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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED JOSEPH ORLANDO,

Defendant and Appellant.

C075349

(Super. Ct. No. 12CR20069)

This case comes to us pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We modify the sentence to comport with section 654 and otherwise affirm the judgment.

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

FACTUAL AND PROCEDURAL BACKGROUND

On February 7, 2012, around 1:00 p.m., two armed men wearing wigs and dark clothing entered the Wells Fargo Bank in Plymouth. One man, later identified as defendant, walked up to the two tellers on duty, said he was there to rob the bank, and

told them not to press any panic buttons or alarms. The other man, later identified as Raymond Ojeda, remained in the lobby near the front door.¹

A third teller, who was in the back of the building, was escorted to the teller line. Upon learning that the vault was closed and that two tellers were required to open it, defendant escorted two tellers to the vault. Once the vault was open, the two tellers remained in the vault while defendant placed currency in a black bag. Then defendant and the two tellers returned to the teller line where all three tellers emptied their cash drawers into a black bag supplied by defendant.

About this time, a customer entered the bank. At gunpoint, Ojeda told the customer to remain in the building and directed him behind the teller line with defendant and the three bank employees. Once all the cash was in the bag, the three employees and the customer were escorted into the vault. Defendant tried to close the vault door but was unable to do so. He left the door ajar and told the tellers and customer to wait inside the vault for five minutes. Then he and Ojeda left the premises.

When the people in the vault heard the exterior doors close, they activated alarms and left the vault. They closed the bank to the public and otherwise secured the bank. The bank's loss was approximately \$53,000.

More than six months later, Mendocino County Sheriff's Detective Bryan Arrington had contact with defendant. In the course of that contact, Arrington learned that defendant had a vehicle. Arrington examined the vehicle and determined that it was equipped with a global positioning system within the display console. The system contained stored memory of previously entered addresses, including defendant's address and an address in Plymouth, California. Mendocino County officers researched the

¹ Ojeda was a codefendant in the trial court but his case was resolved early in the proceeding. He is not a party to this appeal.

Plymouth address and discovered an Amador County Sheriff's Office press release regarding a bank robbery at that location.

Based on that information, Amador County officers traveled to the Mendocino County Sheriff's Office, where they spoke with defendant. Defendant admitted robbing the Plymouth bank. An officer reviewed the surveillance video from the incident and concluded that defendant was depicted in the video.

The defense rested without presenting evidence or testimony.

The jury found defendant guilty of second degree burglary of the bank (Pen. Code, §§ 459, 460, subd. (b); count IV),² second degree robbery of each teller (§§ 211, 212.5, subd. (c); counts I-III), and false imprisonment by violence of the tellers and the customer (§ 237, subd. (a); counts V-VIII). The jury also found that defendant personally used a firearm in the commission of each count. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) In a bifurcated proceeding, the jury found that defendant had two prior convictions that qualified as serious felonies (§ 667, subd. (a)) and as strikes (§ 667, subs. (b)-(i)). Two prior prison term allegations (§ 667.5, subd. (b)) were dismissed in the furtherance of justice.

Defendant was sentenced to prison consecutive to a Mendocino County sentence he was then serving. On each count, he received 25 years to life plus 10 years for the firearm and 10 years for the prior serious felonies. The terms for the count I robbery of a teller and the count VIII false imprisonment of the customer were run consecutive for an aggregate 90 years to life. The terms for the robberies of the other tellers (counts II & III) and the burglary of the bank (count IV) were run concurrent. The terms for false imprisonment of the three tellers (counts V-VII) were stayed pursuant to section 654. Defendant accrued no presentence credit because he was a sentenced prisoner in the

² Further statutory references are to the Penal Code in effect at the time of the charged offenses.

Mendocino case. He was ordered to make restitution to the bank and pay a \$240 restitution fine (§ 1202.4), a \$240 restitution fine suspended unless parole is revoked (§ 1202.45), a \$320 court operations fee (§ 1465.8, subd. (a)(1)), and a \$240 court facilities assessment (Gov. Code, § 70373).

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief raising three contentions of error. We have discovered a sentencing error pertaining to count IV, the second degree burglary count, which we discuss after the issues raised by defendant.

I. State Prosecution Instead of Federal Prosecution

Defendant contends he should have been prosecuted under a federal bank robbery statute (18 U.S.C.A. § 2113)³ instead of the California robbery statute, section 211. Defendant reasons that he is “not guilty of a robbery of a person” because “employees of a bank are entrusted as financial agents of the federal government therefore are acting in essence under the color of law and are not acting as private citizens as a store owner but as said agents of a financial institution therefore are extensions, employees of federal reserve.” By this and similar arguments, defendant evidently sought to be prosecuted under federal rather than state law in order to avoid the harsher penalties of the three strikes law. The arguments have no merit.

³ Further references to “section 2113” are to the United States Code Annotated.

It is well settled that the federal bank robbery statute does not displace state robbery laws. For example, in *In re Morgan* (D.C. Iowa 1948) 80 F.Supp. 810, the defendant was charged in state court with a state law crime entitled “ ‘Entering bank with intent to rob’ ” and in federal court with a violation of section 2113 since the bank was a member of the Federal Deposit Insurance Corporation. (*Id.* at p. 815.) The court noted that the “crime charged against Morgan by the State of Iowa is a separate and distinct crime from that charged against him by the United States. The conviction or acquittal of Morgan on the state charge would not absolve or exonerate him on the federal charge, or vice versa. He is subject to punishment, in the event of conviction, on both charges.” (*Id.* at p. 816.)

Assuming for present purposes that employees of a federally insured bank act as agents of the financial institution and within the scope of federal insurance, the possibility that defendant *could have been* prosecuted for a federal crime does not mean that his state prosecution was improper. Independent trials by different sovereignties are not precluded by the double jeopardy clause (e.g., *United States v. Hoyland* (7th Cir. 1959) 264 F.2d 346, 350) or by any other provision of law.

In California, robbery is defined in section 211 as “the felonious taking of personal property *in the possession of another*, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211, italics added.) All employees of the owner of the property who are present and on duty at the time of the robbery have constructive possession of that property and thus, are victims of the robbery. (*People v. Scott* (2009) 45 Cal.4th 743, 752-758.)

It is undisputed that defendant forced each bank employee personally to empty her cash drawer into the bag defendant had provided. The jury was properly instructed that the bank employees had constructive possession of the bank’s money during the robbery. Defendant’s claim that he “is not guilty of” the state robbery offenses is completely meritless.

II. Remarks of Excused Juror Number Five

Immediately after the jury was sworn and the selection of alternate jurors began, defendant, who represented himself during jury selection, apologized to the jurors and said he had made a mistake when he said he was satisfied with the jury pool. Defendant asked to excuse some of the sworn jurors but the trial court ruled it was too late.

At that point, one of the sworn jurors stated: "I was going to say the same thing. Can I -- is it too late to be able to say anything else? [¶] I just feel like it's a conflict of interest because of my job at Mule Creek [State Prison] and my job as the litigation coordinator and some of the tasks that I have in this courtroom regularly and knowing many of the sheriffs that work for the county. And I don't want to say I'm going to be biased, because I don't like that word, but"

This exchange ensued: "THE COURT: That's the other question. If you tell me that you will be biased, I will excuse you and replace you. But anything short of that, I will not.

"[THE JUROR]: It would be difficult. Yes.

"THE COURT: Yes what?

"[THE JUROR]: Just knowing the sheriff here, I want to be able to be impartial, but I'm not quite sure. And my job is to -- is -- makes it a little bit difficult to be in this position.

"THE COURT: Okay. So what you're saying is you cannot give this defendant a fair trial because of your position?

"[THE JUROR]: I just feel like it would be a conflict of --

"THE COURT: Yes or no?

"[THE JUROR]: Yes.

"THE COURT: Okay. All right. But just sit there, because we have to select some alternates and then we're going to take care of that."

After ruling on some challenges to prospective alternate jurors, the trial court excused the juror for cause.

Defendant claims the juror said in effect that she “would not take the word of a bank robber over her brethren and in doing so convicted the defendant of bank robbery.” In defendant’s view, the juror’s words “had in essence poisoned the jury (fruit of a poisonous tree).”

Defendant forfeited the contention by failing to challenge for cause the prospective jurors who heard these comments. (*People v. Seaton* (2001) 26 Cal.4th 598, 634.) In any event, the words actually spoken do not carry the highly prejudicial connotation that defendant attributes to them. “When, as here, the critical comments are isolated and do not pertain to the facts of the offense charged, the prospective jurors who hear them are rarely if ever ‘contaminated’ to such a degree that they cannot be fair.” (*Id.* at p. 635; see also *People v. Nguyen* (1994) 23 Cal.App.4th 32, 41-42 [prospective juror’s expressed fear of gang retaliation during voir dire did not taint panel because the comments did not contain any information suggesting the panel would have been prejudiced].)

III. Refusal to Stay Count VIII Pursuant to Section 654

Defendant contends the trial court should have stayed the sentence on count VIII, false imprisonment involving the customer, pursuant to section 654.⁴ As to that count, the probation department recommended a fully consecutive term of 45 years to life. Through his counsel, defendant objected, arguing that section 654 should apply because he was still involved in the robbery, and had not made his escape, when the customer was

⁴ 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.”

escorted into the bank vault. Counsel noted that a robbery is not complete until the essential elements are committed and the perpetrator has retreated to a place of relative safety.

The court rejected defendant's section 654 contention, reasoning that, even though he had acted pursuant to a single principal objective and had engaged in a single course of conduct, he may be punished for each crime of violence against a different victim. (Citing *People v. Ramos* (1982) 30 Cal.3d 553, 587, overruled on other grounds *sub nom. California v. Ramos* (1983) 463 U.S. 992, 1013 [77 L.Ed.2d 1171].) The court noted that the customer was not the alleged victim of any other count.

In his supplemental brief, defendant reasserts that robbery continues through the escape and until the perpetrator reaches a place of temporary safety. But defendant does not challenge the *Ramos* principle or show that the consecutive term on count VIII was improper.

IV. Concurrent Sentence for Second Degree Burglary

The probation department recommended that the sentence on the second degree burglary count be stayed pursuant to section 654. Instead, the court imposed a concurrent sentence. The court correctly found that the victim of the second degree burglary (*Wells Fargo*) did not come within the multiple victim exception.⁵ (See *People v. Le* (2006) 136 Cal.App.4th 925, 932 (*Le*) [multiple victim exception to section 654 applies to violent crimes against burglary victims].) The concurrent sentence violates section 654.

When section 654 applies, the trial court cannot impose a concurrent sentence. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468.) The court must impose a sentence and stay execution of that sentence. (*Id.* at pp. 1466, 1468-1469.)

⁵ In the information, the crime was referred to as "commercial burglary" and referred to Wells Fargo as the victim.

Where a burglary and robbery are the means of accomplishing the single intent of stealing, the sentence for the burglary should be imposed and stayed pursuant to section 654. (*Le, supra*, 136 Cal.App.4th at pp. 931-932, 936 [robbery and burglary of a drug store were the means of accomplishing the single intent of stealing whiskey and diapers from the store; thus the sentence on the burglary should have been stayed pursuant to section 654]; see also *People v. Islas* (2012) 210 Cal.App.4th 116, 130 [“When a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes.”].) Defense counsel’s failure to object in the trial court does not forfeit the issue, because the failure to stay execution of sentence pursuant to section 654 is an unauthorized sentence. (*Le*, at p. 931.) We must modify the sentence to stay execution of the sentence imposed on count IV, second degree burglary.

V. Conclusion

Having undertaken an examination of the entire record, we find no other arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to stay execution of the sentence imposed on count IV, second degree burglary and the associated enhancements, pursuant to section 654. As modified, the judgment is affirmed.

The trial court is directed to amend the abstract of judgment to reflect the section 654 stays and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

MURRAY, J.

We concur:

NICHOLSON, Acting P. J.

HOCH, J.