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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ESPARZA,

Defendant and Appellant.

B236857

(Los Angeles County
Super. Ct. No. GA081361)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Michael Villalobos, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Esparza, also known as Miguel Ruiz, appeals from the judgment entered upon his convictions by jury of two counts of making a criminal threat (Pen. Code, § 422, counts 3 & 4),¹ and one count each of disobeying a court order (§ 166, subd. (a)(4), count 5) and misdemeanor vandalism (§ 594, subd. (a), count 6).² The trial court sentenced appellant to state prison for the upper term of three years on count 3 and to concurrent sentences on counts 4, 5 and 6. Appellant contends that his concurrent sentence on count 4 should have been stayed pursuant to section 654.

We affirm.

FACTUAL BACKGROUND

The broken car window

In October 2010, appellant and Priscilla Fuentes (Priscilla) were dating.³ Priscilla was living with her sister, Serena Fuentes (Serena), in Monterey Park. Priscilla and appellant had a history of domestic violence.

In the morning of October 3, 2010, Priscilla and her children left appellant's home and went to Serena's residence to babysit. Appellant telephoned Priscilla and asked where she went and why. He was upset because Dodgers tickets he had purchased for \$600 were missing, and he believed Priscilla had taken them and was going to the game with another "guy." Priscilla had in fact taken the tickets from appellant's drawer and given them to Serena, who was using them to go to the game.

Appellant drove to Serena's house and stopped in the middle of the street as Serena was leaving. He yelled for Priscilla to come out. He asked her and Serena about the missing tickets. Both denied knowing about them. Appellant drove away, returned

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

² Count 1 in the original information was not included in the amended information. Appellant was found not guilty of assault with a semiautomatic firearm (§ 245, subd. (b)) and the lesser included offense of simple assault (§ 240) in count 2 and of attempted kidnapping in count 7 (§§ 664, 207, subd. (a)).

³ When appellant was in custody pending trial in this matter, he and Priscilla were married.

shortly thereafter and yelled at Priscilla to get into his car. She told responding officers that while she was standing at the front door, she heard appellant “rack[] a round into a gun” as he got out of the car. He pointed the gun at her and said, “Walk to my car. I want to talk to you.” Priscilla closed the door. From a window, she saw appellant walk to Serena’s car parked in the driveway, heard a shot, and saw appellant drive away. Priscilla went outside and saw that the rear window of the car had been shattered.⁴

Priscilla prepared a handwritten statement regarding the incident that was substantially the same as she had reported to the officers; that appellant was upset with her, threatened her with a gun and came outside and shot out her sister’s car’s back window.

The threatening text messages

Monterey Park Police Officers Arthur Rousseau, Gilbert Alvarez, and Hector Hernandez responded to a shots fired call at Serena’s residence. When they arrived, Priscilla was crying and pacing in front of the house. As Priscilla was speaking with the officers, she received text messages which she said were from appellant. She showed them to the officers. Among them was one message that said: “Answer me. I just want to talk to you. If not, watch what’s going to happen to all the cars. I know where your sister works and your neighbors.” Three minutes later, another text message stated, “Tell your boyfriend, Luis, to come out. I don’t give a shit if he has a gun. Call me, or I’m going to blast all the house (*sic*) right there. I promise.”⁵

Appellant’s version

⁴ At trial, Priscilla testified that she heard appellant’s car skidding as he drove away but did not hear a gunshot or breaking glass. She also testified that at no time did appellant get out of his car or point a handgun at her, though she admitted telling the police that he pointed a gun at her. She said that she made that up to get back at him for breaking her sister’s car window.

⁵ At trial, Priscilla testified that she told officers that the threatening text messages were from appellant just to get him in trouble. She claimed that he did not send her the text messages. She also claimed that she lied at the preliminary hearing when she testified that he did.

Appellant testified in his own behalf. He admitted that he was angry at Priscilla and Serena for taking his Dodger tickets, went to Serena's house and broke the rear window of her car. He denied, however, shooting at the car window and having a gun at the scene, claiming instead that he broke the window with a brick.

Appellant also admitted sending the threatening text messages to Priscilla because he was angry and knew she would not be afraid because she knew that he said "dumb" things when he was mad.

DISCUSSION

I. Background

Counts 3 and 4 for making criminal threats related to the two threatening text messages that stated: "Answer me. I just want to talk to you. If not, watch what's going to happen to all the cars. I know where your sister works and your neighbors" and, "Tell your boyfriend, Luis, to come out. I don't give a shit if he has a gun. Call me, or I'm going to blast all the house (*sic*) right there. I promise." These messages were sent within three minutes of each other. The trial court imposed a three-year prison term on count 3 and a concurrent three-year term on count 4.

II. Contention

Appellant's sole contention on this appeal is that the criminal threat conviction in count 4 should have been stayed pursuant to section 654. He argues that both criminal threats were part of the same course of conduct and had the same objective. This contention is without merit.

III. Standard of review

By failing to stay sentence on the second criminal threat conviction, the trial court impliedly found that appellant had a separate intent and objective for each offense which were not a part of an indivisible transaction. Whether multiple convictions are part of an indivisible transaction is primarily a question of fact. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We review such a finding under the substantial evidence test (see *People v. Osband* (1996) 13 Cal.4th 622, 730–731; *People v. Blake* (1998) 68 Cal.App.4th 509, 512); we consider the evidence in the light most favorable to

respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.) We must determine whether the violations were a means toward the objective of commission of the other. (See *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

IV. Section 654 Stay

Section 654 provides in 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.*” (§ 654, subd. (a), italics added.) “[S]ection 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.”⁶ (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

“If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*People v. Perez, supra*, 23 Cal.3d at p. 551.) If, on the other hand, “the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished 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.” (*People v. Beamon, supra*, 8 Cal.3d at p. 639.)

We conclude that there is substantial evidence to support the trial court’s imposition of a concurrent sentence on count 4. Appellant sent a threatening text message to Priscilla. Three minutes elapsed before he sent a second threatening text

⁶ In *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*), the California Supreme Court recently limited the breadth of the judicial axiom that section 654 applies to violations of more than one statute committed in the course of conduct constituting an indivisible transaction. *Correa* held that the prohibition under section 654 against multiple punishment for crimes committed during an indivisible transaction does not apply to multiple violations of the same statute, as is the case here (two violations of § 422). Nonetheless, *Correa* is inapplicable here because that case explicitly stated that it would only apply prospectively and not to offenses, as here, that occurred before its rendition.

message. Consequently, the two criminal threat charges here resulted from two separate acts, not one act that violated separate statutes. (§ 654.) They were not incidental to each other, but completely independent. Each of the messages constituted a separate crime. Each threat was calculated, required separate volitional acts to compose a text message and send it to Priscilla and were separated by a sufficient amount of time to allow reflection. Neither act was uncontrollable. “[D]efendant should . . . not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.” (See *People v. Trotter* (1992) 7 Cal.App.4th 363, 368 (*Trotter*) [section 654 inapplicable to multiple shots fired within a span of just over a minute by defendant at pursuing officer].)

Further, the purpose behind section 654 is “to insure that a defendant’s punishment will be commensurate with his culpability. [Citation.]” (*People v. Perez, supra*, 23 Cal.3d at p. 552.) A person making one criminal threat in a fit of anger is less culpable than a person making multiple threats, particularly, as here, where the threats increased in seriousness. Appellant’s first text message was general in nature, stating, “watch what’s going to happen to all the cars. I know where your sister works and your neighbors.” The second message implied that appellant was going to use a gun to shoot people, as he stated, “I’m going to blast all the house (*sic*) right there.” Hence, the second message escalated the threat and would likely cause the victim greater fear. Multiple threats suggest a firmness of purpose and a resolve to follow through that a single threat might not.

Even under the long recognized intent and objective test, each threatening text evinced a separate intent to instill fear in Priscilla, just as each shot in *Trotter* and each new and separate sexual penetration in *People v. Harrison* (1989) 48 Cal.3d 321, 337–338 evinced a new and separate intent and objective. The subjects of the two messages are not the same. The first text message threatened to damage cars and implicitly to harm Priscilla, Serena and neighbors. The second message contains an implicit threat to Priscilla’s boyfriend Luis, not even referred to in the first message, and a threat to shoot at Serena’s house and others in the area.

Accordingly, the trial court here did not err in punishing appellant separately for each of his threatening text messages.

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ