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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JAMES DAVIS WALKER, Defendant and Appellant.	C069278 (Super. Ct. No. 10F07485)

A jury found defendant James Davis Walker guilty of three counts: (1) unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)—count one); (2) possession of a stolen vehicle (Pen. Code, § 496d, subd. (a)—count two);[1] and (3) misdemeanor possession of a master key to break and enter a vehicle (*id*., § 466—count three).

On appeal, defendant contends (1) there was insufficient evidence to support a conviction for possession of the master key; (2) equal protection requires that the 2011 Realignment Legislation (the Act) apply to defendant's sentence; (3) the sentence for possession of the master key should have been stayed pursuant to section 654; and (4) the sentencing judge's statement to defendant that he may not possess firearms or ammunition was unlawful.

We agree that the concurrent sentence for the misdemeanor offense of possession of the master key should be stayed pursuant to section 654. In all other respects, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

While driving a 1996 Honda Accord, defendant was pulled over by two Sacramento police officers after they conducted a routine license plate check that disclosed a Nissan registration. After defendant was pulled over, one officer removed the key from the ignition. The teeth on the key were filed down.[2] The officers confirmed the Honda was stolen.

After defendant was advised of his rights, he stated that he "kind of figured" the car was stolen, and that a guy named "Steve" had let him borrow the car. According to defendant, Steve was a 25- to 27-year-old white male. Steve did not have a telephone and defendant did not know

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[1] Undesignated statutory references are to the Penal Code.

[2] Such "shaved" keys can be used as a master key for mid-1990's Hondas.

where Steve lived. Defendant stated that Steve drove the car to defendant's house and then walked away. Defendant also admitted that he was trying to avoid the police officers.

After his conviction on February 25, 2011, defendant was released until March 1, 2011, when he was required to surrender himself. Defendant failed to surrender himself and was not in custody until August 13, 2011, when he was found in possession of drug paraphernalia. In exchange for the prosecution dropping charges related to defendant's failure to appear, defendant was sentenced to an upper term of three years in state prison for count one. A sentence on count two was stayed pursuant to section 654, and defendant received a 60-day concurrent sentence for count three.

DISCUSSION

I. Sufficiency of the Evidence to Support a Conviction on Count Three—Possession of a Master Key

Defendant contends the evidence is insufficient to support a conviction for possession of a master key. (§ 466.) We do not agree.

As applicable here, section 466 required the jury to find that defendant (1) possessed a master key; with (2) the intent to use the key to break into a vehicle. (§ 466 [stating that any person possessing a "master key . . . with intent to feloniously break or enter into any . . . vehicle . . . is guilty of a misdemeanor"].)[3]

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of

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[3] To convict defendant under section 466, the trial court instructed the jury that the People had to prove, in relevant part: "1. The defendant has on him or in his possession an instrument or tool capable of being used to break or enter into a vehicle; [¶] AND [¶] 2. The defendant had the intent to break or enter into a vehicle."

fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.)

We find no difficulty in determining that there is sufficient evidence to satisfy the possession element of section 466. Defendant was found driving a stolen 1996 Honda Accord. A shaved key was inserted in the ignition. The jury heard uncontroverted testimony that shaved keys may be used as a master key for mid-1990's Hondas. On these facts, a jury could easily find defendant possessed a master key under section 466.

Regarding the intent element of section 466 defendant argues that, because there is no direct evidence establishing that the shaved key opened or could open the Honda's door, the evidence is insufficient to support a finding that he had the intent to use the key to break or enter into a vehicle. We do not agree.

It is well established that " ' " '[c]ircumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.' " ' " (*People v. Howard* (2010) 51 Cal.4th 15, 34.) Although there is no direct evidence establishing that defendant used the master key to open the car door, there is sufficient circumstantial evidence. Defendant was found driving the car with the shaved key. Although the testifying officer discussed the shaved key in the context of the ignition, the officer stated that the shaved key is "a master key for a Honda." The officer also testified that at the time the car was pulled over there was no exterior damage on the car. Finally, defendant stated he was avoiding the police and "kind of figured" the car was stolen. This strongly suggests he knew his actions were illegal. On these facts, the jury could reasonably assume defendant used the shaved key to enter the car without damaging the car. This logical inference is supported by sufficient circumstantial evidence to sustain a section 466 conviction. (See *People v. Maury* (2003) 30 Cal.4th 342, 396 ["An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence."].)

II. Prospective Application of the Act Does Not Violate Defendant's Equal Protection Rights

The Act made significant changes to the sentencing and supervision of persons convicted of felonies. (Stats. 2011, ch. 15, § 1; Stats. 2011, 1st Ex. Sess. 2011, ch. 12, § 1.) Among other changes, the Act provides that certain nonviolent felons will serve their terms in county jail instead of state prison. (§ 1170, subd. (h)(2).) Additionally, some of the nonviolent felons that serve their terms in county jail may be released early under the supervision of a county probation officer. (§ 1170, subd. (h)(5)(B)(i).) The Act's sentencing changes apply "prospectively to any person sentenced on or after October 1, 2011." (§ 1170, subd. (h)(6).)

Defendant contends that the doctrine of equal protection requires the sentencing changes be applied to him, even though he was sentenced on September 16, 2011. We do not agree.

In two recent cases, this court and the Fifth Appellate District have concluded that prospective application of the Act's sentencing changes does not violate a defendant's equal protection rights. (See *People v. Lynch* (2012) 209 Cal.App.4th 353, 356, 362; *People v. Cruz* (2012) 207 Cal.App.4th 664, 680 ["The distinction drawn by [the Act], between felony offenders sentenced before, and those sentenced on or after, October 1, 2011, does not violate equal protection."].)

In short, these cases have reasoned as follows. Because the prospective application of the Act does not involve a race- or sex-based classification, the law is valid under the equal protection clause if the "classification [drawn by the law] bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200.) The state has a strong interest in preserving the integrity and finality of sentencing proceedings that have already occurred. Additionally, retroactive application of the sentencing changes in the Act would impose an incredible burden on the administration of justice. Ensuring the finality of sentencing proceedings and containing administrative costs are legitimate state goals that are rationally furthered by the prospective application of the Act. (See *Baker v. Superior Court* (1984)

35 Cal.3d 663, 668 [" '[R]efusal to apply a statute retroactively does not violate the Fourteenth Amendment.' "].) Therefore, we find that prospective application of the Act does not violate defendant's equal protection rights.

III. The Sentence on Count Three Should Be Stayed Pursuant to Section 654

Defendant contends that his concurrent sentence for count three, misdemeanor possession of a master key with intent to break or enter a vehicle (§ 466), should be stayed pursuant to section 654. We agree.

Section 654 proscribes multiple punishments not only for a single act that violates multiple statutes, but for multiple offenses that are committed in a single transaction incident to a single intent and objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208; *Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 334, 338.) Stated another way, section 654 applies if "all of the offenses . . . were the means of accomplishing or facilitating one objective." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Whether section 654 stays defendant's section 466 conviction turns on whether defendant's objective in violating section 466 was independent of his objective to steal the 1996 Honda Accord.[4]

In opposing a section 654 stay, the People discuss several gun possession cases. (See, e.g., *People v. Jones* (2002) 103 Cal.App.4th 1139; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401.) These cases, however, are distinguishable. The gun possession cases involve the application of section 654 to former section 12021,[5] a statute that criminalized the possession of

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[4] Count one involved the unlawful taking of a vehicle. (Veh. Code, § 10851, subd. (a).) Defendant was sentenced for three years for its violation.

[5] On January 1, 2012, section 12021 was repealed and replaced with section 12022 by Statutes 2010, chapter 711, section 5. Chapter 711 reorganized sections of the Penal

firearms by felons. The intent element of section 12021 is satisfied by mere possession of a firearm by a felon; this makes a section 654 stay more difficult to apply. (*People v. Ratcliff*, *supra*, 223 Cal.App.3d at p. 1410 ["the crime is committed the instant the felon in any way has a firearm within his control" (italics omitted)]; see also *People v. Jones*, *supra*, 103 Cal.App.4th at p. 1148 ["Section 12021 uniquely targets the threat posed by felons who possess firearms. [Citation.] We see no reason why a felon who chooses to arm himself or herself in violation of section 12021 should escape punishment for that offense because he or she uses the firearm to commit a second offense."].)

Section 654 may more easily invoke a stay of a section 466 sentence than a former section 12021 sentence because section 466's intent element (e.g., intent to break or enter) is distinct from its possession element (e.g., possession of a master key).

We conclude the evidence is insufficient to support a finding that defendant had separate objectives when stealing the car and when committing the section 466 offense. There is no evidence that defendant, in possessing the master key, intended to break or enter into any vehicle other than the subject 1996 Honda Accord. The People argue that the universal nature of a master key provides evidence that defendant had an independent intent to break into other vehicles or vehicles generally. We have noted, however, that mere possession of a master key, without something more, is not substantial evidence to support a section 466 conviction. Section 466 requires that a defendant possess an item listed in the statute (e.g., a master key) with the intent to engage in a listed felonious act (e.g., breaking or entering a vehicle). This suggests that mere possession of a listed item, regardless of which item it may be, is not itself sufficient evidence to satisfy the intent element of the offense.

Code related to deadly weapons "without substantive change." (Legis. Counsel's Dig., Sen. Bill No. 1080 (2009-2010 Reg. Sess.).)

Because there is insufficient evidence to support a finding that defendant had separate objectives when stealing the vehicle and when committing the section 466 offense, we find that defendant's section 466 sentence should be stayed under section 654.[6]

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[6] At oral argument, the People asserted for the first time that even though there was no evidence presented at trial to show that defendant intended to use the shaved key to take any other vehicle besides the 1996 Honda, the Honda's stereo was missing when the car was returned to the victim, and from this fact it reasonably could be inferred that defendant had a separate intent connected to possession of the key besides taking the Honda itself—stealing its stereo. The Honda's owner testified at trial that when the car was returned to her after being stolen, it did not have its stereo. The trial court instructed the jury that this evidence was admitted for the following limited purpose only: "[T]here are no charges against this defendant for any alleged articles of theft or damage to the vehicle. That is not the issue that is in front of you. However, the Court will allow this evidence for the sole purpose of determining—or as a possible fact for the jury to consider—as to whether or not a person driving that car may have had knowledge that the automobile was stolen [as noted, defendant was charged with unlawful taking of a vehicle, possession of a stolen vehicle, and misdemeanor possession of a master key to break and enter a vehicle]. And for that limited purpose only, you should consider the information that this witness is now presenting to us."

Case law indicates that a trial court may appropriately pursue a section 654 factual inquiry beyond the evidence presented to the trier of fact, at least where section 654's applicability will inure to the defendant's benefit. (See *People v. Ross* (1988) 201 Cal.App.3d 1232, 1238-1241 (*Ross*); *People .v Rosenberg* (1963) 212 Cal.App.2d 773, 776-777.) However, the appropriateness of the trial court's conducting an extra-record section 654 factual inquiry is more muddled when the result is a more punitive sentence to the defendant; serious due process questions arise where a defendant's sentence is enhanced based upon facts found exclusively by the sentencing judge and not by a jury. (See *Ross, supra,* at p. 1239.)

In light of this distinction in the case law, the belated nature of the People's argument, the limited purpose for which the stereo evidence was admitted at trial, the arguable indivisibility between stealing the car and stealing the car's radio (by using the master key), and the fact that finding section 654 applies here will have no effect on defendant's conviction for misdemeanor possession of a master key or on the actual time he will serve (given his concurrent sentence for such possession) while finding that section 654 does not apply here may raise constitutional concerns if based on an extra-record section 654 factual inquiry by the sentencing court, we believe the prudent course is to find that defendant's sentence for possessing the master key (§ 466) should be stayed under section 654 notwithstanding the People's argument at oral argument.

IV. The Court's Statement That Defendant Not Possess Firearms or Ammunition Was Appropriate

Defendant contends the trial judge made an unauthorized order by telling defendant that he cannot possess firearms or ammunition. We disagree.

The statement made by the judge was not an order; it was an accurate description of the law. During sentencing, the judge simply informed defendant that, in light of his felony convictions, he "will not knowingly own, possess, receive, or have in his possession or under his . . . custody or control, any firearm, ammunition, or reloading ammunition, as mandated by Penal Code section[s] 12021[, subdivision] (a)(1) and 12316[, subdivision] (b)(1)." This is a correct statement of law and we find nothing improper about this admonishment.

DISPOSITION

The concurrent sentence for count three, the misdemeanor offense of possession of a master key with intent to break or enter a vehicle (§ 466) , is stayed pursuant to section 654. As so modified, the judgment is affirmed. Furthermore, we shall order the abstract of judgment amended to correct the following two clerical errors: (1) the abstract of judgment incorrectly indicates count two as count "0"; and (2) the statutory code shown is "VC" for Vehicle Code, rather than "PC" for Penal Code section 496d, subdivision (a). (*People v. Mitchell* (2001) 26 Cal.4th 181, 188; *In re Calendario* (1970) 3 Cal.3d 702, 705.) The trial court is directed to amend the abstract of judgment to reflect this modification and these clerical corrections, and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

HULL, Acting P. J.

MAURO, J.