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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH WIDBY,

Defendant and Appellant.

2nd Civil No. B269909
(Super. Ct. No. TA138124)
(Los Angeles County)

A jury found Joseph Widby guilty of assault with a deadly weapon (count 1; Pen. Code, § 245, subd. (a)(1)¹), battery with serious bodily injury (count 2; § 243, subd. (d)), and misdemeanor vandalism (§ 594, subd. (a)). The jury also found as to count 1 that Widby personally inflicted great bodily injury. (§ 12022.7, subd. (a).) Widby admitted two of four charged prior strike convictions. (§§ 667.5, subd. (b); 667, subd. (a)(1).) At sentencing, the trial court struck all but one of the prior strike

¹ All statutory references are to the Penal Code.

convictions and all of the prior prison term enhancements pursuant to section 1385.

The trial court sentenced Widby to 21 years, including enhancements, on count 1. The court sentenced Widby to three years on count 2 to run concurrently with the sentence on count 1. The court sentenced Widby to six months in jail on the vandalism charge.

We amend the judgment to stay execution of the sentence on count 2 pursuant to section 654. In all other respects, we affirm.

FACTS

On September 5, 2015, at 3:30 a.m., Widby and Tanya McNichols were outside drinking alcohol. A man came by known only as Bug-a-Boo. Widby and McNichols became upset because Bug-a-Boo interrupted their conversation. Bug-a-Boo swung a stick he was holding and dropped it. McNichols picked up the stick, swung it at Bug-a-Boo and missed. Widby told McNichols to stop, but she swung the stick again. This time she hit Bug-a-Boo and Widby in his ribs. McNichols dropped the stick.

Widby ran around the corner and came back with a large stick. He swung at Bug-a-Boo. Then Widby started swinging the stick around “because he was upset.” McNichols was not sure who he was trying to hit. He swung the stick at a parked car, cracking the window.

McNichols tried to calm Widby down, but he began swinging the stick at her. She put her arm up to block the stick and he hit her in the forearm and hand.

A person sitting in the parked car called 911. Los Angeles Sheriff's Deputy Oswaldo Cortez arrived a few minutes

later. McNichols told Cortez that Widby hit her two times on her forearm and two times on her hand, for a total of four hits. A bone was sticking out of her hand. She underwent emergency surgery.

DEFENSE

Widby testified on his own behalf. He said that on the night in question, he was sitting by a liquor store. He had some pictures related to a movie in his brief case. McNichols came up to him and asked for his help. They walked about a block when a man came out of the bushes and said, "That's my girl." McNichols started swinging a stick at Widby. She hit Widby with the stick and he felt someone else hit him.

The man who came out of the bushes grabbed Widby's brief case. The brief case came open and the pictures spilled out. The man grabbed the pictures and ran. McNichols walked away.

Widby picked up the two sticks in case his assailants tried to hit him again. Widby believes McNichols set him up so the man could grab the pictures in his briefcase.

Widby denied he hit anyone with a stick or that he hit a car window.

DISCUSSION

Widby contends the trial court erred in not staying his punishment for battery with serious bodily injury. The People agree.

Section 654 provides in part: "An 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." It

prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Here the trial court sentenced Widby to four years for count 1, assault with a deadly weapon, plus enhancements for a total of 21 years. In sentencing Widby on count 2, battery with serious bodily injury, the court found count 2 involved “the same victim, [the] same conduct [and the] same incident” as count 1. The court sentenced Widby to three years in prison on count 2 to run concurrently with count 1. Because the offense charged in count 2 involved the same victim, the same conduct and the same incident, the court should have stayed execution of the sentence on count 2 under section 654. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) The court should not have imposed a concurrent sentence on count 2. (*Ibid.*)

DISPOSITION

We amend the judgment by staying execution of the sentence on count 2, battery with serious bodily injury. In all other respects, we affirm.

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GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Kelvin D. Filer, Judge

Superior Court County of Los Angeles

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

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