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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD GILFILIAN HULTON,

Defendant and Appellant.

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H029635

(Santa Clara County Superior Court No. CC440394)

Defendant pleaded guilty to one count of arson (Pen. Code, § 451, subd. (d)) and one count of making a criminal threat (Pen. Code, § 422). The court imposed the maximum possible sentence of three years and eight months, composed of the upper term for the arson count and a consecutive term for the criminal threat count. On appeal, he contends that the trial court violated Penal Code section 654 when it imposed terms for both counts, and he claims that the trial court violated his constitutional rights by imposing an upper term for the arson count based on factors that had not been found true by a jury or admitted by him. We reject both of his contentions and affirm the judgment.

I. Background

The original complaint contained a single count of arson which alleged that defendant had burned his mother's car on January 15, 2004. The complaint was subsequently amended to add a criminal threat count which alleged that, "on or about" January 13, 2004, defendant threatened to inflict great bodily injury or death on his mother. Defendant waived his right to a preliminary examination and entered guilty pleas to both counts. Counsel stipulated to a factual basis for the pleas, but the factual basis was not identified.

The only description of the facts of the offenses is contained in the probation report and the documents attached to it. Defendant has long suffered from serious mental illness. In 1998, defendant told a psychiatric social worker that he was going to "blow [his sister's] brains out." Around the same time, defendant told his mother that he was going to "kill someone." His mother and sister obtained a restraining order against him, which he repeatedly violated. Defendant's threats eventually seemed to abate, and, when the restraining order expired, they did not renew it.

Defendant's threats resumed in October 2003. On the evening of January 14, 2004, defendant came to his sister's home, where his sister and mother resided with his sister's son. He complained to them "of how badly he had been treated and lied to as a child." Defendant threatened his mother "and stated he would burn the house down."

Defendant returned four hours later, at 1:00 a.m., when his mother and sister were asleep inside the house.[1] He poured gasoline on his mother's car, which was parked in the house's driveway, and set the car on fire.

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[1] Defendant's appellate attorney and the Attorney General dispute the amount of time between the threat and the arson. The record reflects that the arson occurred at 1:00 a.m. on January 15, 2004. The threat was alleged to have occurred "on or about January 13, 2004," but it is fairly clear that it actually occurred on the evening of January 14, 2004, about four hours before the arson.

After the arson, but before defendant was arrested, defendant left a phone message on his sister's answering machine that said "[n]ow that I know I'm going to Hell I'm going to take all of you with me."

Defendant admitted setting the car afire. He told the probation officer that he burned his mother's car because her failure to pay him for work he had done on his sister's home had resulted in his mobile home being towed. "[B]ecause he was not able to have his vehicle, he decided 'it was only fair' to destroy their vehicles as well." Defendant insisted that he had not intended for the fire to burn the house or to hurt anyone.

The court imposed the upper three-year term for the arson count because it "involved a great deal of violence . . . [t]he threat of violence for the victims as indicated, their vulnerability when they sleep, when the arson vehicle, the place . . . ." A consecutive eight-month sentence for the threat count was imposed because "this is a different felony commit[m]ent under a difference circumstance." Defendant filed a timely notice of appeal. [2]

II. Discussion

A. Multiple Punishment

Defendant asserts that the criminal threat count and the arson count were not separately punishable because they were both committed with the same objective.

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[2] Defendant filed a notice of appeal and a request for a certificate of probable cause. His request for a certificate of probable cause was denied. The Attorney General suggests in a footnote that defendant's notice of appeal was not timely filed. He is incorrect. Judgment was entered on September 22, 2005. Defendant's notice of appeal was postmarked from prison on November 18, 2005. Under the prison-delivery rule, this notice of appeal was timely filed within the 60-day period. (*In re Jordan* (1992) 4 Cal.4th 116, 130 [prison-delivery rule].)

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (Pen. Code, § 654.) "The initial inquiry in any section 654 application is to ascertain the defendant's objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he 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." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Defendant's two violations were his threat to physically harm his mother (the criminal threat) and his burning of her car (the arson). Defendant admitted that he burned his mother's car with the intent of depriving her of her vehicle as retribution for her perceived responsibility for defendant's recent loss of his own vehicle. In contrast, the context of defendant's threat to kill or physically harm his mother indicated that this threat was aimed at instilling fear in his mother to punish her for events that had occurred in defendant's childhood decades earlier. Defendant's desire to deprive his mother of her vehicle and his intent to punish her through fear of physical harm for events during his childhood were distinct and independent of each other, and neither was incidental to the other. Thus, even though defendant engaged in an "otherwise indivisible course of conduct" against his mother, section 654 did not preclude punishment for these independent violations which had separate objectives.

B. Imposition of Upper Term

Defendant challenges the trial court's imposition of an upper term based on factors that were neither admitted by him nor found true by a jury. As he concedes that this contention is foreclosed by the California Supreme Court's decision in *People*

v. Black (2005) 35 Cal.4th 1238 (*Black*) and that we are bound by *Black* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we must reject his challenge.

III. Disposition

The judgment is affirmed.

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Mihara, Acting P.J.

WE CONCUR:

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McAdams, J.

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Duffy, J.