

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY DAVID BECERRA,

Defendant and Appellant.

B277403

(Los Angeles County
Super. Ct. No. NA077776)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Reversed in part and modified with directions.

Ann Haberfelde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

I. PROCEDURAL HISTORY

Appellant Anthony David Becerra (Becerra) was convicted in 2008 of assault with a firearm (Pen. Code,¹ § 245) (count 1), making a criminal threat (§ 422) (count 3), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) (count 4) and possession of a smoking device (Health & Saf. Code, § 11364, subd. (a)) (count 5). He was sentenced as follows: 25 years to life on count 1; 25 years to life on count 3; 25 years to life on count 4; and a term of six months on count 5.² All of these terms were ordered to run consecutive to each other. In addition, he was sentenced to a term of 10 years pursuant to section 12022.5, subdivision (a) (use of a firearm) and a term of five years pursuant to section 667, subdivision (a) (prior serious felony conviction), both of which were ordered to run consecutive to each other and all counts. Finally, a one-year term was imposed under section 667.5, subdivision (b) and stayed. The total sentence was 90 years to life. On January 7, 2010, Becerra's convictions were affirmed by Division Five of this court in a non-published opinion, B212042; however, the sentence was modified to add another five-year term pursuant to section 667, subdivision (a)(1). It also directed the trial court to strike rather than stay the one-year section 667.5, subdivision (b) enhancement.

In February 2015, Becerra filed a petition for resentencing pursuant to section 1170.126, commonly referred to as Proposition 36, and under section 1170.18, commonly referred to as Proposition 47. On February 27, 2015, the Proposition 36

¹ Further statutory references are to the Penal Code except where otherwise noted.

² Count 2 was dismissed before trial.

petition was denied based on the trial court's view that appellant was not eligible for relief because one of the counts of conviction (count 3) was for a serious felony. However, on March 19, 2015, the trial court issued an order to show cause why relief should not be granted under Proposition 47 and granted several extensions of time to allow respondent to file its opposition.³ In a non-published opinion filed on December 18, 2015, B263874, Division Five reversed the order denying the Proposition 36 petition and directed the trial court to resentence Becerra only on count 4 unless it determined that doing so would pose an unreasonable risk of danger to public safety. In a comprehensive written order, the trial court later found that resentencing Becerra on that count was appropriate and eventually conducted a resentencing hearing and hearing on the Proposition 47 petition on August 1, 2016.

Prior to that hearing, at the trial court's request, the parties briefed the issue of whether the court should stay count 3 pursuant to section 654. After substantial argument on this point, the trial court ultimately stated that it did not have jurisdiction to consider the 654 matter in light of the wording of the opinion mentioned above⁴ The trial court then recalled,

³ It appears these extensions were granted so that Becerra could seek review of the trial court's denial of the Proposition 36 petition.

⁴ The last paragraph of that opinion read: "The order denying the resentencing petition in its entirety is reversed in one respect. Upon remittitur issuance, the trial court shall resentence defendant on his methamphetamine possession conviction unless it determines that resentencing him would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd.

vacated, and set aside the 25 years to life sentence on count 4 and resentenced Becerra on that count as a misdemeanor to 364 days to be served concurrently with counts 1 and 3. The Proposition 36 petition regarding count 4 was dismissed as moot.

In this appeal, Becerra argues it was error not to stay his sentence for making a criminal threat (count 3) under section 654 because the assault with a firearm and the criminal threat reflected a single intent and objective. The parties now agree Becerra properly raised this argument in connection with his Proposition 47 petition. We also agree the trial court had jurisdiction to resolve the section 654 issue. (See *People v. Mendoza* (2016) 5 Cal.App.5th 535, 538 [trial court granting Proposition 47 relief “may reconsider any component underlying the sentence”]; *People v. Roach* (2016) 247 Cal.App.4th 178, 185 [trial court has authority to reconsider all sentencing choices upon resentencing].) We conclude the trial court should have stayed Becerra’s count 3 sentence for making a criminal threat.

II. DISCUSSION

We have taken judicial notice of the record on appeal from the judgment. The facts are undisputed. The victim, Rameka Levin, and Becerra’s girlfriend, Martha Marquez, were roommates. Marquez told Levin that Becerra had been hitting her. Marquez wanted Levin “to be there for her.” According to Levin, Becerra’s presence in the house “was a problem for other people in the house.” Levin arrived home one day and learned Becerra was in the house. Levin entered Marquez’s bedroom

(f.) The order denying the resentencing petition is affirmed in all other respects.”

after inquiring, “What is [Becerra] doing here?” Becerra exited a closet, took four to six steps toward Levin, placed a gun to her left temple and said: “Shh. Don’t say anything or you know what I’ll do.” Levin’s girlfriend, Vanessa Ballesteros, was standing outside Marquez’s partially open bedroom door. Levin testified Becerra could not see Ballesteros standing there. Ballesteros heard defendant say, “Don’t or you know what I’ll do to you.” Both Levin and Ballesteros had seen Becerra with a gun prior to this incident.

The judge who presided over the trial sentenced Becerra to separate terms for assault with a firearm and making a criminal threat and did so without considering section 654. As mentioned above, the trial court was not convinced it had jurisdiction to rule on the application of section 654 at the August 1, 2016, Proposition 47 hearing. When, as here, a court does not make an express finding as to the application of section 654, we deem it to have made an implied finding. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

Because the facts are undisputed, we review de novo the trial court’s implied determination section 654 did not bar multiple punishment. (*People v. Corpening* (2016) 2 Cal.5th 307, 312; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) We apply a two-step inquiry: first, were defendant’s crimes, assault with a firearm and making a criminal threat, completed by a single physical act; and second, if not, did the defendant’s course of conduct reflect a single intent and objective or multiple intents and objectives. (*People v. Corpening, supra*, 2 Cal.5th at pp. 311-312.) If Becerra’s crimes were completed by a single physical act, he may not be punished more than once for that act. (*Id.* at p.

311.) Further, if there were two or more physical acts, i.e., a course of conduct, but only a single intent and objective, Becerra also may not be punished more than once. (*Id.* at pp. 311-312.)

There were two physical acts in this case—placing the gun at Levin’s temple and saying the words that constituted the criminal threat. However, the undisputed evidence was that Becerra assaulted Levin with a firearm and threatened her with a single intent and objective—to dissuade her from objecting to his presence and making it known to others.

The Attorney General argues: “The assault . . . was directed solely at Levin. [Citation.] However, in uttering his threat, [Becerra’s] objective was to instill fear throughout the house, as the evidence showed that ‘others did not want him there.’” The evidence does not support the argument. There was no evidence Becerra spoke the threatening words in a voice loud enough for people “throughout the house” to hear it. In fact, he preceded his threat with the word, “Shh,” which suggests he spoke quietly. He did not want Levin to alert others to his presence. Ballesteros heard the threat only because she was standing right outside the bedroom door.

III. DISPOSITION

The order on Becerra’s Proposition 47 petition is reversed in part, and his sentence is modified to stay execution of the sentence on count 3, making a criminal threat, pursuant to Penal Code section 654. On remand, the superior court is to prepare an

amended abstract of judgment and deliver a copy to the
Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

PERLUSS, P.J.

SEGAL, J.

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