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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN KUNIO
HENDERSON,

Defendant and Appellant.

2d Crim. No.B275751
(Super. Ct. No. 1492577)
(Santa Barbara County)

A jury found Shawn Kunio Henderson guilty of kidnapping (Pen. Code, § 207, subd. (a)¹; count 1), criminal threats (§ 422; count 2), misdemeanor battery (§§ 242, 243, subd (a); count 3), unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count 5), and attempt to dissuade a witness (§ 136.1, subd. (a)(2); count 6). The trial court found Henderson suffered a prior serious or violent felony conviction within the meaning of the

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

“Three Strikes” law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court sentenced Henderson to a total of 20 years 4 months in prison. We affirm.

FACTS

Paulisa Fields was homeless and living in her van in Santa Barbara when she met Henderson in August 2015. Henderson’s anger made the relationship difficult. No later than August 12, 2015, the couple had broken up and gotten back together twice.

On the evening of August 13, 2015, the couple was parked in Fields’s van at the beach. Fields was in front and Henderson was in back. They got into an argument. Henderson grabbed Fields by her neck and threw her in back. Henderson got in front and began to drive away, yelling at Fields to close the side doors.

Henderson told Fields to take off her clothes. She complied. Throughout the ride Fields asked Henderson to stop so she could leave the van. Henderson refused. During the ride Henderson told Fields he was going to teach her a lesson and threatened to kill her.

When they arrived at the home of a mutual friend, James Lewis, Henderson told Fields to get dressed. They got out of the van and walked towards Lewis who was outside. Fields mouthed to Lewis to help her. But Lewis told her to go with Henderson.

Henderson grabbed Fields and threw her in the back of the van. He threatened to kill her if she said anything. He told her to take off her clothes. He drove about eight blocks and parked against some dense bushes. Fields was unable to leave the van because the bushes were too thick. She asked Henderson to let her go, but he refused. She tried to call 911, but Henderson grabbed the phone from her.

Fields slept in the van that night. When she awoke the next morning, Henderson was having sex with her. She was afraid if she protested he would kill her.

Thereafter Henderson started driving the van. Fields asked if they could stop for some coffee. Henderson stopped at a gas station. Inside the mini-mart, Fields asked the clerks to call 911. She went into the bathroom, locked the door and called 911 herself. Henderson went to the bathroom door and yelled at her and threatened her. Then he got in Fields's van and drove away, leaving Fields in the bathroom.

When the police arrived, Fields told them that Henderson had kidnapped her and held her against her will. The police took Fields to the police station and photographed her injuries.

On August 14, 2015, Santa Barbara Police Officer Chad Hunt telephoned Henderson. Henderson told Hunt that he and Fields picked up Fields's drug dealer in the van early that morning. They stopped at a gas station. When Fields went inside, her drug dealer drove off with Henderson still in the van.

Henderson kept the van for four days. During that time he called Fields. He admitted he took the van and said he was traveling in a number of states. Eventually he told her she could pick up the van in Ventura.

Fields took the bus to Ventura. She met Henderson in a parking lot. He gave her the keys to the van. Fields called 911 to tell the police she recovered her van, but Henderson grabbed her cell phone and told the police he returned the van. While Fields waited for the police, Henderson left.

After Fields recovered her van, she resumed her relationship with Henderson. She still had feelings for him and she was afraid to be alone because she was homeless.

On August 19, 2015, Hunt spoke with Henderson on the phone. Henderson denied that he had stolen the van. He said he had Fields's permission to use it. Henderson also denied that he threatened to kill Fields, that he had been violent or that he told Fields to take off her clothes.

A few days later Henderson and Fields spent the night together. Henderson became aggressive and refused to leave. The next morning Fields drove Henderson to the store to get some beer. When Henderson got out of the van, Fields drove away. Later that day Fields saw Henderson on a bicycle. When Henderson saw her, he went in front of the van, causing Fields to slam on the brakes. Henderson threw the bicycle under the van, jumped on the driver's side step and banged his head on the window. A police officer saw what occurred and arrested Henderson.

Henderson called Fields while he was incarcerated awaiting trial. The calls were recorded. Henderson tried to convince Fields not to testify against him. Henderson told her: "I'm not influencing your decision in – in any way shape or form but you know legally if you felt under duress and felt threatened by Detective Hunt into makin' the statement that you did you do not have to show up in court . . ."; "[I]f you don't show up it would greatly help my cause"; "[I]f you don't show up, I didn't face my accuser, charges will be dropped and I'm leavin' the state"; "You are allowed to say I exercise my right to my fifth amendment, which means that you don't have to answer any questions."

Defense

On August 23, 2015, Fields called Erik Ventura, a licensed bail bond agent. She asked Ventura about the charges against Henderson and the possibility of bail. She also asked Ventura to

talk to Henderson, relay a message for her and to put her on Henderson's visitor's list.

DISCUSSION

I

Henderson contends the trial court erred in denying his motion for a mistrial.

During the prosecution's direct examination of Fields, the following colloquy took place:

"Q. But at some point you reconnected with [Henderson] after talking to the police, the Ventura police; is that right?

"A. Yes.

"Q. How did that happen?

"A. The – there was probably five or six officers that arrived. They were asking me different sets of questions. When they finally left, I took – I kind of took a moment to try and compose myself, probably five or ten minutes I'd been sitting there, and Shawn appeared at my window.

"Q. So he came back?

"A. Yes.

"Q. What happened after that?

"A. He was – he was crying. He said that he – this would be a third strike for him and that he would go to jail for the rest of his life.

"[Defense Counsel]: Objection. Lacks foundation. Motions in limine.

"The Court: Sustained. So the answer about – this last answer is stricken. You're not to consider it, not at this time or at any time through the course of the trial, including deliberations. There is no foundation. Speculation."

After the presentation of the evidence, Henderson moved for a mistrial on the ground that Fields's reference to a third strike and life in prison was incurably prejudicial. The trial court denied the motion, concluding that the admonition it gave was sufficient to cure any prejudice. The court offered to further instruct the jury reminding it not to consider punishment and confirming that this is not a Three Strikes case. Henderson declined the offer of further instruction.

A mistrial must be granted only when the risk of prejudice is incurable by admonition or instruction. (*People v. Elliott* (2012) 53 Cal.4th 535, 583.) The trial court is vested with considerable discretion in determining whether a particular incident is incurably prejudicial and in ruling on a mistrial motion. (*People v. Collins* (2010) 49 Cal.4th 175, 198.)

Here the trial court told the jury that the offending answer is stricken and admonished the jury not to consider it. The court also gave the general instruction that the jury could not consider any evidence stricken by the court. (CALCRIM No. 222.) The brief reference to a third strike and life in prison was not so egregious as to be incurable by instruction.

We presume the jurors understood and followed all the instructions. (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 148.) There is nothing in the record to rebut that presumption. The trial court did not abuse its discretion in denying Henderson's motion for a mistrial.

II

Henderson contends the trial court abused its discretion in denying his motion to strike his prior conviction.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, our Supreme Court held that the trial court retains the inherent

power to strike a prior conviction in the interest of justice in spite of language to the contrary in the Three Strikes law. In ruling on a *Romero* motion, the trial court must consider whether in light of the defendant's prior and current serious or violent felony convictions and the particulars of his background, character and prospects, the defendant may be deemed outside the three strikes scheme's spirit. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Here the trial court granted Henderson's *Romero* motion as to count 2, criminal threats. But the court denied the motion as to all other counts.

In denying the motion, the trial court took into account all of the appropriate circumstances. Henderson had a 1991 conviction for robbery; his extensive history of criminality dates back to the time he was 20 or 21; there was a period of 10 years when he was not in the criminal justice system, but he resumed committing crimes in 2011; of his current convictions, three are serious or violent felonies. The court also took into account the emotional and psychological impact that Henderson's current offenses have had and will continue to have on Fields.

Henderson's sentence is well within the spirit of the Three Strikes law. The trial court did not abuse its discretion.

III

Henderson contends the trial court erred in concluding that a full-term consecutive sentence on count 6, attempt to dissuade a witness, is mandatory.

On count 6 the trial court imposed a consecutive two year midterm doubled to four years pursuant to the Three Strikes law. The court stated, "The Legislature has mandated that be a fully consecutive sentence"

Absent an express statutory provision to the contrary, the trial court has the discretion to impose either consecutive or concurrent terms. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1262.) But the People correctly point out that a consecutive sentence is mandated by section 667, subdivision (c)(6). That subdivision provides: “If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count” (*Ibid.*)

Count 6, attempt to dissuade a witness, was the only offense Henderson committed while he was in custody. Thus Henderson concedes that it was not committed on the same occasion as any other felony. Henderson argues, however, that count 6 would not have occurred but for the other felonies. Thus he concludes it arose from the same set of operative facts.

But the ““same set of operative facts”” refers to the “facts of a case which prove the underlying [current charged offense].” (*People v. Lawrence* (2000) 24 Cal.4th 219, 231.) The operative facts of count 6 were Henderson’s entreaties to Fields not to testify. That set of operative facts is not the same as the operative facts of any other felonies.

The trial court correctly concluded that a consecutive sentence is mandatory.

IV

Henderson contends the trial court erred in imposing a concurrent term on count 2, criminal threats. He argues the court should have stayed the sentence pursuant to section 654.

The trial court struck the prior strike as to count 2 and sentenced Henderson to the midterm of two years to run concurrently with the 10 year term for count 1, kidnapping. In so

sentencing Henderson, the court acknowledged that the kidnapping and criminal threats were two separate crimes and that one could have occurred without the other, Nevertheless, the court stated the criminal threats were “pretty intimately related to the kidnap.”

Section 654 prohibits multiple punishments for conduct that violates more than one statute but constitutes an indivisible transaction. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Whether the conduct constitutes a single act or separate acts is a factual matter for the trial court to determine. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.)

Here the trial court could reasonably conclude that the kidnapping and criminal threats were separate acts. The kidnapping was complete when Henderson threw Fields in the back of the van and drove away. Fields continually asked Henderson to let her out of the van, but he refused. No threats were necessary to facilitate the kidnapping. The court could reasonably conclude the threats were nothing more than gratuitous psychological violence.

The cases Henderson relies on are distinguishable. In *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346, the defendant was convicted of making a terrorist threat and dissuading a witness. The parties agreed that both convictions arose from the same act. The Court of Appeal concluded section 654 applies. Here the kidnapping and threats are separate acts.

In *People v. Logan* (1953) 41 Cal.2d 279, 290, the defendant struck the victim on her head to facilitate a robbery. Our Supreme Court determined that the assault and robbery constituted a single, individual transaction. Thus the defendant could not be punished for both offenses. Here the trial court

could reasonably conclude the kidnapping and threats were separate transactions.

V

Henderson contends the trial court erred in imposing a second strike sentence on count 5, unlawful driving or taking of a vehicle.

Henderson points out that the information alleged second strike enhancements as to counts 1, 2 and 6, but not as to count 5. He asserts the failure to plead a second strike enhancement as to count 5 makes a second strike sentence on that count an unauthorized sentence.

Henderson acknowledges his argument was rejected in *People v. Morales* (2003) 106 Cal.App.4th 445 (*Morales*). In *Morales*, the information charged the defendant with three counts of felony child molesting, but alleged a Three Strikes enhancement only as to count 2. At sentencing, the trial court doubled the term on count 2, but refused to double the subordinate terms on counts 1 and 3. The Court of Appeal reversed.

The appellate court said the Three Strikes enhancement describes the offender rather than the offense. (*Morales, supra*, 106 Cal.App.4th at p. 455.) In order for a recidivist sentencing to apply, all that is necessary is that the defendant previously had been convicted of a violent felony. (*Ibid.*) “Fairly construed, sections 667 and 1170.12 require enhanced sentencing once a prior violent felony conviction has been pled and found to be true, unless the court dismisses the prior conviction finding pursuant to section 1385, subdivision (a).” (*Id.* at p. 456.)

Henderson attempts to distinguish *Morales* on the ground that there the original amended information alleged a strike

prior with respect to each individual count. But that is not the basis on which *Morales* was decided. *Morales* was decided on the plain language of sections 667 and 1170.12. Those sections require only that the prior strike conviction be pled and proved. They do not require that a prior strike conviction be alleged for each individual count.

The judgment is affirmed.

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GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

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