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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RAIF LEE MATYE, Defendant and Appellant.	C050332 (Super. Ct. No. 05F00241)

APPEAL from a judgment of the Superior Court of Sacramento County, Peter Mering, Judge. Affirmed as modified.

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

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez, Mathew Chan and Kelly E. Lebel, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III and IV.

Defendant Raif Lee Matye was sentenced to state prison after a jury found him guilty of both the abuse and false imprisonment of a dependent adult (Pen. Code, § 368, subds. (b)(1) & (f)), as well as other related crimes. He appeals.

In the published part of this opinion, we reject his claim that the evidence is insufficient to establish the victim was a dependent adult. As we will explain, a "dependent adult" within the meaning of Penal Code section 368 is a person between the ages of 18 and 64, "who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights." (Pen. Code, § 368, subd. (h).) The word "restrict" is not synonymous with "preclude." Therefore, it is not necessary to prove the person is incapable of carrying out normal activities or of protecting the person's rights; it is sufficient that the person's ability to do so is limited in some significant way. So it was with the victim in this case.

In the unpublished parts of our opinion, we address defendant's other contentions.

FACTS

The victim was 60-year-old Jean Estill, who suffered a massive stroke in 1980. The stroke had some effect on her mental abilities and caused partial paralysis on the right side of her body. She also had weakness and lack of coordination in her right arm and right leg, and it was very difficult for her to walk without a leg brace and the use of a cane, walker, or handrails.

In January 2005, the 37-year-old defendant, who is Estill's son, was living with Estill in her trailer and was having a sexual affair with her 18-year-old granddaughter, Heather Ragland, who had moved into the trailer. Estill did not approve of the relationship and told them she wanted them to move out.

After an argument during which Estill called Ragland a "bag whore," meaning a person involved in sex and drugs, defendant took Estill's cane, threw it into the hall, and began slapping Estill. Throughout the weekend, defendant repeatedly slapped her, hit her with an object, and struck her in the chest with his fist. At one point, he twisted her arm and threatened to break it. When Estill tried to leave her bedroom, defendant picked her up and threw her on the bed. He threatened to kill her several times and pulled the telephone out of the wall. The incident ended when Estill called out the window to a neighbor, and the police were summoned. Estill suffered numerous injuries that were still apparent almost two weeks later. Ragland testified at trial and, in all significant respects, confirmed Estill's testimony concerning the events.

Defendant admitted slapping Estill, although he claimed to have done so far fewer times than Estill and Ragland reported. He said he acted after Estill had slapped him numerous times, repeatedly hit him with her cane, and kicked at him. According to him, the injury to Estill's chest was self-inflicted when she hit herself with her cane, and the threats he uttered were a response to threats by Estill, which was a common occurrence. He claimed that he removed the telephone because it was not working and he was trying to fix it, and that he would not let Estill leave because he thought she

would try to drive and, due to the weather and her emotional state, she would get in a wreck.

DISCUSSION

I

The Legislature has determined that crimes against elders and dependent adults are entitled to special consideration and protection. (Pen. Code, § 368, subd. (a); further section references are to the Penal Code unless otherwise specified.)[1]

Section 368, subdivision (b)(1) states: "Any person who knows or reasonably should know that a person is an elder or dependent adult and who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered, is punishable by imprisonment in a county jail not exceeding one year, or by

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[1] Section 368, subdivision (a) provides: "The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf."

a fine not to exceed six thousand dollars ($6,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or four years."

Section 368, subdivision (f) states: "Any person who commits the false imprisonment of an elder or a dependent adult by the use of violence, menace, fraud, or deceit is punishable by imprisonment in the state prison for two, three, or four years."

Defendant claims his convictions for violating both crimes must be reversed because the evidence is insufficient to establish that Estill was a dependent adult within the meaning of section 368.

"As used in [section 368], 'dependent adult' means any person who is between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. 'Dependent adult' includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code." (§ 368, subd. (h).)

"Restrict" is not synonymous with "preclude." A restriction is only a limitation or restraint. (*Carter v. Seaboard Finance Co*. (1949) 33 Cal.2d 564, 580.) Therefore, it is not necessary to prove that the person is incapable of carrying out normal activities or of protecting the person's rights; it is sufficient if the person's ability to do so is limited in some significant way.

Viewed in the light most favorable to the judgment (*People v. Millwee* (1998) 18 Cal.4th 96, 132), the evidence is sufficient to support the finding that Estill was a dependent adult.

Walking, of course, is a normal activity. Estill testified she had to wear a leg brace and use a cane or walker for walking. If she tried to walk without a brace, her ankle twisted and turned and could break. If she had something to hold on to, she could walk without a brace or cane, although it was difficult. When she was in bed, she kept her cane nearby so she could use it to get out of bed. Her hallway was equipped with handrails to assist her movement.

Estill's doctor confirmed that the stroke Estill suffered in 1980 left her with partial paralysis in the right side of her body. She had significant weakness of her entire right arm and entire right leg. She could walk with difficulty and with a lot of limping, and most of the time she required a walker or cane.

Estill testified that the stroke also impaired her mental abilities. She could not speak or comprehend very well since the stroke, and she had problems with her memory. Indeed, during his testimony, defendant related a prior incident in which Estill could not find her car in a store parking lot and security personnel had to call defendant to come and get her. And defendant admitted he told the arresting officer that Estill is like a 10 year old.

The jury had the opportunity to personally observe Estill. As defense counsel said during argument: "Well, on the one hand we have Ms. Estill who came into this courtroom, and you had an

opportunity on more than one occasion to view that Ms. Estill, the Ms. Estill who was wheeled up here, who was helped out by two or three individuals, who took another five or ten minutes to get into the seat, the woman who was helped into that seat. [¶] You heard the expressiveness of how hard it was for her to get into that seat, how hard it was for her to get from just to the courtroom door to here and always with the aid of either a person--I think she had a walker--or some manipulation." The jury could also observe her ability to comprehend questions and to remember and formulate answers.

In his argument, defendant focuses upon things Estill said she can do. However, Estill's testimony was consistent with her report of comprehension and memory problems. She would answer a question but then, through other testimony, qualify the answer. For example, she said she had a driver's license and was able to drive. But she also said she had not driven since Mother's Day 2004. Defendant did the driving while he lived with her. Since defendant had been out of the house, Estill relied on paratransit or her daughter and son-in-law to drive her. Therefore, although Estill said she could drive, it appeared her physical limitations restricted her ability to the extent that she did not do so.

Defendant asserts that Estill herself said she did not depend on defendant. Estill was asked: "And you don't really depend on your son for anything, right?" She replied: "No, I don't, other than making my bed and doing the laundry and vacuuming." However, elsewhere she said defendant helped with the laundry, meals, and driving, and did her banking for her. She testified: "I trusted

him with my -- with my whole being, my well-being. [¶] . . . [¶] . . . I trusted him with my life, implicitly. My life was in his hands." And defendant testified that he was caring for her.

In any event, the pertinent provisions of section 368 do not require that a defendant be in a caretaker relationship with the victim.[2]

In sum, the evidence showed that Estill was a dependent adult for purposes of section 368, subdivisions (b)(1) and (f) because she had physical and mental limitations that "restrict[ed]," i.e., limited in some significant way, "her ability to carry out normal activities or to protect . . . her rights." (§ 368, subd. (h).)

II*

In sentencing defendant, the trial court selected count one, abuse of a dependent adult, as the principal term and imposed the upper term of four years. The court imposed a consecutive term for count two, false imprisonment of a dependent adult, which added one year to defendant's total unstayed prison term. The court imposed the middle term of two years on count three, making a criminal threat, and ordered it be served concurrently with the sentence on count one. On count four, damaging a telephone line, a

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[2] Subdivision (e) of section 368 concerns certain actions of a "caretaker," which is defined as "any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or a dependent adult." (§ 368, subds. (i).) Defendant was convicted of violating subdivisions (b)(1) and (f) of section 368, which apply to any person who commits the acts specified therein.

misdemeanor, the court imposed a 90-day jail term, to be served concurrently with the prison term.

Defendant contends the sentences for counts two, three, and four must be stayed pursuant to section 654.

Section 654, subdivision (a) provides in pertinent part: "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."

The prohibition on multiple punishment applies not only where there is one "act" in the ordinary sense, but also where a course of conduct violates more than one statute but is nonetheless an indivisible criminal transaction. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "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." (*Ibid*.) On the other hand, separate objectives may be found, and multiple punishment permitted, if the defendant's objectives were (1) consecutive even though similar or (2) different even though simultaneous. (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

An example of similar but consecutive criminal objectives is provided by the decision in *People v. Braz* (1997) 57 Cal.App.4th 1. Braz inflicted serious injury upon her child and then failed to

summon help for hours, thus allowing the child to suffer until he lost consciousness. (*Id*. at p. 11.) Braz was convicted and sentenced for two counts of child endangerment. The Court of Appeal upheld the sentence, reasoning that "the failure to obtain help following an injury of this severity, inferentially to avoid detection of the initial crime, is a separate criminal objective." (*Id*. at p. 12.)

The decision in *In re Hayes* (1969) 70 Cal.2d 604, provides an example of separate but simultaneous criminal objectives. Hayes was convicted of driving with a suspended license and driving while under the influence of alcohol. In arguing for the application of section 654, Hayes focused upon the act of driving. However, the Supreme Court noted that section 654 is not concerned with neutral, non-criminal acts which may be common to multiple crimes; rather, "[t]he proper approach, therefore, is to isolate the various *criminal* acts involved, and then to examine only those acts for identity." (*Id*. at p. 607.) Simultaneity must not be confused with identity. (*Ibid*.) Hayes's criminal objective in driving with a suspended license was distinct from his criminal objective in driving while intoxicated, and he could be punished for both offenses. (*Id*. at pp. 607-608; see also *In re Michael B.* (1980) 28 Cal.3d 548, 556.)

"Whether the defendant entertained multiple criminal objectives is a factual question for the trial court, and its findings on this question will be upheld on appeal if there is any substantial evidence to sustain them." (*People v. Nubla* (1999) 74 Cal.App.4th 719, 730.)

Upon review of the record, we reject defendant's contention that the sentence for count two, false imprisonment of a dependent adult, must be stayed pursuant to section 654.

Defendant's criminal objective in committing count one, abuse of a dependent adult, was to inflict unjustifiable pain and suffering upon Estill. That purpose had been accomplished to a considerable extent by the time defendant formed the objective of falsely imprisoning Estill. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1265.) Under the circumstances, it is a reasonable inference that he formed the intent to falsely imprison Estill to prevent her from reporting his initial crime. (*People v. Braz, supra*, 57 Cal.App.4th at p. 12.) After beating Estill, defendant told Ragland "we are going to go to jail for this." He pulled the telephone out of the wall and told Ragland "She can't call anybody." On the occasions when Estill attempted to leave, defendant forced her back to the bedroom. When Estill succeeded in asking a neighbor to call the police, defendant told her that she had no idea what she had done and that she would be sorry. He went out and told the neighbor that Estill was just hysterical. This scenario reasonably supports the court's implied finding that defendant's criminal objective for false imprisonment was subsequent, separate, and distinct from his criminal objective in inflicting pain and suffering.[3]

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[3] Over the weekend, defendant engaged in several separate episodes of beating Estill. Some of these episodes occurred after defendant formed the intent to falsely imprison Estill. But the prosecution's decision to charge the physical abuse as one continuous offense rather than a series of separate offenses does not change the fact that the evidence is sufficient to

We conclude otherwise with respect to count three, criminal threats, and count four, damaging a telephone line.

During the incident, defendant made a number of threats to Estill. In doing so, his criminal objectives were (1) to add mental suffering to the physical abuse he was inflicting, and (2) to maintain control over her. It does not appear that in making the threats defendant had a criminal objective distinct from his objectives in abusing Estill and falsely imprisoning her. Indeed, the trial court imposed a concurrent term for the criminal threats "since I view the threats as part of the process and part of the maintaining of her false imprisonment charge." The trial court's finding, supported by the evidence, requires that the sentence for the criminal threats be stayed pursuant to section 654.

Defendant's criminal objective in damaging the telephone line was apparent. He pulled the telephone out of the wall so Estill could not call anyone and report his initial crime. Indeed, the trial court said that offense "in a sense, is part of the false imprisonment and the other crimes committed against her." The trial court's finding, supported by the evidence, requires that the sentence for damaging a telephone line be stayed pursuant to section 654.

We will modify the judgment to stay the service of sentence on counts three and four. This modification does not affect defendant's total unstayed prison term.

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support the trial court's determination that defendant harbored separate criminal objectives in inflicting the abuse and in falsely imprisoning Estill.

III*

The trial court imposed the upper term on count one because the crime involved significant callousness and a significant level of violence and because defendant took advantage of his position of trust. In a supplemental brief, defendant contends that imposition of the upper term for these reasons violated his right to a jury trial and proof beyond a reasonable doubt.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] that *other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id*. at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by defendant; thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely v. Washington* (2004) 542 U.S. 296, 302-305 [159 L.Ed.2d 403, 413-414].)

Accordingly, in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 860, ___ L.Ed.2d ___], the United States Supreme Court held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Ibid*., overruling on this point

People v. Black (2005) 35 Cal.4th 1238, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [2007 WL 505809].)

Because the factors cited by the trial court for imposition of the upper term for count one do not fall within the prior conviction exception to the rulings of the United States Supreme Court, we will vacate the sentence and remand for further proceedings on this issue.

We note that the probation report recommended the upper term in part because of defendant's "numerous" prior criminal convictions. As we have pointed out, a trial court may increase the penalty for a crime based upon a defendant's prior convictions, without having this aggravating factor submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490 [147 L.Ed.2d at p. 455].)

Thus, we direct the trial court to decide, within 30 days after the filing of the remittitur, whether to impose the upper term on count one based solely on defendant's prior convictions. (See *People v. Cruz* (1995) 38 Cal.App.4th 427, 433 [one valid aggravating factor is sufficient to expose defendant to the upper term].) If the court does not impose the upper term based on that factor alone, the People may either stipulate to the imposition of the middle term or request a jury trial on other sentencing factors.

IV*

At sentencing, the trial court imposed certain fines and fees. However, the amended abstract of judgment reflects only the restitution fine imposed pursuant to section 1202.4, subdivision (b) and the suspended restitution fine imposed pursuant to section 1202.45.

All fines, fees, and penalties must be stated separately at sentencing, with the statutory basis specified for each; and the abstract of judgment must reflect them. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

The abstract of judgment also incorrectly cites defendant's conviction on count one as a violation of section 268(b)(1), elder abuse. It should read section 368(b)(1), abuse of a dependent adult.

We will direct the trial court to prepare an amended abstract of judgment including all of the fines, fees, and penalties imposed at sentencing, and correctly identifying the conviction on count one.

DISPOSITION

The judgment is modified to stay, pursuant to section 654, the service of the sentences on count three, criminal threats, and count four, damage to a telephone line. The upper term sentence on count one is vacated, and the matter is remanded to the trial court for further proceedings on that issue, consistent with part III of this opinion, *ante*. The trial court is further directed to correct errors in the abstract of judgment identified in part IV of this opinion, *ante*. In all other respects, the judgment is affirmed.

SCOTLAND, P.J.

We concur:

SIMS, J.

NICHOLSON, J.