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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT McARTHUR BARNES,
JR.,

Defendant and Appellant.

B283209

(Los Angeles County
Super. Ct. No. MA069787)

APPEAL from the judgment of the Superior Court of Los Angeles County, Kathleen Blanchard, Judge. Affirmed as modified.

Maura F. Thorpe, 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, Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Robert McArthur Barnes, Jr., (Barnes) guilty of three firearm-related offenses and the trial court imposed consecutive sentences. He contends that the consecutive sentences were improper under Penal Code section 654.¹ We disagree in part and agree in part. We therefore modify the judgment and, as modified, affirm it.

BACKGROUND

On October 25, 2016, Omar Guzman was at his apartment, socializing with friends and roommates. Guzman saw Barnes, whom he had met two or three months before. Guzman invited Barnes to his apartment where they socialized and Barnes consumed alcohol. According to Guzman, Barnes displayed a gun, pulling it out and putting it away. Barnes was “just showing it off to . . . anybody.”

At some point, Barnes began acting strangely. After talking to Guzman’s roommate, John Colin, Barnes became upset with Guzman. Barnes accused Guzman of being a bully and, even though Barnes was not a roommate and had nothing to do with the apartment, told Guzman to get his belongings and to get out of the apartment. Barnes indicated he was upset because Guzman had not been contributing enough money to the apartment’s expenses and had not been doing enough chores. Barnes pulled out the gun and began waving it around, calling Guzman the devil and a bully who needed to leave.

Deputies arrived and Barnes gave the gun to Jose Dominguez, another roommate, and told him to hide it. Dominguez took the gun but then gave it to a deputy sheriff. The

¹ All further statutory references are to the Penal Code.

.40-caliber handgun had one bullet in the chamber and two in the magazine.

Barnes presented no defense evidence.

The jury found Barnes guilty of possession of a firearm by a felon (§ 29800, former subd. (a)(1); count 3), possession of ammunition by a prohibited person (§ 30305, subd. (a)(1); count 4), and exhibiting a weapon or firearm (§ 417, subd. (a)(2)(A); count 5), with the court finding that he suffered a prior serious felony conviction (§ 667, subd. (d)).

During sentencing, the court concluded that section 654 did not apply to count 4 because each crime at issue in counts 3 and 4 was a “distinct crime.” The court sentenced Barnes to prison on each of counts 3 and 4 to six years (the three-year upper term, doubled pursuant to the “Three Strikes” law), but ran count 4 concurrent to count 3. The court sentenced Barnes on count 5 to a consecutive term of 365 days in the county jail.

DISCUSSION

Barnes claims section 654 bars multiple punishment on his convictions. As we explain, his claim is partially well-taken.

I. Applicable law

Section 654, subdivision (a), states, in relevant 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.”

Section 654 involves a two-step process. First, we determine whether a defendant’s single physical act separately completed the actus reus of the subject crimes. (*People v.*

Corpening (2016) 2 Cal.5th 307, 310–315 (*Corpening*) [defendant convicted of carjacking and robbery based on same forceful taking of property; § 654 applied.] If so, then section 654 bars multiple punishment on those crimes and there is no need to consider the second step. If, however, the single physical act did not separately complete the actus reus of the subject crimes, then there are multiple acts, i.e., a course of conduct, and the second step is reached. In the second step, we determine whether the course of conduct reflects a single criminal intent and objective. (*Corpening*, at pp. 310–315.) Section 654 bars multiple punishment on those crimes where a course of conduct reflects a single criminal intent and objective, but not where that course of conduct reflects multiple criminal objectives.

People v. Jones (2012) 54 Cal.4th 350, for example, held that section 654 barred multiple punishment for three crimes based on a single physical act. The defendant in *Jones* was sentenced concurrently for possession of a firearm by a felon, carrying a readily accessible concealed and unregistered firearm, and carrying an unregistered loaded firearm in public. *Jones* held that possessing a particular firearm on a single occasion constituted a single physical act punishable only once under section 654. (*Id.* at p. 360.) The same conduct accomplished the actus reus for each of the crimes.

Where, as here, the pertinent facts are undisputed, the application of section 654 to those facts presents a question of law which we review de novo. (*Corpening, supra*, 2 Cal.5th at p. 312.) Moreover, when a court determines that a conviction falls within the meaning of section 654, it is necessary to impose sentence but to stay the execution of the duplicative sentence. (*People v. Duff* (2010) 50 Cal.4th 787, 796.)

II. Section 654 bars punishment on count 4

Respondent concedes, and we agree, that section 654 barred multiple punishment on count 3 (§ 29800, former subd. (a)(1)) and count 4 (§ 30305, subd. (a)(1)). (*Jones, supra*, 54 Cal.4th at pp. 356–358.) Barnes possessed no ammunition other than that in the gun he possessed. (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.)

III. Section 654 does not bar punishment on counts 3 and 5

Although we agree that section 654 applies to count 4, we do not agree it applies to bar multiple punishment on counts 3 and 5, unlawful possession of a firearm and brandishing a firearm, respectively. “ ‘ “Whether a violation of [former] section 12021,^[2] forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly *antecedent and separate* from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession *only* in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.” ’ ” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143, italics added, fn. omitted; accord, *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1407–1414.)

² The pertinent portions of section 29800, former subdivision (a)(1), and its predecessor, former section 12021, subdivision (a)(1), are the same.

Here, Barnes committed two separate physical acts, involving distinct intents and objectives. That is, Barnes was already armed with the gun when he first arrived at Guzman's apartment. Later, after becoming upset, he brandished the gun by waving it in Guzman's direction. Accordingly, Barnes had the gun long before he brandished it. The possession was therefore a "separate but related [action] taken at a separate time." (*Corpening, supra*, 2 Cal.5th at p. 314.) Barnes's possession of the gun and brandishing it were multiple, divisible acts. Accordingly, we conclude section 654 did not bar multiple punishment on counts 3 and 5, because Barnes's antecedent possession of the gun and his brandishing had different respective criminal intents and objectives.

None of the cases cited by Barnes, or his arguments, compel a contrary conclusion. *People v. Fuller* (1975) 53 Cal.App.3d 417, is inapposite. *Fuller* revealed no more about the facts in that case than that the defendant, in a confrontation, committed brandishing, assault with a deadly weapon, and battery (*id.* at p. 419) when he "display[ed] the [shotgun], firing it and injuring the victim" (*id.* at p. 420). *Fuller* concluded section 654 barred punishment for the brandishing and battery. (*Id.* at pp. 420, 422.) *Fuller* did not expressly state whether the brandishing, and the assault with a deadly weapon accomplished by the firing of the shotgun, were concurrent or whether, or by how much time, the brandishing preceded that assault. *Fuller* did not involve the crime of possession of a firearm by a felon or, as in the present case, an antecedent firearm possession by a felon, followed by the defendant's commission of another crime with a new and different criminal objective.

Next, Barnes’s citation to *People v. Atencio* (2012) 208 Cal.App.4th 1239, is unhelpful. In *Atencio*, the defendant stole a firearm and continued to possess it to the next day. He was convicted of grand theft of a firearm and possession of a firearm by a felon and sentenced on both offenses. Section 654 barred multiple punishment because the defendant acquired the gun (the grand theft) and later possessed it (possession of a firearm by a felon) with one criminal objective: to possess the gun. (*Id.* at pp. 1240, 1243–1245.) Unlike this case, *Atencio* was “not a case where the defendant acquired a gun, then committed a crime using it.” (*Id.* at p. 1245.)

DISPOSITION

The judgment is modified by staying the execution of Robert McArthur Barnes, Jr.’s six-year prison sentence on his conviction for possession of ammunition by a prohibited person (Pen. Code, § 30305, subd. (a)(1); count 4), pending completion of his remaining sentence, such stay then to become permanent. As modified, the judgment is affirmed.

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DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.