Filed 3/15/17 In re E.H. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re E.H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B275683 (Super. Ct. No. FJ53336) (Los Angeles County)
THE PEOPLE, Plaintiff and Respondent, v. E.H., Defendant and Appellant.	

E.H., a minor born in September 1999, was declared a ward of the juvenile court in January 2016, for attempting to rob another youngster of a cell phone. (Pen. Code, §§ 211/664; Welf. & Inst. Code, § 602.)[1] E.H. was placed on home probation, on condition that he not commit any new crimes.

[1] Unlabeled statutory references are to the Penal Code.

While E.H. was on probation, a new petition was filed. The current felony charges against him are second degree robbery and making criminal threats. (§§ 211/212.5, 422.)[2] The juvenile court sustained the petition in June 2016. E.H. was removed from parental custody and placed in a camp community program for five to seven months, with a maximum confinement of six years, four months.

Substantial evidence supports the juvenile court's findings, and section 654 does not bar multiple punishments for violent crimes committed against two victims. We affirm the judgment.

FACTS

Twelve-year-old Rico C. and 11-year-old Brendan H. were on their way to a restaurant in Los Angeles the afternoon of May 10, 2016. Rico recounted that "two black males came up to me and threatened to beat me up, tried to go into my pockets and take my phone. They held me down for about a minute or so and . . . one put [his] leg . . . on my neck and the other was holding my friend back from doing anything." Rico and Brendan identified the perpetrators, in court, as E.H. and his cohort Dante.[3]

Rico testified that the assailants demanded his phone and said, "'we're going to beat you up if you don't [give it up].'" Rico refused, thinking they were just "playing around," until Dante "used force to push me onto the ground, off of the bike that I was riding." Dante put his knee on Rico's neck, as Rico lay on the ground. E.H. moved next to Brendan and "was threatening him and telling him that if he intervened, he would beat him up,"

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[2] The court dismissed a third count of resisting arrest.

[3] Dante is not a party to this appeal.

according to Rico. Rico testified that E.H.'s exact words were "'If you get involved, I'll beat you up.'"

Rico was not physically injured, either from being pushed to the ground or having a knee against his throat, but described himself as "scared at one point." Rico saw E.H. make a step toward him, and heard E.H. threaten Brendan.

E.H. prevented Brendan from aiding Rico. Brendan said E.H. "threatened me, if I go over and help, he gonna 'F' me up." The threat stopped Brendan, who was scared for Rico and scared for himself. Brendan wanted to do something, but did not act because he believed E.H.'s threat. Brendan testified that E.H. helped Dante, by pushing Rico's hands down while Dante put his leg on Rico's neck, to pin him to the ground and get the phone.

Dante removed a cell phone from Rico's pocket and demanded the password. Just then, a car drove by and the assailants ran away with the phone. The victims called the police.

The police arrived and began a foot pursuit. Nearby citizens pointed to a bush, where an officer found E.H. lying on the ground a few feet from a cell phone. E.H. waived his *Miranda*[4] rights. He admitted that he was on probation, and claimed that he and Dante were walking to a bus stop when Dante handed him a phone, which E.H. pocketed. When the police arrived, "he ran because he thought he would be in trouble for something." Rico recovered his phone from the police.

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[4] (*Miranda* v. *Arizona* (1966) 384 U.S. 436.)

DISCUSSION

1. Substantial Evidence Shows that E.H. Made Criminal Threats

A conviction for making criminal threats requires (1) a threat to cause death or great bodily injury, (2) that is so unequivocal, unconditional, immediate and specific, on its face and under the circumstances, as to convey a gravity of purpose and immediate prospect of execution, (3) the specific intent that it be taken as a threat, even if there is no intention to actually carry it out, (4) causing the threatened person to reasonably feel in sustained fear for his safety. (§ 422, subd. (a); *People v. Toledo* (2001) 26 Cal.4th 221, 227-228.) We review the record in the light most favorable to the judgment, to determine if any substantial evidence supports the findings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.)

E.H. argues that Brendan did not feel sustained fear. The victims testified that the threats lasted three to five minutes. During that period, Brendan felt scared for Rico and scared for himself. Brendan was afraid to do anything because he believed E.H.'s threats of harm if he acted.

A threat must be examined in context, "on its face and under the circumstances in which it is made" to determine whether it is a true threat, and not hyperbole. (§ 422; *People v. Bolin* (1998) 18 Cal.4th 297, 339-340.) Here, we have 11- and 12-year-old victims confronted by 16-year-old aggressors. The older boys not only threatened to beat up the victims, but backed up their words with actions. Rico was forced from his bicycle onto the ground and a knee was put on his throat. Brendan saw E.H. join the fray, pinning Rico's hands to the ground to enable his companion to rifle Rico's pockets. Both victims heard E.H. threaten to harm Brendan if he tried to help Rico.

"'Sustained fear' refers to a state of mind," so that even 40 seconds of fear from a threat on one's life, as shown on a security videotape, qualifies as "sustained." (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348-1349.) Fear is "sustained" if it "extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156; *People v. Culbert* (2013) 218 Cal.App.4th 184, 190.) This Court recently held that sustained fear arose from a defendant's two-word telephone call—saying "You're dead"—that caused the victim to feel his life was at risk and more scared than he had ever been; the victim later took unspecified "extra precautions" at work. (*People v. Orloff* (2016) 2 Cal.App.5th 947, 952-954.)

E.H.'s threats had credibility and immediacy, when viewed in the context of the violence then being committed against Rico. By contrast, no criminal threat arises when an angry student says to a teacher, "I'm going to get you," without displaying any aggression or making specific threats to beat up the teacher, who feels a momentary fear for his safety. (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1135, 1139-1140.)

Under the circumstances, given the violence used for three to five minutes and the age difference between E.H. and the victims, there is sufficient evidence to establish that the threat was unequivocal, immediate, specific, and reasonably caused Brendan to be in sustained, immobilizing fear for his safety during the entire encounter, which was of sufficient length that it was not momentary, fleeting or transitory.

2. Imposition of Multiple Punishments Is Allowed

At sentencing, the juvenile court stated that the base term is five years for the robbery. It added eight months for the prior attempted robbery and eight months for making criminal

threats. Defense counsel agreed, "[b]ecause it's one-third the mid-term." The court replied, "Correct. So it's six years, four months," prompting defense counsel to say, "Thank you, your Honor."

E.H. contends that the court erred in determining the maximum term of confinement, and should have stayed the eight-month term for making criminal threats under section 654. His claim was not forfeited, despite defense counsel's acquiescence, because the question of whether the lower court acted in excess of its jurisdiction by failing to stay execution of a sentence under section 654 may be raised for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Bui* (2011) 192 Cal.App.4th 1002, 1013, fn. 15; *People v. Le* (2006) 136 Cal.App.4th 925, 931.)

Double punishment cannot be imposed for an act that violates multiple criminal statutes, if the defendant's course of conduct is indivisible and incident to the same intent and objective; this ensures that the punishment is commensurate with the defendant's culpability. (§ 654; *People v. Correa* (2012) 54 Cal.4th 331, 341; *People v. Jones* (2012) 54 Cal.4th 350, 358 ["Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law"].)

Section 654 does not apply, and separate punishments may be imposed, for each crime of violence *committed against different victims*, even if the defendant "entertains a single principal objective during an indivisible course of conduct[.]" (*People v. Andrews* (1989) 49 Cal.3d 200, 225; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.)

E.H. was charged in count one with robbing Rico C., and in count two of making criminal threats against Brendan H.

These are crimes of violence. (*People v. Champion* (1995) 9 Cal.4th 879, 935 ["Robbery is violent conduct warranting separate punishment for the injury inflicted" on each victim]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1023-1024 ["a violation of section 422 constitutes an act of violence against the person within the meaning of the multiple-victim exception to section 654."].) Because E.H. committed crimes of violence against two individuals, he may be separately punished for each crime, as he concedes in his reply brief on appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Robin Miller Sloan, Judge
Superior Court County of Los Angeles

Torres & Torres, Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Analee J. Brodie, Deputy Attorney General, for Plaintiff and Respondent.