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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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>KARL L. WESLEY,<br><br>Defendant and Appellant. | B230719<br><br>(Los Angeles County<br>Super. Ct. No. SA074451) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed as modified.

Sheila Tuller Keiter, 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, Shawn McGahey Webb and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

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Karl Lamonte Wesley appeals from the judgment following his convictions for robbing a gas station convenience store and assaulting the store's cashier with a firearm. We modify the sentence, and as modified, affirm the judgment.

## FACTS AND PROCEEDINGS

Jacob Michaeli was working as a cashier at an Arco gas station and convenience store in Santa Monica shortly before noon on May 7, 2010, when appellant Karl Lamonte Wesley entered the store. Appellant took a bottle of soda from a cooler at the back of the store, placed the bottle on the counter in front of Michaeli, and pulled a gun from his pocket. Pointing the gun at Michaeli, appellant laid it on the counter next to the soda. Appellant told Michaeli, "give me the money." Michaeli opened the cash register and handed appellant several hundred dollars in $1, $5, and $10 bills, but held back about $800 in $20 bills. When Michaeli refused to hand over the $20 bills, appellant pocketed his gun and walked around the cash register to Michaeli. Appellant grabbed Michaeli's wrist from behind and demanded that Michaeli turn over the rest of the money which Michaeli held tightly in his fist. Michaeli pushed back against appellant with his arm, and appellant responded by hitting Michaeli behind his ear with "a huge metal thing" that Michaeli believed to be appellant's gun. Unable to wrest the $20 bills from Michaeli's grasp, appellant left the store without them.

Police arrested appellant several weeks later. The People charged appellant by information with robbery, assault with a firearm, and being a felon in possession of a firearm. Appellant pleaded not guilty. A jury convicted appellant as charged and found true that he personally used a firearm during the robbery and assault. The court sentenced appellant to state prison for 18 years and 8 months, consisting of 17 years for robbery (and related enhancements), a consecutive sentence for assault with a firearm of 1 year, and a consecutive sentence of 8 months for being a felon in possession of a firearm. This appeal followed.

## DISCUSSION

1. *Application of Penal Code Section 654 Sentence for Assault with a Firearm*

For his conduct inside the gas station store, the jury convicted appellant of robbery and assault with a firearm. For appellant's assault conviction, the court imposed a separate one-year prison term to be served consecutively to his sentence for robbery. Generally speaking, courts do not punish a robber's use of a weapon such as a gun as an offense separate from the underlying robbery. (*People v. Beamon* (1973) 8 Cal.3d 625, 637; *People v. Brown* (1989) 212 Cal.App.3d 1409, 1427 disapproved on another point in *People v. Hayes* (1990) 52 Cal.3d 577, 628 fn. 10.) However, when the robber uses his gun in a manner demonstrating a criminal intent or objective separate from the robbery, a court may separately punish the gun offense. (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1015-1016; *People v. Watts* (1999) 76 Cal.App.4th 1250, 1265.) Here, appellant asserts he had the single criminal intent of robbing the store, and used his gun to overcome Michaeli's resistance to the robbery. Thus, appellant contends, the trial court erred in imposing a separate sentence for assault with a firearm, instead of staying that sentence under Penal Code section 654.[1] We agree.

When multiple acts, each of which is a separate crime, constitute an indivisible course of conduct with one criminal intent and objective, each act can support a separate conviction, but the acts may not be separately punished. (*People v. Correa* (2012) 54 Cal.4th 331, 336-337; *People v. Hester* (2000) 22 Cal.4th 290, 294.) It bears noting that " 'Few if any crimes . . . are the result of a single physical act. "Section 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." [¶] . . . " 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654

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

depends on the *intent and objective* of the actor.' " ' " (Italics in original.) (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "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." (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) We review a trial court's application of section 654 for substantial evidence. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.)

Respondent Attorney General argues the trial court correctly imposed a separate sentence for appellant's assault of Michaeli with a firearm because appellant had time to reflect before pistol-whipping Michaeli during the struggle over the $20 bills in Michaeli's fist. In support, respondent cites the testimony of an eyewitness who entered the store during the robbery and saw appellant and Michaeli behind the counter. She testified "they each had a hold of the money, and they were going back and forth." According to her, "at one point [appellant] let go of the money and started to walk away. But then he turned around and went back, and they started struggling again."[2]

Even if one accepts the eyewitness's testimony that appellant momentarily "started to walk away" – testimony unsupported by victim Michaeli who did not describe any break in his confrontation with appellant – the court erred in imposing a separate sentence because appellant's movements inside the store did not cleave his crime into two separate robberies. A robbery ends when the robber reaches a relative place of safety with his loot. (*People v. Anderson* (2011) 51 Cal.4th 989, 994.) Here, even by the eyewitness's own telling, appellant did not leave the store, and thus did not reach a place of relative

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**2** Respondent writes that appellant "proceeded to walk out of the store" and that "appellant's initial decision to walk away and leave the store prior to assaulting Michaeli gave him time to reflect on his actions." If respondent means to imply that appellant left the store, the implication is incorrect because no one testified appellant left the store and then returned in a second attempt to take the $20 bills.

safety, before he resumed struggling with Michaeli.[3] Thus, appellant committed only one robbery. Consequently, to punish appellant's assault with a firearm separately from the robbery, appellant would have needed to use his gun for something other than carrying out his single robbery. But there is no evidence he did so.

Respondent cites several cases for the proposition that the court correctly imposed a separate sentence for assault with a firearm because appellant had "time to reflect" when he "started to walk away," but the cases are distinguishable. *In re William S.* (1989) 208 Cal.App.3d 313, held that two burglaries of one house separated by several hours constituted separate criminal intents sufficient to support two sentences. (*Id.* at p. 315.) In *People v. Trotter* (1992) 7 Cal.App.4th 363, the defendant fired several times at a police car pursuing the defendant on a freeway. Describing the freeway chase, the court stated, "Defendant, as he was driving, turned back, pointed, and shot his weapon. He resumed driving, paused for about a minute, turned back, and shot again. After another few seconds a third shot was fired." (*Trotter* at p. 368.) The *Trotter* court rejected the defendant's contention that "each shot manifested the same intent and criminal objective, which was to force [the pursuing officer] to break off his pursuit" because "there was . . . time prior to each shot for defendant to reflect and consider his next action." (*Ibid*.) And in *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 455, the defendant-shoplifter walked unimpeded out of the store with stolen goods concealed in his clothing when security guards approached him outside the store. Because the shoplifting was complete when the defendant left the store, the defendant's assault of the security guards with a knife when they approached him outside the store was separately punishable from the shoplifting. Each of the foregoing cases involved breaks in time of greater length following the completion of an independent crime – the first burglary in *In re William S.*, gunshots separated by about a minute in *Trotter*, and shoplifting in

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**3** Indeed, the People's charging information and theory at trial presupposed appellant committed a single robbery, not a successful robbery of the smaller bills and an unsuccessful attempted robbery of the $20 bills.

*Vidaurri* – than happened here in the gas station convenience store, where appellant used his gun against a victim who testified their struggle over the $20 bills lasted only 15 seconds.

Respondent alternatively asserts that appellant's pistol-whipping of Michaeli was gratuitous or excessive violence justifying separate punishment. Generally an assault committed in the course of a robbery cannot be separately punished. (*People v. Brown* (1989) 212 Cal.App.3d 1409, 1427, disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 628 fn. 10.) However, an act of gratuitous violence may be subject to separate punishment even if committed in the course of an indivisible transaction. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 439; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) Respondent's authorities do not support the application of the rule here. For example, in *People v. Nguyen, supra*, at page 191, a robber shot a compliant victim who was lying on the ground in the back room of a store while the robber's accomplice emptied a cash register in front of store. Affirming separate punishment, *Nguyen* stated "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*Id.* at p. 191.) *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271-272 also cited by respondent, involved an attack with a two-by-four during a robbery on a 66 year old feeble victim. The court found the means used to effect the robbery were so extreme where the victim was not resisting that the assault constituted attempted murder. (See also *People v. Foster* (1988) 201 Cal.App.3d 20, 27 [false imprisonment for locking robbery victims inside storage room after victims turned over all their money was gratuitous]; *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171 ["When there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable."].)

Here, appellant used his gun to overcome Michaeli's resistance: first, when appellant pointed the gun at Michaeli at the register, and, second, when he struck Michaeli as they struggled over the $20 bills. The record does not support finding

appellant used more force than necessary to effectuate the robbery; to the contrary, the force he used did not overcome Michaeli's resistance because appellant left the store without the $20 bills.

Because appellant's use of his gun did not exhibit a criminal intent or objective separate from robbing Michaeli inside the gas station, section 654 obligated the court to stay appellant's sentence for assault with a firearm.

2. *Substantial Evidence Appellant's Gun Was A Firearm*

The jury convicted appellant of assault with a firearm and of possession of a firearm by a felon, and found true enhancements for personal use of a firearm. (§§ 245, subd. (a)(2), 12021, subd. (a)(1), 12022.53, subd. (b).) Each conviction and enhancement required that appellant's gun be a real firearm. The court instructed the jury that "A firearm is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion."

Appellant contends there was no substantial evidence that the gun he used against Michaeli was a firearm, instead of, for example, a BB gun or a gun replica. (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 [toy guns, pellet guns, and BB guns not firearms because they use means other than explosion or other combustion to propel projectile].) In support, appellant notes that Michaeli's first reference at trial to the gun was to describe it as "like" a gun when he testified appellant "put something from his pocket [on the counter]. It was like a gun." Appellant also cites the testimony of investigating officers who conceded that they could not tell from the convenience store's security videotape whether the robber used a real gun or a replica because a replica can be visually indistinguishable from a real gun. Finally, appellant notes that police did not recover the gun used in the robbery.

*People v. Monjaras, supra,* 164 Cal.App.4th 1432 defeats appellant's contention. *Monjaras* establishes that in the absence of contrary evidence greater than mere speculation, a jury may conclude an object is a real gun based on its appearance and the

circumstances of its use. (*Id.* at pp. 1436-1437.) Here, there was sufficient evidence to permit the jury to find appellant's gun was real. First, appellant treated the object as if it were a real gun. After pulling it from his pocket, he laid it on the counter pointing at Micheali and demanded that Michaeli give him all his money. Second, apart from Michaeli's first reference to the object as being "like" a gun, Micheali's trial testimony thereafter referred without equivocation to the object as a "gun." Third, the object had sufficient mass and rigidity to injure Michaeli when appellant hit him with it. As *Monjaras* noted, a jury may take a defendant "at his word" that an object is a firearm based upon the defendant's conduct. *Monjaras* explained that "Circumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm. [¶] . . . [The victim] 'assumed' the pistol was 'real' . . . [but] conceded that she could not say for certain whether it was 'a toy or real or not.' [¶] The jury was not required to give defendant the benefit of the victim's inability to say conclusively the pistol was a real firearm. This is so because 'defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm]. [¶] . . . [¶] As the old saying goes, 'if it looks like a duck, and quacks like a duck, it's a duck.' . . . While it is conceivable that the pistol was [not a firearm], the jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm . . . ." (*Monjaras* at pp. 1436-1437.)

Appellant contends *Monjaras* was wrongly decided because it shifts to a criminal defendant the burden of proving a gun was not real. Appellant is mistaken. *Monjaras* merely holds that the absence of definitive proof that an object is a real gun does not, as a matter of law, prevent the jury from concluding the object is a firearm. (*Monjaras, supra,* 164 Cal.App.4th at pp. 1437-1438.) Normal rules of circumstantial evidence applies. We thus reject appellant's contention that no substantial evidence existed that the gun he used against Micheali was real.

*3. No Error in Rejecting Pinpoint Instruction*

The court instructed the jury on each of appellant's firearm-related offenses that "A firearm is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion." Finding its instruction was sufficient, the court rejected appellant's proposed pinpoint instruction highlighting that BB guns and replica guns are not firearms.[4] Appellant contends the court prejudicially erred in rejecting his pinpoint instruction.

A defendant has a right to a instruction that "pinpoints" a theory of his defense. (*People v. Roldan* (2005) 35 Cal.4th 646, 715 disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 422.) A pinpoint instruction "relate[s] particular facts to a legal issue in the case or 'pinpoint[s]' the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] A trial court must give a pinpoint instruction . . . only if it is supported by substantial evidence. [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 214.)

Appellant cites no authority that the court's definition of "firearm" was wrong. Moreover, appellant cites no authority that the jury needed his pinpoint instruction to avoid confusion about the definition of a firearm, or to understand his defense that the gun he used was not a real firearm. Finally, he does not explain how the court's refusal to give his pinpoint instruction prejudiced him. Appellant elicited from investigating

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[4] Appellant's rejected pinpoint instruction stated: "As I have instructed you, a firearm is any device, designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion. [¶] 'Replica' guns and 'BB' guns are not firearms. [¶] The People have the burden of proving that the device used in this case was a firearm. [¶] As a result, if you have a reasonable doubt as to whether the device used in this case was a firearm, as opposed to a replica or BB gun, you must find that the defendant is not guilty of possession of a firearm as charged in count three, and you must find that he did not personally use a firearm as alleged in counts one and two."

officers testimony that BB guns and replica guns are not firearms and such objects can be difficult to distinguish from real firearms by sight alone. The officers' testimony was sufficient for the jury to find, if it so desired, that the People had not carried their burden of proof that the gun was a real firearm. We thus find the court did not commit prejudicial error in refusing appellant's pinpoint instruction which highlighted that BB guns and replicas are not firearms.

## DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect that appellant's sentence for assault with a deadly weapon is stayed under section 654, and that appellant's total sentence is 17 years and 8 months, and the trial court is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. As amended, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.