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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. AILEEN AISQUEL CHAPMAN, Defendant and Appellant.	B231648 (Los Angeles County Super. Ct. No. TA111934)

APPEAL from a judgment of the Superior Court of Los Angeles County. John T. Doyle, Judge. Affirmed as modified.

David Reis Mishook, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Aileen Chapman of second degree robbery (Pen. Code, § 211),[1] criminal threats (§ 422), and assault with a deadly weapon (§ 245, subd. (a)(1)). The trial court sentenced Chapman to four years in state prison, consisting of three years on the robbery count, a consecutive sentence of one year on the assault with a deadly weapon count, and a concurrent two-year sentence on the criminal threats count. On appeal, Chapman contends the trial court should have stayed execution of the sentence for assault with a deadly weapon pursuant to section 654. We agree and modify the judgment to stay the sentence on the assault with a deadly weapon conviction.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the factual background in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) On April 21, 2010, Chapman entered a Rite-Aid store in Torrance. Jose Suarez, a Rite-Aid loss prevention agent, began watching her. As Suarez watched, Chapman walked through the store with a shopping basket. She put several cans of food in her purse. She picked up a package of makeup, took the item out of the package, and hid the package under diapers on a shelf. She opened a package of headphones and put them first in her shopping basket, then her purse. Chapman put the basket down and walked out of the store. Suarez followed and approached her in the store's parking lot. Suarez identified himself as "loss prevention" and said he needed the merchandise back. Chapman did not stop. She said she did not have anything and told Suarez to get away from her. Suarez blocked Chapman's path and asked again for the merchandise. He looked down and saw Chapman was pointing a knife at him. Chapman was "throwing [the knife] to [him] like three or four times." She used a "front-and-back" motion with her arm. The knife touched Suarez's stomach. Chapman said, "Get away from me or I'm going to stab you." Suarez stepped aside but told Chapman he would call the police. Chapman began to run. Suarez followed while talking to a 911 dispatcher. Chapman eventually got into a car but was apprehended by

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[1] All further statutory references are to the Penal Code.

police shortly after. Police recovered stolen Rite-Aid merchandise totaling $43.50 in value.[2]

The jury convicted Chapman of second degree robbery (count 1), criminal threats (count 2), and assault with a deadly weapon, a knife (count 3). On count 1, the court sentenced Chapman to the mid-term of three years. On count 2, the court sentenced Chapman to the mid-term of two years, to run concurrent to the sentence on count 1. On count 3, the court sentenced Chapman to a one-year consecutive sentence (one-third of the mid-term of three years), for a total four-year sentence.

Chapman filed the instant appeal.

DISCUSSION

I. The Trial Court Should Have Stayed Execution of the Sentence for Assault with a Deadly Weapon Under Section 654.

Chapman contends the trial court should have stayed execution of the sentence for the assault with a deadly weapon conviction pursuant to section 654 because both the robbery and assault arose out of a single course of conduct. We agree.

Section 654 "has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. [Citation.] The key inquiry is whether the objective and intent attending more than one crime committed during a continuous course of conduct was the same. [Citation.] '[I]f all of the offenses were merely incident 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.] [¶] If, on the other hand, defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." ' [Citation.]" (*People v. Meeks* (2004)

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[2] Chapman testified on her own behalf. She claimed she did not steal anything from the store. She testified she feared Suarez was following her to attack her, and she took out the knife only after Suarez grabbed her breast.

123 Cal.App.4th 695, 704.) " 'Whether the acts of which a defendant has been convicted constitute an indivisible course of conduct is a question of fact for the trial court, and the trial court's findings will not be disturbed on appeal if they are supported by substantial evidence. [Citations.]' [Citation.]" (*People v. Clair* (2011) 197 Cal.App.4th 949, 959.)

In this case, substantial evidence did not support a finding that Chapman had multiple, or independent, criminal objectives when she brandished the knife and touched it to Suarez as she attempted to leave the store parking lot. The acts that rendered Chapman's actions robbery instead of merely petty theft were the same as those constituting the assault with a deadly weapon. Indeed, at trial the court indicated the prosecutor had referred to Chapman's actions as an "*Estes*-type robbery." In *People v. Estes* (1983) 147 Cal.App.3d 23 (*Estes*), the defendant stole clothing from a store. When a security guard confronted him outside of the store, the defendant swung a knife at the guard and threatened to kill him. (*Id.* at p. 26.) The defendant claimed a robbery conviction was invalid because his assaultive behavior was not contemporaneous with the taking of merchandise. (*Id.* at p. 27.)

The Court of Appeal rejected this argument, explaining: "The crime of robbery is a continuing offense that begins from the time of the original taking until the robber reaches a place of safety. It is sufficient to support the conviction that appellant used force to prevent the guard from retaking the property and to facilitate his escape. The crime is not divisible into a series of separate acts. Defendant's guilt is not to be weighed at each step of the robbery as it unfolds. The events constituting the crime of robbery, although they may extend over large distances and take some time to complete, are linked by a single-mindedness of purpose. [Citation.] Whether defendant used force to gain original possession of the property or to resist attempts to retake the stolen property, force was applied against the guard in furtherance of the robbery and can properly be used to sustain the conviction." (*Estes, supra,* 147 Cal.App.3d at p. 28.)

The *Estes* court's explanation of robbery also describes the evidence here. The evidence established that Chapman had not reached a place of safety before she assaulted Suarez with the knife. Indeed, there was no evidence that Chapman used the knife for

any reason other than to prevent Suarez from retaking the merchandise and to facilitate her escape. Her actions of taking merchandise and assaulting Suarez with a knife accomplished a single criminal objective.

We disagree with the People's argument that Suarez used more force than was incidental to accomplishing the robbery, as in *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 (*Nguyen*). In *Nguyen,* the defendant committed an armed robbery at a store. An accomplice took the store clerk to the bathroom, took items from the clerk's pocket, and forced him to lie face down on the floor. While the defendant was at the front of the store opening the cash register, the accomplice kicked the clerk in the ribs and shot him in the back. (*Id.* at p. 185.) On appeal, the defendant argued that under section 654 the court could not impose consecutive sentences for both robbery and attempted murder. (*Id.* at p. 189.) The Court of Appeal rejected this argument, concluding that the shooting of the clerk was not necessary or useful in effectuating the robbery, and was "sufficiently divisible from the robbery to justify multiple punishments." (*Id.* at p. 190.) The court noted the clerk was already lying on the floor when the accomplice shot him, and this act "constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of Penal Code section 654. [Citations.]" (*Id.* at pp. 190-191.)

Nguyen and the line of cases upon which it relies are not applicable here. There was no evidence that Chapman engaged in any act of gratuitous violence that was not incidental to the robbery. Chapman pulled the knife on Suarez only when he stepped in front of her to prevent her from continuing to walk away from the store. The evidence could not reasonably be characterized as an assault following a completed robbery. There was no substantial evidence that the assault was anything other than a means of perpetrating the robbery. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19-20 [when assault is not a means of perpetrating robbery, but is an act that follows a completed robbery, the defendant is guilty of two punishable acts].)

In *People v. Beamon* (1973) 8 Cal.3d 625, our high court, in explaining certain difficulties in the proper application of section 654, stated: "The difficulty would not arise if the reach of section 654 were confined to its literal language, that is, where multiple convictions are based on what is truly a single act or omission. Thus, one who uses a deadly weapon in the commission of first degree robbery simultaneously assaults the victim with such weapon but clearly may not be punished for both the robbery and assault with a deadly weapon." (*Id.* at p. 637.) Except for the degree of robbery, the *Beamon* court's statement describes this case. The evidence established that Chapman used a knife to effectuate the robbery. This was an indivisible course of conduct with a single intent and objective. She could not be punished for both second degree robbery and assault with a deadly weapon.

DISPOSITION

We modify the trial court judgment to stay the one-year consecutive sentence on the assault with deadly weapon conviction, resulting in a total prison term of three years. The trial court is directed to correct the abstract of judgment accordingly, and forward copies of the amended abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.