Filed 11/21/17 P. v. Onodera CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. KAZUYA ONODERA, Defendant and Appellant.	B276273 (Los Angeles County Super. Ct. No. BA443107)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund W. Clarke, Jr., Judge. Affirmed as modified.

Stephanie L. Gunther, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kazuya Onodera of two counts of assault with a deadly weapon and two counts of false imprisonment by violence and found true the special allegation she had used a deadly or dangerous weapon, a knife, in committing the false imprisonment offenses. On appeal Onodera contends the court incompletely answered the jury's question on assault during deliberation by referring it to the applicable jury instruction and her sentence violates the statutory proscription against multiple punishment in Penal Code section 654.[1] We modify the sentence to strike the prior felony prison term enhancements unlawfully stayed by the trial court and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Amended Information*

An amended information charged Onodera with two counts of assault with a deadly weapon (§ 245, subd. (a)), one count of attempted robbery (§§ 664, 211) and two counts of false imprisonment by violence or menace (§ 236). The information specially alleged Onodera had used a deadly or dangerous weapon, a knife, to commit the offenses (§ 12022, subd. (b)(1)) and had served four separate prison terms for felonies within the meaning of section 667.5, subdivision (b). Onodera pleaded not guilty and denied the special allegations.

2. *A Summary of the Evidence at Trial*

One morning in January 2016 Onodera walked into a convenience store where Chihying Huang and Chandra Acharjee were working. After wandering inside the store for several minutes, Onodera showed Huang a knife. Huang recognized

---

[1] Statutory references are to this code.

Onodera as a regular customer and told her to put the knife away and leave the store. Onodera complied. A few minutes later, she returned to the store, used a dog leash to tie the inside handles of the front doors closed and pulled out a 10- to 12-inch kitchen knife. The security guard stationed outside tried to enter the store, but the doors would not budge. The security guard called the 911 emergency operator to report an individual armed with a knife had locked herself inside the store. Meanwhile, holding the knife with the blade up, Onodera confronted Huang and Acharjee, mumbling "as much to herself" as to them, "give me money" or give me "his money." Both Huang and Acharjee were afraid. Huang picked up a pizza paddle to defend himself while Acharjee attempted to back into a nearby storeroom. Ultimately, Huang managed to jump over the counter with a pair of scissors to cut the leash, enabling the security guard to open the doors and rush inside. Onodera put the knife in her pocket or her bag and walked out of the store. Onodera did not try to access the cash registers while inside the store, nor did she take any money. The incident was recorded on video surveillance cameras and played for the jury. When police arrested her a few minutes later, Onodera said, "They owed me money."

Onodera did not testify at trial or present any evidence. Her theory of the case was that she did not intend to commit a robbery. She mistakenly, but in good faith, believed she had left money on the counter when she had been in the store earlier and it had been taken from her. She did not intend to rob the store, nor did she use the knife to commit an aggravated assault.

3. *The Verdict and Sentence*

The jury acquitted Onodera of attempted robbery and convicted her on the aggravated assault and false imprisonment counts. In a bifurcated proceeding after she waived her right to a jury trial on the specially alleged prior felony prison term allegations, the court found each of those allegations true. The court sentenced Onodera to an aggregate state prison term of six years.[2]

DISCUSSION

1. *The Court Properly Answered the Jury's Questions*

In his closing argument defense counsel argued that Onodera's use of the knife amounted to "brandishing," an

---

[2] The court imposed a principal term of three years for one of the aggravated assault counts and consecutive, subordinate terms of one year for the second aggravated assault, plus eight months for each of the two false imprisonment offenses, plus four months for each of two section 12022, subdivision (b), enhancements relating to the false imprisonment charges. The court did not impose the weapon enhancement in connection with Onodera's aggravated assault sentence because personal use of the knife was an element of that offense. (§ 12022, subd. (b)(1).)

The court stayed the section 667.5, subdivision (b), felony prison term enhancements under section 654. This was error. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 [section 667.5, subdivision (b), enhancement cannot be stayed; it must be either imposed or stricken].) Because the court's intent not to impose the enhancements is clear from the record, we modify the sentence by striking the improperly stayed section 667.5, subdivision (b), enhancements. (See *People v. Bradley* (1998) 64 Cal.App.4th 386, 391 ["[t]he failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal"].)

uncharged, lesser related offense, and not aggravated assault. Defense counsel likened Onodera's conduct to holding one's fists in the downward position while arguing with another individual. That action alone, he argued, was not assault. It would become assault only if the individual swung his or her fists. "The assault is in the swinging." Likewise, he argued, "if they . . . had knives . . . it would be [the] point where they start swinging" brandishing became an assault: "[T]here's a reason why brandishing is a different crime than assault. When you start swinging and start making actions that are likely to cause force, that's treated differently. That's a separate crime. Now, there's nothing I can do about the fact that my client's not charged with brandishing. If she were, I would just say find her guilty of that. . . . Obviously [she] brandished a knife. Obviously that's what we've seen [in the surveillance video]. This is not an assault with a deadly weapon."

During deliberations the jury asked the court, "When does brandishing a weapon become assault? . . . Does just holding your fist by your side [constitute] assault, or is it only assault once you start to throw the punch?" After some lengthy colloquy during which defense counsel attempted unsuccessfully to persuade the trial court to answer the jury's fists-related hypothetical,[3] the court responded to the jury's questions by

---

[3] The court refused defense counsel's request to answer the jury's fists-related hypothetical stating, "I don't plan to answer hypotheticals. . . . I mean, these are all hypotheticals, not even tied that closely to the facts of our case. So it's problematic to start wondering what are they surmising and then answering hypothetical questions. In my opinion, a person reading the instruction who thinks that the defendant only held his hand by

stating, "Please review instruction [CALCRIM Nos.] 875 [aggravated assault] and 915 [simple assault] in their entirety, including element 1 of each instruction." The first paragraph of both instructions states, "The defendant did an act that by its nature would directly and probably result in the application of force to a person." (CALCRIM Nos. 875, par. 1, 915, par.1.)

Onodera contends the court abused its discretion when it merely referred to the jury instructions on assault in response to the jury's questions without answering the jury's hypothetical. She also contends the court should have clarified for the jury in response to its expressed confusion the difference between brandishing and assault with a deadly weapon.

a. *The court did not abuse its discretion when it told the jury to refer to the first element of aggravated and simple assault contained in the jury instructions*

"The court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138[4] to

---

his side and never gestured towards the victim would say [based on the instruction], no, that is not an assault." Asked by defense counsel to provide that answer to the jury, the court refused, concluding such an answer would put its thumb on the scale: "Only if you want me to join you at the defense table as defense counsel. I don't mean to be flip with you. I think that's unfairly interjecting the court into the issue. I think within the instruction they can find the answer."

[4] Section 1138 provides, "After the jury have retired for deliberation, if there be any disagreement between them as to the

determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97; accord, *People v. Cleveland* (2004) 32 Cal.4th 704, 755; see *People v. Smithey* (1999) 20 Cal.4th 936, 984-985 [a trial court may satisfy its duty to respond to the jury's question by referring it to instructions already given if those instructions are full and complete and adequately answer the jury's question on the facts of the case].)

We review the trial court's response to the deliberating jury's questions for abuse of discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 745-746 ["[a]n appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury"]; *People v. Beardslee*, *supra,* 53 Cal.3d at p. 97.)

Onodera suggests that, by referring to the instructions already given, the court effectively "thr[e]w up its hands" and told the jury it could not assist it. (See *People v. Beardslee, supra,* 53 Cal.3d at p. 97 [when faced with a question from a deliberating jury on the law given to it, the court "must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further

---

testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

explanation is desirable, or whether it should merely reiterate the instructions already given"].) Contrary to her contention, the court thoughtfully considered the jury's fists-related hypothetical, concluding, along with the prosecutor and defense counsel, that the question was directed to whether some affirmative act was required for assault. Careful not to interject the court's view by answering a hypothetical wholly unrelated to the facts of the case, the court directed the jury's attention specifically to the part of the aggravated and simple assault instructions that correctly informed the jury that assault requires the commission of "an act that by its nature would directly and probably result in the application of force to a person." The court's well-considered answer, a correct statement of the law, was a proper exercise of its discretion.

b. *Onodera was not entitled to a brandishing instruction in response to the jury's question*

Onodera also contends the court had a duty to instruct the jury with the elements of brandishing once it expressed confusion between the uncharged offense of brandishing and the charged offense of assault with a deadly weapon. Defense counsel did not request that instruction (see *People v. Marks* (2003) 31 Cal.4th 197, 236-237 [when court responds to jury's question with correct statement of law, defendant must affirmatively request the court provide additional clarification to preserve the argument for appeal]; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [same]), nor would Onodera have been entitled to it even if he had.[5]

---

[5] During its discussion with counsel on formulating a response to the jury's question, the court noted, "[I]t's interesting that they're adopting the word 'brandishing.' They don't need to

The court's duty to instruct on all lesser included offenses when supported by substantial evidence (see *People v. Foster* (2010) 50 Cal.4th 1301, 1343; *People v. Gutierrez* (2009) 45 Cal.4th 789, 826) does not extend to lesser related offenses. (*People v. Jennings* (2010) 50 Cal.4th 616, 668 ["[a] defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties"]; *People v. Birks* (1998) 19 Cal.4th 108, 136 [same].) Brandishing, as Onodera concedes, is a lesser related, not lesser included, offense of assault with a deadly weapon. (*People v. Steele* (2000) 83 Cal.App.4th 212, 218; *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 569; *People v. Escarcega* (1974) 43 Cal.App.3d 391, 398.) The prosecutor made clear this was not a brandishing case. In light of the People's lack of consent to such an instruction, Onodera had no right to a brandishing instruction, even in response to the jury's brandishing-related question. (See *People v. Steele, supra,* 83 Cal.App.4th at p. 218 [court had no duty to give brandishing

---

know the relationship between brandishing and assault, since there is no brandishing charge here. And so they very well might accept the defense theory that this was brandishing . . . but that doesn't mean that they should continue along the spectrum and say, gee, did it go past brandishing into assault, because it's not necessarily a continuum anyway, nor did you argue that, and that wasn't presented in that way." Onodera's counsel did not respond or otherwise request a brandishing instruction.

instruction because it was a lesser related, not lesser included, offense to assault with a deadly weapon/firearm].)[6]

2. *Onodera's Sentence Does Not Violate Section 654*

Section 654, subdivision (a), provides, "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. . . ."

The determination whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry. First, the court considers whether the different crimes were completed by a single physical act. If so, the defendant may be punished only once for the single act. (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) If more than a single act is involved, that is, a "course of conduct," then the court considers whether "that course of conduct reflects a single 'intent and objective' or multiple intents and objectives." (*Ibid.*) If multiple acts were

---

[6] Because Onodera was not entitled to an instruction on brandishing as a lesser related offense, her claim her counsel's performance was constitutionally deficient for failing to request a definition of brandishing in response to the jury's question necessarily fails: We fail to see any meaningful difference between a lesser related offense instruction and another form of response that defined the elements of that crime. (See *In re Crew* (2011) 52 Cal.4th 126 150 [to establish ineffective assistance of counsel under either the federal or state constitutional guarantee, defendant must show that counsel's representation fell below objective standard of reasonableness under prevailing professional norms and that counsel's deficient performance was prejudicial]; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

pursued with a single criminal intent and objective, "'"'the defendant may be punished for any one of such offenses but not for more than one.'"'" (*People v. Jackson* (2016) 1 Cal.5th 269, 354; accord, *Corpening*, at p. 311.)

Onodera concedes tying the doors closed while armed with a knife (false imprisonment) and confronting the employees behind the counter with the knife (aggravated assault) were two distinct acts.[7] However, she contends she engaged in an indivisible course of conduct with a single intent and objective—to commit an aggravated assault to get money or her money—and her act of tying the doors shut was incidental to that single objective. The trial court disagreed, impliedly finding the false imprisonment was not necessary to the aggravated assault, but designed to increase the danger to her victims by preventing the security guard stationed outside the store from coming to the employees' aid. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 [section 654 "cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense"].) Substantial evidence supports that finding. (See *People v. Osband* (1996) 13 Cal.4th 622, 730-731 [trial court's section 654 determinations on disputed facts reviewed for substantial

---

[7] Onodera also acknowledges the court did not violate section 654 by sentencing her separately for crimes committed against Huang and Acharjee. (See *People v. Correa* (2012) 54 Cal.4th 331, 341 [section 654 does not preclude imposition of separate sentences for crimes of violence committed against different victims, whether or not the crimes were in furtherance of a single objective]; *People v. Oates* (2004) 32 Cal.4th 1048, 1063 [same].)

evidence]; *People v. Andra* (2007) 156 Cal.App.4th 638, 640-641 [same]; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 [trial court "is vested with broad latitude" in making its section 654 determination and court's "findings will not be reversed on appeal if there is any substantial evidence to support them"].)

Onodera also argues the court violated section 654 when it used "the same act"—her use of a knife—to punish her for aggravated assault and to enhance her false imprisonment sentence under section 12022, subdivision (b). In *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*) the Supreme Court concluded sentence enhancements may be subject to section 654 provided the specific sentencing statutes themselves do not otherwise state whether more than one enhancement may be imposed. (*Ahmed,* at p. 159.) When the sentencing statutes themselves are silent, the section 654 analysis is adjusted to account for the differing nature of substantive crimes and enhancements. (See *id.* at p. 163 ["[Enhancement provisions do not define criminal acts; rather, they increase the punishment for those acts. They focus on *aspects* of the criminal act that are not always present and that warrant additional punishment."], citations and fn. omitted.) Thus, the Court held, when applied to multiple enhancements for a single crime, separate enhancements may be applied to different aspects of the same substantive offense (*id.* at p. 163),[8] but "section 654 bars multiple punishment for the same *aspect* of a criminal act." (*Id.* at p. 164.)

---

[8] The Court chose the word "aspect" to avoid confusion with statutes containing the words "circumstances" (such as section 190.2), factors or elements. (*Ahmed, supra,* 53 Cal.4th at p. 163, fn. 3.)

The instant case does not involve multiple enhancements for a single crime (*Ahmed, supra,* 53 Cal.4th 156) or multiple punishment for the same aspect of a single criminal act (see *People v. Buchanan* (2016) 248 Cal.App.4th 603, 615 [the court violated section 654 when it used the same act, possession of a firearm on a single occasion, to sentence defendant for the crime of possession of a firearm by a felon and to impose an arming enhancement under section 12022, subdivision (c), for the separate offense of possessing methamphetamine with intent to sell]; *People v. Calles* (2012) 209 Cal.App.4th 1200, 1217-1218 [section 654 prohibited court's use of same act to sentence defendant for the offense of fleeing the scene of an accident and to enhance his vehicular manslaughter conviction based on the same conduct of fleeing the scene of a crime]).

Rather, the court separately punished Onodera for two separate crimes and two distinct uses of a knife—the first occurred when Onodera took out the knife and committed false imprisonment by violence; the second when, armed with the knife, she confronted Huang and Acharjee, committing an aggravated assault on both. Although the court could not, and did not, enhance Onodera's aggravated assault conviction based on her use of the knife in the commission of that offense (see § 12022, subd. (b)(1) [this enhancement does not apply when use of a deadly or dangerous weapon is an element of the offense]), it did not violate section 654 when it imposed the section 12022, subdivision (b), enhancement for using a knife in the commission of her false imprisonment offenses.

DISPOSITION

The judgment is modified to strike the section 667.5, subdivision (b), prior felony prison term enhancements improperly stayed by the court. As modified the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.