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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAMON G. MORALES-SMITH, Defendant and Appellant.	B228834 (Los Angeles County Super. Ct. No. MA047345)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified.

Murray A. Rosenberg, 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, Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Ramon G. Morales-Smith, appeals the judgment entered following his conviction for residential robbery, domestic violence, assault with a firearm, burglary, making criminal threats, discharging a firearm with gross negligence, grand theft, possession of a firearm by a felon, evading a peace officer, flight from an officer, possession of a controlled substance, and possession of a controlled substance for sale, with prior prison term and firearm use enhancements (Pen. Code, §§ 211, 273.5, 459, 422, 246.3, 487, 12021, 69, 667.5, 12022, 12022.5, 12022.53; Veh. Code, §§ 2800.1, 2800.2; Health & Saf. Code, §§ 11377, 11378.)[1] He was sentenced to state prison for a term of 24 years and 8 months.

The judgment is affirmed as modified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The robbery.*

On the night of August 13, 2009, 15-year-old Daisy S. was asleep in her bedroom when she heard a voice outside her window. Although the voice was slightly familiar, she could not place it and there was too little light to see the person's face. The person said "he wanted to kick it," which Daisy understood to mean he wanted to come in and hang out. Daisy said no and asked him to leave. The person then pushed the window blind to one side and Daisy saw an object in his hand. She asked what it was and he said it was a gun. Daisy testified that from the look of it she was 90 percent sure it was indeed a gun. The person reached into Daisy's bedroom, grabbed a laptop computer from her desk by the window, and ran off. Daisy testified this encounter lasted about three minutes, although she recalled having told a police

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[1] All further statutory references are to the Penal Code unless otherwise specified.

officer it lasted ten minutes. She also recalled telling police she could not see what the person had in his hand.

A few days later, Daisy placed the voice as belonging to defendant Morales-Smith, whom she had met a couple of times through a friend. Daisy had purchased marijuana from Morales-Smith on one occasion. This sale took place on the street across from her house; she paid him $10 for the marijuana and she did not owe him any more money. Daisy denied ever purchasing marijuana from Morales-Smith at her bedroom window or giving him her laptop in exchange for drugs.

b. *The domestic violence.*

Carina Alegre lived in Lake Los Angeles with her family. She had dated Morales-Smith for three months before breaking up with him in October 2009. When they parted, she was pregnant with his child.

On December 17, 2009, Carina was sleeping when Morales-Smith arrived at her house, called her on the phone, and asked her to come outside. When she refused, he got angry and started banging on the doors and windows. Through her bedroom window, she saw him pull a revolver from his waistband and fire a shot into the air. Then he phoned her again and said, "Come out or I'm going to show you how active I really am." Carina hung up on him. A minute later, she heard three gunshots. She called the police, but by the time they arrived Morales-Smith had left.

On the morning of December 27, 2009, Carina awoke to discover Morales-Smith had called her multiple times while her phone was turned off. She answered the next time he called: "He started yelling at me, telling me that what [*sic*] the fuck was over there and that he was going to smoke whoever I'm with." Carina told him she was in bed with her one-year-old daughter and her six-year-old niece. Morales-Smith said he was coming over and he showed up a few minutes later. When she wouldn't let him in, he forced his way into her house through the front door. Carina tried to push him back out of the house and a struggle ensued during which he bit her finger and scratched her arms. Morales-Smith then grabbed her by the throat, threw her onto

a couch, got on top of her and bit her neck. He pulled out a gun, pressed it to her forehead and said, "If you don't talk to me right, I'm going to kill you."

Just at that moment Carina's daughter appeared: "Then my daughter comes out of the master bedroom, and she's walking down the house. I was like, 'Look. My daughter. My daughter. Please stop, not in front of my daughter.' And once she approached us all the way, he got off me. He put the gun away." Carina screamed to her niece to call the police. Meanwhile, Morales-Smith ran into Carina's bedroom to see if there was a man there. After verifying the bedroom was empty, he fled.

c. *The burglary.*

On January 4, 2010, Axene Pate was living in Lake Los Angeles with her family. Morales-Smith, a friend of Pate's grandson, was visiting. Pate, who paid her mortgage every month in cash, had $700 in an envelope under her pillow. She left the bedroom for a few minutes to get coffee from the kitchen, and when she returned the money was gone. Pate accused Morales-Smith of taking the money, but he denied it. The police were called, but Morales-Smith left before they arrived. That night, Morales-Smith called Pate's daughter. He denied having stolen the money, but said he had $300 in savings he could give the family.

d. *Evading the police.*

On February 6, 2010, officers on patrol in Lake Los Angeles noticed a white sedan with unregistered plates. The officers recognized the driver as Morales-Smith from a fugitive briefing and signaled the car to stop. Morales-Smith ignored them and kept going. He committed various traffic infractions while driving through residential areas at 60 miles per hour. After he finally stopped, Morales-Smith jumped out of the car and fled.

On February 9, 2010, officers arrived at a house in Lake Los Angeles in order to take Morales-Smith into custody. When they announced their presence, Morales-Smith jumped out a window and fled. He was finally apprehended after a foot chase and a struggle. Officers found methamphetamine in his pocket and a loaded gun inside the house.

2. *Defense evidence.*

Morales-Smith testified he had been friends with Daisy for about two years and had been to her house a couple of times. Whenever he visited, he would just go up to her bedroom window and talk to her. He denied having gone to her house on the day she claimed he took her laptop, but testified he went there a few days earlier to sell her some marijuana. When he arrived, Daisy did not have any money so she gave him the laptop computer as collateral. Two days later, she called and asked for her laptop back. When Morales-Smith said he had gotten rid of it, Daisy threatened to call the police. Morales-Smith denied having ever taken a gun to Daisy's house.

Morales-Smith denied going to Carina's house on December 15 and firing a gun into the air. On December 27, he called her and they argued, but he did not go to her house. Sometime after Christmas, Carina said she was going to call the police and make up allegations against him.

Morales-Smith denied having taken Pate's money.

On February 6, he did not stop his car because he believed the police would kill him. On February 9, he ran from the house because he feared the police would kill him. The methamphetamine found in his pocket was for his personal use. The gun inside the house did not belong to him.

CONTENTIONS

1. There was insufficient evidence to support the conviction for robbing Daisy.

2. The trial court violated section 654 when it sentenced Morales-Smith for the domestic violence crimes against Carina.

3. Morales-Smith was improperly convicted on two lesser included offenses.

DISCUSSION

1. *Sufficient evidence of robbery.*

Morales-Smith contends there was insufficient evidence to sustain his conviction for robbing Daisy. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal

defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

b. *Discussion.*

Citing several minor inconsistencies in Daisy's testimony, e.g., as to how long Morales-Smith was at her window and how sure she was he had a gun, Morales-Smith argues she must have been lying about the entire episode. He suggests Daisy was trying to prevent her family from learning he had sold her drugs and that she had once given him her computer in lieu of cash.

However, "[i]n deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Although a verdict based upon evidence that is inherently improbable is reversible, testimony that merely discloses unusual circumstances does not constitute inherently improbable evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 306.) "To warrant the rejection of the statements given by a witness who has been believed by the [jury], there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions." (*Ibid.*)

Morales-Smith's claim that Daisy lacked credibility simply because of minor inconsistencies in her testimony constitutes an improper attempt to reweigh the evidence on appeal. There was sufficient evidence to sustain his conviction for robbery.

2. *Improper multiple punishment.*

Morales-Smith contends that, in connection with the domestic violence incident, the trial court erred by imposing sentences on the count 2 (corporal injury to a former cohabitant) and count 7 (making criminal threats) convictions because, under section 654, they were both part of a single transaction which culminated in his commission of count 3 (assault with a firearm). The Attorney General concurs as to count 7, but not as to count 2. We agree with the Attorney General.

a. *Legal principles.*

Section 654, the prohibition against multiple punishment, 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." " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] 'We must "view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" [Citation.]' " (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.) This rule applies whether or not the trial court made express factual findings.

(See *People v. Osband* (1996) 13 Cal.4th 622, 730 [trial court's implicit determination that defendant had more than one objective was supported by substantial evidence]; *People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585 [trial court's finding, whether explicit or implicit, may not be reversed if supported by substantial evidence].)

b. *Discussion.*

Morales-Smith argues it "is impossible on the facts in this case to conclude that appellant entertained multiple objectives . . . as the acts . . . were part and parcel of one course of conduct and one objective, appellant's intent to force [Carina] to see him and speak with him." "Nothing in the record supports any implied finding that appellant harbored multiple objectives that were independent and not incidental violations beyond his efforts to force his way into [Carina's] presence and to see her."

We disagree. As the Attorney General argues, the evidence supports an inference Morales-Smith had a different objective for committing the initial infliction of corporal injury than he did for subsequently committing assault with a firearm and making criminal threats. The first event occurred when Morales-Smith forced his way through Carina's front door and she tried to eject him from her house; a struggle ensued during which he bit her on the finger and scratched her arms. At this point, Morales-Smith had committed infliction of corporal injury (count 2). The second event occurred when Morales-Smith grabbed Carina by the neck, pushed her down onto the couch, got on top of her, put the gun to her head and said, "If you don't talk to me right, I'm going to kill you." At this point, Morales-Smith had committed the crimes of assault with a firearm and making criminal threats (count 3 and count 7). Thus, there was substantial evidence Morales-Smith committed count 2 in order to gain access to Carina's house, and then committed counts 3 and 7 in an attempt to force her to treat him with more respect in the future. However, count 7 should have been stayed pursuant to section 654 because putting the gun to Carina's head was part and parcel of threatening her.

Alternatively, even if there had been only one continuous course of conduct, multiple punishment was not precluded by section 654 because the offenses were divisible in time. That is, Morales-Smith had already injured Carina by the time he pushed her onto the couch, put the gun to her head, and threatened her. He had an opportunity to reflect on his actions before pulling out a deadly weapon and using it to try and coerce more compliant behavior from her in the future.

"[A] course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11; see *People v. Felix* (2001) 92 Cal.App.4th 905, 915 ["multiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm"].) Thus, in *People v. Trotter* (1992) 7 Cal.App.4th 363, multiple assault sentences were proper where the defendant fired three gunshots in slightly more than a minute at a pursuing police officer during a freeway chase: "[T]his was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible," and "[d]efendant's conduct became more egregious with each successive shot." (*Id*. at p. 368.) The same was true here. After forcing his way into Carina's house, during which Morales-Smith committed acts of violence against her, he subsequently threw her onto the couch, got on top of her, bit her again, put the gun to her head and threatened her. Count 7 still should have been stayed, because Morales-Smith simultaneously put the gun to Carina's head and verbally threatened her, but he was properly sentenced on count 2 and count 3.

Hence, viewing the evidence in the light most favorable to the prosecution, we must affirm the separate sentences for counts 2 and 3. The judgment shall be modified, however, by staying the two-year term imposed on count 7.

3. *Convictions on lesser included offenses must be vacated.*

Morales-Smith was convicted of both felony evasion of a peace officer (Veh. Code, § 2800.2) and misdemeanor evasion (Veh. Code, § 2800.1). He was also convicted of both possession of methamphetamine for sale (Health & Saf. Code, § 11378) and simple possession of methamphetamine (Health & Saf. Code, § 11377). Morales-Smith contends, and the Attorney General properly concedes, that this amounted to an improper conviction for both greater and lesser included offenses.

"In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.' [Citations.] But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses. [Citations.] [¶] In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether ' " 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' " [Citation.]' [Citation.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034; see *People v. Sanchez* (2001) 24 Cal.4th 983, 987, disapproved on other grounds by *People v. Reed* (2006) 38 Cal.4th 1224, 1228 [defendant "cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act"].)

Vehicle Code section 2800.1 is a lesser included offense of Vehicle Code section 2800.2. (*People v. Springfield* (1993) 13 Cal.App.4th 1674, 1680 ["The only distinction between the two crimes is that in committing the greater offense the defendant drives the pursued vehicle 'in a willful or wanton disregard for the safety of persons or property.' "].) Similarly, simple possession of a controlled substance is a necessarily lesser included offense of possession of a controlled substance for sale. (*People v. Magana* (1990) 218 Cal.App.3d 951, 954.)

Morales-Smith's convictions on these two lesser included offenses must be vacated.

DISPOSITION

The sentence on count 7 is ordered stayed pursuant to section 654. The convictions for violating Health and Safety Code section 11377, and Vehicle Code section 2800.1, are vacated. As modified, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.