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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.

JOSE ESTRADA,

Defendant and Appellant.

B271335

(Los Angeles County
Super. Ct. No. YA092948)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Gary Y. Tanaka, Judge. Remanded with directions in part and affirmed in
part.

Cynthia Grimm, under appointment by the Court of Appeal, for
Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General, Steven D.
Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff
and Respondent.

Jose Estrada (defendant) appeals from the judgment that was entered following a jury trial that resulted in his conviction of one count of second degree robbery (Pen. Code, § 211)¹ and one count of assault with a deadly weapon (§ 245, subd. (a)(1)). The jury found true the allegation that defendant personally used a deadly and dangerous weapon in the commission of the robbery within the meaning of section 12022, subdivision (b)(1). The trial court imposed the low term of two years in state prison for the robbery conviction, plus a one-year enhancement term for the weapon use allegation. The court sentenced defendant to a concurrent two-year term for the assault conviction.

Defendant's sole claim on appeal is one of sentencing error. In sum, he contends that either the concurrent sentence for assault must be stayed pursuant to section 654 or the section 12022 enhancement to the robbery conviction must be stricken. Respondent believes the section 12022 enhancement term must be stricken and requests that we remand the matter to the trial court for resentencing. We remand the matter to the trial court for a determination of the applicability of section 654, and for resentencing thereafter. We affirm the judgment of conviction in all other respects.

BACKGROUND

On August 31, 2015, David Meza, a loss prevention specialist at Ralphs supermarket in Torrance, observed defendant place two screwdrivers into his pants pocket. Defendant then went into the restroom. When defendant left the restroom, he returned to the tool section, picked up a set of socket wrenches and hid them in his waistband. Defendant then left the store without paying for the tools.

¹ Further undesignated statutory references are to the Penal Code.

Outside the store, Meza stepped in front of defendant and identified himself as Ralphs security. Defendant grabbed Meza's left hand and bit it several times as he pulled Meza away from the store entrance and toward the parking lot. The men struggled as they moved toward the parking lot. Defendant took the set of socket wrenches out of his clothing and threw it to the side. The struggle was observed by John Mezin as he was walking up to the store entrance and by Robert Hall as he sat in his car in the parking lot. It was also captured on surveillance video.

Meza was able to bring defendant down to the ground. Meza tried to handcuff him, but he continued to struggle. Hall and Mezin attempted to assist Meza. Mezin held defendant's right arm and shoulder down.

Meza told defendant to give up or Meza would call the police. Meza then asked defendant if he was going to go back inside the store. Defendant replied, "Yes." Meza and Mezin helped defendant stand up. Defendant had stopped struggling, and so Meza did not handcuff him. Both Meza and Mezin believed defendant had given up. They began escorting defendant back to the store.

As the men were walking toward the store, defendant pulled a screwdriver out of his front left pocket and lunged at Meza, attempting to stab him in the stomach with the screwdriver. Mezin forced defendant's hand behind his back and defendant dropped the screwdriver. Meza and Mezin forced defendant to the ground. Defendant pulled out another screwdriver and attempted to stab Meza with it.² Defendant also bit Mezin. Hall joined the struggle and sat on top of defendant. Meza was able to

² Mezin believed that defendant also attempted to stab him with the screwdriver. Defendant was charged with assault with a deadly weapon against Mezin, but the jury found him not guilty.

handcuff defendant. Meza then called 911. Police came to the scene and arrested defendant.

DISCUSSION

Defendant contends he may not be punished for both the assault with a deadly weapon conviction and the use of the deadly weapon in the commission of the robbery. Initially, he contended section 654 required that the assault conviction be stayed because the assault and robbery were part of one continuous transaction. Respondent replied that the robbery was complete when defendant quit struggling and agreed to return to the store with Meza; defendant's assault with the screwdriver took place thereafter; and a concurrent term for the assault conviction was thus permissible.

Defendant filed a letter brief contending if the robbery was complete when he agreed to return to the store, the deadly weapon enhancement to the robbery conviction must be stricken because he did not use the screwdriver to commit the robbery. Respondent agrees the enhancement should be stricken, but contends we should remand the matter for resentencing.

A. Section 654

Section 654 generally prohibits multiple punishment for a single physical act that violates different provisions of the law. (*People v. Jones* (2012) 54 Cal.4th 350, 358.) It also prohibits multiple punishment for an indivisible course of conduct that violates more than one provision of law. (*People v. Correa* (2012) 54 Cal.4th 331, 336.)

“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. . . .’ [Citation.]” (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may

be found to have harbored a single intent and therefore may be punished only once. [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The issue of whether a defendant harbored a single or multiple objectives during a course of criminal conduct is a factual question for the trial court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) A trial court need not explicitly state it is considering and rejecting the applicability of section 654 when it imposes sentence; the court’s findings may be implied. (*Coleman*, at p. 162.) We review any findings by the trial court for substantial evidence, and presume in support of the court’s conclusion the existence of every fact the court could reasonably have deduced from the evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

B. Robbery

Robbery is “the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) It is well settled that a perpetrator commits robbery when he gains possession of property without using force or fear, but resorts to the use of force or fear to retain the property while carrying it away. (*People v. Gomez* (2008) 43 Cal.4th 249, 257.)

Robbery is a continuing crime, and the asportation element of robbery, and thus the robbery itself, continues “as long as the loot is being carried away to a place of temporary safety.” (*People v. Gomez, supra*, 43 Cal.4th at pp. 254, 256.) “The escape of the thief with his ill-gotten gains by means of arms is as important to the execution of the robbery as gaining possession of it.” [Citations.]” (*Id.* at pp. 256-257.)

C. Analysis

The trial court did not make any explicit findings concerning the applicability of section 654. The trial court's sentencing decisions do not clearly support an implied finding on the applicability of that section.

The court's decision to sentence the assault conviction concurrently could support implied findings that the robbery was complete, defendant had a separate intent when committing the assault and the two crimes were not part of one indivisible course of conduct. There is substantial evidence which would support such a finding. Defendant had already abandoned part of the stolen property, and had agreed to return to the store, which could support an inference that he viewed the robbery as finished. It would be reasonable to infer that defendant subsequently attacked Meza for some reason other than completing the robbery, including anger at Meza for stopping him. (See, e.g., *People v. Coleman*, *supra*, 48 Cal.3d at pp. 162-163 [assault may be punished separately when committed after robbery is complete]; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299-1300 [gratuitous violent act after attempted robbery has been completed may be punished separately]; see also *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 ["Once robbers have neutralized any potential resistance by the victims, an assault or attempt to murder to facilitate a safe escape, evade prosecution, or for no reason at all, may be found by the trier of fact to have been done for an independent reason."].) In such a situation, section 654 would not bar the imposition of a concurrent term, but since the first use of the screwdriver occurred after the robbery was complete, there would be no evidence to support the weapon enhancement.

At the same time, the court's decision to impose the deadly weapon enhancement on the robbery conviction supports an implied finding that the

robbery was ongoing at the time of the assault, and that the assault was incidental to the robbery. There is substantial evidence which would support such a finding. Defendant still had possession of the stolen screwdrivers and had not yet reached a place of safety when he began his assault on Meza with the screwdrivers. It would be reasonable to infer defendant assaulted Meza in an attempt to successfully complete the robbery. (See, e.g., *People v. Ridley* (1965) 63 Cal.2d 671, 677-678 [section 654 applied when defendant shot resisting victim during robbery]; *People v. Medina* (1972) 26 Cal.App.3d 809, 823-824 [section 654 applied when robbery victim was hit while being tied up during robbery]; *People v. Flowers* (1982) 132 Cal.App.3d 584, 587-589 [section 654 applied when defendant assaulted robbery victim a second time when he resisted].) In such a situation, section 654 would bar a concurrent sentence for the assault conviction, but there would be substantial evidence to support the weapon enhancement to the robbery conviction.

The question of when the robbery ended is a determination to be made in the first instance by the trial court, as is the applicability of section 654. We remand this matter for such a determination. Once the trial court has made its determination, it should resentence defendant accordingly.

DISPOSITION

The matter is remanded to the trial court for a determination of when the robbery ended and for resentencing thereafter. The judgment of conviction is affirmed in all other respects.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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