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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ANTONIO ATAYDE,

Defendant and Appellant.

B257053

(Los Angeles County

Super. Ct. No. BA421775)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Henry J. Hall, Judge. Affirmed.

Craig C. Kling, under appointment by the Court of Appeal; California  
Appellate Project, Jonathan B. Steiner and Lisa Ferreira, for Defendant and  
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Lance E. Winters, Senior Assistant Attorney General, James  
William Bilderback and Robert C. Schneider, Deputy Attorneys General, for  
Plaintiff and Respondent.

In the underlying action, appellant Jorge Antonio Atayde was convicted of inflicting corporal injury on a cohabitant, making criminal threats, and dissuading a witness. The trial court imposed enhancements for personal use of a knife on the count for inflicting corporal injury on a cohabitant and the count for making criminal threats, identified the former as the principal count, and ordered consecutive terms on the remaining counts. Appellant contends the imposition of a separate knife use enhancement on the criminal threats count contravened Penal Code section 654.<sup>1</sup> We reject that contention, and affirm.

### **RELEVANT PROCEDURAL HISTORY**

In March 2014, an information was filed, alleging that appellant engaged in three offenses against L.A. on February 17, 2014. The information charged appellant in count 1 with inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)), in count 2 with making criminal threats (§ 422, subd. (a)), and in count 3 with dissuading a witness by force or threat (§ 136.1, subd. (c)(1)). Accompanying count 1 was an allegation that appellant personally inflicted great bodily injury on L.A. (§ 12022.7, subd. (e)); accompanying counts 1 and 2 were allegations that he personally used a kitchen knife in the commission of the offenses (§ 12022, subd. (b)(1)). Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty as charged, and found the special allegations to be true. The trial court imposed a sentence totaling 12 years in prison. This appeal followed.

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L.A.1

All further statutory citations are to the Penal Code.

## FACTS

### *A. Prosecution Evidence*

L.A. and appellant were married in 1990. Throughout the marriage, appellant engaged in abusive conduct toward L.A. In the early 2000's, she lived for a period in a woman's shelter with their two children, Ashley and George Atayde. In March 2001, L.A. obtained a restraining order against appellant. On more than six other occasions, appellant inflicted physical injuries on L.A. that she did not report to the police. In 2007 or 2008, they were divorced. After the divorce, L.A. decided to resume a relationship with appellant when she learned she had a brain tumor, and realized her children required his financial support.

Regarding the incident underlying the charges against appellant, L.A. testified as follows: On February 17, 2014, at approximately 3:00 p.m., appellant picked her up at her place of employment and drove her to their home. Appellant's breath smelled of alcohol. He yelled at L.A. and accused her of sleeping with someone from her church, which she denied. When they arrived, appellant said he had to go the market, and left. After an hour, he phoned her, called her a bitch, and said that he "had something" for her.

When appellant returned home, L.A. was in the kitchen preparing food. He accused her of being unfaithful, and yelled three or four times that he was going to kill her. While continuously threatening to kill her, he began to hit her with his hand. He shoved her head against a counter, and then repeatedly struck her forehead with his cell phone. His blows shattered the cell phone. Appellant's conduct scared L.A. and caused pain in her face and neck.

Appellant pushed L.A. against the refrigerator, and she felt a sharp hot pain in her stomach. When L.A. experienced a second such pain, she saw that appellant was stabbing her with a kitchen knife. Appellant repeatedly accused

L.A. of being unfaithful, and alternated threats to kill her with declarations of love for her. After he stabbed her a third time, she tried to escape, but appellant grabbed her by the head, dragged her to their son's bedroom, and pushed her head against the door. Appellant then forced her inside the bedroom.

In the bedroom, L.A.'s mind "went blank." When she regained consciousness, she went to a nearby bathroom and locked the door. Outside the bathroom, appellant continued to yell at her, and made many threats. He said that he was going to kill her, and that if she said anything to anybody he was "going to finish what he had started." According to L.A., he threatened that if she reported the incident to her children, he would not give her money for their daughter's school, and that if she "call[ed] the cops," he would kill her.

L.A. remained in the bathroom for approximately two hours. She texted her children that she loved them. At some point, appellant knocked on the door, asked why she was in the bathroom, and said that he had made dinner. When "everything was quiet," she left the bathroom, discovered that appellant was asleep, and cleaned the kitchen in order to conceal the incident from their son. She found a bloody knife under the kitchen sink and washed the blood from it. The following day, when her daughter returned from school, L.A. discussed the incident, but asked her to say nothing regarding it. Four days later, when her wounds became infected, she reported the incident to the police.

George Atayde testified that although he was not present during the incident, he noticed damage to his bedroom door and scratches on appellant's face. Appellant said that a dog had scratched him. Later, after discovering pieces of appellant's cell phone under the kitchen stove, George confronted appellant, who denied any misconduct.

Ashley Atayde testified that on the date of the incident, she was attending an out-of-state college, and received a text message from L.A. stating, “Don’t ever forget that . . . I never stopped loving you.” The following day, L.A. described the incident to Ashley, who decided to return home to help her.

### *B. Defense Evidence*

Appellant testified that on February 17, 2014, L.A. appeared to be upset when he picked her up at her place of employment. After they arrived, he saw her standing near the door of their son’s bedroom. L.A. said she had fainted and hit her arm against the bedroom door. She then told appellant to “get out of [her] life,” smashed his phone on the ground, and hit his face with her hand. Appellant left the house for approximately two hours. When he returned, L.A. said her medicine was causing hallucinations. Appellant denied any misconduct on that day, but acknowledged that he had pleaded no contest to prior charges of domestic violence upon L.A. and to violating a restraining order she had obtained against him.

## **DISCUSSION**

Appellant contends that the imposition of a separate knife use enhancement (§ 12022, subd. (b)(1)) on his conviction for making criminal threats contravened section 654.<sup>2</sup> For the reasons discussed below, we disagree.<sup>3</sup>

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<sup>2</sup> Subdivision (b)(1) of section 12022 provides: “A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.”

<sup>3</sup> Although appellant raised no objection under section 654 when the trial court imposed the enhancement, he may properly assert his contention on appeal. (*People v.* (Fn. continued on next page.)

### A. Sentencing

In sentencing appellant to a total term of 12 years, the trial court selected count 1 (infliction of corporal injury on a cohabitant) as the principal count, imposed the upper term of four years, and added a five-year great bodily injury enhancement (§ 12022.7, subd. (e)) and a one-year knife use enhancement (§ 12022, subd. (b)(1)). On count 2 (criminal threats) the court imposed a consecutive term of eight months (one-third the middle term), plus a four-month knife use enhancement (§ 12022, subd. (b)(1)) (one-third the enhancement); in addition, on count 3 (dissuading a witness), the court imposed a consecutive one-year term (one-third the middle term). In imposing the knife use enhancement on the criminal threats count, the court stated: “[T]he knife was used in a separate event here, [in] that the knife [was] used to threaten the victim in addition to the stabbing that was involved in count one.”

Appellant maintains that section 654 barred imposition of a separate knife use enhancement on the criminal threats count, in addition to the knife use enhancement on the count for corporal injury to a cohabitant. He argues that “[his] actions in the kitchen of stabbing and threatening [L.A.] were part of a single indivisible course of conduct” governed by a single intent and objective, namely, to “dominate and control [her].”

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*McCoy* (2012) 208 Cal.App.4th 1333, 1338.) As that contention focuses exclusively on the propriety of the enhancement relating to the criminal threats count, he has forfeited all other contentions of error regarding that count, including any challenge to the imposition of separate punishment for the substantive offense. Moreover, for the reasons discussed below, we would reject such a challenge had it been asserted.

## B. *Section 654*

We begin by examining the application of section 654 to multiple enhancements of the same type on two substantive offenses. Subdivision (a) of section 654 prohibits multiple punishment for “[a]n act or omission that is punishable in different ways by different provisions of law . . . .” Generally, when several counts are properly subject to section 654, a court must identify the count carrying the longest sentence, including enhancements, and stay the sentence imposed under the other pertinent counts. (*People v. Kramer* (2002) 29 Cal.4th 720, 722.) Thus, “[i]f . . . a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed.” (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) However, multiple punishment is proper if the defendant pursues suitably independent criminal objectives. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1473-1474.) “Whether the defendant held ‘multiple criminal objectives is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it.’ [Citations.]” (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1218.)

### 1. *Offenses Involving a Course of Conduct*

Here, counts 1 and 2, which underlie the knife use enhancements, implicate a course of conduct. The test governing the application of section 654 to such offenses was first stated in *Neal v. State of California* (1960) 55 Cal.2d 11, overruled in part in *People v. Correa* (2012) 54 Cal.4th 331, 334: “‘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.”” (*Neal v. State of California, supra*, 55 Cal.2d at p. 19.) However, “[i]f he 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* (1973) 8 Cal.3d 625, 637, 639.)

## 2. *Enhancements*

We next examine the application of section 654 to enhancements. In *People v. Ahmed* (2011) 53 Cal.4th 156, 161-164 (*Ahmed*), our Supreme Court addressed the propriety of imposing separate unstayed punishments for multiple enhancements to a single charged offense. There, the defendant shot his girlfriend in the stomach, and was convicted of assault with a firearm. (*Id.* at p. 160.) The trial court imposed a gun use enhancement (§ 12022.5, subd. (a)) and a great bodily injury enhancement (§ 12022.7, subd. (e)) on the offense. (*Ahmed, supra*, 53 Cal.4th at p. 160.) The issue presented to the Supreme Court was whether section 654 permitted the imposition of the two enhancements on the defendant’s conviction for assault with a firearm, which arose from a single act, viz., the shooting of his girlfriend. (*Ahmed, supra*, at p. 160.)

The court noted that when applying enhancements that ““go to the nature of the offense,”” such as weapons use enhancements, a court should first examine the pertinent sentencing statutes, which may themselves resolve whether the imposition of multiple enhancements on a single offense is permissible. (*Ahmed, supra*, 53 Cal.4th at pp. 161-163.) If those statutes do not provide an answer, then section 654 governs the issue. (*Ahmed, supra*, at p. 163.) After examining the



language and legislative history of the relevant enhancement statutes, the court concluded that subdivisions (f) and (g) of section 1170.1 were “intended to permit the sentencing court to impose both one weapon enhancement and one great-bodily-injury enhancement for *all* crimes.” (*Ahmed, supra*, at p. 168.)

In *People v. Wooten* (2013) 214 Cal.App.4th 121, 130 (*Wooten*), the appellate court confronted a question *Ahmed* “did not address,” viz., the propriety of “impos[ing] of multiple sentence enhancements for separate substantive offenses.” There, the defendant was convicted, inter alia, of forcible oral copulation and attempted murder, and the jury found true allegations as to each count that the defendant had inflicted great bodily injury. (*Id.* at pp. 127-128.) The evidence at trial showed that the defendant forcibly entered the victim’s motel room, punched and choked her, dragged her into the bathroom and sexually assaulted her. (*Id.* at p. 133.) After the victim attempted to escape, the defendant bit and repeatedly kicked her in the head, inflicting life-threatening injuries. (*Id.* at pp. 125, 126, 133.) The trial court imposed separate enhancements for great bodily injury (§§ 12022.7, 12022.8) on each of the convictions for forcible oral copulation and attempted murder. (*Wooten, supra*, at p. 124.)

On appeal, the defendant argued that one of the enhancements should have been stayed under 654, because they arose from a single indivisible course of conduct. In rejecting that contention, the appellate court noted that although *Ahmed* did not examine the imposition of enhancements on separate crimes, virtually every decision that had limited enhancements under section 654 had done so in the context of a single crime against a single victim. (*Wooten, supra*, 214 Cal.App.4th at p. 130.) The court concluded that section 654 does not bar enhancements on separate offenses, stating: “When the criminal acts forming the basis for convictions of multiple substantive offenses are divisible . . . then section

654 has been held inapplicable. [Citation].) Thus, it follows that if section 654 does not bar punishment for two crimes, then it cannot bar punishment for the same enhancements attached to those separate substantive offenses.” (*Wooten*, *supra*, at p. 130.) The court expressly rejected the defendant’s contention that the assault constituted an indivisible course of conduct, noting that he engaged in separate attacks with separate purposes. (*Id.* at p. 133.) Accordingly, the court upheld imposition of a separate great bodily injury enhancement for each offense. (*Ibid.*)

### C. Analysis

We turn to the trial court’s imposition of a separate knife use enhancement on appellant’s conviction for making criminal threats. In sentencing appellant, the trial court effectively determined that appellant’s infliction of corporal injury on L.A. and his criminal threats constituted separately punishable offenses. Specifically, the court found that each of the three counts relied on “separate acts,” a finding that appellant does not expressly challenge on appeal. Additionally, the court found that appellant’s knife use relating to the criminal threats was a “separate event” from the stabbings underlying the infliction of corporal injury. We see no error in those determinations.<sup>4</sup>

Like the defendant in *Wooten*, appellant argues that the conduct underlying the enhancement -- here, his use of a knife -- was part of an indivisible course of conduct prompted by the single intent to “dominate and control his wife.” We disagree. We note initially that the record supports the trial court’s determination

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<sup>4</sup> In view of that conclusion, it is unnecessary to address respondent’s contention that section 12022, subdivision (b)(1), establishes an exception to section 654 applicable to the circumstances presented here.

that the offenses were divisible, as it discloses that appellant's criminal threats were intended to create fear, and that his physical attacks were intended to cause pain and injury. The incident began in the kitchen, when appellant threatened several times to kill L.A. before he attacked her physically, and he continued making such threats after stabbing her. The continuous pattern of threats establishes his intent to create fear in L.A. Interspersed among those threats, however, were several violent acts: appellant hit her with his hands, shoved her into a counter, smashed his cell phone against her head, stabbed her three times, and pushed her into a door. Those acts are reasonably viewed as reflecting a different intent and purpose, namely, the infliction of pain and injury. Accordingly, appellant's offenses were properly subject to separate punishment.<sup>5</sup>

Moreover, the record supports the trial court's imposition of separate knife use enhancements for inflicting corporal injury on a spouse and making criminal threats, as it establishes that each enhancement related to a distinctive aspect of the underlying offense. The enhancement on the corporal injury conviction reflected a particular aspect of his violent attacks, namely, that appellant caused injury by means of a knife. In contrast, the enhancement on the criminal threats conviction reflected a particular aspect of that crime, namely, that appellant openly held a knife while threatening L.A.

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<sup>5</sup> Appellant suggests that the intent or intents underlying his crimes of inflicting corporal injury on a spouse and making criminal threats must be determined solely from the acts underlying those crimes, which he argues are, respectively, the three stabbings and the threats he made while L.A. saw his knife. We disagree. Generally, the intent underlying a crime is properly inferred from all the circumstances of the case, regardless of whether they constituted criminal conduct. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 888 ["Intent is rarely susceptible of direct proof and must usually be inferred from a consideration of all the facts and circumstances shown by the evidence."].) Accordingly, we may examine all of appellant's conduct in identifying his intentions.

Appellant's reliance on *People v. Wynn* (2010) 184 Cal.App.4th 1210 (*Wynn*) and *People v. Reeves* (2001) 91 Cal.App.4th 14 (*Reeves*) is misplaced. In *Wynn*, the defendant left a convenience store with a carton of cigarettes he had not purchased. (*Wynn, supra*, 184 Cal.App.4th at p. 1213.) When a store guard confronted him in the parking lot, the defendant threw the carton to the ground, denied that he had stolen it, and began swinging a nunchaku. (*Ibid.*) It took several guards to subdue the defendant, some of whom suffered physical injuries. (*Ibid.*) After the defendant was convicted of burglary and several counts of assault with a deadly weapon, the trial court imposed a weapon use enhancement (§ 12022, subd. (b)(1)) on the burglary conviction, and ordered consecutive punishment for the offenses. (*Wynn, supra*, at p. 1214.)

On appeal, the defendant contended that section 654 precluded separate punishment for the substantive offense of burglary and the imposition of a separate weapon use enhancement on that offense. (*Wynn, supra*, 184 Cal.App.4th at p. 1214.) The appellate court held that separate punishment was properly imposed on the burglary because it was divisible from the assaults with a deadly weapon, concluding that the offenses reflected different intents and purposes. (*Id.* at pp. 1215-1216.) The court nonetheless held that section 654 barred the separate weapon use enhancement on the burglary count because the enhancement “was based on the same indivisible course of conduct as the assaults with a deadly weapons counts . . . .” (*Wynn, supra*, at p. 1221.)

*Wynn* is factually distinguishable. There, the People conceded that, in fact, the defendant made no personal use of the nunchaku until he assaulted the guards. (*Wynn, supra*, 184 Cal.App.4th at p. 1218.) In contrast, appellant used the knife

while inflicting corporal injury and while making criminal threats, albeit in a different manner in connection with each offense.<sup>6</sup>

*Reeves*, which also predates *Ahmed*, is similarly distinguishable. There, the defendant entered his victim's apartment and attacked her, causing physical injury. (*Reeves, supra*, 91 Cal.App.4th at pp. 22-23.) After the defendant was convicted of burglary and assault with force likely to cause bodily injury, the trial court imposed enhancements for great bodily injury on both counts (§ 12022.7), and ordered consecutive punishments for the offenses. (*Reeves, supra*, at pp. 54-55.) On appeal, the appellant raised no challenge under section 654 to the separate punishments for substantive offenses, but contended that one of the great bodily injury enhancements should be stayed. (*Reeves, supra*, at pp. 54-55.) The appellate court agreed, concluding that both enhancements attached to a single assault on a single victim, which was not "divisible." (*Id.* at pp. 56-57.) As noted in *Wooten*, *Reeves* thus stands for the proposition that "multiple enhancements for great bodily injury may not be premised on an indivisible assault . . . ." (*Wooten, supra*, 214 Cal.App.4th at p. 131.) However, as explained above, the enhancements at issue here attach to distinct aspects of separate offenses. Accordingly, the trial court did not err in imposing a separate knife use enhancement on appellant's conviction for making criminal threats.

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<sup>6</sup> The continuing vitality of *Wynn* is questionable. As explained in *People v. Calderon* (2013) 214 Cal.App.4th 656, "*Wynn*'s analysis is not tenable in light of *Ahmed*[,] . . . [which] teaches that because enhancements are different from substantive crimes, section 654 bars multiple punishment only for the same aspect of the criminal act." (*Id.* at p. 667, fn. omitted.)

**DISPOSITION**

The judgment is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.