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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.

LARRY JESSIE JACKSON,

Defendant and Appellant.

B293028

(Los Angeles County
Super. Ct. No.BA468140)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part and remanded in part with instructions.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Larry J. Jackson punched his girlfriend Denise T., in the head and threatened to kill her while brandishing a knife. A jury found him guilty of inflicting corporal injury with a prior, violating a domestic violence restraining order with a prior, and brandishing a deadly weapon. The court imposed concurrent sentences for all three crimes.

Defendant's sole argument on appeal is that the court should have stayed his sentences for violating the protective order and brandishing the knife pursuant to Penal Code section 654.¹ He contends the punch and brandishing were born of a single intent—to abuse Denise—and the violation of the protective order was part of and dependent upon his acts of violence. We reject these contentions and affirm the judgment.

We remand the matter, however, so that two minor corrections may be made to the sentence. First, the trial court must exercise its discretion to either impose or strike a one-year enhancement under section 667.5 for defendant's prison prior. Second, the abstract of judgment must be updated to reflect any prison prior enhancement the court chooses to impose and to correctly reflect the 180-day sentence the trial court imposed for brandishing a deadly weapon.

PROCEDURAL HISTORY

An information filed June 15, 2018 charged defendant with willfully inflicting corporal injury on Denise within seven years of a previous conviction for inflicting corporal injury (§ 273.5, subd. (f)(1)), willful disobedience of a protective order within seven years of a previous conviction for violating a protective order (§ 166, subd. (c)(4)), and assault with a deadly weapon (§ 245,

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

subd. (a)(1)). The information further alleged that defendant suffered a prior strike conviction (§§ 667, subds. (b)-(j), 1170.12, subd. (b)) and served a prior prison term (§ 667.5, subd. (b)).

A jury found defendant guilty as charged of corporal injury and disobedience of a protective order, but found him guilty only of a lesser included offense of assault with a deadly weapon, brandishing a deadly weapon other than a firearm (§ 417, subd. (a)(1)). The trial court later found the priors allegations true.

The court sentenced defendant to the midterm of four years on the corporal injury count, which it doubled to eight years due to defendant's strike. The court imposed a concurrent sentence of four years on the protective order count—the midterm of two years doubled to four due to the strike—and a concurrent sentence of 180 days for the misdemeanor brandishing. The court did not impose a sentence for or strike the prison prior.

Defendant timely appealed.

FACTUAL BACKGROUND

Denice testified that she began dating defendant in 2012. In approximately November 2013, defendant broke into her apartment and “slapped the daylight out of [her]” after she told him he could not come over because she was tired. Kristina Gonzales, a legal support office assistant at the Los Angeles County District Attorney's office, testified that defendant suffered convictions for corporal injury and contempt of court as a result of that incident. A protective order barring him from contacting Denice for ten years was issued May 9, 2014.

Denice broke up with defendant while he was incarcerated, but allowed him to move into her apartment in approximately September 2017 “because he didn't have a place to stay.” They were “more like roommates” than romantic partners at that time;

defendant assisted with expenses and cared for Denice during her two heart surgeries and ongoing dialysis treatment.

On May 11, 2018, defendant approached Denice after she finished a phone conversation with her sister and punched her on the side of her forehead with a closed fist. Denice thought “he had burst my head open”; her forehead felt numb, her eyes began to swell, and she struggled to retain consciousness. She got up off the couch and thought about defending herself as she tried to clear her head.

Defendant, who was then about seven feet away from Denice, pulled out a switchblade knife from his pocket and opened the blade. He pointed the knife randomly and repeated, “I’ll kill you, bitch.” Denice said nothing and left the room; defendant put the knife away without incident. Although she had a lump the size of a golf ball on her forehead, Denice did not call the police because the phone was in the living room with defendant.

A few days later, Denice went to a dialysis appointment. Workers at the dialysis facility noticed her injuries, and Denice told them what had happened. The workers at the facility alerted social services. Denice testified that a male social worker visited her apartment later that evening. He called the police. Denice told the police about the May 11 incident.

Nick Ovsepyan testified that he worked as an adult protective services social worker for the Los Angeles County Department of Public Services. On May 15, 2018, he was dispatched to Denice’s apartment to investigate allegations of physical abuse. Ovsepyan spoke with Denice and saw the bump on her head. Ovsepyan then spoke to defendant and “ask[ed] him nicely” to leave the apartment. Defendant said he could

leave at the end of the month. Ovsepyan said that was not an option and called the police.

Los Angeles Police Department officer Jacob Kiker was on patrol on May 15, 2018 when he heard a radio call about a domestic battery. He responded and went to Denice's apartment, where he talked with her and saw a "knot" "the size of a golf ball" above her right temple. Denice told Kiker defendant hit her and threatened her with a knife. She provided a description of defendant, whom Kiker arrested shortly thereafter in front of Denice's apartment complex. Kiker found a switchblade knife in defendant's pocket.

DISCUSSION

I. Section 654

Defendant contends his sentences for violating the protective order and brandishing the knife should have been stayed under section 654 rather than run concurrently to his sentence for inflicting corporal injury. We disagree.

Section 654, subdivision (a) provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose of the statute is to ensure that a defendant's punishment is commensurate with his or her culpability. (*People v. Correa* (2012) 54 Cal.4th 331, 341.) To that end, a defendant may be convicted of, but not punished for, multiple crimes arising out of the same act or course of conduct. (*Id.* at p. 337.) Concurrent sentences count as multiple punishments. "It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations]

because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.’ [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 350, 353.) “Instead, the accepted ‘procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.’ [Citation.]” (*Ibid.*)

“Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an ‘act or omission’ may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective.” (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) First, we consider whether the crimes were completed by a single physical act. (*Ibid.*) If so, the defendant may be punished only once for that act. (*Ibid.*) If the crimes were completed by multiple acts, or a “course of conduct,” we move to the second step of the inquiry, at which we consider whether the defendant’s course of conduct reflects a single intent and objective or multiple intents and objectives. (*Ibid.*) If a course of conduct reflects only a single intent and objective, the defendant may be punished only once.

Whether section 654 applies in a particular case is largely a question of fact. “Intent and objective are factual questions for the trial court, which must find evidence to support the existence of a separate intent and objective for each sentenced offense.” (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) We affirm the trial court’s express or implied findings if they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) If the facts are undisputed, the application of section 654 presents a question of law we review de novo. (*People v.*

Corpening, supra, 2 Cal.5th at p. 312.)

Defendant first argues that section 654 bars multiple punishment for the corporal injury and brandishing offenses because the prosecution presented no evidence he acted pursuant to anything other than a single abusive intent. He relies on an ambiguous remark the trial court made before imposing sentence on the brandishing count: “this is all part of the same transaction and I think it would be difficult to - - you can sever it out and it’s not 654”. We are not persuaded.

At step one of the *Corpening* analysis, we consider whether the crimes were completed by a single physical act. They were not: the corporal injury was completed by the punch, and the brandishing was completed when defendant waved the knife at Denice. We then proceed to step two, where we consider whether the multiple acts—which the trial court described as “the same transaction”—are reflective of a single intent and objective or multiple intents and objectives. Substantial evidence supports the trial court’s conclusion that defendant harbored two separate intents. Denice testified that defendant punched her completely without warning or provocation; he simply walked up and punched her. Then, after she got up, he brandished the knife, which he always carried in his pocket, and threatened to kill her with it. Denice testified, “I guess he thought I was going to defend myself, which I was. Next thing I know he had the knife.” The trial court reasonably could conclude, from the sequence of events and the escalation of defendant’s behavior, that defendant’s intent changed between the two incidents. First he acted to abuse or disable Denice. Then, when he saw her recovering and making efforts to defend herself, he drew the knife and threatened to kill her to prevent her from retaliating.

Defendant next argues that his sentence for violating the restraining order should have been stayed under section 654 because the violation was dependent “on the violence that supported the convictions for domestic violence . . . and brandishing.” In other words, he argues multiple offenses were predicated on a single physical act. We disagree.

To sustain a conviction under section 166, subdivision (c)(4), the prosecution had to prove that the restraining order violation “involv[ed] an act of violence or ‘a credible threat’ of violence, as provided in subdivision (c) of Section 139.”² Defendant argues that the punch and/or brandishing constituted the “act of violence” necessary for this conviction. However, substantial evidence, in the form of Denice’s testimony, demonstrated that defendant also made a credible threat of violence: he threatened to kill Denice while holding a knife that gave him the ability to do so. Defendant’s credible threat of violence was not necessary to prove the other two charges. Corporal injury requires only the infliction of a traumatic condition (see § 273.5, subd. (a)), and brandishing requires only the drawing or exhibition of a weapon “in a rude, angry, or threatening manner” (§ 417, subd. (a)); neither crime requires verbal threats. Defendant points to another remark by the court, that the corporal injury and restraining order violation were “all part of a single transaction.” As before, such a remark does not end the analysis. Rather, it requires the court to look at the

² Section 139, subdivision (c) defines “a credible threat” as “a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.”

defendant's intentions. As we explained above, a reasonable factfinder could (and did) conclude that defendant acted pursuant to shifting intentions during the course of the incident.

Substantial evidence supports the trial court's ultimate conclusion that concurrent rather than stayed sentences were appropriate. We accordingly affirm the judgment.

II. Other Sentencing Matters

A. Prison Prior Enhancement

The trial court found true an allegation that defendant served a prior term of imprisonment within the meaning of section 667.5, subdivision (b). However, the trial court neither imposed nor struck the one-year enhancement to which defendant was subject as a result. The Attorney General points out this omission in his response brief and contends the matter must be remanded so the trial court may impose or strike a one-year sentence for defendant's prison prior. Defendant contends remand is unnecessary, because the trial court "clearly intended to dismiss the alleged one-year prison prior" since an "eight-year sentence could not be imposed with the inclusion of the one-year prison prior enhancement." He also argues that the trial court cannot impose the one-year enhancement on remand under article I, section 15 of the California Constitution, because the sentence he received was a permissible one. We agree with the Attorney General.

The failure to impose or strike a prior prison term enhancement under section 667.5, subdivision (b) is a jurisdictional error (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1562) or "legally unauthorized sentence" (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391) that may be corrected for the first time on appeal. Illegal sentences may be corrected at any

time, even if the new sentence is more severe than the original sentence, without running afoul of the California Constitution. (*People v. Reyes* (1989) 212 Cal.App.3d 852, 857; see also *People v. Serrato* (1973) 9 Cal.3d 753, 763-764, disapproved on another issue, *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn.1.) Indeed, article I, section 28, subdivision (f), paragraph (4) of the California Constitution expressly authorizes the use of prior felony convictions for “enhancement of sentence in any criminal proceeding.”

Despite defendant’s contention to the contrary, it is not clear from the record that the trial court intended to strike the prior enhancement. While it had the discretion to strike the enhancement under section 1385 (*People v. Bradley, supra*, 64 Cal.App.4th at p. 391), the trial court gave no indication whether it intended to do so. The enhancement was not mentioned at all during sentencing, apparently through inadvertence. The trial court remarked that its “take on it all along is that it’s a mid term case,” but that comment sheds no light on whether the court believed a one-year enhancement was appropriate for defendant. We accordingly remand the matter so that the court may exercise its discretion to impose or strike the one-year enhancement.³

³ It appears likely that by the time this case returns to the trial court, Senate Bill 136 will have taken effect. Because it amends section 667.5, subdivision (b) to provide that one-year prison prior enhancements are applicable only to specified sexually violence offenses, Senate Bill 136 may further constrain the trial court’s discretion. See: (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB136, archived at <https://perma.cc/YAA7-JGNC>.)

B. Clerical Error in Abstract of Judgment

Both defendant and the Attorney General note in their briefing that the abstract of judgment contains a clerical error. Indeed, the abstract of judgment erroneously indicates that the court imposed a concurrent sentence of six years on the brandishing count; in fact, the court imposed a sentence of six *months*, or 180 days. “It is well settled that ‘[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]’ [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge’s verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 1, 89.) We accordingly direct the clerk to issue an amended abstract of judgment accurately reflecting the 180-day concurrent sentence on the brandishing count. If the trial court imposes the one-year prison prior enhancement, the updated abstract should reflect that as well.

DISPOSITION

The judgment of the trial court is affirmed. The matter is remanded so the trial court may impose or strike the one-year prison prior enhancement. After the court makes its determination, the clerk is directed to prepare an amended abstract of judgment accurately reflecting the 180-day sentence for brandishing a weapon. If the trial court imposes the one-year enhancement, the clerk is to include the additional one-year term on the amended abstract of judgment. The amended abstract of judgment shall be forwarded to the Department of Corrections

and Rehabilitation.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.