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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.

LOUIS JOSEPH HUNYADI,

Defendant and Appellant.

B232991

(Los Angeles County
Super. Ct. No. MA051099)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Bernie C. LaForteza, Judge. Affirmed with modifications.

Adrian K. Panton, 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, Eric E. Reynolds and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Louis Joseph Hunyadi appeals from the judgment entered upon his conviction by jury of two counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2), counts 1 and 2),¹ and two counts of making criminal threats (§ 422, counts 3 and 4). The jury also found true the special allegations that appellant personally used a firearm (§12022.5, subds. (a) and (d)). The trial court sentenced appellant to a prison term of 20 years and four months, imposing consecutive sentences on each of the four counts. Appellant's sole contention on appeal is that the consecutive sentences imposed on counts 3 and 4 violated section 654 because the criminal threats were incidental to the assaults with a firearm.

We hold that the trial court erred in failing to stay the sentences for the criminal threat convictions (counts 3 and 4) pursuant to section 654 and will modify the judgment accordingly. The judgment is otherwise affirmed.

FACTS

Prosecution Case

In June 2010, appellant rented the southeast bedroom in a trailer located on East Avenue I, in Lancaster. On September 1, 2010, Teri Rene Bennett rented the northwest bedroom in the same trailer. The landlord and his wife, and another individual named Felix Ayala also lived in the trailer.

Appellant and Bennett began a sexual relationship around the end of October 2010 which lasted approximately one month. Bennett ended the relationship because appellant was "hostile, disrespectful, and aggressive."

On the night of November 23, 2010, Bennett and Thomas Tercero went to dinner. They planned to spend Thanksgiving in Victorville and returned to the trailer around 9:00 p.m. so that Bennett could pack a bag. They entered Bennett's bedroom and Tercero stood at the foot of the bed. As Bennett was packing her bag Tercero saw appellant at the doorway to Bennett's bedroom. Appellant "cocked" a shotgun, aimed it at Tercero's

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

chest and said “I’ll blow you away, and I’ll blow holes in your car. Get the hell out of my house.” Tercero froze and was in fear for his safety.

Bennett moved between appellant and Tercero and attempted to “talk [appellant] down.” Bennett grabbed the barrel of the gun to prevent appellant from pointing it at Tercero. Appellant struck Bennett’s right eye three times with the barrel of the gun causing a cut above her right eyebrow. Appellant yelled at Bennett, “I’ll kill you, fucking bitch.” Appellant yelled something about calling the police and then addressing Tercero said “I’m going to shoot you both. If you don’t move, I’ll blow her brains right out the back and shoot yours right into that door behind you.” Tercero stated “Okay. Okay. I’ll just leave,” and walked out of the trailer. Tercero then drove towards the front of the trailer park and called 9-1-1.

Appellant moved the gun to his side and put it down when Tercero left the trailer. Bennett tried to calm appellant down and directed him back towards his room. Bennett washed up in the bathroom and cleaned the blood from her eye. Appellant entered the bathroom without the shotgun and started another argument. Bennett followed him back to his room where she told him “it’s going to be okay” and hugged him. She then grabbed her bag and left the trailer.

Los Angeles County Deputy Sheriffs Scott Smith and Jason Elizondo arrived at the trailer park in response to a call about a man with a gun. Bennett called appellant on her cell phone and gave the phone to Deputy Elizondo who asked appellant to exit the trailer. Appellant told Deputy Elizondo “Fuck you. I’m not coming out,” and hung up the phone. Appellant came out of the trailer a few minutes later after a second telephone conversation with Deputy Elizondo.

Deputy Smith performed a protective sweep of the trailer to determine if any occupants remained inside. He observed the barrel of a shotgun protruding from underneath the bed in appellant’s bedroom. The shotgun was loaded and there was blood on the end of the barrel. Tercero and Bennett identified the shotgun as the weapon appellant pointed at them in the trailer.

Defense Case

Appellant testified on his own behalf. At approximately 2:00 a.m. on November 23, 2010, a drunken Bennett came into his room. An argument ensued during which Bennett punched and slapped appellant. Appellant put his arms around Bennett and walked her out of his room. Bennett returned a number of times to yell at appellant and threatened to have her friends in Hells Angels kill him.

That evening appellant saw Tercero and Bennett enter and leave the trailer a number of times. On one occasion after they returned to the trailer appellant saw that Bennett had a cut over her right eyebrow which she dabbed with a tissue. Shortly afterwards he received two calls on his cell phone from Bennett asking him to come outside. He received a third call from Bennett's cell phone and a male voice who claimed to be a deputy sheriff asked him to come outside. Appellant came out of the trailer and was arrested.

Appellant admitted he owned a shotgun but that on November 23, 2010 it was unloaded and put away in a pouch in a corner against the wall of his bedroom. He denied taking out the shotgun and pointing it at anyone and denied threatening either Tercero or Bennett. He denied leaving the shotgun underneath his bed and claimed that it had no blood on it when he last saw it about four days prior to the incident when he cleaned it. He stated that after he was arrested he saw both Bennett and Tercero in his bedroom.

Rebuttal

Deputy Smith testified that after appellant was arrested he was placed in the back seat of a patrol car. Neither Bennett nor Tercero were in the bedroom while the sweep was being conducted. The shotgun that was found underneath the bed was shown to Bennett and Tercero while they were outside by the patrol vehicle.

DISCUSSION

Sentences for Criminal Threats Should Have Been Stayed Pursuant to Section 654

A. *Contention*

Appellant contends that the consecutive sentences for the criminal threat convictions should be stayed because the course of conduct in which he engaged had the single objective to instill fear. He contends that the verbal threats to shoot Bennett and Tercero were incidental to the assaults with the shotgun and merely served to enhance that fear and achieve his objective.

B. *Relevant Authority*

Section 654 provides 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.” (§ 654, subd. (a).) In *People v. Perez* (1979) 23 Cal.3d 545, the Supreme Court observed, “. . . it is well settled 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. [Citation.] Whether a course of conduct is indivisible depends upon the intent and objective of the actor. [Citation.] 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.” (*Id.* at p. 551.)

“The resolution of this question is one of fact and the trial court’s finding will be upheld on appeal if it is supported by substantial evidence.” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) One relevant consideration in determining whether multiple crimes should be considered severable for section 654 purposes is the “temporal proximity” of the crimes. (*People v. Evers* (1992) 10 Cal.App.4th 588, 603, fn. 10.)

Making criminal threats is a specific intent crime that occurs when the defendant “willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out” (§ 422.) The statement, “on its

face and under the circumstances in which it is made, [must be] so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby cause[] that person reasonably to be in sustained fear for his or her own safety.” (*Ibid.*)

An assault with a firearm occurs when a defendant willfully performs an act with a firearm with the present ability to apply force with it. (§§ 240, 245, subd. (a)(2); see *People v. Williams* (2001) 26 Cal.4th 779, 787.)

C. Sentencing Hearing

The prosecutor filed a sentencing memorandum in which he recommended a total sentence of nine years and four months. The prosecutor recommended that sentence on counts 3 and 4 and the related personal firearm use enhancements be stayed pursuant to section 654. The defense sentencing memorandum argued that the sentences in counts 3 and 4 merged under section 654.

At the sentencing hearing, the court indicated that it had read and considered the probation report and the sentencing memoranda. The trial court sentenced appellant to the upper term of four years on count 1 (assault on Bennett) based on the aggravating factors that the crime involved great violence and the threat of great bodily harm, and that appellant lied on the witness stand. The court selected the upper term of 10 years on the related firearm use enhancement because appellant had engaged in violent conduct that indicated a serious danger to society and because of a prior arrest in 2006 for willful infliction of corporal injury. (§ 273.5.)

The trial court found that section 654 did not apply to the remaining counts “because they were independent of and not merely incidental to each other.” The court stated that appellant “entertained several criminal objectives.” The court found that appellant had a criminal objective to assault Tercero in count 2 and sentenced appellant to a consecutive term of two years and four months (one-third of the middle term plus 16 months for the firearm use enhancement). With respect to counts 3 and 4, the trial court found that appellant had separate criminal objectives to intentionally threaten Bennett and Tercero. The court sentenced appellant to consecutive terms of 2 years on

each count comprised of one-third the middle term (eight months) plus 16 months for the firearm use enhancement. The aggregate term of imprisonment was 20 years and four months.

D. Analysis

Factually, the record indicates that all of the offenses occurred at the same location, and as part of the same confrontation. The assault and criminal threat charges against appellant were incident to a single objective and were part of an indivisible transaction. Case law establishes that even when two offenses were committed by separate acts, section 654 precludes separate punishment when the sole purpose for committing one offense was to facilitate commission of the other. (See, e.g., *People v. Latimer* (1993) 5 Cal.4th 1203, 1216 [objective behind kidnapping was to facilitate rape].)

The People present a structured, step-by-step analysis of the incident which breaks down appellant's actions in the bedroom into separate distinct acts. They argue that appellant had one objective to physically injure the victims and a separate objective to mentally terrorize them. But appellant did not have an opportunity to reflect between the assaults and the threats, and the trial court's finding that the threats created a new risk of harm and were independent of the assaults is not supported by the evidence. (*People v. Felix* (2001) 92 Cal.App.4th 905, 915.)

The testimony of the victims describing the circumstances of the assaults supported the fact that appellant harbored a single intent. The assault with the shotgun against both victims occurred in the bedroom. Tercero testified that as appellant approached the doorway to the bedroom appellant cocked the gun and threatened to "blow [Tercero] away and put holes in [Tercero's] car." Bennett testified that it was after she interceded that appellant assaulted and threatened her. Bennett was asked by defense counsel "So when you place yourself between Mr. Tercero and the shotgun, did Mr. Hunyadi say anything to you at that specific moment?" Bennett responded "That is when he had threatened for me to move, or he would shoot through both of us and into the door."

Bennett's testimony regarding appellant's behavior immediately after Tercero left the trailer offered further support that appellant's sole objective was primarily to threaten Tercero. Bennett testified that appellant put the gun down and went back to his room. When appellant returned to the bathroom where Bennett was washing her eye she testified that appellant did not have the shotgun. Bennett testified that an argument ensued but there was no testimony regarding further threats and she comforted him in his room before leaving the trailer.

The prosecutor relied on the same set of operative facts to find appellant guilty of the assault and criminal threats (counts 2 and 4 respectively) against Tercero. During closing argument the prosecutor stated, "The defendant comes in with a shotgun, and he points it at Thomas Tercero's chest. He points it at his chest, ladies and gentlemen. That is the assault. That is the assault with the firearm, ladies and gentlemen. He points it at Thomas Tercero's chest. What does he do? He threatens him. He says he is going to blow him away. That is a threat, an immediate threat he's going to shoot Thomas Tercero with a shotgun that is pointed right at Thomas Tercero's chest. *That is an assault, ladies and gentlemen, and that is a threat.*" (Italics added.)

Similarly, with respect to the assault and criminal threats (counts 1 and 3 respectively) against Bennett, the prosecutor stated, "Teri Bennett testified she was in her bedroom, packing in the bedroom. The defendant comes in with the loaded shotgun, points it at Thomas Tercero, points it at her forehead, says he's going to shoot through her to shoot Thomas Tercero. *That is assault and that is a threat. That is why he's guilty of the criminal threats.*" (Italics added.)

The People argue that the trial court could have found that appellant had two separate objectives: (1) to threaten Tercero because appellant was under the impression that Tercero was Bennett's friend from Hells Angels sent to kill appellant, and (2) to prevent Tercero from having a relationship with Bennett because appellant was interested in renewing his recently terminated sexual relationship with her.

But what the People characterize as objectives are more correctly described as motives behind appellant's actions. Motive is different from intent, and is not an element

of a crime. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126.) While the motivations behind appellant's commission of the crimes charged may have been different, he had a single criminal objective.

The cases cited by the People are distinguishable. In *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1654 (*Nichols*), a defendant kidnapped a victim for robbery and threatened to kill him if he "opened his mouth," and the Court of Appeal concluded that the defendant could be convicted for both acts as there was substantial evidence that the defendant had two different objectives: to hijack the victim's truck by kidnapping and robbing him, and to avoid detection and future conviction by dissuading and intimidating him. (*Id.* at p. 1657.)

The court in *Nichols* noted that a defendant's criminal objectives are distinct if the defendant used different means to achieve them, and the goals are attained at different times. (*Nichols, supra*, 29 Cal.App.4th at pp. 1657–1658 [defendant's first objective of hijacking the truck was accomplished in two hours by means of threatening the victim with a shotgun, while his second objective of avoiding detection was ongoing and achieved by looking at the victim's driver's license, reading aloud his address, and threatening future harm].)

In *People v. Solis* (2001) 90 Cal.App.4th 1002, the defendant argued that he should not have been sentenced consecutively on one count of arson and two counts of making terrorist threats because the objective in both cases was to threaten and scare the victim. The *Solis* court disagreed, finding that "in making the terrorist threats, the defendant intended to frighten whereas in committing arson an hour later the defendant intended to burn. Because defendant committed multiple and divisible acts with distinct objectives, section 654 was not violated by sentencing him on both the arson and terrorist threat convictions." (*Id.* at p. 1022.)

Here, unlike the cases cited by respondent, the assaults and threats took place at the same time and each was a means of committing the other and advanced the same objective, instilling fear in the victims.

DISPOSITION

The judgment is ordered modified to reflect that the two-year consecutive sentences for the criminal threat (§ 422) convictions (counts 3 and 4) are stayed pursuant to section 654. As so modified, the judgment is affirmed. The superior court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections & Rehabilitation.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ