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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFFORD EDWARD ADAMS,

Defendant and Appellant.

A129713

(San Mateo County
Super. Ct. No. SC069895A)

Defendant Clifford Edward Adams appeals a judgment entered upon a jury verdict finding him guilty of identity theft (Pen. Code,¹ § 530.5, subd. (a)) (count one); grand theft (§ 487, subd. (a)) (count two); commercial burglary (§ 460, subd. (b)) (count three); and access card fraud (§ 484g) (count four). The trial court found true several prior conviction and prison term allegations. The court imposed a six-year sentence for count one, a concurrent sixteen-month sentence for count three, and a one-year enhancement pursuant to section 667.5, subdivision (b). Sentence on the remaining counts was stayed pursuant to section 654. Defendant contends the trial court committed sentencing error. We shall order the judgment modified to stay the sentence on count three, and affirm in all other respects.

I. BACKGROUND

Chase Bank had issued a credit card to one of the victims of the identity theft, Noushin Oshidari. Her husband, Babak Hemati, filed the card away, and the couple did

¹ All statutory references are to the Penal Code.

not use it. In January 2009, they received notification from Chase Bank that there had been a request for a change of address on the card, although they had never requested the change themselves and were unfamiliar with the new address, which was on MacArthur Boulevard in Oakland. Hemati and Oshidari did not know defendant and never gave him permission to use the card.

Several charges appeared on the card which Oshidari had not authorized; they were a charge of \$5,150 at a merchant or bank in San Pablo, a transaction of \$5,000 at a financial institution in Stockton, a \$5,000 transaction at Wells Fargo in El Cerrito, a \$5,111.99 transaction at Lucky Chances in Colma, a \$4,635 transaction in San Pablo, and two transactions, one of \$4,240 and the other of \$4,470, at the GCA Napa Valley Casino in American Canyon. Oshidari had not authorized any of those transactions, which took place on January 7, 8, and 9, 2009.

Pinky Nacional, who worked as a cashier at the Lucky Chances Casino (Lucky Chances) in Colma in January 2009, testified that customers could receive cash advances on their credit cards. On January 9, 2009, she issued to defendant a cash advance of \$5,000, with an added service charge of \$111.99. Defendant used a credit card with Oshidari's account number and the name Clifford Adams name printed on the card.²

Cecilia Garay, a detective with the Town of Colma and the County of San Mateo, testified about various methods of identity theft. One method is an "account takeover," in which identifying information is stolen from real estate agents, car dealerships, or mortgage companies, then used to add other names onto a credit card account. Another method is "skimming," which occurs when account information is taken directly from a victim's card and transferred to another card. Equipment to emboss names onto credit cards is readily available on the internet. Equipment is also available that can encode account information onto a card. People involved in identity theft commonly work as a group.

² Nacional could not identify defendant in court at the August, 2010 trial, but recognized him in a photographic lineup on January 29, 2009.

Garay interviewed defendant after the incident at Lucky Chances. After Garay told him he had been identified, defendant said that someone had “made him do it,” that a woman he knew only as Pokey had asked him to use some credit cards she had, and that Pokey and a friend of hers named Herby would pick him up from his home in Stockton and take him to casinos where he could withdraw large sums of money with a credit card. He acknowledged having withdrawn a total of approximately \$20,000 at casinos in San Pablo, Colma, and Napa. He gave the money to Pokey and Herby, and received \$1,200 from them. He said Pokey arranged to have credit reports stolen from mortgage companies; she would then call the credit card companies and have cards sent to the address on MacArthur Boulevard in Oakland.

II. DISCUSSION

A. Concurrent Sentences

The trial court treated count one, identity theft (§ 530.5, subd. (a)), as the principal offense, and imposed a concurrent term for count three, commercial burglary (§ 460, subd. (b)). Defendant argues the sentence on count three should instead have been stayed pursuant to section 654.³

“[S]ection 530.5, subdivision (a) provides in relevant part: “ ‘Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense’ Thus, to be guilty under section 530.5, subdivision (a), the defendant must (1) willfully obtain personal identifying information of another person, and (2) *use the identifying information* for an unlawful purpose without the person’s consent.” (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 533, italics added; see also *People v. Mitchell* (2008) 164

³ Section 654, subdivision (a) provides in pertinent 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.”

Cal.App.4th 442, 455 [“[I]t is the *use* of the identifying information for an unlawful purpose that completes the crime and each separate use constitutes a new crime”] (italics added).) The basis for the burglary conviction was defendant’s entry into Lucky Chances with the intent to use the credit card unlawfully.

Section 654 has been applied “to preclude multiple punishment where multiple acts, or offenses, were committed incident to a single intent and objective.” (*People v. Gao* (2000) 81 Cal.App.4th 919, 935.) However, “[u]nder section 654, ‘a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment. [Citations.]’ [Citations.] This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]” (*Ibid.*; see also *People v. Beamon* (1973) 8 Cal.3d 625, 637-638.) “The defendant’s intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. [Citation.] ‘We review the court’s determination of [a defendant’s] “separate intents” for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]’ [Citation.]” (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641 (*Andra*).)

Defendant draws our attention to a number of cases in which section 654 has been held to bar multiple punishment for a burglary and the associated theft, where the purpose of the burglary was to commit the theft. (See, e.g., *People v. Isenor* (1971) 17 Cal.App.3d 324, 335-336 [concurrent sentences for burglary and theft arising out of same occurrence improper]; *People v. Jaramillo* (1962) 208 Cal.App.2d 620, 628-629 [“[w]here a person enters a house to commit theft, and does commit theft, he may be guilty of both burglary and larceny, but under the ‘one objective’ test he may be punished for only one offense”]; *People v. Moore* (1965) 234 Cal.App.2d 29, 32 [section 654 “forbids multiple punishment for separate indivisible crimes arising out of a single act which were the means and were incidental to the accomplishment of a single objective”];

compare *People v. Green* (1985) 166 Cal.App.3d 514, 518 [section 654 did not bar multiple punishment where intent to commit robbery and rape was formed after intruders entered residence to commit theft of other property].)

Defendant contends the burglary and identity theft fall within this rule. He argues that the crime of identity theft was not complete until he actually used the credit card at the Lucky Chances, and that his intent and objective in entering the casino was to facilitate the unlawful use of the card. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1216-1217 (*Latimer*) [double punishment for kidnapping and rape barred by section 654 where defendant's purpose in driving victim to isolated area was to rape her].)

The Attorney General disagrees, arguing that this case is governed by *Andra*. There, the court concluded section 654 did not bar multiple punishment where the defendant committed identify theft by using a victim's personal information to obtain a credit card over the Internet, and committed vehicle theft by, two weeks later, failing to return a car to a rental agency after she had rented it using the credit card. (*Andra, supra*, 156 Cal.App.4th at p. 641.) The court stated: "The weeks between the commission of these crimes afforded defendant ample opportunity to reflect and then renew her intent before committing the next crime. [Citation.] Moreover, these crimes, committed more than two weeks apart, had two different victims: Ms. Baker and Budget Rent-A-Car. Accordingly, no plausible argument can be made that defendant's sentence on either count should be stayed under section 654." (*Ibid.*)

On this record, defendant has the better argument. In finding section 654 applied to counts one (identity theft), two (grand theft), and four (access card fraud), the trial court explicitly found that "each crime was based upon the same facts, namely the use of a credit card to obtain cash on a single occasion"—that is, the incident at Lucky Chances. Moreover, in arguing to the jury that defendant was guilty of identity theft, the prosecutor relied solely on the events at Lucky Chances to show that defendant used Oshidari's personal identifying information for an unlawful purpose. Thus, unlike the case in *Andra*, we cannot conclude that the crime of identity theft was already complete before

defendant committed burglary by entering the casino.⁴ There is no basis to conclude the burglary was anything other than incidental to defendant's intent to withdraw money using the credit card, and there is no evidence of any significant delay between defendant's entering the building and his obtaining the money so as to make the transaction divisible and take it outside the rule of the burglary cases discussed above.

The Attorney General argues, however, that section 654 does not apply because the delay between the time the identity theft began—when defendant acquired the identifying information or credit card—and the time of the burglary gave defendant the opportunity to reflect and renew his intent. We are not persuaded by this argument. Defendant's undisputed intent and objective in committing the burglary was to facilitate the identity theft. (See *Latimer, supra*, 5 Cal.4th at pp. 1216-1217.) Indeed, the only reason his entry into the casino was a crime at all was the fact that he entered with the intent to use the credit card unlawfully.

The Attorney General also contends that under *Andra*, multiple punishment was proper because the crimes had different victims—that is, Oshidari and Hemati were the victims of the identity theft, and Lucky Chances was the victim of the burglary. The Attorney General is correct that there is a “multiple victim” exception to the application of section 654. This exception, however, applies to crimes of *violence* committed against multiple victims. (*People v. Centers* (1999) 73 Cal.App.4th 84, 99 (*Centers*); see also *People v. Solis* (2001) 90 Cal.App.4th 1002, 1023.) “Where, however, the offenses arising out of the same transaction are not crimes of violence but

⁴ The prosecutor told the jury that defendant was charged with only the Lucky Chances incident because the other casinos where defendant withdrew money were outside San Mateo County, and that Oshidari's testimony about the charges at the other casinos had been introduced to “give you some context as it relates to the defendant's statement to Detective Garay,” and to substantiate Garay's claim that defendant referred to various casinos. The Attorney General concedes that the identity theft offense was completed when defendant used the credit card to get \$5,000 from Lucky Chances. Although we might reach a different result if defendant's actions at the other locations had formed the basis of the trial court's ruling, on the record before us, we must treat the crime of identity theft as being complete only when defendant withdrew money at Lucky Chances.

involve crimes against property interests of several persons, this court has recognized that only single punishment is permissible.” (*People v. Bauer* (1969) 1 Cal.3d 368, 378.) Here, the only interests at stake were property interests, and the multiple victim exception does not apply. (See *Centers, supra*, 73 Cal.App.4th at p. 99 [“Burglary, standing alone, is not a violent crime for purposes of the multiple victim exception. [Citations.]”].)

Accordingly, the trial court should have stayed the sentence on count three rather than running it concurrently with the sentence in count one. We shall therefore order the judgment modified to stay the concurrent sentence for count three. (See *People v. Spirlin* (2000) 81 Cal.App.4th 119, 131.)

B. Prior Prison Term Enhancement

Defendant contends the evidence does not support the imposition of a one-year enhancement under section 667.5, subdivision (b). At the court trial on the enhancement allegations, the District Attorney submitted defendant’s prison packet (§ 969b), which showed he was convicted of robbery (§ 212.5, subd. (b)), assault with a firearm (§ 245, subd. (a)(2)), and being a felon in possession of a firearm (§ 12021, subd. (a)) in 1993, and sentenced to 16 years in prison. He was released on parole in 2002, rearrested, and again released on parole in 2003. The evidence also included records from Oregon, which showed that defendant was convicted of felonies in 2006 and 2007, and on each occasion placed on probation.

Section 667.5 provides for enhancement of prison terms for new offenses because of prior prison terms. At the time in question, subdivision (b) of that section provided: “Except where subdivision (a) [related to specified violent felonies] applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that *no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.*” (Former § 667.5, subd. (b), italics added.)

The parties disagree about the interpretation of the “washout period” established by the italicized language. Relying on *People v. Shoals* (1992) 8 Cal.App.4th 475, 500-501 (*Shoals*), defendant argues that under section 667.5, subdivision (b), he cannot receive the one-year enhancement unless the People show that he suffered *both* a felony conviction *and* a prison term during the five-year period following his prison term. *Shoals* indeed suggests that this is the case, concluding that the defendant there was not subject to the enhancement because “proof of felony convictions *and* prison custody during the five-year washout period after defendant’s discharge from parole [was] not established.” (*Shoals*, 8 Cal.App.4th at p. 500.)

As the Attorney General points out, the court in *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1229-1231, reached a different result, stating, “According to the ‘washout’ rule, if a defendant is free from both prison custody *and* the commission of a new felony for *any* five-year period following discharge from custody or release on parole, the enhancement does not apply. [Citations.] Both prongs of the rule, lack of prison time *and* no commission of a crime leading to a felony conviction for a five-year period, are needed for the ‘washout’ rule to apply. This means that for the prosecution to prevent application of the ‘washout’ rule, it must show a defendant *either* served time in prison *or* committed a crime leading to a felony conviction within the pertinent five-year period. (*People v. Elmore* (1990) 225 Cal.App.3d 953, 957 [‘washout’ period does not apply if defendant committed a new offense resulting in a felony conviction within five years even without a showing he was incarcerated in state prison as a result thereof]; *People v. Young* (1987) 192 Cal.App.3d 812, 816 [‘We hold that the statute requires a convicted felon to remain free from prison custody and the commission of an offense resulting in a felony conviction for a single, continuous five-year period in order to avoid the enhancement provided in section 667.5, subdivision (b)’]; and *People v. Jackson* (1983) 143 Cal.App.3d 627, 631 [‘It is self-evident that no five-year period elapsed in which appellant was free from both prison custody *and* the commission of offenses resulting in felony convictions as required by section 667.5, subdivision (b) in order to avoid enhancement’].)” (*Fielder, supra*, 114 Cal.App.4th at p. 1229.) The court in

Fielder concluded the *Shoals* decision was “based upon a misreading of the pertinent statutory language,” and reasoned instead that the language of the washout provision “requires the presence of two elements: no prison custody *and* no commission of an offense resulting in a new felony conviction for a five-year period. Therefore, for the prosecution to avoid application of the ‘washout’ provision, it need only show one of those elements has occurred.” (*Fielder, supra*, 114 Cal.App.4th at p. 1231.) We agree with *Fielder*’s reading of section 667.5, subdivision (b). Under the plain language of the statute, to avoid application of the washout rule, the People need only show that a defendant *either* failed to remain free of custody *or* committed a new felony offense during the five-year period.

Defendant does not dispute that he committed new felony offenses in 2006 and 2007, and that there was therefore no five-year period after his prison term in which he both was free of prison custody and committed no offense resulting in a felony conviction. Accordingly, the trial court properly imposed a one-year enhancement pursuant to section 667.5, subdivision (b).

III. DISPOSITION

Defendant's sentence is modified so that execution of sentence imposed for count three is stayed pending finality of the judgment and service of the sentence on count one, the stay to become permanent upon completion of the term imposed. As so modified, the judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.