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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.

LUIS ORTEGA,

Defendant and Appellant.

B275292

(Los Angeles County
Super. Ct. No. BA442150)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed as Modified.

G. Martin Velez, 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, Assistant Attorney General, Jason Tran and Amanda V. Lopez, Deputy Attorneys General, for Plaintiff and Respondent.

On November 29, 2015, defendant Luis Ortega held his live-in girlfriend, Sara L., and their three children (at the time of trial, 13-year-old M., 11-year-old O., and 8-year-old N.) hostage in their house on Normandie in Los Angeles at knifepoint, turned on the gas burners of the stove, and would not let anyone leave. Sara and the children were rescued by responding police officers and defendant was arrested. A jury convicted defendant of one count of criminal threats against Sara (count 1; Pen. Code, § 422, subd. (a)),¹ four counts of false imprisonment by violence (counts 2-5; § 236) with use of a knife (§ 12022, subd. (b)(1)) as to Sara and the children, and three counts of child abuse as to the children (counts 6-8; § 273a, subd. (a)). The trial court sentenced defendant to 7 years and 4 months in state prison.

On appeal from the judgment, defendant contends that the evidence is insufficient to support his conviction of making a criminal threat against Sara, and that section 654 requires that the sentence on counts 3 through 5 (false imprisonment of the children) be stayed. We disagree with these contentions. Respondent notes that the abstract of judgment must be corrected in certain particulars. We agree, and so order. As modified, we affirm the judgment.

¹ All undesignated section references are to the Penal Code.

BACKGROUND

Sara's Testimony

Sara and the children testified at trial. In her testimony, Sara minimized the incident in various particulars, including whether defendant used a knife and threatened to kill the family.

She testified that around 11:30 a.m. on the date of the incident, defendant accused her of infidelity based on a text message she received. They argued for about 10 minutes without raising their voices. Sara told defendant she thought defendant had sent the text messages and that if defendant did not believe her they should separate. Defendant said he would kill himself and turned on four burners of the gas stove. Sara threatened to call the police and leave with the children, who were asleep in a bedroom with the door closed. She tried to turn off the burners, but defendant told her not to do so. She denied that defendant touched her (though at the preliminary hearing she testified that defendant had grabbed her hand).

Sara yelled for M. to call the police. O. opened the bedroom door and Sara could see that N. was crying. Sara smelled gas and was concerned that the house would explode. She tried to leave with the children; at the preliminary hearing she testified that defendant placed his hand out to prevent her from walking out of the kitchen. She then took N. to an open window to help him breathe. Sara called 911 from the bathroom, whispering so that the children would not hear and because she thought defendant might get angry. She made the call because defendant had turned on the stove and also because she

thought he was going to kill himself with a knife. She denied that defendant threatened her or said he was going to kill the family.

When police officers arrived, there was a delay in the front door being opened because Sara was with N., who was still having difficulty breathing. When the door opened, police officers directed Sara and the children outside.

After leaving the house, Sara spoke to Los Angeles Police Officer Hugo Chavez, who responded to the 911 radio broadcast with his partner, Officer Joseph Raviol. At trial, she denied telling a version of events in which: (1) defendant told her to tell him if she was cheating or they would all die; (2) defendant threatened to blow them all up and kill the entire family; (3) defendant walked towards her with a knife every time she went near the stove to turn off the gas; (4) defendant pushed her against a wall; (5) she tried to leave several times but defendant stood at the front door holding a knife; and (6) defendant had piled furniture in the living room to start a fire faster (at trial she claimed it was stacked there because they were going to discard it).

On December 3, 2015, Sara (as well as the children) was interviewed by Los Angeles Police Officer Ronnesha Hunter. At trial, Sara testified that she told Officer Hunter that defendant had turned on the gas in order to kill himself, and that defendant was trying to harm himself, and not her or the children. She denied saying defendant stood near the door with a knife.

911 Calls

Sara made three 911 calls from the bathroom. A recording of the calls was played for the jury, and a transcript provided.

In the first call, which began at 11:25 a.m. and 48 seconds and terminated at 11:27 and 48 seconds, Sara did not speak to the operator, and simply left the line open. In the background, she could be heard telling defendant, “let us out,” and calling to M. to call the police. Defendant could be heard asking if she admitted to being with another man, and Sara could be heard saying, “Yes, and that’s it!” There was a child crying in the background as well as unidentified screaming.

The second call began at 11:28 a.m. and 8 seconds and terminated in 10 seconds without Sara speaking. The third call began at 11:28 a.m. and 38 seconds. In this call, Sara spoke to the operator and gave the address. Asked who was yelling and making the children cry, Sara said it was her husband, and that he “has a knife right now and he says that if you guys come, he’s gonna kill himself.” She said nothing else to the operator. As a radio call was broadcast, there was crying and screaming in the background. The line was open until the call was terminated at 11:39 and 28 seconds, after responding officers had entered the house.

Officer Vasquez’ Testimony

In his trial testimony, Officer Vasquez impeached the version of events Sara gave at trial on several points. According to Officer Vasquez, Officer Raviol knocked on the front door of the apartment (both officers had their guns drawn). After two to three minutes, Sara

opened the door and ran outside crying and yelling. Officer Vasquez saw defendant in the living room and ordered him to exit the residence with his hands up, but defendant retreated into the kitchen. Vasquez then entered the apartment, and defendant complied. Officer Vasquez observed a knife in the kitchen, but did not see defendant armed with it.

When Officer Vasquez spoke to Sara, she told him that she was afraid because for the past three days, defendant had threatened to kill her, the family, and himself. Sara explained that defendant told her she better tell him if she was cheating on him or they were all going to die. He turned on the gas burners of the stove, and they were on for about 30 minutes before the officers arrived. Defendant pinned Sara against a wall, and later placed her in a headlock. When she tried to turn off the gas, he picked up a knife and stopped her. Defendant placed furniture in the center of the living room to help ignite the apartment. He threatened to blow up the house and kill the family if she called the police. Sara attempted to leave the house several times, but defendant either blocked the door or prevented her from getting to the door. Sara told Officer Vasquez that she was in fear as a result of appellant's threat to kill her and the family. Sara said that when the officers knocked on the door, defendant was standing at the door holding a knife.

Officer Hunter's Testimony

Officer Hunter, who interviewed Sara on December 3, 2015, also impeached Sara's trial testimony. According to Officer Hunter, Sara

told her defendant said he would not let Sara leave until she told him with whom she was cheating. Defendant also told Sara that she had better say who you are cheating with or “we” are all going to die. He threatened to kill himself if she contacted the police. However, Officer Hunter also testified that Sara said defendant was only trying to harm himself and never stood near the door with a knife.

M.’s Testimony and Her Statements to Officer Raviol

M., who was 13 years old at the time of trial, testified that she woke up because her brothers O. and N. were crying. She closed the bedroom door, and heard Sara ask to let the children out. Defendant said no. Sara told M. to get dressed. M. went to the bathroom and heard N. say, as he held his throat, that he could not breathe. Sara then put N. by the window. Sara asked again to let the children out, but defendant said no.

Called as a defense witness, Officer Raviol testified that he spoke to the children at the scene. M. told him she and her brothers were locked in the bedroom. M. heard her parents fighting and defendant did not want them to leave.

O.’s Testimony

O., who was 11 years old at the time of trial, testified that he was asleep in the bedroom when he was awakened by his parents screaming. He went to the bathroom and smelled gas coming from the stove. He heard Sara ask defendant to turn off the gas. When he did not, Sara did so.

O. saw defendant with a knife, holding it with his left hand outward at 45 degrees next to his side. While holding it, defendant asked Sara, “who were you texting?” Sara did not answer, walked into the bedroom, and called 911.

N.’ Testimony and His Statements to Officer Hunter

N., who was 8 years old at the time of trial, testified that he was asleep in the bedroom when he heard his brother O. crying. He became scared and began to cry also. Sara took him to a window. Before police officers arrived, N. did not see anything happen between his parents. He recalled speaking to police officers, but he did not remember what he said.

N. told Officer Hunter that defendant turned on the gas and did not let the family leave. N. said he could not breathe and that O. was able to breathe because he was holding his breath. Also, N. demonstrated how defendant would not let them leave the residence by extending his arms at chest level and saying they could not go.

DISCUSSION

I. Sufficiency of the Evidence

The threat supporting count 1 (making a criminal threat against Sara in violation of § 422) was based on Sara’s extrajudicial statement to Officer Vasquez that defendant threatened to blow up the house and kill the family. On appeal, defendant contends that the evidence is insufficient to support the conviction, because Sara testified that defendant did not make any such threat (he only said he would kill

himself), and her extrajudicial statements (which she repudiated at trial) are inadequate evidence to support a conviction as a matter of law. He relies on *In re Miguel L.* (1982) 32 Cal.3d 100, 107 (*Miguel L.*), which held that an uncorroborated extrajudicial statement by an accomplice is insufficient to support a conviction.

Defendant's reliance on *Miguel L.* is misplaced. First, as the California Supreme Court has observed, the "legal premise [of *Miguel L.*] may have evaporated, at least partly" (*People v. Williams* (1997) 16 Cal.4th 153, 248), because the decision was based on *People v. Gould* (1960) 54 Cal.2d 621, which held that an extrajudicial identification not confirmed at trial is insufficient to support a conviction. But after *Miguel L.* was decided, *Gould* was overruled in *People v. Cuevas* (1995) 12 Cal.4th 252, 274-275, which held that whether the evidence is insufficient to support a conviction must be judged by the substantial evidence test.

Second, in any event, Sara was not defendant's accomplice, so whatever precedential value *Miguel L.* retains, it does not apply here. Third, even if *Miguel L.* applied to the present case, there was a wealth of evidence corroborating Sara's extrajudicial statement that defendant threatened to blow up the house and kill Sara and the children. We need not recount it all, but suffice it to say that defendant does not dispute the sufficiency of the evidence to support his convictions of falsely imprisoning Sara and the children with use of a knife. Of course, he kept them in the house at knifepoint, refusing to let them leave, after he turned on four burners of the gas stove and while gas

was filling the residence, so much so that N. had to be taken to the window to breathe. Moreover, furniture had been piled in the living room, and even Sara herself admitted at trial she feared that the apartment would blow up. On this evidence, the notion that defendant threatened only to kill himself, and not to kill Sara and the children as well by causing the house to explode, would require the jury to be blind to the obvious: Sara's extrajudicial statement that he threatened to kill himself and his family was the only rational explanation of the incident. Without doubt, judged under the substantial evidence standard (reviewing the whole record in the light most favorable to the judgment, and drawing all reasonable inferences in support (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206-1207), the evidence was sufficient to support defendant's conviction of making a criminal threat against Sara.

II. *Section 654*

On counts 3 through 5, defendant was convicted of false imprisonment by violence of the three children, and on counts 6 through 8 he was convicted of child abuse of the three children. At the sentencing hearing, the prosecutor argued that defendant's intent and objective in the false imprisonment counts was separate from his intent and objective in the child abuse counts. That is, the endangering conduct underlying the child abuse counts was defendant's turning on the gas burners of the stove and filling the house with gas, causing N. to have difficulty breathing and exposing the other children to the risk of great bodily harm from inhaling gas. The false imprisonment counts

were based on defendant's preventing the children from leaving. Therefore, according to the prosecutor, section 654 did not apply to preclude punishment on both sets of convictions. The trial court agreed, finding that "the intents are different as it relates to the false imprisonment" and that there was "different behavior."

In sentencing defendant to 7 years, 4 months in state prison, the court selected count 8 (child abuse against N.) as the base term, and imposed the midterm of 4 years. As to each of counts 6 and 7 (child abuse against M. and O., respectively), the court imposed consecutive terms of one-third the midterm, or 1 year, 4 months. As to count 1 (criminal threat against Sara) the court imposed one-third the midterm of 2 years, or 8 months. As to each of count 2 (false imprisonment of Sara) and counts 3 through 5 (false imprisonment of M., O., and N., respectively), the court imposed a term of 2 years, plus 1 year for use of a knife, and ordered them to run concurrent.

On appeal, defendant contends that in light of the sentences imposed on counts 6 through 8 (child abuse against the children), section 654 required the court to impose and stay the sentences on counts 3 through 5 (false imprisonment of the children), rather than run them concurrent. We disagree.

"[S]ection 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 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.] By contrast, ‘If [the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he [or she] 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.’ [Citation.]” (*People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414-1415.) We review the trial court’s finding of multiple intents and objectives – whether express or implied – under the substantial evidence test. (*Id.* at p. 1415.)

Here, substantial evidence supports the conclusion that the basis of the child abuse counts was defendant’s criminal negligence in endangering the children’s health by exposing them to accumulating natural gas in the house. The intent and objective of the false imprisonment of the children (refusing to let them leave after he turned on the gas) was arguably different – to coerce Sara into admitting her infidelity, and later (after the police arrived) to prevent the children from talking to the police. On the record presented, we conclude that the trial court could rationally find that the false imprisonment and child abuse counts were not part of an indivisible transaction sharing a single objective, but rather divisible crimes based on separate and independent objectives. Therefore, section 654 did not preclude the court from sentencing on the false imprisonment counts in addition to the child abuse counts.

III. *Errors in the Abstract of Judgment*

Respondent notes that the abstract of judgment contains two clerical errors. The court imposed identical consecutive sentences of 1 year and 4 months for both counts 6 and 7. However, the abstract of judgment does not include a sentence for count 7, and lists a sentence for count 6 twice. Also, the sentence of 4 years for count 8 is inaccurately characterized as the upper term sentence, rather than the mid-term. To cure these clerical errors, we order the abstract of judgment corrected to reflect a consecutive sentence of 1 year, 4 months for both counts 6 and 7, and to state that the 4-year sentence on count 8 is the midterm. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [“Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts. [Citations.]”].)

DISPOSITION

The clerk of the superior court is ordered to amend the abstract of judgment to reflect a consecutive sentence of 1 year, 4 months for both counts 6 and 7, and to state that the 4-year sentence on count 8 is the midterm. The clerk shall mail a copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.