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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.

MICHAEL RIVERA,

Defendant and Appellant.

B238286

(Los Angeles County
Super. Ct. No. GA071240)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Modified with directions and, as so modified, affirmed.

Sharon Fleming, 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 Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

After a court trial, defendant and appellant Michael Rivera was convicted of committing a series of offenses, including several robberies and an assault, and was sentenced to a term of five years in prison. The record contains conflicting information regarding whether the court also found him guilty of receiving stolen property. We conclude the trial court did not find him guilty of that offense. Rivera also contends, and the People concede, that his sentence on a subordinate count was miscalculated. Accordingly, we order the record corrected to show Rivera was not convicted of receiving stolen property, and modify his sentence on the weapons enhancement appended to count 2 to a term of four months. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

During a two-week period in May 2007, Rivera committed a series of offenses at or near the Pasadena City College (PCC) campus.

a. *Crimes against Huynh, Steimer, and Heim.*¹

On May 7, 2007, Rivera displayed a knife and robbed Duong Huynh of over \$300 in a PCC restroom.

On the afternoon of May 14, 2007, Rivera approached Alex Steimer near the PCC campus, demanded money and Steimer's iPod, and displayed a knife. Steimer gave Rivera \$5. On May 18, 2007, Steimer was working at the PCC radio station. Rivera entered the station and began talking with Steimer. Rivera distracted Steimer and took Steimer's iPod when Steimer was not looking.

On May 21, 2007, William Heim, Caltech's Director of Security Operations, observed Rivera riding a bicycle. Heim was aware Rivera was wanted for various crimes committed in the area, and attempted to arrest him. Rivera pushed his bicycle at Heim. When Heim attempted to grab Rivera, Rivera punched him.

¹ Because the evidentiary details of these offenses are not relevant to the issues presented on appeal, we do not further discuss them.

b. *Offenses relating to the psychology textbook.*

On the afternoon of May 10, 2007, PCC student Taylor Calderone was seated at a Pasadena bus stop across from the campus. Rivera was also waiting at the bus stop. Rivera displayed a switchblade knife and told Calderone he was going to take all Calderone's money. Calderone gave Rivera \$4. Rivera then demanded Calderone's cellular telephone, and Calderone complied. Rivera then asked if Calderone had a laptop computer, an iPod, or an ATM card. He told Calderone he was going to take him to an ATM and have him "clean out" his account. When Calderone explained he had none of these items, Rivera asked whether Calderone had anything else of value. Hoping to appease Rivera, Calderone gave him a psychology textbook, explaining Rivera could sell it at a local bookstore for \$50. Rivera told Calderone that if he saw him on campus, "this never happened," and departed.

Later that day Rivera went to the PCC radio station, where Collin Jones was working. Rivera asked Jones to help him sell the psychology textbook. Jones agreed to sell the book for him.² He and Rivera went across the street to Book Mart. While Rivera waited outside, Jones went inside and sold the book for \$10. Jones gave Rivera the cash, but Rivera returned \$5 to him in exchange for his assistance in selling the book.

A few days after the incident Calderone recovered the book from Book Mart, identifying it as his by virtue of a bookmark placed in the book.

2. *Procedure.*

In an information filed in July 2008, Rivera was charged with the robberies of Huynh (count 1), Calderone (count 2), and Steimer (counts 6 and 7); the attempted robbery of Aaron Fink (count 5);³ the commercial burglary of Book Mart (count 3); receiving stolen property (the textbook, count 4); and the assault of Heim (count 8). After several continuances at Rivera's request, in July 2009 defense counsel declared a

² Jones did not know the book was stolen.

³ Because the court acquitted Rivera of the attempted robbery of Fink, we have omitted further discussion of that charge.

doubt about Rivera's competence. Proceedings were suspended pursuant to Penal Code section 1368.⁴ After a psychological evaluation of Rivera, proceedings were reinstated. The court found Rivera competent in October 2009. Rivera waived his right to a jury trial, and a bench trial commenced in December 2009. The court found Rivera guilty of the second degree robberies of Huynh, Calderone, and Steimer (count 6) (§ 211) and the misdemeanor assault of Heim (§ 240). On count 7 (robbery of Steimer), the court found Rivera guilty of the lesser included offense of misdemeanor theft (§ 484, subd. (a)). The court further found Rivera used a dangerous or deadly weapon, a knife, in commission of the robberies of Huynh and Calderone. (§ 12022, subd. (b)(1).) It acquitted Rivera of the attempted robbery of Fink, charged in count 5. As we discuss *post*, it also acquitted Rivera of receiving stolen property as charged in count 4. It dismissed count 3, the commercial burglary of Book Mart, in the interests of justice. (§ 1385.) The court sentenced Rivera to a term of five years in prison. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a criminal assessment fee. Rivera appeals.

DISCUSSION

1. *The record must be corrected to reflect that Rivera was not convicted of receiving stolen property.*

Due to a discrepancy between the reporter's transcript and the court's minute order, the parties disagree about whether the court acquitted Rivera of receiving stolen property in count 4. The reporter's transcript indicates that when rendering its verdict, the court stated: "With respect to count 4, violation of . . . section 496(a), the court finds the defendant not guilty of that charge." The minute order, on the other hand, states that the court found Rivera guilty on count 4.

⁴ All further undesignated statutory references are to the Penal Code.

Generally, when there is a conflict between the oral pronouncement of judgment and a minute order, the former controls and the latter is presumed to be the result of clerical error. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1070; *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [“An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize”]; *People v. Gonzalez* (2012) 210 Cal.App.4th 724, 744; *People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [the “oral pronouncement of judgment controls over any discrepancy with the minutes or the abstract of judgment”]; *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.) It is also the “ ‘general rule’ ” that “ ‘a record that is in conflict will be harmonized if possible. [Citation.] If it cannot be harmonized, whether one portion of the record should prevail as against contrary statements in another portion of the record will depend on the circumstances of each particular case.’ [Citation.]” (*People v. Lawrence* (2009) 46 Cal.4th 186, 194, fn. 4; *People v. Smith* (1983) 33 Cal.3d 596, 599; *People v. Harrison* (2005) 35 Cal.4th 208, 226; *People v. Freitas* (2009) 179 Cal.App.4th 747, 750, fn. 2.)

Here, the record cannot be harmonized: either the trial court found Rivera guilty of receiving stolen property, or it did not. Thus, we consider whether the circumstances of the case provide a clear indicator of which portion of the record should control. Less than two months after the court’s verdicts, the same deputy district attorney who had prosecuted the case at trial filed a sentencing memorandum that referenced the fact Rivera had been convicted on count 4. Defense counsel’s responsive memorandum did not suggest this was error. The sentencing hearing transpired approximately seven months after trial.⁵ At sentencing Rivera was represented by the same attorney who had represented him at trial. The deputy district attorney who appeared was not the same attorney who had prosecuted the case. The reporter’s transcript indicates that the sentencing judge was not the same judge who presided over trial; however, the minute

⁵ The delay was due, at least in part, to efforts to have Rivera evaluated by the California Department of Corrections in order to find an appropriate placement for him.

order memorializing the sentencing hearing contradictorily indicates that the judge who presided over sentencing *was* the same judge who presided at trial. The court's statements at the sentencing hearing tend to confirm the minute order on this point. When the court imposed sentence on count 4, defense counsel did not object or inform the court that Rivera had not been convicted on that count. On this record, Rivera argues that the reporter's transcript is correct; he urges that given the long delay between trial and sentencing, the court and the parties no doubt relied upon the erroneous minute order at sentencing. The People, on the other hand, argue that, given the sentencing memoranda and defense counsel's failure to object at the sentencing hearing, the minute order is most likely correct and the reporter's transcript contains a clerical error.

As the parties agree, however, it is clear that Rivera could not have been lawfully convicted of both robbing Calderone of the textbook in count 2, and receiving the same property, the textbook, in count 4. It has long been the common law rule that a person may not be convicted of both stealing and receiving the same property. (*People v. Ceja* (2010) 49 Cal.4th 1, 3; *People v. Smith* (2007) 40 Cal.4th 483, 522; *People v. Garza* (2005) 35 Cal.4th 866, 871, 874.) This principle is codified in section 496, subdivision (a). (*Smith*, at p. 522.) Robbery is a form of aggravated theft. (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) Apparently in reliance on this principle, at trial defense counsel argued Rivera could not be convicted of both crimes, stating: "count 4, I assume that would be an alternative between count 4, the receiving of the book, which was allegedly taken by Mr. Rivera from Taylor Calderone in count 2. I would argue those are alternative theories. Either the court would find count 4 or count 2."

We presume that a trial court " 'knows and applies the correct statutory and case law.' " (*People v. Thomas* (2011) 52 Cal.4th 336, 361; *People v. Braxton* (2004) 34 Cal.4th 798, 814; *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1355.) Given the undisputed fact that the court could not have properly convicted Rivera of both count 2 and count 4, we apply the settled rule that the oral pronouncement of judgment controls. Accordingly, we order the record corrected to show that Rivera was acquitted, not convicted, on count 4, receiving

stolen property. Because the sentence on count 4 was stayed pursuant to section 654, remand for resentencing is not required.

2. *Correction of Rivera's sentence.*

Rivera also argues that the trial court miscalculated his sentence on count 2. The court selected count 1, the robbery of Huynh, as the base count. On count 2, the robbery of Calderone, the court properly imposed one-third of the midterm, or one year, for the substantive offense. (§ 1170.1, subd. (a).) However, it imposed the full term of one year for the section 12022, subdivision (b)(1) weapons enhancement. As the parties agree, the court should have imposed one-third of the midterm, or four months, on the enhancement. Section 1170.1, subdivision (a), provides in pertinent part: “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. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.*” (Italics added.) Accordingly, we order the judgment modified to correct this error.

DISPOSITION

The clerk of the superior court is directed to correct the court's minute order dated December 22, 2009, and the abstract of judgment, to reflect that Rivera was acquitted of count 4, receiving stolen property. The clerk is also directed to modify the abstract of judgment to reflect a sentence of four months on the Penal Code section 12022, subdivision (b)(1) enhancement related to count 2. The clerk is directed to forward the modified abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.