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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TYLER P. PERRY,

Defendant and Appellant.

B230391

(Los Angeles County
Super. Ct. No. VA116891)

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

Susan L. Ferguson, 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, James William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Tyler Perry appeals from the judgment in which he was convicted of one count of first degree burglary and one count of assault by means of force likely to produce great bodily injury and sentenced to prison on both counts. On appeal, Perry argues the trial court erred in not staying execution of sentence under Penal Code section 654 for the assault. We agree.

FACTS AND PROCEEDINGS BELOW

Marsha Landess, age 68, testified that she was sitting on the couch in her living room when Perry “put a hand over [her] face and forehead and started twisting [her] neck.” Landess screamed, and her dogs started barking. Landess’s caregiver came out of her bedroom, saw Perry standing behind the couch and said: ““Who the hell is that, Marsha?”” Perry turned and looked at the caregiver, then walked down the hall and out of the house. The caregiver called the police and Perry was apprehended. The evidence at trial showed that shortly before entering Landess’s home, Perry had been begging for money and cigarettes in front of a liquor store and smoking methamphetamine in the yard of a vacant house near Landess’s.

The information alleged one count of burglary and one count of assault by means of force likely to produce great bodily injury. The trial court instructed the jury on burglary, assault and larceny, and told the jury that it could convict Perry of burglary if it found he had entered Landess’s residence with the intent to commit theft or assault by means of force likely to produce great bodily injury. In closing argument the prosecutor maintained that when Perry entered Landess’s house “his intent was to steal[.]” Perry, however, could not carry out that intent, the prosecutor argued, because Landess was sitting on the couch and the caretaker “caught him before it could occur.” The jury convicted Perry of burglary and assault. The court sentenced him to consecutive sentences of six years for the burglary and one year for the assault.

DISCUSSION

Penal Code section 654, subdivision (a), states: “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.” The statute “prohibits multiple punishment for a single criminal act and for two crimes arising from a single indivisible course of conduct in which the defendant had only one criminal intent or objective. [Citation.] Thus: ‘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. [Citation.] 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.’ [Citation.]” (*People v. Conners* (2008) 168 Cal.App.4th 443, 458, fn. omitted.) “Each case must be determined on its own circumstances. [Citations.]” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

Despite the deferential standard of review, we conclude that the evidence is insufficient to support the implied finding by the trial court that Perry had separate intents and objectives in committing the burglary and the assault. If Perry entered the house with intent to commit assault, then his intent for the burglary and the assault is the same. If, on the other hand, Perry entered Landess’s house with the intent to commit a theft, then the assault was incident to that objective. Although the People argue that Perry entered the home with the intent to commit theft but formed a separate intent to commit an assault, once he saw Landess sitting on the couch, such argument is not supported by substantial evidence. Indeed, the People offer no explanation why Perry, who wanted cash for cigarettes, would enter a home to obtain money, change his mind and then form

a separate intent to assault a 68-year-old woman sitting on the couch. The evidence supports only the theory that, if Perry entered the house with intent to steal, he assaulted Landess as a means to frighten and control her while he carried out the theft, a plan that he aborted when Landess screamed, her dogs barked and her caretaker entered the room. Thus, whether Perry entered Landess's home with the intent to commit theft or assault, execution of sentence on the assault conviction should be stayed pursuant to Penal Code section 654. (See *People v. Miller* (1977) 18 Cal.3d 873, 886 [execution of sentence for assault stayed when burglar entered jewelry store and committed assault while inside as a means to execute the theft]; *People v. McElrath* (1985) 175 Cal.App.3d 178, 191 [execution of burglary sentence stayed when burglar entered house with intent to rape and did rape victim and defendant punished for the rape].)

DISPOSITION

The judgment is modified to stay execution of sentence on the assault conviction. As modified, the judgment is affirmed. The trial court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

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ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.