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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MELVIN GODOY CASTILLO, Defendant and Appellant.	B214976 (Los Angeles County Super. Ct. No. NA078983)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed.

Charles R. Khoury, Jr. for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Melvin Godoy Castillo, also known as Melvin Goody Castillo (defendant), appeals, after a jury trial, from the judgment entered upon his convictions of attempted kidnapping[1] (Pen. Code, §§ 664, 207, subd. (a), count 1),[2] assault with a deadly weapon (§ 245, subd. (a)(1), count 2), and making a criminal threat (§ 422, count 3). As to counts 1 and 3, the jury found to be true the special allegation that in the commission of those offenses defendant personally used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1). The trial court sentenced defendant to an aggregate state prison term of six years. Defendant contends that (1) the trial court erred in failing to stay his sentence on count 3 pursuant to section 654; (2) even if the trial court correctly did not stay sentence on count 3, the personal use of a deadly weapon enhancement on that count should have been stayed; and (3) the court facilities assessment in Government Code section 70373, subdivision (a)(1) was improperly imposed on defendant because his offenses occurred before it was operative.

We affirm.

FACTUAL BACKGROUND

On the night of July 12, 2008, Claudia Castillo (Claudia)[3] left work in the City of Wilmington to go home. She walked to the bus stop at Avalon Boulevard and Anaheim Street, where she sat on the bench talking on the phone, while waiting for the bus. Defendant approached her, sat down next to her, put his arm on her left shoulder and put a "reddish" knife at her midsection. He told her to "shut up and walk." Claudia asked him "why," and got up from the bench because he had the knife. She was frightened, as defendant was holding her very close to him.

As they walked down Anaheim Street toward an alley, defendant had his left hand on Claudia's left shoulder and his right hand around her stomach. Claudia looked at

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[1] The jury found defendant guilty of kidnapping, but the trial court reduced the conviction to attempted kidnapping.

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

[3] Claudia was not related to defendant.

defendant's face, and defendant said, "Don't look at me, don't look at me. . . . Walk, or do you want to die right here?"

Claudia noticed defendant put the blade away because someone was coming. Shaking and crying, she pushed defendant and ran toward Avalon Boulevard, where she saw a patrol car. She ran toward it and told the police officers that defendant wanted to kill her, describing him to them.

The officers told Claudia not to wait there and went looking for defendant. They returned without finding him. The officers went looking for him again. Shortly afterwards, Claudia saw defendant coming towards her. She was frightened. The patrol car returned, and defendant crossed the street, got a newspaper and began reading it. His clothing fit Claudia's description, and the officers arrested him. In the course of searching defendant, the officers recovered a red utility knife.

DISCUSSION

I. Failure to stay sentence on count 3

The trial court sentenced defendant to the high term of four years on count 1 (attempted kidnapping) plus one year for the deadly weapon enhancement. On count 3, defendant was given a consecutive one-third the midterm of two years, or eight months, plus one-third the midterm of one year, or four months, on the weapon enhancement on that count. A three-year term on count 2 was imposed and stayed.

Defendant contends that the trial court erred in failing to stay the sentence on the criminal threat conviction (count 3) pursuant to section 654. He argues that the threat was directed at facilitating the kidnapping, as it was made to force Claudia to go where defendant wanted her to go. This contention lacks merit.

Section 654 provides in 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*." (§ 654, subd. (a), italics added.) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless

constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) A course of conduct that constitutes an indivisible transaction violating more than a single statute cannot be subjected to multiple punishment. (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1248.)

Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends upon the intent and objective of the actor and is primarily a question of fact. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 185; see also *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583). "'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not more than one.'" (*People v. Flores, supra*, at p. 185.) If, on the other hand, "the [defendant] 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.)

We review a finding of whether multiple convictions were part of an indivisible transaction under the substantial evidence test (*People v. Osband* (1996) 13 Cal.4th 622, 730); we consider the evidence in the light most favorable to support the verdict and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.) We must determine whether the violations were a means toward the objective of the commission of the other. (*People v. Beamon, supra*, 8 Cal.3d at p. 639.)

We conclude that the trial court's implicit finding that defendant's threat to kill Claudia was the result of an independent objective from the objective of kidnapping her is supported by substantial evidence. Defendant approached Claudia at a bus stop after 10:00 p.m. He held her at knifepoint and forced her to walk toward an alley.

Claudia testified that she looked at defendant's face as he moved her away from the bus stop. He then told her "Don't look at me, don't look at me" and "He would just say whether I wanted to die there. He would say, walk or do you want to die right here?"

This evidence permitted an inference that defendant did not want Claudia to look at him in order to impede her identifying him later. The threat was made immediately following his demand that she stop looking at him. The words were unnecessary to accomplish moving Claudia to the alley, as defendant held a knife to her stomach which had already proven sufficient to induce her to get up from the bench and go with him. Consequently, the evidence supports the trial court's finding that the threat had a separate, independent and distinct objective from that of forcing her to the alley.

Defendant claims that the prosecutor made conflicting arguments, arguing in summation to the jury that defendant's threat to kill Claudia was to facilitate the kidnapping, but arguing to the judge in connection with sentencing that the threat was to prevent Claudia from looking at defendant's face. Accepting without deciding defendant's characterization of the prosecutor's arguments, we nonetheless find them irrelevant. Statements of counsel are not evidence (*People v. Stuart* (1959) 168 Cal.App.2d 57, 60-61), and it is the evidence that we must evaluate to determine if it supports the trial court's finding.

II. Imposition of weapon enhancement on count 3

Defendant contends that even if count 3 is not subject to section 654, that statute requires that the sentence on the deadly weapon enhancement on that count be stayed. He argues that there is a split of authority as to whether section 654 applies to enhancements and that the better rule is that it does because section 654 does not refer to crimes but to "an *act* or *omission*." This contention is without merit.

We need not decide whether section 654 applies to enhancements, for even if we assume that it does, it was still proper for the trial court to sentence defendant on the deadly weapon enhancement on count 3.

The deadly weapon enhancement adheres to the count to which it is attached.[4] As we reasoned in part I, *ante*, defendant had different objectives in kidnapping Claudia and

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[4] Had we concluded in part I, *ante*, that count 3 was required to be stayed under section 654, the deadly weapon enhancement on that count would have been

in threatening to kill her. He kidnapped her for the purpose of taking her to an alley to presumably hurt or sexually attack her. His criminal threat was to stop her from looking at him so as to make it more difficult to identify him. Having concluded that defendant could be sentenced on both convictions because they had independent objectives, it follows that the deadly weapon enhancement on each of those counts similarly had separate objectives. The trial court therefore did not err in failing to stay sentencing on the deadly weapon enhancement in count 3 pursuant to section 654.

III. Court facilities assessment (Gov. Code, § 70373)

Defendant was convicted in February 2009 of three offenses committed in 2008. At sentencing, he was assessed a court facilities fee of $30 pursuant to Government Code section 70373 for each of his three convictions. That code section, effective on January 1, 2009, provides that the assessment is "[t]o ensure and maintain adequate funding for court facilities." (Gov. Code, § 70373, subd. (a).) It also requires that all of the assessments collected under that section "shall be deposited in a special account in the county treasury and transmitted therefrom monthly to the Controller for deposit in the Immediate and Critical Needs Account of the State Court Facilities Construction Fund." (Gov. Code, § 70373, subd. (d).)

Defendant contends that the court facilities assessment was improperly imposed. He argues that section 3 of the Penal Code requires that new statutes generally operate prospectively absent an express declaration of retroactivity or a clear indication that the Legislature intended otherwise. Government Code section 70373 does not expressly declare that it is to operate retroactively.

This contention is without merit.

Section 3 makes clear that it is not intended to be a "straitjacket. Where the Legislature has not set forth in so many words what it intended, the rule of construction

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automatically stayed. (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711 ["'an enhancement must necessarily be stayed where the sentence on the count to which it is added is required to be stayed [under section 654]'"], disapproved on other grounds in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8.)

should not be followed blindly in complete disregard of factors that may give a clue to the legislative intent. It is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." (*In re Estrada* (1965) 63 Cal.2d 740, 746; *People v. Alford* (2007) 42 Cal.4th 749, 753.) "Even without an express declaration, a statute may apply retroactively if there is '"a clear and compelling implication"' that the Legislature intended such a result. [Citations.]" (*People v. Alford, supra*, at p. 754.) The paramount concern is to determine whether the Legislature intended for the law to operate retroactively. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 791.)

Section 3 "applies to penal measures which increase the punishment for particular crimes. [Citations.]" (*People v. Teron* (1979) 23 Cal.3d 103, 116-117, disapproved on other grounds in *People v. Chadd* (1981) 28 Cal.3d 739, 750, fn. 7.) Laws that "define[] past conduct as a crime, increase[] the punishment for such conduct, or eliminate[] a defense to a criminal charge based on such conduct" cannot be applied to crimes committed before the measure's effective date. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 288.) Even though the offense in this case was committed prior to the effective date of the statute, section 3 does not preclude imposition of the court facilities fee for several reasons.

First, section 3 only applies to provisions of the Penal Code. The court facilities assessment is not in that code, but in the Government Code.

Second, Government Code section 70373 is nonpunitive, being "primarily . . . a budget measure" with an "unambiguously . . . nonpunitive objective." (*People v. Wallace* (2004) 120 Cal.App.4th 867, 873, 875-876 [discussing section 1465.8].) Its stated purpose is to raise funds for court facilities and is part of a broad legislative scheme in which civil fees were also raised to fund courthouse construction. (See *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1.) It does not use the term "fine," but rather "assessment" and the amount of the assessment is relatively small and unrelated to the seriousness of the offense. It therefore does not increase punishment.

Finally, "a law addressing the conduct of trials still addresses conduct in the future. . . . Such a statute 'is not made retroactive merely because it draws upon facts existing prior to its enactment . . . . [Instead,] [t]he effect of such statutes is actually prospective in nature since they relate to the procedure to be followed in the future.' [Citations.]" (*Tapia v. Superior Court, supra*, 53 Cal.3d at p. 288.) "In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. [Citations.] Thus, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. [Citations.]" (*People v. Grant* (1999) 20 Cal.4th 150, 157.)

The facilities fee does not address past conduct. Its purpose is unrelated to the offenses that a defendant may have committed and is not intended to punish the defendant. (See *People v. Wallace, supra*, 120 Cal.App.4th at p. 875.) The last act necessary to trigger application of the statute is defendant's convictions, regardless of the nature of the offenses of which the defendant was convicted or when they occurred. The convictions here occurred after the statute had become effective.

We therefore conclude that application of the court facilities assessment to defendant's offenses occurring before its adoption, but tried after, is not a retroactive application of that fee and is not barred by section 3.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST