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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSEPH M. TAUBMAN,<br><br>Defendant and Appellant. | B230600<br><br>(Los Angeles County Super. Ct. No. BA358718) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

James Koester, 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, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

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Joseph M. Taubman appeals from the judgment entered after he pleaded no contest to one count each of burglary, robbery, and assault with a deadly weapon. We reject his contentions that: his prison term for assault should have been stayed; his admission to certain prior prison term allegations was insufficient because he did not admit to all the elements of those sentence enhancements; and that the trial court erred by denying his motion to withdraw his plea. We therefore affirm the judgment.

## FACTS AND PROCEDURAL HISTORY[1]

When Anthony Mack came home from work at around 4:30 p.m. on June 5, 2009, he saw that the kitchen window screen had been removed, but the window was closed. He entered his house, where he saw defendant Joseph Taubman heading toward the back door. Taubman was carrying various items that belonged to residents of the home, and had a canvas bag with a black strap that was slung over his shoulder. Mack moved to intercept Taubman and yelled at him to stop. Mack grabbed hold of the bag's shoulder strap, but was unable to hold on to it. Taubman said, "don't try to stop me or I'll cut you." Taubman then turned around and stabbed Mack in the chest with what was most likely a screwdriver.

Taubman ran out the door with Mack in pursuit.[2] Mack's wife drove up at that moment, and although Mack never got a good look at Taubman, she did, and was able to identify Taubman from a "six pack" photographic line-up.[3] Mack and several neighbors chased Taubman, but he got away. The police eventually found Taubman in Las Vegas. Inside Taubman's car were eight screwdrivers and a black bag for a laptop computer.

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**1** Taubman, who represented himself at trial, entered his plea toward the end of the prosecution's case-in-chief. Our statement of facts concerning the underlying crimes is necessarily limited to that evidence.

**2** Mack's stab wound was not serious.

**3** Mack was later able to identify Taubman through his voice, size, and shape after seeing him at the preliminary hearing.

Taubman was charged with burglary, robbery, and assault with a deadly weapon. Due to his extensive criminal record, numerous sentence enhancement allegations were included in the information. Relevant here are seven that were alleged for purposes of the one-year enhancement supplied by Penal Code section 667.5, subdivision (b) for each separate prison term served so long as it was imposed within five years of having completed an earlier prison term.[4]

In addition to the testimony of Mack and his wife, Taubman's friend and drug-use companion Alicia Witkowski testified that she was with Taubman right before the break-in at the Mack home, and that Taubman said he was going to commit a burglary to pay for drugs. According to Witkowski, Taubman returned some time later, stating that he had been inside someone's home when that person returned, they had struggled, and he had accidentally stabbed him with a screwdriver.

On cross-examination by Taubman, the police detective who arrested Taubman in Las Vegas testified that Taubman was arrested on a parole violation with a hold for a burglary investigation. Although the evidence was brought out by Taubman, the court offered to instruct the jury to disregard the statement about Taubman's parole violation. Taubman said he might want stand-by counsel to question him as a witness. The trial court agreed, adding that the prosecutor's evidence had destroyed Taubman's case. The trial court said Taubman should have stand-by counsel and that Taubman "should be on [his] hands and knees begging" the prosecutor to renew her pre-trial plea deal of a 13-year sentence. The trial court pointed out that it had not seen all the evidence yet, that its view of the evidence did not matter, and that it was up to Taubman. Taubman replied that he had "already made those observations." When asked by Taubman, the prosecutor declined to renew her earlier plea deal.

The next day, Taubman said he wanted to enter an open plea. The prosecutor reminded Taubman of the charges and allegations against him, and asked if he needed more time to talk to a lawyer about the case. Taubman answered no. The prosecutor said

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[4] All further undesignated section references are to the Penal Code.

Taubman should ask either her or his newly-appointed stand-by counsel for an explanation if he did not understand something during the plea proceedings, and Taubman said he understood. He was then advised of, and acknowledged, that he was giving up all of his various trial-related rights. However, he was not expressly advised at that time that he had a right to counsel when entering his plea. As part of the plea proceedings, Taubman agreed to admit to all the prior conviction allegations.

Taubman later brought a motion to withdraw his plea because: (1) he was mentally overcome by his untreated bi-polar condition and being placed in administrative segregation while in jail; (2) the trial court pressured him by making negative comments about his case and urging him to take the original 13-year plea deal if he could get it; and (3) by not appointing counsel for him during the plea process. At the hearing on that motion, the trial court said it had "observed the defendant through the trial. . . . [¶] It was in fact after very strong evidence against Mr. Taubman, evidence that was so strong, including the testimony of his girlfriend that put him at the location and had him admitting to the conduct, that the defendant realized there was no way for him to go other than to plead open to the court. [¶] I observed the defendant. There was no problem with his mental state. The transcript can be reviewed as to how he was questioning the witnesses and handling his defense." The trial court then denied the motion to withdraw the plea and proceeded to sentence Taubman.

A six-year prison term for the burglary count was doubled to twelve years under the Three Strikes law. A one-year sentence for robbery was also doubled by the Three Strikes law, plus four months for a weapon use allegation, but was stayed pursuant to section 654. A one-year sentence for the assault was doubled to two years under Three Strikes, and was ordered to run consecutively to the burglary sentence. Of the seven prior prison term allegations made under section 667.5, subdivision (b), the court imposed sentence as to only the two most recent and dismissed the rest. Taubman's combined sentence was 21 years.

Taubman contends: (1) the trial court erred by denying his motion to withdraw his no contest plea; (2) his admission of the prior prison term section 667.5 allegations

was defective because he never admitted that he served a separate prison term or that he did not remain free of custody for five years; and (3) the assault sentence should have also been stayed under section 654.

## DISCUSSION

1. *The Trial Court Did Not Err By Denying the Motion to Withdraw the Plea*

Section 1018 provides that every plea shall be entered or withdrawn by the defendant himself in open court and, in felony cases where the maximum punishment is not death or life without parole, no plea "shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him or her of the right to counsel and unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel." At any time before judgment, the court shall, on a showing of good cause, allow a plea made by a defendant without counsel to be withdrawn.

To prevail on a motion to withdraw a plea, the defendant must show good cause by clear and convincing evidence. Good cause requires a showing that the defendant operated under a factor that overcame the exercise of his free judgment. (*People v. Weaver* (2004) 118 Cal.App.4th 131, 145-146.) We review the trial court's ruling under the abuse of discretion standard and will adopt the trial court's factual findings if they are supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

Taubman contends the trial court violated section 1018 because it took his plea without first advising him of his right to counsel and obtaining an express waiver of that right. Contending that no reported decision addresses this issue, Taubman bases his conclusion on *People v. Crayton* (2002) 28 Cal.4th 346 (*Crayton*), a decision construing section 987, subdivision (a), which states that if a defendant appears for arraignment without counsel, the trial court must advise the defendant of his right to counsel and let him know a lawyer will be appointed for him if he wants.

At issue in *Crayton* was a defendant who, upon his initial arraignment in the former municipal court, was granted permission to represent himself after being advised of his right to counsel. He was advised of that right during the next two proceedings, including the preliminary hearing, where he was bound over for trial. He was arraigned again on the ensuing information, but was not advised of his right to counsel at that proceeding. The Supreme Court held that even though no federal constitutional right was violated when the trial court failed to re-advise the defendant of his right to counsel at the re-arraignment hearing, this procedure still violated section 987. (*Crayton, supra,* 28 Cal.4th at pp. 362-364.)

However, the error was found harmless under the standard in *People v. Watson* (1956) 46 Cal.2d 818 because it was not reasonably probable the defendant would have elected to forego self-representation and accept appointment of counsel even if he had been properly advised. (*Crayton, supra,* 28 Cal.4th at pp. 364-366.) The court based its holding on the fact that the defendant had been previously been advised of his right to counsel in connection with his desire to represent himself, and that although the court repeatedly warned defendant of the dangers of doing so, he showed an unwavering desire to act as his own lawyer. (*Id.* at pp. 365-366.)

By parity of reasoning, Taubman contends the *Crayton* rule applies here. Respondent contends that re-advisement of the right to counsel was not necessary, and, even if it was, the error was harmless. We will assume for discussion's sake only that the trial court was required to re-advise Taubman of his right to counsel before accepting his change of plea. Even so, under *Crayton,* we conclude this error was harmless.

We begin with Taubman's preliminary hearing, where he was represented by a public defender. At his subsequent arraignment, while still represented by counsel, Taubman waived the arraignment, the reading of the information, and advisement of his various constitutional rights. However, because Taubman had counsel up to that point, and because the court was required to advise him of his right to counsel when he was first

brought to court (Pen. Code, § 859), we presume that Taubman had been advised of that right. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; Evid. Code, § 664.)[5]

Then, when the court granted Taubman's motion for self-representation, the record shows that he was advised of that right, and the pitfalls of self-representation. At trial, on the day before Taubman entered his plea, when the court remarked about the strength of the prosecutor's case and urged Taubman to accept stand-by counsel and ask the prosecutor to renew her original plea deal, Taubman replied that he had made much the same observation. At the hearing where Taubman changed his plea, the prosecutor asked whether he needed more time to consult with a lawyer, and also told Taubman that he could consult with his stand-by counsel during the proceedings. Finally, he was told of his many jury trial rights, including the right to confront and examine witnesses under oath, which, the prosecutor said, meant that "your attorney or yourself if you stayed in pro per would have the right to ask those witnesses questions."

Taken as a whole, the record shows that Taubman was well aware of his right to counsel and in fact had counsel on stand-by, was given the opportunity to consult with that counsel before changing his plea, and declined to do so. Based on this, we conclude that even if the trial court had expressly told Taubman he had a right to counsel at the plea proceeding, it is not reasonably probable he would have exercised that right.

Taubman also contends that the trial court should have granted his motion to withdraw his plea because he was suffering from certain physical and emotional problems: his untreated bi-polar condition; his lack of sleep, stress, and feelings of helplessness from his placement in jailhouse administrative segregation and certain events occurring during the trial; and comments from the trial court about how weak his case was and how he should try to have the prosecutor renew her original plea deal. The trial court said it had observed Taubman throughout the trial, noted that he had handled himself well, and saw no signs of stress or other mental weakness.

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**5** Taubman does not contend otherwise.

Our examination of the record shows that Taubman filed numerous motions on his behalf, including successful ones to obtain discovery and the appointment of an investigator, and that he questioned the witnesses in a logical and effective manner. In short, we see no evidence to suggest he suffered from debilitating stress or mental weakness that affected his decision to change his plea, and conclude there is substantial evidence to support the trial court's exercise of its discretion when determining that Taubman had been mentally sound and acted with free will throughout the trial.

2. *Taubman Sufficiently Admitted the Priors*

The information alleged that Taubman had suffered seven prior convictions for purposes of the one-year sentence enhancement provided by section 667.5, subdivision (b). In order to find such allegations true, the prosecution must prove that the defendant was previously convicted and imprisoned for a felony, completed his prison term, but, for a five-year period, did not stay free from both prison custody and the commission of a new offense resulting in a felony conviction. (§ 667.5, subd. (b); *People v. Tenner* (1993) 6 Cal.4th 559, 563.) The information alleged all of these elements.

The trial court found true two of the seven allegations against Taubman and dismissed the rest. Relying on *People v. Epperson* (1985) 168 Cal.App.3d 856 (*Epperson*) and *People v. Lopez* (1985) 163 Cal.App.3d 946 (*Lopez*), Taubman contends his admission of these priors was ineffective because he did not admit that the prior prison terms were separate or that he had not remained free of prison for five years between convictions.

In *Epperson*, the information alleged the essential elements of section 667.5, subdivision (b), but there was no evidence the amended information was ever read to the defendant, and when the defendant's admission of the two priors was taken, the court did not ask whether the defendant admitted that the convictions involved prior prison terms within five years. The Court of Appeal ordered the two enhancements stricken as a result, although the unspoken, deciding factor seems to be that the record showed one of

the priors occurred outside the five-year period. (*Epperson, supra,* 168 Cal.App.3d at pp. 863-865.)

In *Lopez, supra,* 163 Cal.App.3d 946, the Court of Appeal struck findings that the defendant suffered two prior serious felony convictions for burglary under section 667, subdivision (a), because the amended information did not allege that the prior burglaries were residential, which would have made them serious felonies. As a result, the defendant's admission to having suffered two serious prior felony convictions was insufficient. The same was true for his admission to two section 667.5 allegations because he was never asked and the prosecution did not show that they involved separate prison terms. (*Id.* at pp. 950-951.)

We view *Epperson* as an anomaly. It has never been cited by any published decision for the proposition advanced by Taubman. The general rule is that so long as the information alleges all the essential facts of a prior conviction allegation, then the defendant's admission to that allegation is sufficient. (*People v. Thomas* (1986) 41 Cal.3d 837, 842-842; *People v. Watts* (2005) 131 Cal.App.4th 589, 594; *People v. Westbrook* (1996) 43 Cal.App.4th 220, 223-224; *People v. Cardenas* (1987) 192 Cal.App.3d 51, 61; *People v. Welge* (1980) 101 Cal.App.3d 616, 623.) *Lopez, supra,* 163 Cal.App.3d 946, is consistent with these cases. Pursuant to these authorities, because the information alleged all the elements of section 667.5, subdivision (b), we hold that Taubman's admission to those allegations was valid.

We alternatively conclude that his admission was valid under all the circumstances. The court in *People v. Mosby* (2004) 33 Cal.4th 353 (*Mosby*) held that we look to the totality of the circumstances to determine whether the advisements given a defendant about his various trial-related rights were sufficient. By parity of reasoning, we believe this type of analysis is proper when determining whether a defendant was in fact aware of and admitted all the essential allegations of a prior conviction allegation.

When Taubman was entering his plea, the prosecutor began reading off the charges and allegations. When Taubman asked about an allegation, the prosecutor directed him to a paragraph in the information, but Taubman said he did not have his

paperwork with him. Taubman asked if they were going through the prior conviction allegations yet, and said he thought "it might speed things up if I simply stipulated that the prior allegations are all true." The court said, "Let's go through them." Each of the seven section 667.5, subdivision (b) allegations was read off and admitted by Taubman, without reference to whether they involved prior separate prison terms or fell within the required five-year period. When the prosecutor moved on to using the convictions for other purposes, Taubman interrupted and said, "We do realize that at least two of those convictions are single term; is that correct?" The court told Taubman to point it out during sentencing, and the prosecutor agreed that "they were served during the same consecutive prison sentence." Taubman replied, "Yes, ma'am."

At the sentencing hearing two months later, Taubman said, "In the event that you're using any of the one-year priors, which are pretty petty to start with, considering the amount of time we're discussing, case number A972094 and A966931 are all the same prison term, your Honor, so they only count as one." Taubman then said, "They're listed as two separates. I was told to plead them separately, so I wanted to raise that." When it came time to sentence Taubman on the section 667.5 allegations, the court said, "As to the one-year allegations, [Taubman] admitted seven 667.5 priors. Two were served as one term, so there are actually only six. I'm going to strike four of those one-year priors." The court then sentenced Taubman under section 667.5 for the two most recent qualifying convictions.

We take from this that Taubman was well aware of the requirements of section 667.5, subdivision (b) and had examined the allegations and determined which ones did not qualify because separate prison terms had not been served. His failure to challenge any of the other allegations supports a finding that he knew the other allegations were proper, and his admission to the truth of those allegations is therefore valid under the circumstances.

3. *The Assault Sentence Need Not Be Stayed*

As noted, the trial court stayed Taubman's sentence on the robbery count, but imposed a consecutive sentence for the assault conviction. Taubman contends that sentence should have been stayed as well under section 654.

Multiple punishments for two crimes arising from a single course of conduct are prohibited by section 654. If all the crimes were merely incidental to, or were the means of carrying out one objective, a defendant may be punished only once. (§ 654; *People v. Perry* (2007) 154 Cal.App.4th 1521, 1525 (*Perry*).) If the defendant had different independent criminal objectives, however, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*Perry,* at p. 1525.) The defendant's intent and objectives are factual questions for the trial court, and we will affirm its ruling so long as it is supported by substantial evidence. (*Ibid.*)

The *Perry* court considered a conviction for robbery and burglary arising from the theft of a car stereo. The victim caught the defendant in the act, and the defendant jumped out, brandished an ice pick or screwdriver, and adopted a fighting stance before running off. The trial court imposed a concurrent term for the robbery conviction, but we reversed because even though the burglary was ostensibly complete, the defendant's threatening conduct that constituted the robbery shared the same intent – to deprive the victim of his property. (*Perry, supra,* 154 Cal.App.4th at p. 1527.)

Relying on *Perry*, Taubman contends that the sentence on the assault conviction should have also been stayed because he used only the minimal force necessary to escape from Mack and then fled instead of escalating the force used. We disagree. In *Perry,* we were careful to distinguish burglary and robbery combinations from burglary and assault combinations. "Assault reflects an intent to perform an act that, by its nature, will probably and directly result in the application of physical force to another person. [Citation.] Robbery, while involving the use of force or fear, reflects an intent to deprive the victim of property. Accordingly, a conviction of assault committed during an escape

with property taken during a burglary reflects, in essence, an intent to apply, attempt to apply, or threaten to apply force to a person, rather [than] an intent to steal property. The objective of such an assault generally will be to deter, interrupt or put a stop to a pursuit or other effort to capture the defendant and any property taken during the burglary. However, if property is taken during a burglary and a robbery pertaining to the same property is committed during the escape, the objective is still essentially to steal the property." (*Perry, supra,* 154 Cal.App.4th at p. 1526.)

Although the additional objective of preventing the victim from taking back the property will exist, it may be incidental to, not independent of, the objective of stealing the property. "At some point, the degree of force or violence used or threatened may evince 'a different and a more sinister goal than mere successful commission of the original crime,' i.e., an independent objective warranting multiple punishment. [Citation.]" (*Perry, supra,* 154 Cal.App.4th at pp. 1526-1527.)

Several reported decisions have allowed multiple punishment for assaults committed in an attempt to stop pursuit of a burglar. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1216 [cigarette thief pursued by security guard threw down cigarettes and confronted pursuer with nunchuks]; *People v. Weaver* (1984) 151 Cal.App.3d 592, 596-597; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 529-530 [multiple punishment allowed when, after burglary of money and a hatchet from a home, the defendant threw the hatchet back in the house from an outside window as the victim phoned the police]; *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 464-466 [defendant burgled goods from a store, then committed numerous assaults on store employees who tried to stop thieves from leaving].)

We conclude there was substantial evidence that Taubman had separate intents and objectives when he burgled the premises and when he assaulted Mack. Stabbing Mack showed more than just the intent to take Mack's property. Instead, as in the cases cited above, it shows the intent to injure Mack in an attempt to stop any pursuit. Accordingly, the trial court did not err by imposing a consecutive sentence for the assault conviction.

## DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.