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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEKAI LARSEN et al., Defendants and Appellants.	B232387 (Los Angeles County Super. Ct. No. KA090227)

APPEALS from a judgment of the Superior Court of Los Angeles County, Steven D. Blades, Judge. Affirmed as modified.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant Kekai Larsen.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Duran.

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

Following a jury trial, Kekai Larsen and Joseph Duran (collectively referred to as defendants) were convicted of second degree robbery (Pen. Code, § 211),[1] second degree commercial burglary (§ 459), attempted second degree robbery (§§ 664, 211), and assault with a firearm (§ 245, subd. (a)(2)). The jury found the following enhancements true: (1) as to each of the four counts that a principal was armed with a firearm (§ 12022, subd. (a)(1)); (2) in the commission of the robbery and burglary, Larsen personally used a firearm (§ 12022.53, subd. (b)); (3) in the commission of the attempted robbery, Larsen personally used and intentionally discharged a firearm, proximately causing great bodily injury (§ 12022.53, subds. (b), (c), and (d)); and (4) in the commission of the assault, Larsen personally inflicted great bodily injury (§ 12022.7, subd. (a)). In a separate proceeding, Duran admitted that he had suffered two prior felony convictions for which he had served separate prison sentences. (§ 667.5, subd. (b).) Larsen was sentenced to 25 years to life and Duran was sentenced to 11 years in state prison. We affirm the judgment as to Duran and remand Larsen's matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On April 6, 2011, Albert Garcia met with Larsen and Duran in Rosemead. They asked Garcia to drive them to the Santa Anita Mall. Defendants got into Garcia's car, along with a female. As the vehicle passed a business on Gidley Street in El Monte, defendants told Garcia to stop because they wanted to "check it out." Duran got out of the car and looked at a large air compressor in the parking lot in front of the business. He unhooked a hose from the compressor. Larsen got out of the car. The business owner, Henry Franco, came outside and confronted them. Duran and Larsen approached him aggressively. Larsen demanded Franco's wallet. When Franco refused, Larsen lifted his shirt and showed him a handgun in his waistband. Franco handed over his wallet, and asked if he could have his wallet and identification cards back after the money was

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

removed. He wrestled with Larsen to retrieve them. In the meantime, Duran went into the building and into Franco's office. When Duran emerged from the building, he and Larsen ran back to the car and Larsen told Garcia, "Take off." Garcia saw that Larsen had a pistol on his lap. Franco wrote down the license plate number of the car, and took the compressors inside the building. He discovered that his office had been ransacked and his cell phone was missing. In addition, $153 was taken from his wallet.

Garcia continued to drive the car to Arcadia. As they were driving on a residential street, they saw Qiu Qim Sheng walking her dog. Duran said, "I want to get that dog." Garcia made a U-turn and drove past Sheng. Duran jumped out of the car, grabbed the leash out of Sheng's hand, and ran down the street with the dog. John Gibbs was exiting a residence on the street and saw Duran take the dog. Gibbs chased Duran for 50 or 60 yards and Duran let go of the leash and continued to run. Garcia pulled the car up. According to Garcia, Larsen got out of the car to assist Duran. Garcia heard gunshots coming from behind the car. Both Duran and Larsen got in the car and Garcia drove off. Gibbs said he saw Duran dive into the rear seat of the car and then a person in the front passenger seat leaned out of the car and fired at Gibbs, striking him in the leg. Walter Quintanilla, who was driving down the street, saw a man running towards a car. The man dove into the rear passenger seat and then an arm came out of the car. Quintanilla heard a gunshot. He could not tell whether the person who jumped in the car was the one who put his arm out of the window. He wrote down the license plate number of the car.

Larsen and Duran told Garcia to drive them to El Sereno. Defendants and the female got out of the car and Larsen threw a bag of methamphetamine towards Garcia.

When Garcia arrived home at approximately 7:10 p.m. that evening, he was detained by police. They found a glass methamphetamine pipe in the car and methamphetamine in his pocket. Garcia admitted that he had used methamphetamine that day. Garcia told a detective that when he first picked up defendants, Duran sat in the front passenger seat and Larsen sat in the rear seat on the driver's side. After defendants took Franco's wallet, Duran got in the front seat again. Larsen was the only one with a gun. Garcia told police that Duran and Larsen were staying at a hotel about five miles

away from where the dog had been taken. Officers responded to the hotel and detained defendants. Franco identified both of them at a field showup and said that Larsen was the one with the gun. The next day at a photographic lineup, Franco did not identify either one. Police performed gunshot residue tests on defendants' hands and the results were consistent with firing, touching, or being around a firearm.

At the preliminary hearing, Franco identified Duran but not Larsen. At trial, Franco identified both men and Larsen as the one with the gun. He said he did not identify Larsen at the preliminary hearing because he feared for his life.

At trial, Garcia testified that the female sat in the front passenger seat of his car. He admitted that he had pled guilty to two misdemeanor counts and one count of being an accessory after the fact. He acknowledged that he had entered into an agreement with the district attorney's office for leniency in exchange for testifying.

Gibbs testified that the person in the front passenger seat leaned out and fired at him. He first described the shooter as a "he," but could not identify anyone present in court as the shooter. On cross-examination, he could not say for sure whether the shooter was a male or female.

Neither defendant testified. Larsen called one witness, Leandra Munoz, who testified that she saw a Hispanic man wearing a blue shirt taking a dog from a woman about 20 feet away. She said the man jumped into a car and fired a gun at someone chasing him. She could not identify either defendant in court.

The court sentenced Larsen as follows: On count 1, five years for the robbery plus 10 years for the section 12022.53, subdivision (b) use enhancement; on count 2, eight months for the burglary plus three years and four months for the section 12022.53, subdivision (b) use enhancement for a total of four years to run consecutively to count 1; on count 4, one year plus one year for the great bodily injury enhancement, for a total of two years to run consecutively to the sentence imposed on counts 1 and 2; on count 3, he was sentenced to 25 years to life to run concurrently with the sentence on counts 1, 2, and 4.

Duran was sentenced to five years for the robbery in count 1 plus one year for the section 12022, subdivision (a)(1) principal armed enhancement; on count 2, a consecutive term of one year for the commercial burglary plus the armed enhancement; on count 3, a consecutive term of one year for the attempted robbery and the armed enhancement; and on count 4, a consecutive term of one year for the assault. He was sentenced to two additional years for the priors for a total term of 11 years.

DISCUSSION

I. Ineffective Assistance of Counsel

During direct examination of Munoz, Larsen's counsel asked how far away she was when she observed the person who took the dog. She pointed to the "wall," identified by counsel as "the bar" in the courtroom, and when Larsen's counsel asked the court how far the bar was from the witness stand, the court stated it was about 20 feet. When cross-examined by Duran's counsel, Munoz again pointed to the wooden partition, and Duran's counsel confirmed with her several times that the distance was 20 feet.

In closing argument, Duran's counsel stated, "The last witness . . . , a Miss Munoz, told you the guy who took the leash off of the lady's hand is also the shooter. That was the only witness. . . . And this person who is telling you to believe her . . . is not a trustworthy witness, not because she's lying but because she's not sure. She told you that she was *20 yards*, and I think His Honor determined it was *20 yards* or so from where she is sitting to this wooden divider. . . . There's no way that if I am moving the distance between the juror over there in the blue and me is the same now, I will be farther because I'm walking away and then closer when I walk closer. So it's not that she's lying, . . . I'm not going to say it's not honest because she's not dishonest. . . . It's not reliable. You cannot rely on that one witness." (Italics added.) Neither the prosecutor nor Larsen's counsel objected.

Larsen contends his counsel was ineffective for failing to object during Duran's counsel's argument and point out that Munoz testified that she was only 20 feet instead of 20 yards away when she made her observations.

"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)" (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212.)

We find that Larsen suffered no prejudice as a result of his counsel's failure to object. While we agree there is a substantial difference between 20 yards and 20 feet, in this case, the distance from which Munoz viewed the incident was demonstrated by pointing to fixed objects in the courtroom; from the partition or "bar" to the witness stand. This distance was one which the jury could readily ascertain as it had viewed that distance during the trial. Moreover, Larsen's counsel stated in his closing argument immediately following Duran's counsel's remarks: "And then we have the testimony of Miss Munoz. . . . She probably had the best view of the situation that took place because she indicated to you that she said it was about to there, and the judge indicated that's *20 feet*. So she was about *20 feet* from where the incident took place . . . ." (Italics added.) We also note the jury was instructed that nothing the attorneys say is evidence. (CALCRIM No. 222.) It is not reasonably probable that Duran's counsel's mistaken reference to "yards" had any effect on the jury's determination of Munoz's credibility. Thus, the ineffective assistance claim fails.

II. The Natural and Probable Consequences Instruction

The court instructed the jury with CALCRIM No. 402, as follows: "The defendants are charged in count 3 with attempted robbery in violation of Penal Code

section 664/211, and in count 4 with assault with a firearm in violation of Penal Code section 245(a)(2). You must first decide whether the defendants are guilty of attempted robbery in violation of Penal Code section 664/211. If you find the defendants are guilty of this crime, you must then decide whether defendant Duran is guilty of assault with a deadly weapon in violation of Penal Code section 245(a)(2). Under these circumstances a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time."

Larsen's trial attorney objected to the instruction, but did not specify a reason. Duran's counsel indicated that she joined in the objection but also did not specify a reason.

Larsen asserts that the instruction signaled to the jury that he was the one who personally used the gun and that Duran's liability stemmed only from the natural and probable consequences doctrine. Larsen argues that he was thus precluded from presenting an effective defense to the assault with a deadly weapon charge. Larsen's defense was premised on Munoz's identification of Duran as the shooter and the ballistics testimony that Duran also had gunshot residue on his hands.

The prosecutor's theory of the case was that Larsen was the one who shot Gibbs. As a result, only Larsen was charged with the personal use of a firearm with respect to the attempted robbery charge. Accordingly, the prosecutor argued specifically that Duran's liability stemmed from the natural and probable consequences doctrine.

We reject Larsen's assertion that the instruction foreclosed the jury from considering whether he personally used a firearm during the commission of the assault. His claim that the instruction caused the jury to find the firearm enhancement true as to him even if it had believed Munoz's testimony that the person who took the dog (Duran) was the same person who shot Gibbs is speculation. The court properly instructed the jury that it had to find beyond a reasonable doubt all of the elements necessary to conclude that Larsen used and intentionally discharged a weapon causing great bodily injury. (CALCRIM Nos. 3146, 3148 & 3149.) The jury also was given CALCRIM No. 200, which states in pertinent part: "You must decide what the facts are. It is up to

all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial. [¶] . . . [¶] Some of these instructions may not apply, depending on your findings about the facts of the case. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." Viewing the instructions as a whole, we do not conclude that the jury was misled in the manner Larsen suggests. We presume that if the jury had a reasonable doubt that Larsen was the individual who fired the weapon, it would have followed the court's instructions and found the allegation not true. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 107.)

III. Section 654

Duran was sentenced to five years for the robbery of Franco and a consecutive term of eight months for the commercial burglary of Franco's business and another four months for the principal armed allegation. After imposing a consecutive term for the burglary, the court stated, "The reason the court is imposing consecutive sentences is after looking at California Rules of Court 4.125, the crimes were predominantly independent of each other, the crimes involved separate acts of violence, and the crimes were committed at different times and different places." Duran's counsel did not object. Duran's counsel had filed a sentencing memorandum that did not address the imposition of consecutive terms. Duran contends the sentence for the commercial burglary should have been stayed pursuant to section 654. Additionally, he claims counsel was ineffective for failing to object to the imposition of consecutive terms. Larsen joins in the argument.

The record reflects that Garcia was told to pull over by Larsen when they were on their way to the Santa Anita Mall. Larsen told Garcia to stop while on Gidley Street and Duran got out of the car to look at the air compressors which were in the parking lot in front of the building. While Duran and Larsen were in the process of unhooking the hoses, Franco came out and verbally confronted the two men. They then demanded his wallet, and when Franco refused, Larsen showed him a handgun in his waistband. Franco testified that Duran went inside the building and into Franco's office while Larsen

was demanding Franco's wallet. While Franco gave his wallet to Larsen, Duran came out of the office, and both men left. It was then that Franco determined that his office had been ransacked and a cell phone had been taken.

"Penal Code section 654 prohibits punishment for two crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid.*) If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The defendant's intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)" (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.)

Duran contends, "[t]he trial court's consecutive sentence of the commercial burglary is prohibited because the evidence showed that Larsen and [he] engaged in essentially simultaneous acts against the same victim, and their intent in committing the crimes was the same: to take Franco's property. The record revealed no evidence that either act was committed for any reason other than for the theft." Duran's evaluation of the sequence of events is inaccurate.

Defendants stopped at Franco's business to steal the compressors that were outside of the building. While they were in the process of moving the compressors, Franco came out and confronted them. It was then that defendants formed the intent to take Franco's wallet and demanded that he relinquish it. When Franco refused, Larsen displayed his gun and repeated the demand. While Franco was being detained, Duran took the opportunity to go inside the building and into the office, obviously looking for something of value. There is no evidence Duran knew Franco's office existed prior to his entry into the building. Nor is there evidence that Duran entered the building to facilitate the taking of Franco's wallet.

In *People v. Green* (1985) 166 Cal.App.3d 514 and *People v. Dugas* (1966) 242 Cal.App.2d 244, disapproved on other grounds in *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, 327, footnote 11, the defendants were in the course of burglarizing a home when the residents unexpectedly returned to the premises and were robbed. In each case, the appellate court held that the burglary and robbery did not constitute an indivisible course of conduct. This was so because the burglary had been accomplished when the victims returned home and the defendants had no intent to commit a robbery until the victims entered the residence. (*Green, supra,* 166 Cal.App.3d at p. 518; *Dugas, supra,* 242 Cal.App.2d at pp. 250-251.)

Our case presents the reverse scenario. Defendants had accomplished the robbery and did not form the intent to burglarize the office until Franco was immobilized through Larsen's use of force. There is substantial evidence that defendants had three separate objectives, each formed independently as the events unfolded. First, they intended to steal the compressors. Second, when Franco emerged from the building, they formed the intent to rob him. Third, Duran entered the building for the purpose of determining whether other property could be seized. Based on the evidence, the trial court reasonably concluded that burglarizing the building was an afterthought brought about by the confrontation with Franco.

Duran argues this case is controlled by *People v. Bauer* (1969) 1 Cal.3d 368 (*Bauer*). There, the defendant and his accomplice committed a residential robbery. After ransacking the home, they carried the victims' property to the garage and drove away in one of the victims' car. (*Id.* at p. 372.) After his conviction, the defendant was sentenced for both robbery and car theft. The Supreme Court held that multiple punishment was barred by section 654. Under the principle of that statute, "the taking of several items during the course of a robbery may not be used to furnish the basis for separate sentences." (*Id.* at pp. 376-377.) The Attorney General urged that separate sentences could be upheld on the theory that the robbery was completed before the theft of the car. The court rejected the argument, concluding that "the evidence in the instant case does not show that the theft of the car was an afterthought but indicates to the contrary that the

robbers, who while ransacking the house were carrying the stolen property to the garage, formed the intent to steal the car during the robbery if not before it." (*Id.* at p. 377.)

Bauer is distinguishable. As we have discussed, Franco's cell phone was not taken during the course of the robbery. The burglary occurred at a time and place separate from the robbery, the entry into the office did not facilitate the robbery, and defendants had multiple, independent criminal objectives. If defendants had intended from the outset to invade Franco's building in search of property, they would have done so instead of attempting to take the compressors. The imposition of consecutive sentences for the burglary and robbery was proper.[2]

IV. Cumulative Error

Defendants argue that if we find the alleged errors were harmless when considered individually, the cumulative effect of the rulings deprived them of a fair trial. We are satisfied that the rulings to which defendants object did not affect the fairness of the trial whether considered individually or collectively. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

V. The Sentence

When the trial court sentenced Larsen to a consecutive term for the burglary, it imposed a sentence of three years, four months, one-third of the 10-year term for the firearm enhancement pursuant to section 12022.53. The parties were apparently unaware that section 12022.53 applies only to the specific felonies set forth in subdivision (a) and the list does not include commercial burglary. We gave Larsen's counsel and the Attorney General an opportunity to brief the issue of whether the trial court could impose a sentence for the use of the firearm pursuant to section 12022.5.

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[2] Given our conclusion, Duran's claim that counsel was ineffective for failing to object to the sentence necessarily fails. (*People v. Scott*, *supra*, 15 Cal.4th at pp. 1211-1212.)

Larsen contends no sentence may be imposed for an enhancement that was not alleged in the information. Thus, he urges, the sentence for the section 12022.53 enhancement must be stricken and the only sentence that may be imposed is one pursuant to the section 12022, subdivision (a) allegation which the jury also found true. We disagree. The case of *People v. Strickland* (1974) 11 Cal.3d 946 (*Strickland*) is instructive. In *Strickland*, as in our case, the firearm enhancement alleged and found true by the jury (§ 12022.5) did not apply to the crime for which the defendant was convicted. The Supreme Court concluded that because the defendant was charged with the use of a firearm, he had notice that his conduct also violated section 12022's prohibition against using a dangerous or deadly weapon. As a result, the court modified the defendant's sentence to delete punishment imposed under section 12022.5 and to add a sentence pursuant to section 12022. (*Id.* at pp. 961-962.)

The principles of *Strickland* apply here to allow the imposition of a sentence pursuant to section 12022.5. The elements of sections 12022.53 and 12022.5 are identical. Indeed, the same jury instruction, CALCRIM No. 3146, is used for both allegations. Larsen had notice that his conduct could violate either section. In addition, because the elements of the two sections are the same, the jury's finding that Larsen used a firearm within the meaning of section 12022.53 necessarily means that he violated section 12022.5 as well. On remand, for the firearm enhancement on count 2, the burglary, the trial court may sentence Larsen pursuant to section 12022.5.

As we must remand Larsen's matter for resentencing, we need to point out other errors that resulted in the imposition of an unauthorized sentence. Although not raised by the parties, an appellate court may correct an unauthorized sentence on its own motion. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) For count 3, the attempted robbery, the court sentenced Larsen to 25 years to life, which corresponds to the sentence for the 12022.53, subdivision (d) enhancement. Pursuant to section 1170.1, subdivision (a), the court was required to impose a sentence for the attempted robbery (16 months, two years, or three years) and then add the mandatory sentence for the enhancement. In addition, the court selected count 1, the robbery, as the principal term. Section 1170.1, subdivision (a) states

that the "principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements." No matter what term the trial court selects for the attempted robbery, the addition of the 25 years to life enhancement for the 12022.53, subdivision (d) allegation will make the sentence for count three the "greatest term of imprisonment" the court can impose for any of the crimes of which Larsen was convicted.

In calculating Larsen's sentence, the trial court must select a term for the attempted robbery and add the 25 years to life sentence for the enhancement. That sentence will be the principal term. It then must impose sentences on the remaining counts. As to count 2, the burglary, the court may sentence Larsen pursuant to section 12022.5 for the use of the firearm. We are fully cognizant of the fact that the mandatory sentence imposed for count 3 will exceed the 25 years to life Larsen originally received. Ordinarily, a defendant may not be given an aggregate sentence that is greater than that initially imposed when a case is remanded for resentencing. However, "[a] more severe sentence may be imposed following a successful appeal if the initial sentence was unlawful or unauthorized." (*People v. Neely* (2009) 176 Cal.App.4th 787, 800.) That is the case here. Lest there be any doubt, in order to avoid imposing another unauthorized sentence, Larsen may receive no more than three years for the attempted robbery and a consecutive 25 years-to-life term for the section 12022.53 enhancement.

DISPOSITION

As to defendant Larsen, the convictions are affirmed. The sentence imposed on count 2 pursuant to section 12022.53, subdivision (b) is stricken. His matter is remanded for resentencing in accordance with the directions set forth in this opinion. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

As to defendant Duran, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.