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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHANG YANG,

Defendant and Appellant.

C052449

(Super. Ct. No. CM024113)

Defendant Chang Yang pleaded no contest to first degree burglary (Pen. Code, § 459) and making criminal threats (Pen. Code, § 422). The trial court sentenced him to the upper term of six years for the burglary count and a consecutive eight-month term for the criminal threats count.

On appeal, defendant contends the sentence for the criminal threats count should have been stayed pursuant to Penal Code section 654 and his upper term sentence violates *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We agree that defendant's sentence for making criminal threats should be stayed and otherwise shall affirm the judgment.

BACKGROUND

Since defendant pleaded no contest, the facts of defendant's crimes are taken from the probation report and the preliminary hearing.

On October 30, 2005, Mai V was at her home in Oroville with her children. Defendant is her ex-husband, and she had tried to keep the location of her house a secret from him. Defendant drove into Mai's driveway and entered the house through the front door. He was holding a knife and appeared to be upset.

Defendant wanted to talk to Mai about letting his pregnant girlfriend live at her residence. When Mai refused, defendant became more upset, brandished the knife, and threatened to kill her. He said if anyone tried to call the police, he would kill Mai and her children. Defendant took the battery from the only phone in the house, preventing anyone from calling the police.

Defendant walked toward Mai with the knife as she tried to run away from him. As she ran, defendant told Mai he was going to get a gun from his car and show her "'who was the boss.'" When defendant left the house, Mai locked the front door and ran toward the rear door. Defendant heard the front door lock and immediately ran to the rear door. Mai locked the rear door before defendant could reach it, so he punched through the living room window, injuring his upper arm.

Defendant entered through the broken window and tried to grab Mai. She ran outside, but defendant caught her by the arm and started to drag her to the house. Gerardo Cuevas, who was

driving by Mai's house, reported the incident to the police. When defendant saw Cuevas, he ran to his car and drove away.

DISCUSSION

I

Defendant claims his sentence for making criminal threats should have been stayed pursuant to Penal Code section 654. The People correctly concede this point.

Penal Code Section 654 prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1216.) Whether a course of criminal conduct is divisible and gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to a single objective, the defendant may be punished for only one. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) However, if the defendant entertained multiple criminal objectives that were independent of one another, he may be punished for each offense committed in pursuit of each objective even though the offenses were otherwise part of an indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Based on the record before us, defendant's primary motive was to assault or threaten Mai. The purpose of the burglary was to assault or threaten his ex-wife, and the break-in allowed defendant to make the criminal threats. Defendant's criminal conduct is thus indivisible, and his sentence for the criminal

threats count should have been stayed pursuant to Penal Code section 654.

II

Defendant contends his upper term sentence violates the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Blakely, supra*, 542 U.S. 296. We find any *Blakely* error to be harmless beyond a reasonable doubt.

In *Apprendi*, the Supreme Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Apprendi, supra*, 530 U.S. at p. 490.) 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 the 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, supra*, 542 U.S. at pp. 303-305.)

In *Cunningham v. California* (2007) 549 U.S. ____ [166 L.Ed.2d 856], the 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" (*id.* at p. ____ [166 L.Ed.2d at p. 864]), California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments" (*ibid.*). (Overruling *People v. Black* (2005)

35 Cal.4th 1238 on this point, vacated in *Black v. California* (2007) ___ U.S. ___ [127 S.Ct. 1210].)

One of the reasons the trial court gave for imposing the upper term is defendant's "history of violence involving his spouse or cohabitant." The probation report for defendant's present offenses refers to his prior felony conviction for domestic violence against the victim. The trial court relied on defendant's prior conviction, in part, as a basis for denial of probation.

The California Supreme Court has determined that the exception to *Blakely* for prior convictions is not to be read narrowly, concluding that the rule of *Apprendi* does not preclude a court from making sentencing determinations related to a defendant's recidivism." (*People v. McGee* (2006) 38 Cal.4th 682, 707.) The exception to the rule of *Apprendi* and *Blakely* thus "refers broadly to recidivism enhancements." (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) Defendant's history of domestic violence is thus a factor related to recidivism and therefore not subject to the rule of *Blakely*.

One valid aggravating factor is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) We are satisfied beyond a reasonable doubt that the trial court would have imposed the upper term based upon defendant's recidivism. Therefore, any error in considering the facts that the victim was particularly vulnerable and that the crime involved great bodily injury or the threat of great bodily injury was harmless beyond a

reasonable doubt. (See *Washington v. Recuenco* (2006) 548 U.S. ___, ___ [165 L.Ed.2d 466, 473, 476-477].)

DISPOSITION

The eight-month consecutive term imposed for defendant's conviction for making criminal threats is hereby ordered stayed pursuant to Penal Code section 654. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

DAVIS, J.

I concur:

BLEASE, Acting P.J.

I concur except as to Part II, in which I concur in the result.

BUTZ, J.