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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL ANGEL LEDESMA, Defendant and Appellant.	B267241 (Los Angeles County Super. Ct. No. VA136638)

APPEAL from a judgment of the Superior Court of Los Angeles County. Raul A. Sahagun, Judge. Affirmed as modified.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted Daniel Angel Ledesma (defendant) of several crimes, including attempted murder and assault. The trial court imposed consecutive sentences for those crimes. Defendant challenges the court's decision not to stay the assault sentence under Penal Code section 654.[1] We agree with defendant that the assault sentence should have been stayed.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

One early evening in August 2014, defendant, his grandmother, his cousin and Gustavo Roa (Roa) were hanging out in the garage of defendant's aunt's house in Hawaiian Gardens. Defendant was recounting and bragging about a fistfight he was in when Roa told him "stop bullshitting" everyone because Roa had watched defendant get beaten up in that fight. Defendant got upset with Roa and punched him in the face. Although defendant was a bigger man than Roa, the ensuing fistfight ended when Roa pinned defendant on the ground. Roa let defendant up.

As defendant started to walk out of the garage, Roa chided him for not being able to "handle his shit." Defendant replied, "I can't handle my shit? I'll be back. 187 on your ass," or "You're dead. You're 187." Roa knew that "187" referred to the Penal Code section for murder. Defendant then left.

Five to ten minutes later, defendant returned to his aunt's house wearing a black glove on his right hand. Using that hand, he pulled a semiautomatic gun out of his pocket, aimed the gun at Roa's chest, racked it back, and pulled the trigger twice. The gun did not fire either time.

Roa rushed defendant and launched himself into the air, punching defendant in the face on the way down. The two tumbled to the ground. Defendant initially emerged on top, and from that vantage repeatedly pistol whipped Roa on the top of the head. Roa eventually grabbed defendant's head and slammed it against a concrete block wall. Defendant dropped the gun. Defendant then struggled to regain control of the gun and

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

tried to pull the trigger, but Roa grabbed the gun and began pistol whipping defendant's head until the magazine clip fell off the gun. Defendant's brother arrived and started punching Roa. When he saw defendant attempting to put the broken gun back together, Roa ran from the yard and reported the incident to a Sheriff's Deputy patrolling nearby.

II. Procedural Background

The People charged defendant with (1) attempted murder, with an allegation that defendant acted willfully, deliberately and with premeditation (§§ 187, subd. (a) & 664), (2) attempted criminal threats (§§ 422, subd. (a) & 664), (3) assault with a firearm (§ 245, subd. (a)(2)), and (4) assault with a semiautomatic firearm (§ 245, subd. (b)). For each crime, the People further alleged that defendant personally used a firearm (§ 12022.53, subd. (b) [for the attempted murder] & § 12022.5, subd. (a) [for the remaining crimes]).

A jury convicted defendant of all four crimes, and found true the allegation that the attempted murder was committed willfully, deliberately and with premeditation and the firearm use allegations.

The trial court sentenced defendant to prison for life plus 13 years. The court imposed a prison sentence of three years for the assault with a semiautomatic firearm count and struck the firearm use allegation. The court then imposed a consecutive prison sentence of life plus 10 years for the attempted murder count, comprised of life for the attempted murder itself plus an additional 10 years for the firearm use enhancement. The court imposed a concurrent, one-year sentence for attempted criminal threats count, but struck the firearm use allegation for that count. Because the People freely admitted that the assault with a firearm count was based on the same conduct as the assault with a semiautomatic firearm count, the court stayed the six month sentence for the assault with a firearm count.[2]

Defendant filed this timely appeal.

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[2] The court simultaneously imposed a concurrent, three-year sentence for defendant's plea to the unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a)) in a separate case.

DISCUSSION

Defendant argues that his sentence is legally invalid because (1) the trial court should have stayed the three-year assault with a semiautomatic firearm sentence under section 654, and (2) there is insufficient evidence to support the jury's finding that he personally used a firearm in conjunction with the attempted criminal threats count. Defendant's second argument is without merit for the simple reason that the trial court, when it imposed sentence, struck the personal firearm use enhancement for the attempted criminal threats count. As a result, we cannot grant defendant any effective relief because the trial court already did. (Accord, *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 590 [an issue is moot on appeal if it is "'impossible for the appellate court to grant [the] appellant any effective relief'"].) We accordingly address only defendant's first argument.

Section 654 provides that a court may not punish a defendant for the same "act or omission" more than once, even if it is the basis for multiple convictions. (§ 654, subd. (a).) Section 654 also applies when the defendant engages in multiple acts that are part of a single course of conduct. (*People v. Capistrano* (2014) 59 Cal.4th 830, 885-886 (*Capistrano*).)

When examining whether to stay sentences for crimes occurring in a single course of conduct, courts have employed two tests. In the vast majority of cases, the applicability of section 654's ban on multiple punishments turns on """the intent and objective of the""" defendant: """If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."""" (*Capistrano*, *supra*, 59 Cal.4th at p. 885, quoting *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) However, if the defendant while committing the various acts simultaneously has independent objectives that are "not merely incidental to each other," section 654's ban does not apply and he may be separately punished for each offense. (*People v. Blake* (1998) 68 Cal.App.4th 509, 512; *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1007 (*Rodriguez*).) However, in certain types of cases where a defendant repeatedly commits discrete acts with a single objective or intent—such as committing multiple sexual

assaults or firing a gun multiple times from a car—the application of section 654's ban on multiple punishments turns on whether the discrete acts were "separated by periods of time during which reflection was possible." (*People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368; see also *People v. Harrison* (1989) 48 Cal.3d 321, 337-338; *People v. Braz* (1997) 57 Cal.App.4th 1, 11; *People v. Surdi* (1995) 35 Cal.App.4th 685, 689.)

Because the trial court did not make any express findings on how section 654 applies to the offenses defendant challenges on appeal, we review the court's "implicit finding that section 654 does not apply" for substantial evidence. (*Rodriguez, supra,* 235 Cal.App.4th at p. 1005; *People v. Brents* (2012) 53 Cal.4th 599, 618.)

To determine what conduct of the defendant the jury used to convict the defendant of each charged offense, we look to how the prosecutor argued the case to the jury. (*People v. Kelly* (2016) 245 Cal.App.4th 1119, 1131; *People v. Ortega* (2000) 84 Cal.App.4th 659, 665-666.) Here, the prosecutor told the jury that the attempted murder count referred to defendant's conduct in aiming the gun at Roa and pulling the trigger, and that the assault counts referred either to (1) "when [defendant] pistol whipped [Roa]," or (2) "when he pulled out the gun and pointed it at [Roa]."

To the extent the jury grounded the assault conviction on defendant's conduct in pointing the gun at Roa and pulling the trigger, the very same conduct underlies both the assault and attempted murder counts. Section 654 would clearly apply.

To the extent the jury grounded the assault conviction on defendant's conduct in pistol whipping Roa, we must apply the two tests described above, which require us to ask (1) whether defendant had the same intent and objective when he tried to shoot Roa with the gun as he did when he tried to beat Roa with the gun, and (2) whether defendant had time to reflect between the two incidents.

The answer to the first question is "yes" because defendant's intent when he shot at Roa with the gun and beat Roa with the gun was the same—that is, to harm and, if possible, kill Roa. Indeed, defendant tried to pull the trigger a third time during the melee. On these facts, there is no distinction between the intent to kill and the intent to injure. (*People v. Womack* (1995) 40 Cal.App.4th 926, 932 ["'[t]here is no repugnancy

between an intent to kill the victim and an intent to *injure* him'"]; *People v. Meriweather* (1968) 263 Cal.App.2d 559, 563-564 [section 654 applies when a defendant is guilty of attempted murder and assault with intent to commit murder]; *People v. Kynette* (1940) 15 Cal.2d 731, 760-761 [same].)

The answer to the second question is "no" because defendant's conduct in pistol whipping Roa came just seconds after defendant twice pulled the trigger, and was separated only by Roa's act of punching defendant and wrestling him to the ground; the melee was continuous and uninterrupted, and provided defendant no time to reflect.

The People resist this conclusion, arguing that defendant pistol whipped Roa only after Roa had "thwarted" the shooting and pinned defendant to the wall; thus, the People argue, defendant pistol whipped Roa with the distinct intent to incapacitate him and thereby extricate himself from the melee he started. This argument fails both factually and legally. It is factually unsupported because Roa did nothing to thwart the shooting; the gun just misfired. Also, Roa did not pin defendant to the wall until *after* defendant pistol whipped him. Because defendant pistol whipped Roa at a time when defendant still had the upper hand in the fight, there is no substantial evidence to support a finding that he was trying to extricate himself from the fight at that time. The People's argument is also legally untenable because it is akin to an argument that defendant was acting with the intent to defend himself. But that option is legally unavailable to a person who started a fight unless, at a minimum, that person tries to withdraw from the fight. (*People v. Crandell* (1988) 46 Cal.3d 833, 871-872.) The jury specifically rejected the defense of self-defense at trial, and necessarily found that defendant did not act with such an intent.

DISPOSITION

The convictions are affirmed. The sentence on count 3 is stayed pursuant to section 654. The superior court is directed to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ