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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFF McLAUGHLAR aka CLIFF
McLAUGHLIN,

Defendant and Appellant.

D059243

(Super. Ct. Nos. SCD228563;
SCD224472)

APPEAL from a judgment of the Superior Court of San Diego County, Francis M. Devaney, Judge. Affirmed.

A jury convicted Cliff McLaughlar of robbery (count 1; Pen. Code, § 211)¹ and assault by means of force likely to cause great bodily injury (count 2; then § 245, subd. (a)[(4)]). The jury found true the allegation appended to count 2 that he personally inflicted great bodily injury on the victim (§§ 1192.7, subd. (c)(8) & 12022.7, subd. (a)).

¹ Statutory references are to the Penal Code.

Following the verdict, McLaughlar admitted he had served a prior prison term within the meaning of section 667.5, subdivision (b). The court sentenced him to prison for four years for count 2, three years for the great bodily injury enhancement, one year for count 1, and one year for his prison prior, for a full term of nine years.

On appeal, McLaughlar contends the court should have stayed execution of his one-year sentence for the robbery conviction under section 654. We affirm the judgment.

FACTS

On March 12, 2010, Sally Dugger was walking to a taco shop when she passed by McLaughlar. Dugger had previously stopped at an ATM and retrieved \$60. She put the \$60 in a pocket of her sweatshirt.

Dugger noticed McLaughlar squatting against a nearby building. As she passed him, McLaughlar threatened to sexually assault her. Dugger ignored him and continued walking to the shop. She then felt a tug on her sweatshirt that spun her around toward McLaughlar, causing the \$60 to fall from her pocket. McLaughlar reached down and picked up the money. He then put his forearms on Dugger's shoulders and again threatened to sexually assault her. Dugger backed up and asked McLaughlar a few times to give her money back. McLaughlar responded to her request by pounding his chest and yelling. McLaughlar then started to pace and Dugger told him to calm down and to return her money. At some point she started to follow him. When Dugger reached for McLaughlar's hand to retrieve her money, he turned and punched her in the face five to six times, breaking her glasses and causing blood to pour from her face. McLaughlar continued to punch her even after she fell down. Several witnesses intervened to help

stop the assault and to aid Dugger. McLaughlar then went across the street and changed out of his bloody shirt. Police arrived at the scene and two witnesses identified McLaughlar through a curbside lineup. Dugger was treated at the hospital that night and continued to experience pain for months after the assault.

DISCUSSION

McLaughlar contends the trial court erred by not staying execution of the sentence it imposed for the robbery conviction under section 654. He claims the assault and robbery were part of an indivisible transaction aimed at obtaining the victim's money.

Section 654 provides, in part: "(a) 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." Section 654 limits a defendant's punishment "to insure that . . . punishment will be commensurate with [the defendant's] culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552; *Neal v. State of California* (1960) 55 Cal.2d 11, 20.)

Under section 654, a defendant cannot be punished twice for a single offense or for a course of conduct composed of many offenses, but "nevertheless constitut[ing] an indivisible transaction." (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240; *People v. Beamon* (1973) 8 Cal.3d 625, 637; *People v. Brown* (1958) 49 Cal.2d 577, 591.) A transaction's divisibility is not determined by temporal factors, but instead by the "defendant's intent and objective" behind the transaction. (*People v. Harrison* (1989) 48

Cal.3d 321, 335; *People v. Wynn* (2010) 184 Cal.App.4th 1210, 1215.) If the separate offenses were "incident to one objective," section 654 limits the defendant's punishment to "any one of such offenses but not . . . more than one." (*Neal v. State of California, supra*, 55 Cal.2d at p. 19; *People v. Perez, supra*, 23 Cal.3d at p. 551.) However, "if the evidence discloses that a defendant entertained multiple criminal objectives . . . independent of and not merely incidental to each other, he may be punished for the independent violations committed in pursuit of each objective." (*Perez*, at p. 551; *Beamon*, at pp. 638-639.)

Although there is no "proper application of section 654 in every instance" (*People v. Beamon, supra*, 8 Cal.3d at p. 636), "a separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.) An assault is separately punishable when it is committed "after the fruits of the robbery have been obtained." (*In re Jessie F.* (1982) 137 Cal.App.3d 164, 171.) An after-occurring assault is indicative of gratuitous violence. (See *Nguyen*, at pp. 189-191.)

We apply a substantial evidence standard of review to the trial court's determination that there was more than one objective behind the defendant's offenses. (*People v. Wynn, supra*, 184 Cal.App.4th at p. 1215.) The trial court has "broad latitude in making this determination" (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *Wynn*, at p. 1215), and we will reverse only if the court's finding is "unsupported by the

evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438; *Wynn*, at p. 1215.)

McLaughlar contends his assault on Dugger was simultaneous with his robbery, and therefore both crimes were part of an indivisible course of conduct. He claims that because the assault was merely incidental to his goal of accomplishing the robbery, the sentencing court erred by not staying execution of his robbery sentence.

At sentencing, the court expressly considered whether McLaughlar had two separate intents for the two offenses. The court noted there were two arguments for finding separate intents: one based on McLaughlar's testimony and the other based on circumstantial evidence.

The court first posited that McLaughlar had testified to having two intents. In his testimony, McLaughlar explained his motivation behind the robbery was to keep the money from the victim. McLaughlar made no mention of the money in his testimony regarding the assault, but instead explained that it was a reaction to being grabbed by the victim and that he "didn't know what was going on." The court interpreted this second intent as "a knee jerk nonself[-]defense assault on Ms. Dugger," which was different from McLaughlar's first intent to take her money.

The court went on to analyze the separate intents through circumstantial evidence. The court relied on the fact that the robbery was complete once the money was obtained, and therefore the assault was a separate and distinct crime. It noted McLaughlar had the opportunity to escape, and did not have to attack the victim to retain the money.

Based on the evidence provided at trial, we agree with the sentencing court. The record shows McLaughlar already had the money in his possession when he began his assault on Dugger. He even testified that he "had already safely secured the money in [his] pocket. " His assault on Dugger occurred after the "fruits of his robbery [were] obtained" (*In re Jessie F.*, *supra*, 137 Cal.App.3d at p. 171), and therefore the assault was gratuitous and not incidental to the commission of the robbery. (See *People v. Nguyen*, *supra*, 204 Cal.App.3d at pp. 190-193.) We conclude there is substantial evidence to support the court's finding that section 654 did not preclude execution of the consecutive sentences for McLaughlar's assault and robbery convictions.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.