

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

CRAIG ALLEN SCOTT,

Defendant and Appellant.

B284384

(Los Angeles County
Super. Ct. No. GA099347)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed and remanded with directions.

Gloria C. Cohen, 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, Senior Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Craig Allen Scott committed two burglaries, one on April 28, 2016 and one on July 28, 2016, of his former employer's business. A jury convicted him of second degree burglary and vandalism for the first incident and second degree burglary and driving and taking a vehicle without the owner's consent for the second incident. The trial court imposed concurrent sentences on all four convictions. Scott argues the court should have stayed under Penal Code section 654 his sentences for vandalism and driving and taking a vehicle without the owner's consent. We agree and remand with directions to stay execution of the sentences on those convictions.

FACTUAL AND PROCEDURAL BACKGROUND

A. April 28, 2016

After working in the service department of an automobile dealership for two years, Scott quit his job in late March 2016. On April 28, 2016 Scott returned to the dealership in the middle of the night and broke into the service area. Scott wandered around the service area, tried unsuccessfully to open several cabinets and toolbox drawers by prying off the locks, and eventually found an unlocked toolbox. Scott carried a bag into which he placed tools he selected from various drawers throughout the service area. Scott used tools to pry open a locked toolbox and removed tools from its drawers. The next morning, dealership employees discovered the lock mechanism of this toolbox had been scratched and damaged, and the toolbox was "in

complete disarray” and missing many tools. The dealership submitted insurance claims for \$60,000 for the damaged items.

After the break-in, the owner immediately suspected Scott. Surveillance cameras on the ceiling and walls throughout the dealership recorded Scott’s movements in the shop that evening. Several employees of the dealership and the investigating detective identified Scott on the videos from his “unusual gait” and distinctive “duck-type walk,” facial features, glasses, and mannerisms.¹

B. *July 28, 2016*

On July 28, 2016 Scott again broke into the dealership in the middle of the night. This time he got into a pickup truck that was parked in a service bay and drove it to another bay, where he backed it up to a large toolbox. Scott broke into the toolbox, removed several drawers of tools, and loaded the drawers onto the pickup truck. Scott also removed a bumper from another car and took a pair of expensive headlights. Scott drove the truck, valued at \$35,000, from the service department loaded with the tools. Scott opened the dealership’s front gate by “hotwiring” it. The dealership submitted insurance claims in excess of \$100,000 in connection with the July 28, 2016 incident. The truck was never recovered.

¹ The investigating detective stated, “In reference to the walk, it’s a very distinct walk. When you watch [the] videos in totality, you can see the walk is identifiable. It’s hard to say that’s not the same person. [¶] I know it’s been said it’s an unsteady gait. It is not politically correct. It is the legs and the thighs shifting and the outward appearance of the feet.”

Dealership employees viewed the surveillance videos of the July 28, 2016 incident and recognized Scott when the mask Scott was wearing fell away from his face. The employees also confirmed it was the same person who appeared in the video recordings of the April 28, 2016 incident. The owner of the dealership was “100 percent sure” it was Scott.

C. *July 27, 2017*

The People charged Scott with committing two crimes on each date. For the April 28, 2016 incident, the People charged Scott with second degree burglary (Pen. Code, §§ 459, 460)² and vandalism causing \$400 or more in property damage or destruction (§ 594, subd. (a)). For the July 28, 2016 incident, the People charged Scott with second degree burglary and driving or taking a vehicle without the owner’s consent (Veh. Code, § 10851, subd. (a)). On July 27, 2017 the jury convicted Scott on all charges.

D. *August 3, 2017*

On August 3, 2017 the trial court held the sentencing hearing. For the April 28, 2016 incident, the court sentenced Scott on the burglary count to the upper term of three years,³ and on the vandalism count to a concurrent term of the lower term of one year four months. For the July 28, 2016 incident, the court sentenced Scott on the burglary count to the middle term of two years, and on the driving or taking a vehicle count to the “low[er]

² Undesignated statutory references are to the Penal Code.

³ The court mistakenly referred to it as the July 28, 2016 burglary.

term of two years,”⁴ both to be served concurrently with the sentence on the burglary conviction for the April 28, 2016 incident.

DISCUSSION

Scott argues the trial court erred in not staying under section 654 the concurrent sentences the court imposed on the vandalism count in connection with the April 28, 2016 incident and the driving or taking a vehicle count in connection with the July 28, 2016 incident.

A. *Applicable Law*

Section 654 prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct. (*People v. Williams* (2013) 57 Cal.4th 776, 781; *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not

⁴ The lower term for driving or taking a vehicle is one year four months, not two years. (See Veh. Code, § 10851, subd. (a); § 1170, subd. (h).) Scott, however, did not object to this mistake at sentencing, nor does he argue on appeal the trial court erred in imposing a two-year sentence, rather than a 16-month sentence, on this count. Scott simply states in his opening brief that the trial court imposed “the low term of two years for taking a vehicle without consent” The trial court’s error does not make the sentence unauthorized.

for more than one.” (*Rodriguez*, at p. 507, italics omitted; *People v. Phung* (2018) 25 Cal.App.5th 741, 760.) “The trial court has broad latitude in determining whether section 654, subdivision (a) applies in a given case.” (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564; accord, *People v. Archer* (2014) 230 Cal.App.4th 693, 703; see *People v. Deegan* (2016) 247 Cal.App.4th 532, 545, fn. 4 [“[t]he question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination”].) We review an implied finding that “two crimes were separate, involving separate objectives,” for substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618; see *People v. Redd* (2014) 228 Cal.App.4th 465, 499.) Failure to object under section 654 at the time of sentencing does not forfeit appellate review of the issue because imposition of a sentence that violates section 654 results in an unauthorized sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17, *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1338.)

Where section 654 applies, “the trial court must impose a full term and stay execution of that term.” (*People v. Relkin* (2016) 6 Cal.App.5th 1188, 1198.) “[U]nder section 654, a stayed sentence is one that has first been *imposed*, but because of some legal rule must be stayed to prevent the infliction of any *punishment* for such imposed sentence. Imposing a stayed sentence results in the *receipt* of a sentence, albeit one that is not executed absent some subsequent reason to lift the stay.” (*People v. Jones* (2015) 236 Cal.App.4th 1411, 1416.)

B. *The Trial Court Should Have Stayed Execution of Sentence on Scott's Vandalism Conviction*

The felony underlying the April 28, 2016 burglary was theft. Although the information alleged Scott entered a commercial building “with the intent to commit larceny and any felony,” the trial court instructed the jury that, to prove Scott guilty of burglary, the People had to prove “he intended to commit theft” and that the jurors could not find the defendant guilty of burglary “unless [they] all agree that he intended to commit theft.”

Had the jury convicted Scott of burglary and theft in connection with the April 28, 2016 incident, section 654 would apply. (See *People v. Islas* (2012) 210 Cal.App.4th 116, 130 “[w]hen a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes”]; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1468 [section 654 “preclude[s] punishment for both burglary and theft where . . . the burglary is based on an entry with intent to commit that theft”]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1336 [section 654 applied to convictions for theft and commercial burglary]; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458 [section 654 applied to convictions for burglary and theft occurring during the burglary]; see also *People v. McFarland* (1962) 58 Cal.2d 748, 762 [section 654 applied to the defendant’s convictions for burglary of a hospital and theft of an air compressor from the hospital where the record contained “nothing indicating that he entered the hospital with intent to commit some crime other than theft”].)

Does it make a difference, as the People suggest, that the underlying conviction here was vandalism and not theft? Not in this case. The evidence showed that Scott broke into the car dealership's service department to steal tools, looked around the service area for some, was unable to find any tools readily available, and vandalized a closed toolbox to get access to the tools he stole. As the People characterize his movements that night: "After [Scott] did not find any unlocked toolbox, he took some tools that he apparently found in the shop and pried open the locking system on [an employee's] tool box," and "[t]his act was the basis of the vandalism charge" The only reason Scott vandalized the toolboxes was to steal tools. The prosecutor emphasized this point in her closing arguments, telling the jury Scott went into the dealership on April 28, 2016 "with the intent to steal the contents of [a] toolbox, among other things," was in the shop "about an hour, shopping, going from bin to bin," and committed vandalism to get "into the toolbox to get the tools." The prosecutor argued that, "in order to steal the tools, you have to completely tear the property of the toolboxes . . . apart." There was no evidence, substantial or otherwise, Scott damaged or destroyed a toolbox on April 28, 2016 for any reason or with any intent other than to steal its contents.

The burglary, theft, and vandalism on April 28, 2016 constituted one indivisible transaction with one criminal objective, where the vandalism was not independent of, and was "merely incidental" to, the goal of committing theft. (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see *People v. Petronella* (2013) 218 Cal.App.4th 945, 963-964 [section 654 "limit[s] punishment for multiple convictions arising out of either an act or omission or a course of conduct deemed to be indivisible in

time, in those instances wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental”]; *People v. Powell* (2011) 194 Cal.App.4th 1268, 1296 [““[i]f 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””].) Therefore, the trial court should have imposed and stayed execution of the 16-month sentence on Scott’s conviction for vandalism.

In re William S. (1989) 208 Cal.App.3d 313, cited by the People, is distinguishable. In that case two minors broke into an occupied house at night through a bedroom window, stole items from a hallway cabinet, and left the house through the front door after unlocking it. They returned “several hours” later through the front door, stole a wallet and keys from the kitchen, left again, and returned a third time, when one of the residents was waiting for them. (*Id.* at pp. 315-316.) The court held that the minors committed two separate burglaries and that section 654 did not bar multiple punishments for the two crimes. (*Id.* at pp. 316-318.) The court explained that the “crimes were committed by means of two distinct and different entries, separated both in time and place, and with the intent to steal entirely different property” and that substantial evidence supported the “trial court’s finding of two completed burglaries which were not so intertwined in a continuous course of conduct to justify application of Penal Code section 654.” (*Id.* at p. 319.) The facts here are very different. Scott entered the commercial establishment once on April 28, 2016, vandalized toolboxes in order to gain access to tools, stole the tools, and left. He did make several efforts to open different toolboxes, but he was still

in different areas of the same shop and was engaged in a continuous course of conduct designed to steal tools.

C. *The Trial Court Should Have Stayed Execution of Sentence on Scott's Conviction for Driving or Taking a Vehicle Without the Owner's Consent*

Whether section 654 precluded separate punishments for the crimes Scott committed on July 28, 2016 is a closer question. A defendant can commit the crime of driving or taking a vehicle, in violation of Vehicle Code section 10851, “in several ways.” (*People v. Page* (2017) 3 Cal.5th 1175, 1180.) “A person can violate section 10851 by ‘[u]nlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession.’ [Citation.] Section 10851 can also be violated ‘when the driving occurs or continues after the theft is complete’ (referred to by the Supreme Court as ‘posttheft driving’) or by “driving [a vehicle] with the intent only to temporarily deprive its owner of possession (i.e. joyriding).”” (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 854; see *Page*, at p. 1182 [“Vehicle Code section 10851 punishes not only taking a vehicle, but also driving it without the owner’s consent, and ‘with intent *either* to permanently or *temporarily* deprive the owner thereof of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle*’”].) While “[t]aking a vehicle with the intent to permanently deprive the owner of possession is a form of theft,” posttheft driving and joyriding are not. (*Gutierrez*, at p. 854; see *People v. Jackson* (2018) 26 Cal.App.5th 371, 377-378 [“[t]he unlawful taking of a vehicle with the intent to permanently deprive the owner of possession is a theft offense, but the unlawful driving of a vehicle is not”].)

Here, the only evidence was that Scott stole the pickup truck. There was no evidence Scott drove the truck after he completed the theft of the truck on July 28, 2016 and no evidence Scott only temporarily drove the truck. The testimony was that the truck was never seen again. In addition, the People's theory under Vehicle Code section 10851 was theft of the truck. The prosecutor argued to the jury that, "with respect to [the] July 28, 2016" incident, Scott entered the service department of the dealership "with the intent to steal" the pickup truck and that the truck "was missing after the incident of July 28, 2016" and "it's never been seen again." The prosecutor further stated: "And with respect to the . . . unlawful taking or driving of a vehicle, which is count 3, car theft. Here's where we're very specifically referring to the theft of the [pickup] truck." Scott's conviction under Vehicle Code section 10851 was a theft conviction, and under section 654 the court could not punish Scott for burglary and theft. (See *People v. Islas*, *supra*, 210 Cal.App.4th at p. 130.)

People v. See (1980) 109 Cal.App.3d 76, cited by the People, is distinguishable. In that case the defendant "and another person broke into a business office and stole several thousand dollars worth of office equipment. They removed the stolen items in a friend's car. They 'hot-wired' a truck and returned to the office building to remove a safe they had seen but could not remove by car. When they later opened the safe and found only papers, they abandoned the truck and safe." (*Id.* at p. 79.) The court held section 654 did not prohibit separate punishment for burglary and driving or taking a vehicle without the owner's consent because, even though "only one burglary was charged," there were in fact two burglaries, "one before the theft of a truck and one after," and because "the first burglary was completed

before the truck was taken to effect the second burglary, it was a separate crime and incident to a separate course of conduct.” (See, at p. 80.) The court explained that the “intent to take the truck [was] a separate intent obviously formed after [the defendant] burglarized the office building and discovered the safe” and that the “first burglary and the later car theft were separated in time, place and victim.” (*Id.* at p. 81.) Here, unlike *People v. See* and *William S.*, there was only one burglary on July 28, 2016, and Scott’s theft of the pickup truck was incidental to the burglary on that date.

DISPOSITION

The convictions are affirmed. The matter is remanded with directions for the trial court to impose but stay execution of the concurrent sentences for vandalism and driving or taking a vehicle without the owner’s consent.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.