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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARLIN JOHN GUSTAFSON,

Defendant and Appellant.

B288309

(Los Angeles County
Super. Ct. No. VA145992)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed with directions.

Mona D. Miller, 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, Scott A. Taryle and Nancy Lii Ladner, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant Marlin John Gustafson was convicted of two counts arising from a single assault. He contends the trial court erroneously failed to stay count 2 pursuant to Penal Code section 654.¹ Finding the court's minutes and abstract of judgment do not reflect the court's actual judgment, we affirm, and order the court to correct its minutes and abstract of judgment.

BACKGROUND

Defendant was charged by information with assault by means of force likely to cause great bodily injury (§ 245, subd. (a)(4); count 1) and battery with serious bodily injury (§ 243, subd. (d); count 2), with great bodily injury allegations as to count 1 (§ 12022.7, subd. (a)), for his July 6, 2017 assault upon Curtis Wilshusen. He was also charged with misdemeanor battery (§ 242) for an October 2, 2017 incident involving the same victim.

Defendant rented a room from Mr. Wilshusen. Their relationship was fraught with conflict, and the two often argued and physically fought. On July 6, 2017, defendant walked into Mr. Wilshusen's bedroom, straddled him, and pressed his thumbs into his eyes. Mr. Wilshusen was recovering from cataract surgery at the time, and suffered significant damage to his right eye.

The jury found defendant guilty of counts 1 and 2, and found the great bodily injury allegation to be true, but found defendant not guilty of count 3. The People's sentencing memorandum recommended that defendant's sentence on count 2 be stayed pursuant to section 654. The court's handwritten notes

¹ All further statutory references are to the Penal Code.

on the sentencing memorandum indicated that the sentence for count 2 was subject to section 654.

At the sentencing hearing, the court stated that it saw “no reason to deviate . . . from the D.A.’s recommended sentencing.” The court sentenced defendant to three years in prison for count 1, plus a three-year great bodily injury enhancement. For count 2, the court stated that it would “impose but stay [the] low term of two years which will run concurrent.” The court’s February 21, 2018 sentencing minute order reflects a concurrent sentence for count 2, as does the abstract of judgment. Neither reflects that the sentence for count 2 was stayed pursuant to section 654.

DISCUSSION

Defendant contends the trial court erroneously failed to stay his sentence for count 2. Respondent tells us the court properly stayed the conviction, but that the sentencing minute order and abstract of judgment must be corrected to reflect the actual judgment of the court.

Section 654 “prohibits multiple punishment for a single physical act that violates different provisions of law.” (*People v. Jones* (2012) 54 Cal.4th 350, 358.) A sentence prohibited by section 654 is imposed and stayed by the trial court. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.)

Here, it is clear the court intended to impose and stay the sentence for count 2 pursuant to section 654. Where the clerk’s and reporter’s transcripts differ as to a criminal sentence, the oral pronouncement of sentence constitutes the judgment and will control over the abstract of judgment, which is presumed to contain clerical error. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

DISPOSITION

The judgment is affirmed. The superior court is directed to amend the sentencing minute order and abstract of judgment to reflect that defendant's sentence for count 2 is stayed pursuant to section 654, and to send a certified copy to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.