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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

HOA DUC LE,

Defendant and Appellant.

B231958

(Los Angeles County
Super. Ct. No. KA092095)

APPEAL from a judgment of the Superior Court for Los Angeles County, Carol Williams Elswick, Judge. Sentence stayed in part, judgment affirmed in all other respects.

Kevin Michele Finkelstein, 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, Lawrence M. Daniels and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Hoa Duc Le appeals from a judgment sentencing him to five years, eight months in prison after a jury found him guilty of unlawful driving of a vehicle (Pen. Code,¹ § 666.5), receiving stolen property (§ 496, subd. (a)), and possession of burglar's tools (§ 466). He contends on appeal that the eight-month consecutive sentence for receiving stolen property should have been stayed under section 654, and that the trial court erred by imposing a one-year enhancement under section 667.5, subdivision (b), because there was insufficient evidence that he served a prison term for the prior conviction he admitted. We agree that the sentence for receiving stolen property should have been stayed, but otherwise affirm the judgment.

BACKGROUND

On September 30, 2010, Jose Trujillo parked his Honda Civic² in the parking structure at the West Covina Mall. After locking the car, he (and a friend who was with him, Leslie Garcia) went into the mall for around 45 minutes. When they came out, Trujillo's car was missing. He searched around to make sure he had not parked it somewhere else, then called mall security. When mall security could not find it, he called the police to report the car stolen. He then called a friend, Louis Bohorquez, to come pick him up.

When Bohorquez picked Trujillo and Garcia up, Trujillo asked him to drive around to see if they could find Trujillo's car. They found the car parked in a nearby, less crowded, parking lot. A man, identified at trial as defendant, was standing near Trujillo's car, talking on a cell phone. Someone in Bohorquez's car

¹ Further undesignated statutory references are to the Penal Code.

² The car was registered to Trujillo's stepfather, but Trujillo was the person who used it.

called the police; Bohorquez parked his car so they could keep an eye on Trujillo's car. They saw there was another car parked nearby, and defendant would occasionally go into that car, then come back and stand near Trujillo's car. At some point, defendant drove away in his car and returned on foot; he got into Trujillo's car and drove off.³ Trujillo and his friends followed defendant in Bohorquez's car, and called the police again. Defendant drove Trujillo's car back to the mall parking lot and parked.

West Covina Police Officer Eric Street heard a radio call about a stolen car being driven through the mall parking structure. Officer Street, who happened to be driving through the parking structure, responded immediately. As he drove up, Trujillo, who had gotten out of Bohorquez's car and was walking toward defendant, pointed defendant out to Officer Street. Trujillo had seen defendant get out of Trujillo's car with some car parts in his hand. Officer Street drove his patrol car to defendant's location, got out with his gun drawn and told defendant to get down on the ground. When the officer approached defendant, he saw two items on the ground next to him -- a car stereo, and the center console unit with the speedometer/odometer.

After defendant was arrested, another police officer informed Officer Street that defendant's car⁴ had been found nearby. Inside the car they found a Phillips head screwdriver and another screwdriver on the front passenger seat, a speedometer/tachometer/odometer on the front passenger floorboard, and a stereo

³ Trujillo and his friends gave slightly different accounts of how many times defendant either drove away in defendant's car or left on foot, but they agreed that just before defendant drove off in Trujillo's car, defendant drove off in his own car and came back to Trujillo's car on foot.

⁴ The car was registered to defendant's father and sister.

and center console cluster on the back seat. When defendant was booked after his arrest, he had latex gloves, seven screws, and an Allen wrench in his pockets.

Defendant was charged in an amended information with unlawful driving of a vehicle with a prior (count 1; § 666.5), receiving stolen property, i.e., a speedometer and a stereo (count 2; § 496, subd. (a)), and misdemeanor possession of burglar's tools, i.e., a screwdriver, master key, and shaved key (count 3; § 466). The information also alleged that defendant suffered three prior convictions within the meaning of section 1203, subdivision (e)(4), and served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court granted defendant's motion to bifurcate trial on the prior conviction allegations. The jury found defendant guilty of all three counts; defendant waived jury trial on the prior conviction allegations and admitted certain prior convictions, including one conviction within the meaning of section 667.5, subdivision (b).

The trial court sentenced defendant to the upper term of four years on count 1, plus one year under section 667.5, subdivision (b), a consecutive term of eight months (one-third the mid-term) on count 2, and concurrent term of 180 days on count 3, for a total term of five years, eight months. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *Section 654*

Defendant argues that his eight-month sentence for count 2, receiving stolen property, should have been stayed under section 654 because there was no evidence that he harbored more than a single intent when he committed the two crimes alleged in counts 1 and 2, that is, he drove Trujillo's car to a different location solely to facilitate the receipt of stolen property. We agree.

Section 654 “prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If 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.” (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525, citing *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Ordinarily, “[t]he question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by any substantial evidence, its finding will be upheld on appeal.” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466, disapproved on other grounds in *People v. Mesa* (June 4, 2012, S185688) ___ Cal.4th ___ [12 C.D.O.S. 6097].) In this case, however, there is no indication that the trial court considered or made any express finding with regard to section 654, as the issue was not raised prior to or during sentencing.⁵ More importantly, the trial court’s comments when explaining why it chose the upper term on count 1 indicate the court found that defendant acted with a single objective when committing both crimes.

In choosing the upper term in count 1 (unlawful driving of a vehicle), the court stated that some of the aggravating factors it considered was that “this particular crime was carried out with some amount of planning, sophistication, and professionalism.” The court explained: “From what the state of the testimony was is that the victim’s vehicle was moved from location to location in an attempt to presumably by the defendant to avoid detection so that he could then remove the parts, certain parts from the victim’s vehicle and perhaps install them in his vehicle.” In other words, the trial court concluded that defendant drove Trujillo’s car to facilitate the transfer of parts from Trujillo’s car to his own car, i.e., to

⁵ The fact that defendant did not raise the section 654 issue in the trial court does not preclude him from raising it on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295 [“a section 654 claim is not waived by failing to object below”].)

facilitate defendant's possession of stolen property. Therefore, the sentence on count 2, possession of stolen property, should have been stayed under section 654.

B. *Prior Prison Term Enhancement*

The trial court imposed a one-year sentence enhancement under section 667.5, subdivision (b), which applies when a defendant “(1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.” (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) Defendant contends the trial court erred by imposing this enhancement because although he admitted he suffered a prior conviction, no inquiry was made as to the second, third, and fourth elements, and therefore he did not admit the prior prison term or that he did not remain free for five years of prison custody or the commission of a new offense. (Citing *People v. Epperson* (1985) 168 Cal.App.3d 856, 862-865 (*Epperson*), and *People v. Lopez* (1985) 163 Cal.App.3d 946, 951 (*Lopez*).)

In making this contention, defendant points to the portion of the reporter's transcript in which defendant admitted to a *different* prior conviction, which was alleged in connection with count 1. When defendant was asked to admit that prior conviction, there was no reference to any prior prison term, or to section 667.5, subdivision (b), because that conviction was not alleged as a prior prison term enhancement. Instead, that conviction was alleged as part of count 1, unlawful driving of a vehicle with a prior. The court subsequently asked defendant if he wished to admit a different prior conviction, which was alleged in the information under section 667.5, subdivision (b). The court took defendant's waiver of jury trial, and defendant admitted that conviction. The following day, after the information was further amended to correct the statute under which defendant had

been convicted in that prior conviction, the court again took defendant's waiver and defendant admitted he suffered the prior conviction as alleged under section 667.5, subdivision (b).⁶ Thus, to the extent defendant's contention on appeal is premised on the trial court's failure to refer to section 667.5, subdivision (b) or its elements when obtaining defendant's admission to having suffered a prior conviction, his contention fails on the facts.

To the extent defendant's contention is based upon *Epperson*, *supra*, 168 Cal.App.3d at pages 862-865 and *Lopez*, *supra*, 163 Cal.App.3d at page 951, we decline to follow them to the extent they may be understood to require per se reversal of a prior prison term enhancement where the defendant's admission does not include an express admission of all of the elements. Instead, we look to the totality of the circumstances, as instructed by our Supreme Court in *People v. Mosby* (2004) 33 Cal.4th 353, 356. Here, the amended information alleged that defendant had suffered the prior conviction at issue "and that a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term." In taking defendant's waiver and admission, the trial court referred to the prior conviction alleged under section 667.5, subdivision (b),⁷ and defendant admitted that he suffered that conviction. Viewing defendant's admission under the totality of the circumstances, we conclude that defendant was admitting the allegations set forth in the amended information, which included all of the elements under section 667.5, subdivision (b). (See *People v. Ebner* (1966) 64

⁶ The court mistakenly referred to section 666.5, subdivision (b), initially, but subsequently corrected itself and stated that it was alleged under section 667.5, subdivision (b).

⁷ See footnote 6.

Cal.2d 297, 303 [“Defendant’s admission of the prior convictions is not limited in scope to the fact of the convictions but extends to all allegations concerning the felonies contained in the information”].) Therefore, the trial court did not err by imposing the one-year prior prison term enhancement.

DISPOSITION

The eight-month consecutive sentence on count 2 is stayed under section 654. In all other respects, the judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.