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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. LUNDY DEON MURPHY, Defendant and Appellant.	B237117 (Los Angeles County Super. Ct. No. BA386520)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gail Ruderman Feuer, Judge. Affirmed in part and reversed in part with directions.

California Appellate Project, under appointment by the Court of Appeal, Jonathan B. Steiner, Executive Director, and Ann Krausz for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Lundy Deon Murphy appeals from the judgment entered following a jury trial in which he was convicted of two counts of petty theft with prior theft-related convictions. Defendant initially filed an opening brief raising no issues and asking this court to independently review the record. After reviewing the record, we asked the parties to file letter briefs addressing whether defendant was properly convicted of two counts of theft for taking items from the same victim on separate occasions. Defendant contended in his letter brief that one of his convictions must be reversed. We agree.

BACKGROUND

Jung Seo was an employee of Thrifty Furniture Store in Los Angeles, which had 60,000 square feet of appliances and furniture. Seo testified that on June 11, 2011, he reviewed footage from the store's surveillance cameras and saw defendant enter the store carrying a tray at a little after 1:00 p.m. Defendant then picked up a sink and walked out of the store with the sink without paying for it. (Date references pertain to 2011.) Seo recognized defendant because Seo had seen recordings from the store's surveillance cameras of defendant in the store, "stealing one merchandise at a time like once a week."

About 2:00 p.m. on June 11, Seo saw defendant enter the store again. Seo approached defendant and told him to stop stealing. Defendant said he was not stealing and claimed he wanted to sell a tray. Defendant was carrying the same tray he had been carrying during his visit to the store an hour earlier. Seo asked defendant to wait. Defendant put the tray down, ran to his car, and drove away. Seo wrote down defendant's license plate and called the police.

Seo knew that things had previously been stolen from the store, including a "welding machine." Seo reviewed the store's prior surveillance recordings looking for defendant and found that on June 1 defendant had entered the store twice. The first time defendant walked out with a restaurant sink. A few minutes later, he returned and took the welding machine. Seo further testified that he believed the tray defendant left in the store on June 11 belonged to Thrifty Furniture, and that defendant had stolen it "long time ago."

Los Angeles Police Department Officer Daniel Wheat arrived at the store about 2:20 p.m. Seo gave Wheat the license plate number—which was registered to defendant—and a description of the car and of defendant. Seo also showed Wheat the surveillance videos from both of defendant's visits to the store on June 11. A police technician subsequently downloaded the videos of defendant's visit to the store on June 1 and his first visit on June 11, but not the one of defendant's second visit on June 11.

The jury convicted defendant of two counts of petty theft. Defendant admitted prior convictions for burglary, robbery, and petty theft with a prior for purposes of Penal Code section 666, subdivision (a). Defendant also admitted allegations that he suffered a prior serious or violent felony conviction within the scope of the "Three Strikes" law and served three prior prison terms within the scope of Penal Code section 667.5, subdivision (b). The trial court sentenced defendant to a second strike term of seven years in prison, consisting of two years eight months for count 1, a consecutive subordinate term of one year four months for count 2, and three one-year prior prison term enhancements.

DISCUSSION

Pursuant to the rule set forth in *People v. Bailey* (1961) 55 Cal.2d 514 (*Bailey*), where the defendant commits "a series of takings from the same individual, there is a single theft if the takings are pursuant to one continuing impulse, intent, plan or scheme, but multiple counts if each taking is the result of a separate independent impulse or intent." (*People v. Packard* (1982) 131 Cal.App.3d 622, 626 (*Packard*).) "*Bailey* does not prohibit multiple convictions where the defendant commits a series of thefts based on *separate* intents, even if the defendant acts pursuant to the *same* intent on each occasion." (*People v. Jaska* (2011) 194 Cal.App.4th 971, 984 (*Jaska*).) "Whether multiple takings are committed pursuant to one intention, one general impulse, and one plan is a question of fact for the jury based on the particular circumstances of each case." (*Id.* at pp. 983–984.) In *Jaska*, the court surveyed cases applying *Bailey* and concluded that "the following types of evidence are relevant in determining whether a defendant acted pursuant to a single intent in committing a series of thefts: whether the defendant acted

pursuant to a plot or scheme [citations]; whether the defendant stole a defined sum of money or particular items of property [citation]; whether the defendant committed the thefts in a short timespan [citation] and/or in a similar location [citation]; and perhaps most significantly, whether the defendant employed a single method to commit the thefts [citation]." (*Id.* at pp. 984–985, fn. omitted.) "The *Bailey* doctrine applies as a matter of law only in the absence of any evidence from which the jury could have reasonably inferred that the defendant acted pursuant to more than one intention, one general impulse, or one plan." (*Id.* at p. 984.)

The issue of whether defendant acted pursuant to a single intent, plan, or impulse in committing the June 1 and June 11 thefts from Thrifty Furniture Store was not presented to the jury.

The record includes evidence falling within three of the four categories identified in *Jaska*. Defendant stole a sink on both days in issue, the thefts were in the same location and just 10 days apart, and he employed essentially the same method on each occasion, that is, he walked into the store, picked up one item, left with the item, then returned later in the day. The Attorney General argues that defendant used a different method on June 11, in that he carried the tray into the store and claimed he wanted to sell it. Defendant's addition of a cover story (selling the tray) did not fundamentally alter his method of stealing and does not necessarily demonstrate that he acted pursuant to a separate independent impulse or intent. Notably, Seo testified that he had seen surveillance recordings of defendant stealing one item at a time at approximately one-week intervals, which suggested an ongoing plan and intent. The Attorney General also argues that the theft of the welding machine on June 1 demonstrates defendant operated pursuant to a separate intent. But defendant stole a sink on both dates, and the welding machine and sinks were all items that could be sold for commercial use.

The Attorney General also argues that the *Bailey* doctrine applies only where the defendant and victim had a continuing relationship. Although *Bailey* and many of the cases applying *Bailey* arose in a context of an ongoing relationship that enabled the

defendant to repeatedly steal funds or goods from the same victim over a period of time (see, e.g., *Packard*, *supra*, 131 Cal.App.3d 622 [for three years movie studio employee with outside business presented studio with phony invoices for services never performed]; *People v. Tabb* (2009) 170 Cal.App.4th 1142 [over four months, defendant stole goods from employer and sold them to recycler]), neither *Bailey* nor any of the numerous cases applying *Bailey* have required or even mentioned a continuing relationship. Indeed, in many of the cases applying *Bailey,* nothing suggested the existence of such a relationship. For example, in *People v. Gardner* (1979) 90 Cal.App.3d 42, the defendant killed and took five hogs belonging to the victim while hunting wild hogs on unfenced, open land. In *People v. Brooks* (1985) 166 Cal.App.3d 24, an auctioneer sold property consigned to him by 14 people but he failed to pay any of the consignors any of the proceeds from the auction. And in *People v. Richardson* (1978) 83 Cal.App.3d 853 [disapproved on another ground in *People v. Saddler* (1979) 24 Cal.3d 671, 682, footnote 8], which involved "a scheme whereby City of Los Angeles Controller's warrants were obtained by an unauthorized means and made payable to fictitious commercial payees" (83 Cal.App.3d at p. 858), nothing indicated that the defendant had any relationship with the city.

Although the evidence would have supported a finding that defendant acted pursuant to "one continuing impulse, intent, plan or scheme" (*Packard*, *supra,* 131 Cal.App.3d at p. 626) in committing the June 1 and June 11 thefts, it did not compel that conclusion. A trier of fact could also have concluded that defendant acted as "the result of a separate independent impulse or intent." (*Ibid.*) The issue should have been presented to the jury for resolution. Because no such determination was made, we adopt the remedy employed in *People v. Sullivan* (1978) 80 Cal.App.3d 16, 21. We reverse the conviction in count 2, which pertained to the June 11 thefts, and remand for further proceedings. The prosecutor may choose to retry defendant for count 2, but in such retrial, the trier of fact must determine whether or not "the takings [were] pursuant to one continuing impulse, intent, plan or scheme" or "if each taking [was] the result of a separate independent impulse or intent." (*Packard*, *supra*, 131 Cal.App.3d at p. 626.)

DISPOSITION

Defendant's conviction in count 2 is reversed. The judgment is otherwise affirmed, and the cause is remanded for further proceedings.

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.