencing hearing, a different deputy district attorney postulated "there were multiple instances where the [section] 245(a)(2) occurred throughout the series of events as I understand [how] the trial played out." Defense counsel submitted the matter and without further explanation, the court imposed a separate, concurrent sentence for the assault.[3]

The Attorney General argues the record supports the trial court's implied findings under several different views of the facts. Under one scenario, Bazan completed the assault before the kidnapping and neither crime was incidental to the other. Under the other scenario, the Attorney General suggests the force required for the kidnapping could have been based on a display of the gun while Moreno was in the car but before Bazan returned to the house for his keys. Admitting the record is not clear as to the amount of time involved, the Attorney General asserts Bazan had ample time between the crimes to reflect on his actions, either before he forced Moreno out of the house or during the time it took for him to retrieve his car keys. We find ourselves in agreement.

The Attorney General compares this case to *People v. Surdi* (1995) 35 Cal.App.4th 685. There, the defendant was convicted of aggravated mayhem, torture, kidnapping, attempted murder and conspiracy to commit second degree murder. After they beat Ruben Sanchez, a rival gang member, the defendant and his group forced Sanchez into a van. Once inside the van, the leader of the pack, Victor Lomeli, told the defendant to hold Sanchez down. The defendant complied by strapping a seat belt

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[3] Trial counsel's failure to object to the court's imposition of sentence on section 654 grounds does not waive the claim unless the sentence is imposed pursuant to a plea bargain. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

around Sanchez's neck, which enabled Lomeli to stab him with a screwdriver. The group stopped at a school to discuss what to do and then drove Sanchez to a river bed. Once there, they dragged him to a dirt area where two gang members stabbed Sanchez with the screwdriver while the defendant kicked him. The group left Sanchez for dead. He survived, although he was permanently disabled.

On appeal, the defendant argued section 654 precluded separate punishment for attempted murder and kidnapping. The issue was conceded with respect to the attempted murder, which left "only the kidnapping count for discussion." (*People v. Surdi, supra,* 35 Cal.App.4th at p. 688.) With respect to the kidnapping, this court concluded there was ample time for the defendant to reflect on his actions during the commission of the crimes. (*People v. Surdi, supra,* 35 Cal.App.4th at p. 689.) We held, "The fact Surdi assisted *multiple* stabbing episodes, each of which evinced a *separate intent* to do violence, precludes application of section 654 with respect to the offenses encompassed within the episodes." (*Id.* at pp. 689-690.)

Bazan asserts his case involves something different. He claims the assault and kidnapping here occurred as part of "one continuous motion" with no time for reflection, but it does not look that way to us. Although we cannot determine the exact time interval between the assault and kidnapping, the record supports the trial court's implied finding Bazan harbored a separate intent when he committed each crime. He had already spent hours pacing the floor with a gun in his hand and threatening to kill himself. He asked Moreno to come with him and she declined. Given his state of mind and what had already occurred, we have no difficultly concluding Bazan formed a separate intent to terrorize Moreno with the gun before he decided to point the gun at her head or ribs, pick her up, and force her into the car. There being more than one way the trial judge could have found separate objectives here, and substantial evidence to support them, we cannot say he abused his discretion in punishing for both kidnapping Moreno and assaulting her with a firearm.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.