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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. RAUL AGUILAR, Defendant and Appellant.	B171870 (Los Angeles County Super. Ct. No. BA251556)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Modified and affirmed.

Sandra Uribe, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal, Raul Aguilar claims the trial court should have instructed on theft as a lesser included offense to robbery, and should have given a unanimity instruction as to the charge of making criminal threats. He also claims the consecutive sentence for making criminal threats should have been stayed pursuant to Penal Code[1] section 654, and in supplemental briefing, attacks his upper term sentence as violating *Blakely v. Washington* (2004) 124 S. Ct. 2531. We remand for resentencing, and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Nora Lopez and appellant were romantically involved and lived together from November 2002 to January 2003. They were no longer together when, on the evening of August 5, 2003, appellant came to her door. Appellant told her he wanted to come in because he wanted to get back together with her. She said no. Then appellant said, "'You knew I was going to come back to kill you.'" Ms. Lopez took this threat seriously and was frightened. Ms. Lopez tried to close the apartment door, but appellant pushed his way inside. He pushed Ms. Lopez on her chest, kicked her, and hit her on the shoulder. He told her he was not going to let her be free, that he was going to kill her.

Appellant told Ms. Lopez to give him whatever money she had. She told him she only had ten dollars. She walked over to the closet to get the money and gave it to him. He threw the bills down and demanded more: "If you don't give me more money, you're going to see what's going to happen to you." Appellant hit Ms. Lopez twice on the mouth, then punched her three times on the head. He went to the kitchen and returned with a knife. He threatened to kill Ms. Lopez if she did not give him more money, and made a slicing gesture back and forth across her neck with the knife, then pointed it at her stomach.

Appellant left the room and Ms. Lopez ran out of the apartment to ask her neighbor, Maria Mota, for help. She was crying and her mouth was bleeding. Ms. Lopez

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

called her children, who were outside playing, and they all entered Ms. Mota's apartment. Ms. Mota called the police, who arrived a few minutes later.

After speaking with Ms. Lopez, the police went to her apartment and told appellant to come out. When he came out, Officer Grasso noticed that he smelled of alcohol, his eyes were bloodshot, and he had difficulty with his balance. Officer Grasso searched appellant and found bus tokens, food stamps, a gold earring, a quarter, and two $5 bills in his pocket. These items were all missing from Ms. Lopez's purse, which was found emptied on the apartment floor.

Appellant was arrested and charged with first degree residential robbery (count 1), first degree burglary (count 2), corporal injury to a cohabitant (count 3), assault with a deadly weapon (count 4), and making criminal threats (count 5). As to counts 1, 3 and 5, it was alleged that he personally used a weapon, and as to count 3, it was alleged that he had a prior assault conviction. Appellant was convicted on all five counts, the personal use allegations were found true, and he admitted the prior conviction. He was sentenced to the upper term on count 1, with a one-year enhancement for the weapon use, and one-third the midterm on counts 3 and 5. Punishment on counts 2 and 4 and the enhancements on counts 3 and 5 were stayed. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims the court erred in refusing to instruct the jury on theft as a lesser included offense of robbery. Because theft includes the same elements as robbery, with the exception of the use of force or fear, it is a lesser included offense of robbery. (*People v. Ortega* (1998) 19 Cal.4th 686, 694.) Instruction on this lesser offense would have been required if the evidence raised a question as to whether all of the elements of the greater offense were present, but not where there was no evidence that the offense was less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Thus, in *People v. Turner* (1990) 50 Cal.3d 668, 690, evidence that the defendant killed in response to the victim's advances, and only afterward decided to take property, was held to be substantial evidence that the defendant did not steal by means of force or fear. On that evidence, the court held the jury should have been instructed on theft as a lesser included offense of robbery.

Appellant argues the evidence in this case similarly supported a finding that he used force for reasons unrelated to theft -- domestic abuse--and only afterward decided to take advantage of the situation by demanding money from Ms. Lopez. To support this argument, appellant attempts to explain away his first demand for money: "When appellant initially demanded money from Lopez and she gave it to him, he had no weapon and he made no threats related to his quest for money." Appellant may not have used a weapon at the time of this first demand, but he did use both force and threats -- he pushed his way into the apartment, pushed Ms. Lopez on the chest, kicked her, and hit her on the shoulder before demanding the money. When she handed him the two $5 bills, he threatened her: "If you don't give me more money, you're going to see what's going to happen to you." Then he hit her on the mouth and head.

This evidence shows that appellant's demand for money was accompanied by the use of force and fear, not that theft was a separate unrelated crime. The fact that he took possession of the property after Ms. Lopez ran out of the apartment does not change this fact -- the robbery was in motion at that point. There was no evidence that appellant's crime was less than robbery; an instruction on theft as a lesser included offense was neither appropriate nor required.

II

Appellant contends the court should have given a unanimity instruction on the charge of making criminal threats. We disagree. "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.] A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." (*People v. Maury* (2003) 30 Cal.4th 342, 422-423.)

In this case, appellant made a number of threats. At the door, when Ms. Lopez said she did not want to go back to her relationship with appellant, he said, "You knew I was going to come back to kill you." After appellant pushed his way into the apartment and hit Ms. Lopez, he told her he was not going to let her be free, that he was going to kill her. He demanded money, and when she only had ten dollars to give him, he said, "If you don't give me more money, you're going to see what's going to happen to you." Appellant left the room and returned holding a knife. He asked if Ms. Lopez had the money, and said if she did not, he was going to kill her. At that point, he made a slicing motion back and forth across her neck with the knife. Then he pointed the knife at her stomach.

These statements were all made in a short period of time, interrupted only briefly while appellant went into the kitchen and obtained a knife. The prosecutor treated the statements as just one threat. He argued that appellant threatened Ms. Lopez "numerous times, that he was going to kill her numerous times, what he was going to do to her if she came to court, if she told the police, if she didn't give him money. For a variety of ways, the defendant threatened her numerous times. He was going to kill her. He meant it to be a threat, and she took it as a threat, and it caused her to be fearful."

Appellant's defense was the same as to all the statements -- he lacked the specific intent to commit the crime, Ms. Lopez lacked credibility, and she was motivated by anger and jealousy. Under these circumstances, there was no danger the jury could have found appellant was guilty of making one threat but not another. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1199.) A unanimity instruction was not required.

Even if a unanimity instruction should have been given, any error was harmless beyond a reasonable doubt. The jury found true the allegation that appellant used a knife in the commission of the offense. From this, we can determine that all jurors agreed appellant was guilty of making a criminal threat when he told Ms. Lopez he would kill her if she did not give him more money and then made a slicing motion with the knife back and forth across her neck and pointed the knife at her stomach. Appellant was not deprived of his right to a unanimous jury verdict on count 5.

III

The court imposed sentences on count 1 (robbery), count 3 (corporal injury to a cohabitant) and count 5 (criminal threats). The court stayed sentences on count 2 (burglary) and count 4 (assault with a deadly weapon) pursuant to section 654. Appellant claims section 654 required the trial court to stay the consecutive eight-month sentence on the criminal threats conviction. We agree.

Section 654 precludes a court from imposing multiple punishment where a defendant engages in a course of conduct that violates more than one statute and comprises an indivisible transaction punishable under more than one statute. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The critical question is whether the defendant acted pursuant to a single intent and objective; if so, the defendant may only be punished for one of the offenses. (*Ibid*.) In *People v. Britt* (2004) 32 Cal.4th 944, 953, the Supreme Court warned courts against "pars[ing] the objectives too finely."

As we have explained in our discussion of the unanimity instruction, appellant's several threatening statements were essentially one act. He threatened to kill Ms. Lopez if she did not give him more money. There was a single objective -- to frighten Ms. Lopez in order to obtain property from her. For that reason, section 654 precludes punishment for both the robbery and the threats. The sentence on count 5 must be stayed.

IV

The trial court imposed the upper term for appellant's robbery conviction. Relying on *Blakely v. Washington, supra*, 124 S.Ct. 2531, appellant claims he was denied his constitutional right to have a jury decide all facts necessary for imposition of this sentence.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*), the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington, supra*, 124 S. Ct. 2531 (*Blakely*), the Supreme Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant 'statutory

maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (124 S.Ct. at p. 2537.) It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) 124 S.Ct. 2519.)

Appellant, as expected, argues that *Blakely* applies to the California determinate sentencing law. We agree. Under Penal Code section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Circumstances in aggravation cannot include a fact on which an enhancement is based or a fact which is an element of the underlying offense. (Cal. Rules of Court, rule 4.420(c) & (d).) Like the "standard range" in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum sentence the court can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . ." (*Blakely*, *supra*, 124 S.Ct. 2531, 2537.)

In our case, the court imposed the upper term based on two factors in aggravation. First, it relied on the circumstances of the offense, which it found demonstrated a "certain degree of planning." The court then added: "Additionally, if that was not sufficient aggravation the court notes he was on probation at the time the offense was committed in case BA224748 involving domestic violence."

Arguably, the fact that appellant was on probation could be used to increase the statutory maximum sentence without a jury determination of that fact. (See *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224.) But appellant was still entitled to have a jury determine the other fact on which the court relied, whether the offense showed planning. Use of that fact to impose the upper term does not comply with the Sixth Amendment, resulting in an invalid sentence, and there is no basis on this record to conclude that the court would have imposed the upper term on the basis of the probation factor alone. (See *People v. Butler* (2004) 122 Cal.App.4th 910, 921.)

DISPOSITION

The judgment is modified to stay sentence on count 5, and the cause remanded for resentencing on count 1 in accordance with the views expressed in this opinion; in all other respects, the judgment is affirmed.

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EPSTEIN, P.J.

I concur:

HASTINGS, J.

GRIMES, J., Concurring and Dissenting.

I concur in parts I, II, and III of the majority opinion. Respectfully, I dissent with respect to the disposition and discussion in part IV, which addresses the issue of whether *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) mandates reversal of the upper term imposed on appellant's robbery conviction (count 1) and remands for resentencing on that count.

My colleagues conclude that "[l]ike the 'standard range' in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum sentence the court can impose 'solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . .' (*Blakely, supra*, 124 S.Ct. 2531, 2537.)" (Maj. opn. at p. 7.) I disagree.

Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). (Accord, *People v. Picado* (Nov. 5, 2004, A102251) ___ Cal.App.4th ___ [20 Cal.Rptr.3d 647, 664] ["our California sentencing scheme is the type of discretionary sentencing to which *Blakely* does not apply"]; *People v. Wagener* (2004) 123 Cal.App.4th 424, 430 ["California's sentencing scheme is consistent with and does not offend the constitutional concerns addressed in *Apprendi* and its progeny, *Blakely*," fn. omitted]; see also, *People v. Lemus* (2004) 122 Cal.App.4th 614, 625 (dis. opn. of Benke, J.) [California's scheme is unlike the Washington scheme, which *Blakely* found to be unconstitutional in that "it allowed for the imposition of a term greater than the range authorized by law for the offense to which Blakely pled guilty based on a fact not found by a jury or admitted by [him]".)

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

In view of the foregoing, I would affirm the trial court's imposition of the upper term on appellant's robbery conviction (count 1).

GRIMES, J.*

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