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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Glenn)

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE MADERA,

Defendant and Appellant.

C069122

(Super. Ct. No. 11NCR08657)

A jury convicted defendant Enrique Madera of conspiracy to commit robbery of Ricardo Hernandez (Pen. Code, §§ 182, subd. (a) (1), 211-count I),¹ attempted robbery of Hernandez (§§ 211, 664-count II), and assault with a deadly weapon (§ 245, subd. (a) (1) of Hernandez (count III), David Barajas (count IV), and Arney Giron (count V). An allegation that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b) (1)) was found true as to count II but not true as to count I.

¹ Undesignated statutory references are to those sections of the Penal Code in effect at the time of defendant's August 10, 2011 sentencing.

Defendant's motion for acquittal was granted on counts of burglary (§ 459—count VI) and conspiracy to commit burglary (§§ 182, subd. (a)(1), 459—count VII).

Defendant was sentenced to state prison for eight years, consisting of five years on count I (Hernandez), one year on count IV (Barajas), one year on count V (Giron), and one year for the weapon enhancement on count II. The trial court orally accepted the defense argument that section 654 applies to count III because the victim, Hernandez, was also the target victim of the count I conspiracy. The court did not orally address the identical argument with respect to count II. The clerk's minutes and the abstract of judgment list the terms on counts II and III as concurrent, not stayed pursuant to section 654. Defendant was awarded 273 days of custody credit and 273 days of conduct credit pursuant to the relevant 2010 amendment to section 2933.

Defendant contends, and the Attorney General concedes, the sentences on counts II and III must be stayed pursuant to section 654. The parties further agree that, because count II must be stayed, so too must its weapon enhancement be stayed. We shall modify the judgment.

FACTUAL BACKGROUND

On an evening in November 2010, defendant and codefendant Antonio Guerrero approached Hernandez and his girlfriend outside of their motel room. The duo walked by Hernandez without speaking. A few minutes later, Guerrero reappeared and asked

Hernandez for the time. Hernandez gave Guerrero the time; Guerrero thanked Hernandez and left. After a few more minutes, defendant repeated what Guerrero had done: He approached Hernandez and asked for the time. Hernandez gave defendant the time.

Instead of walking away as Guerrero had done, defendant just stood there looking at Hernandez and his girlfriend in a "weird" way. Defendant ignored Hernandez's request to move away from what was intended to be a private conversation. Instead, defendant moved closer to Hernandez and said, "Where's my ten?" or "Give me my ten." Hernandez told defendant that he did not know him, did not owe him \$10, and did not know what he was talking about. Defendant persisted and became more aggressive. Guerrero then came from "out of nowhere" and punched Hernandez in the head; Hernandez grabbed Guerrero and started hitting him back.

As Hernandez defended himself against Guerrero, defendant started hitting Hernandez as well, striking him eight or nine times. Hernandez's friends, Barajas and Giron, emerged from the motel and tried to push defendant away from Hernandez. Defendant chased Hernandez, Barajas and Giron with a knife. Hernandez's girlfriend observed blood on Hernandez. He soon realized that defendant had cut him on the head. Defendant and Guerrero fled.

DISCUSSION

I. Section 654

Defendant contends, and the Attorney General concedes, the count I conspiracy, count II attempted robbery, and count III assault with a deadly weapon all involve the same course of conduct against the same victim, Hernandez. Thus, the imposition of sentence on count I requires that the sentences on counts II and III be stayed pursuant to section 654. (E.g., *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) We accept the Attorney General's concession.

The probation department recommended that sentence on counts II and III be imposed concurrently rather than stayed pursuant to section 654.

At sentencing, defense counsel countered that the count I conspiracy, count II attempted robbery, and count III assault on Hernandez should all "merge under [section] 654."

Regarding "the [section] 245[, subdivision](a)(1) [assault] on the victim [Hernandez]" in count III, the trial court stated, "I'm agreeing with" defense counsel's argument that "[t]hey should merge under [section] 654." The court did not orally pronounce sentence on count II or address counsel's argument that count II merges into count I for the same reasons as count III.

The clerk's minutes do not reflect the trial court's rather inartful oral pronouncement of a section 654 stay on count III or the court's failure to make any oral pronouncement on count

II. Instead, the minutes reflect the concurrent sentences that had been recommended by probation. The abstract of judgment contains this same defect.

We shall modify the judgment to stay imposition of sentence on count II pursuant to section 654. We shall direct the trial court to correct its minutes to reflect section 654 stays on counts II and III and to prepare an amended abstract of judgment reflecting the correction and modification.

II. Weapon Use Enhancement

Defendant contends, and the Attorney General concedes, the judgment must be modified to stay the weapon use (§ 12022, subd. (b)(1)) enhancement on count II pursuant to section 654. We accept the Attorney General's concession.

When the base term of a sentence is stayed pursuant to section 654, the attendant enhancement must also be stayed. (E.g., *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709, disapproved on another ground in *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8.; *People v. Guilford* (1984) 151 Cal.App.3d 406, 411.) Because the judgment must be modified to stay count II pursuant to section 654 (part I, *ante*), it must be further modified to stay the count II weapon enhancement.

DISPOSITION

The judgment is modified to stay imposition of sentence on count II and its enhancement pursuant to section 654. As so modified, the judgment is affirmed. The trial court is directed to correct its minutes to reflect section 654 stays on count II,

its enhancement, and count III. The court is further directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____ BUTZ _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ NICHOLSON _____, J.