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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY RAY McCOY,

Defendant and Appellant.

B269960

(Los Angeles County
Super. Ct. No. BA432459)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed as modified.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Esther P. Kim, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Johnny Ray McCoy in count 1 of evading an officer (Veh. Code, § 2800.2, subd. (a)), in count 2 of child endangerment (Pen. Code, § 273a, subd. (a)),¹ and in counts 3 and 4 of misdemeanor hit and run (Veh. Code, § 20002, subd. (a)). The trial court sentenced defendant to the low term of 2 years in state prison for child endangerment, a concurrent low term of 16 months for evading an officer, and two concurrent terms of 6 months in county jail for the misdemeanor hit and run offenses.

Defendant contends the trial court erred by imposing concurrent sentences in counts 1 and 2, rather than staying sentence for evading an officer in count 1 pursuant to section 654. We modify the judgment to reflect that defendant's 16-month sentence in count 1 is stayed. We affirm the judgment as modified.

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

FACTS

Prosecution

On December 5, 2014, police officers activated the lights and siren in their patrol car after observing defendant driving a vehicle with expired license plates. Defendant failed to pull over, and instead led the officers on a seven-minute car chase. During the chase, defendant committed numerous traffic violations. The chase culminated with defendant's vehicle hitting two other vehicles on an off-ramp of the freeway after traveling at excessive speeds. Witnesses saw defendant exit the driver's side of the vehicle and flee the scene. A young woman exited the passenger side of the vehicle with a little girl who was approximately four or five years old, and ran in the opposite direction.

Defendant was apprehended. He told the officers he was taking medication, and then began shaking as if he was experiencing convulsions. A paramedic who responded to the scene believed defendant was having an anxiety or panic attack. Officers found a child seat and toys in the back seat of the vehicle, along with more toys and clothing for a small girl in the trunk. They also discovered medical paperwork for a minor, K. M., signed by a Maria Saldana.

Defense

Defendant testified he was alone in the car. He had been driving himself to the hospital because he felt like he was having a panic attack. He evaded the police because of his medical condition. He believed they were trying to kill him. Defendant admitted to hitting the two cars on the off-ramp, and admitted that if there had been a child in the car he would have been placing the child in danger. He denied that he had a daughter named K. M. or a girlfriend named Maria Saldana.

Defendant's treating psychiatrist, Imran Hassan, testified that he had diagnosed defendant with moderate to severe PTSD, with symptoms including anxiety and panic attacks. Defendant told Hassan that a social worker had told him his ex-girlfriend was planning to sue him for child support, but defendant did not believe the child was his. He had no contact with his ex-girlfriend for three years. Hassan did not go into the subject any more deeply with defendant, because he specialized in PTSD, and defendant's condition was his concern.

Rebuttal

Officer Ian Ward testified that defendant told him Saldana was his girlfriend, and that his daughter lived with her.

DISCUSSION

Defendant contends the trial court was statutorily required to stay the 16-month sentence for evading an officer pursuant to section 654, which prohibits multiple punishments for a single act.² We agree.

Section 654, subdivision (a), 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.” “In *Neal v. State of California* (1960) 55 Cal.2d 11, this court construed the statute broadly: “Section 654 has been applied not only where there was but one ‘act’ in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.” [Citation.] [¶] Whether *a course of criminal conduct* is divisible and therefore gives rise to more than one act within

² “This question of whether the trial court acted in excess of its jurisdiction by failing to stay execution of a sentence under section 654 is not waived by failure to raise it below. (See *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; see also *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6 [claim that sentence is unauthorized may be raised for first time on appeal].)” (*People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1013, fn.15.)

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.’ (*Id.* at p. 19, italics added.)” (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

“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.” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) “When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) ‘A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.’ (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)” (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

The Attorney General posits that “the record supports a reasonable inference that [defendant] harbored a separate and distinct intent and objective in endangering K. M., separate and apart from the evading count, because: 1) he wanted to scare Saldana into ‘finally’^[3] tell [*sic*] him the

³ The Attorney General appears to be quoting the prosecutor’s language rather than defendant’s testimony.

truth of whether or not he was K. M.'s father; 2) he was upset he was not K. M.'s father; or 3) he wanted to get back at Saldana for lying to him."

The bases for this theory are defendant's psychiatrist's testimony regarding stress in defendant's life, and defendant's testimony in response to a single question posed by the prosecutor. On cross-examination, the prosecutor questioned defendant's psychiatrist as follows:

"[Prosecutor]: And at some point during that treatment towards the end of January 2015 he told you he was experiencing even more stressors than he had before; right?

"[Psychiatrist]: Right.

"[Prosecutor]: And that included a legal situation in which his ex-girlfriend was suing him for child support and DCFS was involved?

"[Psychiatrist]: He told me that particular thing for the first time during his visit with me on 29th of January, 2015 that's when he told me about that. And he told me the first time about the legal -- sorry -- about the police related event, he told me the first time on 29th of December, 2014.

"[Prosecutor]: "So that's -- in addition to telling you he had an ex-girlfriend and a child, does that in and of itself then cause panic attacks? He sees his ex-girlfriend or child from that point on will he have panic attacks because that's included in that panoply of stressors?

"[Psychiatrist]: Could you clarify the question again, I didn't understand fully.

“[Prosecutor]: Sure. You know, I’ll just end on this. He told you he had an exgirlfriend who was suing him for child support; right?

“[Psychiatrist]: Yes.”

Later on redirect examination, defense counsel followed up on this line of questioning:

“[Defense Counsel]: All right. You mentioned that a woman was suing [defendant] for paternity money from DCFS; is that correct?

“[Psychiatrist]: He told me -- what he told me and what I wrote was that a DCFS social worker told him that his ex-girlfriend was claiming that she had a child from him and that he had not been paying child support. He told me that he was unaware of that and he did not have any contact with the ex-girlfriend in three years. That’s all he told me.

“[Defense Counsel]: Okay. So a girlfriend told a social worker told [defendant] told you?

“[Psychiatrist]: Right. And I -- since it’s not a part of PTSD, so I didn’t really go much into this topic because it’s not my area of expertise.

“[Defense Counsel]: All right. Did he ever discuss with you DCFS contacting him about their department wanting to take this child away from its mother because of the incident he’s being charged with, evading the police?

“[Psychiatrist]: He did not mention anything like that. This is -- I don’t know anything about it.

“[Defense Counsel]: Did he ever tell you that he had been ordered to pay child support to anyone?

“[Psychiatrist]: I don’t think he told me he was already ordered to pay.

“[Defense Counsel]: Did he ever tell you that he ever even had to go to court over this?

“[Psychiatrist]: Yes, I think so. I mean, I think he’s dealing with -- that’s what he has always told me that he’s dealing with two issues; one is the police arrest and one is the topic of child support topic. I don’t know the details.

“[Defense Counsel]: But -- okay. You don’t know the details?

“[Psychiatrist]: No.

“[Defense Counsel]: All right. Did he ever tell you that he had a child?

“[Psychiatrist]: He told me that he -- like I said that he -- what he told me -- the thing is I don’t go into these kind of questions because they’re unrelated to me, but when he told me the first time and pretty much the only time when I wrote in my note that he told me about it was he said that he was not aware that he had a -- that he did not think he had - - indeed had a child with that girl.”

During cross-examination of defendant, the prosecutor inquired as to whether defendant and Saldana had a conversation about K. M. following the car chase:

“[Prosecutor]: So what happened is Maria Saldana told you you had a child together, after you took them on this high speed chase, she finally told you [K. M.] is not your child?

“[Defendant]: I never -- I was not aware of none of that.”

The Attorney General’s reading of the transcript is untenable. Our own understanding gleaned from these passages is that a month after the incident at issue, defendant told his treating psychiatrist that a social worker called to notify him that an unnamed ex-girlfriend whom he had not seen in three years was suing him for child support of an unnamed child of an unknown age and gender, of whom defendant had been previously unaware. Defendant was distressed by this event, in part because he did not believe the child was his, and in part because of the court proceedings related to it. Defendant was not aware that he ever had a conversation with Saldana after the chase regarding whether or not K. M. was his child.⁴

The theory that defendant mistakenly believed he was the father of Saldana’s child, K. M., and that Saldana told him he was not K. M.’s father during the car chase causing him to purposely endanger K. M., is speculation without basis in the record. In the absence of any evidence that defendant had some separate reason to endanger K. M.,

⁴ The Attorney General does not mention Officer Ward’s testimony that defendant told him Saldana was his girlfriend at the time of the chase and that his daughter lived with Saldana. This evidence does not change our view of the evidence, however, as it establishes only that Saldana was defendant’s current girlfriend and that his child lived with her, not that Saldana was the aforementioned ex-girlfriend who was suing him for child support.

there is not substantial evidence to support an implied ruling that defendant harbored separate objectives with respect to the evading and child endangerment offenses. The two charges are based on a single course of conduct. There was simply no evidence adduced at trial from which it could be reasonably inferred that defendant had the additional objective of endangering the child passenger when he led police on the car chase in an attempt to evade them.

The appropriate remedy is to stay punishment on the count carrying the lesser punishment. (*People v. Deloza* (1998) 18 Cal.4th 585, 591–592.) We thus modify the judgment by staying defendant’s 16-month sentence in count 1.

DISPOSITION

The judgment is ordered modified to reflect that defendant's 16-month sentence in count 1 is stayed pursuant to section 654, the stay to become permanent upon completion of the sentence in count 2. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.