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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS IGNACIOUS BUTLER,

Defendant and Appellant.

C062788

(Super. Ct. No. 07F08883)

Defendant was convicted by a jury of four counts of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) and one count each of transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a)), attempting to evade a peace officer (Veh. Code, § 2800.2), driving or taking another's vehicle without consent (*id.*, § 10851, subd. (a)), and receiving stolen property (Pen. Code, § 496). (Further undesignated section references are to the Penal Code.) Sentenced to state prison for an aggregate term of 23 years, defendant appeals contending: (1) the trial court improperly admitted identification evidence; (2) there is insufficient evidence to support the controlled

substance and weapon possession convictions; and (3) section 654 bars punishment on more than one firearm possession conviction. We agree in part with the last contention and order that punishment on two of the firearm offenses be stayed. In all other respects, we affirm.

FACTS AND PROCEEDINGS

On August 20, 2007, D.W. was on vacation in Georgia when he received a telephone call from a neighbor informing him that someone had broken into his home. D.W. returned home and found the front door forced open and several items missing, including a red Ford Mustang convertible, a Harley Davidson motorcycle, three handguns, a sword, knives, jewelry, silver dollars, two car radios and hair cutting equipment.

In the early morning hours of August 22, 2007, Deputy John Van Assen was on duty in a marked patrol car parked at the corner of Oak Avenue and Santa Juanita in Sacramento County. At approximately 1:25 a.m., he observed a red Ford Mustang convertible go through an intersection without stopping at a posted stop sign. There were two people in the car, one in the driver's seat and the other in the front passenger seat.

Van Assen pulled out, activated the lights on his patrol car and followed the Mustang. When the Mustang failed to pull over and instead sped away, Van Assen activated his siren and engaged in a high speed pursuit. Eventually, the Mustang turned onto a dirt road and traveled another 75 feet before hitting a tree. Van Assen followed onto the dirt road. Before the Mustang hit the tree, the driver jumped out, looked back at the patrol car for a couple of seconds, and then fled on foot. Van Assen identified defendant in court as that driver.

The passenger in the Mustang, Nicholas Dunbar, remained in the vehicle. Van Assen arrested Dunbar, placed him in the back of his patrol car, and waited for backup.

After Sergeant Eric Buehler and a canine unit arrived on the scene, Buehler assumed custody of Dunbar and Van Assen assisted in searching for defendant.

While Van Assen was away, Buehler found a cell phone on the front seat of the Mustang and began calling numbers from the list of contacts in the phone. When Buehler informed the people he called who he was and what he was doing, they all hung up except Joseph V., who was identified on the phone as Uncle Joe and is defendant's uncle. Joseph informed Buehler that defendant had been living with defendant's mother for approximately a year and that his date of birth is April 20. Joseph thought defendant had been born in 1974.

Buehler searched a police database using the computer in his patrol car and found an entry for defendant, who had previously been convicted of numerous crimes. Defendant's birth date was listed as August 20, 1970. Buehler pulled up a booking photograph of defendant on the screen of his computer.

Van Assen and the other officers were unable to find defendant in their search of the area. When Van Assen returned to his patrol car, Buehler showed him the photo of defendant on his computer screen. Van Assen immediately identified defendant as the driver of the Mustang.

While Van Assen was searching for defendant, Buehler saw Dunbar in the back seat of Van Assen's patrol car moving around a lot and walked over to investigate. Buehler noticed a white granular substance on the floorboard below Dunbar's feet. It appeared to Buehler that Dunbar had been trying to destroy the substance, so he removed Dunbar from the patrol car and placed him in another. After returning from the search, Van Assen collected the substance from the floor of his patrol car and it tested positive for methamphetamine. However, later testing of the substance was inconclusive for the presence of methamphetamine.

A search of the Mustang turned up various items taken from D.W.'s home, including the sword, three handguns, radios and knives. They also found bolt cutters, a

duffel bag containing a baggie of methamphetamine, smoking paraphernalia, and a fourth handgun, which was loaded.

Dunbar was interviewed at the scene and claimed not to know the driver of the Mustang. According to Dunbar, he knew the driver only as "Tom." However, at trial, Dunbar claimed he told the officers the driver's name was "John." He denied that defendant had been the driver.

Defendant was arrested on September 12, 2007. Later that day, Van Assen was working at the jail and saw defendant being booked. He immediately recognized defendant as the driver of the Mustang on August 22.

Defendant's mother, J.S., was called to testify at trial. In a taped jail conversation, defendant had asked J.S. to tell his attorney that he had been with her the night of August 22. She refused. J.S. testified that her brother, Joseph, had called that evening to tell her about the call he received from Sergeant Buehler. According to J.S., defendant arrived home some time after that call from her brother.

Defendant presented an alibi defense. M.M. testified that she had a blind date on the evening of August 21, 2007, but was "stood up." She and a friend, T.W., remained at a bar until 1:00 or 1:30 a.m. on August 22 and then walked to the trailer of T.W.'s friend, A.L. Sr. While there, they met A.L. Sr.'s son, A.L. Jr., and his friend named "Tommy," who M.M. identified in court as defendant. M.M. testified defendant was working on his truck and remained with them until 2:30 or 3:00 a.m., at which time he left with a tow truck driver.

A.L. Jr. also testified about that evening. According to A.L. Jr., defendant was working on his truck at the trailer until approximately 1:45 or 2:00 a.m. the evening of August 22 or 23. A.L. Jr. testified M.M. showed up that evening around midnight but stayed only for a minute.

Defendant testified on his own behalf. Defendant vaguely remembered meeting M.M. but could not recall when. He admitted the cell phone found in the Mustang

belonged to him but claimed he had lost track of it sometime in August 2007 and ended up replacing it five to seven days later. Defendant testified that, in the jail conversation with his mother, he was not trying to convince her to lie for him but was trying to determine where he had been on August 22. Defendant denied driving the Mustang on August 22.

Defendant was convicted as previously indicated. Following dismissal of the jury, the trial court found defendant had suffered four prior felony convictions, one of which was a serious felony within the meaning of the three strikes law, and had served three prior prison terms. Defendant's new trial motion and motion to strike the priors were denied. He was sentenced on the drug offense to the upper term of four years plus four years for a weapon enhancement, doubled under the three strikes law. On the fleeing a peace officer, vehicle theft, receiving stolen property, and three of the firearm possession offenses, defendant received consecutive one-third middle terms of eight months, doubled to 16 months. The court stayed sentence on the fourth firearm offense, because that firearm had been the basis for the firearm enhancement on the drug offense. The court imposed three additional years for the three prior prison terms, for an aggregate sentence of 23 years.

DISCUSSION

I

Identification Evidence

Defendant contends the trial court erred in admitting into evidence the pretrial and trial identifications of him by Deputy Van Assen. Defendant argues the pretrial identification was unfairly tainted by the fact Van Assen was shown a photograph of him alone rather than the typical six-pack of photos. He further argues this impermissible pretrial identification unfairly tainted any subsequent identification.

“In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness’s degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 989.) “The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.” (*Ibid.*) “[T]here must be a ‘substantial likelihood of irreparable misidentification’ under the ‘ “ ‘totality of the circumstances’ ” ’ to warrant reversal of a conviction on this ground.” (*Id.* at p. 990.)

A “ ‘single person showup’ is not inherently unfair.” (*People v. Floyd* (1970) 1 Cal.3d 694, 714, disapproved on other grounds in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) “[F]or a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness-- i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure. . . . ‘A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 413.)

In the present matter, much was made by the prosecution of the fact that Sergeant Buehler said nothing to Deputy Van Assen about how he was able to secure defendant’s photograph before showing it to Van Assen. However, it could not have been lost on Van Assen that Buehler did not simply pick this photograph at random. When he viewed the photo, Van Assen must certainly have suspected Buehler had traced the photo using evidence found at the scene. Hence, Van Assen would have known there was other evidence linking the man depicted in the photo to the crime.

Of course, as the trial court explained in admitting the evidence, the same observation of defendant's photograph could have been made by Van Assen if it had been him, rather than Buehler, who had discovered the cell phone in his routine investigation, traced its ownership, and then searched the offender database. Likewise, if Van Assen had discovered defendant during his search of the area and recognized him as the driver, this would be equivalent to a single person show-up.

At any rate, defendant failed to establish the identification was unreliable under the totality of the circumstances. The evidence established that Van Assen had a good look at defendant from a distance of approximately 37 feet when defendant jumped out of the Mustang and looked back at him. The area was lit by the lights on the patrol car, and Van Assen saw defendant for two or three seconds before defendant fled. Van Assen's description of the suspect before observing defendant's picture was fairly general, initially describing him as a white male adult wearing a black shirt and blue jeans. He later described the suspect as a white male adult, five feet, eight inches to six feet tall, 160 pounds, with brown hair wearing blue jeans and a black shirt, possibly a "Raiders" shirt. We have nothing in the record before us to indicate whether these descriptions were accurate. Finally, the identification came only hours after Van Assen saw defendant flee and Van Assen immediately and without hesitation identified defendant as the driver. Under the totality of the circumstances, we conclude the trial court did not err in admitting the identification evidence.

II

Sufficiency of the Evidence--Methamphetamine

Defendant was convicted of one count of transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a)). The evidence showed there were in fact two quantities of suspected drugs: 1.83 grams found in a plastic baggie in a duffel bag in the trunk of the Mustang, and (2) 1.34 grams collected from the floor of Deputy Van Assen's

patrol car. The substance from the trunk, identified at trial as MH-8, was ultimately determined to contain methamphetamine. However, testing on the substance from the floor of the patrol car, identified as MH-7, was inconclusive.

Defendant contends the drug conviction is not supported by substantial evidence, because the officers who handled the drugs were confused as to which item, MH-7 or MH-8, was found in the trunk. Only one contained methamphetamine, and defendant argues the evidence is uncertain as to whether that was the substance found in the trunk of the Mustang or the substance taken from the patrol car, which had apparently been in the possession of Dunbar.

The People respond that it does not matter which substance contained methamphetamine, because defendant was in constructive possession of both substances prior to fleeing on foot from the Mustang. One substance was found in the trunk of the Mustang, which was in defendant's possession and control. The other substance was in the possession of Dunbar, who testified he hid it in his underwear after Van Assen began chasing them. The People argue it may be inferred defendant was aware of the presence of this other substance in the possession of Dunbar, and defendant had constructive control over it as well.

The offense of possession of a controlled substance requires physical or constructive possession, knowledge of the possession, and knowledge of the narcotic character of the substance. (*People v. Johnson* (1984) 158 Cal.App.3d 850, 853.) “Constructive possession ‘occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.’ ” (*Id.* at p. 854.)

We need not decide whether defendant had constructive possession of both quantities of suspected methamphetamine. In support of his contention that the evidence

failed to establish which substance contained methamphetamine, defendant asserts Deputy Van Assen “was confused from the time of seizure to the time of trial as to where each baggie was found.” According to defendant, Van Assen admitted to another officer during trial “that he did not know where the baggies were found.” However, the only evidence defendant cites in support of these assertions is a portion of the testimony of Sergeant Buehler, where he said nothing about Deputy Van Assen. In fact, Van Assen testified repeatedly that MH-7 was the substance taken from the floor of the patrol car and MH-8, which contained the methamphetamine, was the substance taken from the trunk of the Mustang.

Defendant asserts that while the officers identified MH-8 as the substance taken from the trunk and MH-7 as the substance taken from the floor of the patrol car, “[a]t trial, MH-7 matched the description of the item Van Assen described as MH-8,” whereas, MH-8 “had a piece of plastic and some other impurity mixed in with it.” Defendant points to the testimony of Sergeant Buehler, who first saw the substance on the floor of the patrol car. Buehler testified MH-8 “is more consistent” with what he saw on the floorboard. He indicated MH-8 contains a piece of plastic not normally seen in a baggie of drugs and appears to be something picked up from the floor of the car. He further testified the substance in MH-8 appeared smashed up.

This is a slim reed on which to base a claim of error. While Sergeant Buehler may have believed MH-8 *appeared* more consistent with what he saw in the patrol car, he based this belief solely on the presence of impurities in the substance and the fact it appeared to have been smashed. However, Buehler acknowledged he did not observe the substance from the floor of the patrol car being collected. He also acknowledged the other substance, MH-7, could have been smashed and, of the two substances, MH-7 appeared to be in smaller particles. Furthermore, Van Assen testified that when he collected the substance from the floor of the patrol car, he made sure no impurities got in

with it. Thus, according to Van Assen, the item with impurities was that taken from the trunk of the Mustang.

On a claim of insufficient evidence, we review “the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “ ‘The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.’ ” (*Id.* at p. 576, quoting from *People v. Reilly* (1970) 3 Cal.3d 421, 425.) “ ‘ ‘ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” ’ ’ ” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Based on the totality of the evidence presented at trial, substantial evidence supports defendant’s conviction for possession of a controlled substance. Any confusion in the evidence as to which substance was taken from the trunk of the Mustang was for the jury to sort out.

III

Sufficiency of the Evidence--Items in Trunk

Defendant contends his conviction on the drug offense and each of the firearm offenses must be reversed because there is insufficient evidence he was aware of the presence of these items in the trunk of the Mustang. According to defendant, there was nothing in the trunk, such as fingerprints or identifying documents, tying him to the contents. Defendant further argues that while it may be inferred he knew of the items in the trunk, it may also be inferred he did not and was “simply out joyriding in a convertible car he knew was of questionable origin.”

Defendant does not contest that he had constructive possession of the items found in the trunk of the Mustang. He contends instead there is no evidence he had knowledge of their presence.

The People respond that defendant's flight from the pursuing officer "constitutes an implied admission from which the jury could find his consciousness of guilt." Moreover, the People argue, defendant's jailhouse conversations with his mother and girlfriend reveal an attempt to create a false alibi and suppress evidence, further demonstrating a consciousness of guilt. Thus, according to the People, "[s]ufficient circumstantial evidence existed from which the jury could infer that [defendant] possessed the firearms and had knowledge of their presence."

The People's consciousness of guilt arguments establish nothing more than that defendant was aware he was in possession of contraband. However, it is undisputed defendant was aware he was driving a stolen vehicle and there were other items of stolen property in the passenger compartment of the Mustang. Thus, his flight does not prove he was aware of additional contraband inside the trunk.

Nevertheless, where defendant was in knowing possession of a stolen vehicle in which other items of stolen property were located in the passenger compartment, a reasonable jury could infer defendant was aware of additional stolen property from the same robbery, as well as other items, in the trunk of the vehicle. Defendant's alternate theory that the jury could infer he was simply out joyriding in a convertible of questionable origin is not reasonable under the circumstances.

We conclude substantial evidence supports defendant's conviction on the controlled substance and firearm offenses.

IV

Penal Code Section 654

On three of the firearm possession convictions, defendant received consecutive terms of 16 months each. Because the fourth firearm possession was used for purposes of an enhancement, the court stayed sentence on that conviction. Defendant contends imposition of sentence on more than one of the firearm offenses violates section 654, because the four possessions arose from a single, indivisible transaction. He further argues multiple convictions violate double jeopardy principles and, therefore, three of the four convictions must be reversed. We address first defendant's double jeopardy argument.

“The double jeopardy clauses of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and article I, section 15, of the California Constitution, guarantee that a person shall not be placed twice ‘in jeopardy’ for the ‘same offense.’ The double jeopardy bar protects against a second prosecution for the same offense following an acquittal or conviction, and also protects against multiple punishment for the same offense. [Citations.]” (*People v. Bright* (1996) 12 Cal.4th 652, 660-661, overruled on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.)

In *Ball v. United States* (1985) 470 U.S. 856 [84 L.Ed.2d 740] (*Ball*), the defendant was convicted and sentenced under one statute for receipt of a firearm by a felon and under another statute for possession of a firearm by a felon. Both convictions were based on the same firearm possession. (*Id.* at pp. 857-858 [84 L.Ed.2d at pp. 743-744].) The United States Supreme Court concluded both convictions could not stand. (*Id.* at p. 865 [84 L.Ed.2d at pp. 748-749].)

Defendant contends the Supreme Court in *Ball* held that multiple convictions under the circumstances were prohibited by federal double jeopardy principles.

Defendant misreads *Ball*. In that case, the court did indeed hold that a defendant may not be convicted and punished for both receiving and possessing the same firearm. However, the closest the court came to discussing double jeopardy was to indicate in a footnote that federal double jeopardy principles do not prohibit *prosecution* under both criminal statutes. (See *Ball, supra*, 470 U.S. at p. 860, fn. 7 [84 L.Ed.2d at p. 745].)

In the present matter, we are not dealing with two convictions arising from a single possession of the same firearm but multiple convictions based on simultaneous possession of multiple firearms. *Ball* is therefore inapposite. Defendant's multiple convictions for multiple offenses committed simultaneously does not violate double jeopardy.

Turning to defendant's section 654 argument, that section reads 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. . . ." In *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*), the California Supreme Court recently determined section 654 does not apply to a situation like that presented here, where a defendant is convicted of multiple counts of the *same* substantive offense. (*Correa*, at p. 334.) The high court pointed out the express terms of section 654 concern an act or omission that "is punishable in different ways by different provisions of law" (§ 654), which would not be the case with multiple convictions for the same offense. (*Id.* at pp. 340-341.) However, the court also concluded its interpretation of section 654 is a departure from prior accepted law (see, e.g., *People v. Davey* (2005) 133 Cal.App.4th 384; *People v. Hall* (2000) 83 Cal.App.4th 1084) and therefore must be applied prospectively. (*Correa, supra*, 54 Cal.4th at p. 344.)

Because the offenses in the present matter occurred before *Correa* was decided, its interpretation of section 654 is not applicable here. We therefore proceed to an analysis

of section 654 without regard to the fact the four firearm convictions involved the same substantive offense.

Although section 654 speaks in terms of “an act or omission,” it has been judicially interpreted to include situations in which several offenses are committed during a course of conduct deemed indivisible in time. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) The key inquiry in a section 654 analysis is whether the objective and intent attending more than one crime committed during a continuous course of conduct was the same. (*People v. Brown* (1991) 234 Cal.App.3d 918, 933.) “[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] ¶ If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ ” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

The question whether a defendant entertained multiple criminal objectives is one of fact for the trial court. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) “A trial court’s implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

In imposing separate terms on three of the firearm offenses, the trial court expressly found defendant possessed each of the weapons for a separate purpose. The court explained: “I find that there was a different purpose in possessing each of these weapons and that these crimes and their objectives were predominantly independent of each other. ¶ First, I would note that the firearms, the weapons, were of a different make and caliber. And that indicates that the defendant harbored a separate objective for possessing each one. ¶ Further, with respect to every determined firearm the defendant

possessed, his capability to be able to more successfully accomplish violent goals is satisfied or is met.”

The People contend the foregoing findings by the trial court are supported by the record. They point to expert testimony that the methamphetamine found in the Mustang was possessed for sale and those who deal in drugs generally arm themselves for protection. The People argue a felon who possesses multiple weapons is inherently more dangerous than one with a single weapon and therefore should be subject to harsher punishment.

We disagree that substantial evidence supports the trial court’s conclusion as to all four firearms. Three of the four firearms found in the trunk of the Mustang came from the home of D.W. There is nothing in this record from which it can be determined those weapons, along with the other items taken from D.W., were in defendant’s possession other than as fruits of defendant’s receipt of stolen property. The fourth firearm, which was found in the duffle bag along with drugs and drug paraphernalia, was loaded. However, there is nothing in the record to suggest the other firearms were loaded. Thus, while there is evidence to support the conclusion the one loaded firearm found with the drugs was possessed for a purpose different from that of the other three firearms, there is nothing to support the trial court’s conclusion those three stolen firearms were each possessed for a purpose distinct from each other. Hence, defendant could be punished only once for his possession of the three stolen firearms. Two of the terms imposed on the three firearm possession offenses must therefore be stricken.

DISPOSITION

The judgment of conviction is affirmed. The sentence is modified to stay punishment on three of the firearm possession offenses rather than just one. The trial

court is directed to prepare an amended abstract of judgment to reflect the foregoing and to forward a copy to the Department of Corrections and Rehabilitation.

_____ HULL _____, J.

I concur:

_____ NICHOLSON _____, J.

I concur in the judgment and the opinion, except as to part IV of the Discussion as to which I concur in the result.

_____ BLEASE _____, Acting P. J.