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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR VASQUEZ,

Defendant and Appellant.

E054991

(Super.Ct.Nos. RIF1101662 &
RIF1101838)

OPINION

APPEAL from the Superior Court of Riverside County. Gordon R. Burkhardt, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as to case No. RIF1101662. Affirmed in part, reversed in part with directions as to case No. RIF1101838.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Edgar Vasquez appeals his conviction on 10 counts arising from the robbery of three people at a place of business. He contends that Penal Code¹ section 654 bars unstayed sentences on a number of counts. He also contends that a conviction for false imprisonment as to one victim must be reversed because as to that victim, he was also convicted of kidnapping, and false imprisonment is a necessarily included lesser offense.

The Attorney General agrees with defendant to a great extent. However, she contends that section 654 does not apply to the kidnapping count or to one count of false imprisonment pertaining to a different victim.

We agree with defendant, except that we conclude that section 654 does not apply to the kidnapping count.

PROCEDURAL HISTORY

Defendant was charged with three counts each of robbery (§ 211; counts 1-3), false imprisonment (§ 236; counts 5-7) and assault with a firearm (§ 245, subd. (a)(2); counts 8-10). Defendant was also charged with one count of kidnapping (§ 207, subd. (a); count 4). Each count alleged personal use of a firearm. The jury found defendant

¹ All statutory citations refer to the Penal Code.

guilty as charged on all counts and (apparently) found the firearm use allegations true.² The court imposed a total term of 47 years.³ Defendant filed a timely notice of appeal.⁴

FACTS

Maria Ortega owned a business in Perris called “Cash Money Services,” which sold cell phones, sent money, paid bills, and provided other services. When she arrived at her shop around 7:30 a.m. on February 18, 2011, she noticed that she was being watched by a man wearing a hooded sweater that covered his face. His hands were in his pockets. He asked her if she was about to open. She said that she was. At that point, a

² We say “apparently” because the record contains the finding forms only as to counts 1 through 7, and the sentencing minutes use designators for the enhancements which are not explained (“D2,” “B1” & “UF”).

³ Defendant was sentenced on October 19, 2011. On November 28, 2011, the court granted a motion by the prosecution to “Strike Enhancements to Close Case.” The court ordered “PC 667 and 1192.7(c)(8) Stricken without affecting Counts 8 9 and 10.” We do not know what this means. The record does not contain either the prosecution’s written motion to strike enhancements, nor does it contain an amended abstract of judgment reflecting any change in the sentence. There is no reporter’s transcript of that hearing. We do note that although the information alleged personal use of a firearm within the meaning of section 12022.53, subdivision (b) or section 12022.5, subdivision (a) and within the meaning of section 1192.7, subdivision (c)(8) as to counts 1 through 7, as to counts 8 through 10, the information alleged personal use of a firearm within the meaning of sections 667 and 1192.7, subdivision (c)(8). As indicated above, the jury’s findings on the enhancements as to counts 8 through 10 are not in the record on appeal. Because we will remand for resentencing, we will direct the court to state on the record the disposition of the enhancements on those counts.

⁴ In a separate case tried by the same jury (case No. RIF1101662), defendant was convicted of shooting a firearm in a grossly negligent manner (§ 246.3), carrying a loaded firearm (§ 12031, subd. (a)) and resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)). He filed a notice of appeal from that conviction, but raises no issues pertaining to that conviction. Accordingly, no further discussion of case No. RIF1101662 is needed.

customer she knew, named Francisco Hernandez, came up to her and said he wanted to buy a phone. She and Hernandez went into the shop.

Defendant and another man, also wearing a hooded shirt or sweater, entered the shop. Defendant pointed a gun at Ortega and demanded money. One of the two men took Ortega to the back room⁵ to open the safe. Finding no money in the safe, the man took Ortega back to the cash register and took the money which was in the register, about \$200. While at the register, Ortega pushed the silent alarm button.

About the time Ortega got to the register, a man from a neighboring business, Francisco Doe, came into the store. Defendant pointed his gun at Doe. He knocked him down and then searched him. Hernandez was also ordered to get down on the floor. Defendant took Hernandez's fanny pack. Ortega did not see if anything was taken from Doe, except possibly his cell phone. The accomplice then asked Ortega where her purse was and went into the back room to retrieve it. The men took her purse, which contained \$20 and Ortega's identification and credit cards, and left the store. Ortega then called 911.

On March 11, 2011, defendant was arrested in an unrelated matter. Ortega identified him from a photo lineup.

⁵ This is sometimes transcribed as "back room" and sometimes as "bathroom." Hazarding a guess that the safe was not in the bathroom, we will refer to it as the back room.

LEGAL ANALYSIS

1.

DEFENDANT'S CONVICTION ON COUNT 7 MUST BE REVERSED

In count 4, defendant was charged with kidnapping Francisco Doe. In count 7, defendant was charged with falsely imprisoning Francisco Doe. Defendant contends that because false imprisonment is a necessarily included lesser offense of kidnapping, the conviction on count 7 must be reversed. The Attorney General agrees, as do we.

A defendant may not be convicted of both a greater offense and a necessarily included lesser offense. (*People v. Medina* (2007) 41 Cal.4th 685, 700.) False imprisonment is a necessarily included lesser offense of kidnapping. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65.) Accordingly, defendant's conviction on count 7 must be vacated. (*Ibid.*)

Under the same heading, defendant contends that his conviction on count 7 must be reversed because the trial court failed to instruct the jury that count 7 was a lesser included offense of count 4 and that defendant could not be convicted on both counts. Because we will reverse the conviction on count 7 as stated above, we need not address this contention.

2.

SECTION 654 REQUIRES THAT SENTENCE ON SOME COUNTS MUST BE
STAYED

Summary of Issue and Standard of Review

Section 654, subdivision (a) provides: “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.” Judicial interpretation holds that section 654 also bars multiple punishment for separate offenses which are committed during an indivisible course of conduct, i.e., with a single criminal intent or objective. “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Here, defendant was convicted of multiple offenses against each of the three victims. He contends that because his objective was robbery, and because the commission of the remaining offenses was incidental to and for the purpose of achieving that objective, he can be sentenced only for the robberies of Ortega and Hernandez and only for either kidnapping or robbery as to the third victim, Doe.

We accept a trial court's finding that the defendant harbored a separate intent and objective for each offense, if the court's findings are supported by substantial evidence. (*People v. Williams* (2009) 170 Cal.App.4th 587, 645 [Fourth Dist., Div. Two].) Here, the trial court based its conclusion that section 654 did not apply solely on the fact that there were multiple victims. It is undisputed that section 654 does not bar multiple punishment for an act of violence against multiple victims. (*People v. Latimer, supra*, 5 Cal.4th at p. 1212.) However, the trial court did not address defendant's argument that section 654 applies to the multiple crimes committed against *each* victim and made no factual findings pertinent to that contention. Nevertheless, when a court imposes sentence rather than staying it, it is normally deemed an implicit finding that the defendant harbored more than one objective. (See *People v. Tarris* (2009) 180 Cal.App.4th 612, 626 [Fourth Dist., Div. Two].) Where the facts are in dispute, we uphold the trial court's implicit finding if it is supported by substantial evidence, viewing the evidence in the light most favorable to the judgment. (*Id.* at pp. 626-627.) However, the applicability of the statute to conceded facts is a question of law. (*Id.* at p. 627.)

Assault With a Firearm (Counts 8, 9 & 10)

The Attorney General concedes that defendant and his accomplice committed assault with a firearm as to each victim solely to facilitate the objective of robbery. Accordingly, she agrees that imposition of sentence on counts 8, 9 and 10 must be stayed.

We agree as well. A separate sentence may not be imposed for a crime which is committed solely as the means of accomplishing or facilitating the commission of another

crime. (*People v. Latimer, supra*, 5 Cal.4th at pp. 1216-1217.) Accordingly, where the defendant uses a weapon only to facilitate the robbery, section 654 bars multiple punishment. (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) In contrast, where the defendant assaults the robbery victim only after having achieved the objective of obtaining the victim's property, the acts may be deemed to have been committed in furtherance of multiple objectives, and multiple punishment is permissible. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191, implicitly disapproved on another ground in *People v. King* (1993) 5 Cal.4th 59, 79, as recognized in *People v. Perry* (2007) 154 Cal.App.4th 1521, 1527.) Here, it is undisputed that the assaults were committed solely to facilitate the ultimate objective of robbery.

False Imprisonment (Counts 5, 6 & 7)

Similarly, false imprisonment is not separately punishable if it is done solely to facilitate the robbery. (See *People v. Foster* (1988) 201 Cal.App.3d 20, 27-28.) The Attorney General concedes that defendant held the two male victims at gunpoint solely to facilitate the robbery, both by preventing their escape from the shop and by preventing their resistance to the taking of their money. She agrees that counts 6 and 7 are subject to section 654. (We have previously determined that the conviction on count 7, false imprisonment of victim Doe, must be reversed.)

As to Ortega, however, the Attorney General contends that section 654 does not bar separate sentences for robbery and false imprisonment. She contends that as to Ortega, the false imprisonment consisted not of detaining her in the store at gunpoint but

of forcing her to accompany one of the robbers to the back room to retrieve her purse. She contends that “sequestering” Ortega in the back room, out of sight of anyone looking in the front window of the store, increased the risk of harm to Ortega and therefore rendered section 654 inapplicable. The cases she cites, however, do not support her position.⁶

In *People v. Foster, supra*, 201 Cal.App.3d 20, the defendant robbed several people in a convenience store. After having obtained all of the money, the defendant locked the victims in the store’s cooler, apparently to facilitate his escape and to prevent their calling the police. (*Id.* at p. 23.) Although the court *noted* that locking the victims in the cooler posed a risk to their safety, the court actually held that the false imprisonment was separately punishable because it was not incidental to committing the robbery, which had already been accomplished. (*Id.* at pp. 27-28.)

Similarly, in *People v. Nguyen, supra*, 204 Cal.App.3d 181, the court held that the attempted murder of a store robbery victim which occurred after the robbers had obtained the victims’ property was separately punishable because it did not facilitate the robbery, but was merely gratuitous. (*Id.* at pp. 189-193.)

⁶ Moving a robbery victim a distance “beyond that merely incidental to the commission of, and [which] increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense” supports a conviction for kidnapping for robbery. (§ 209, subd. (b)(2).) However, section 654 precludes imposition of separate sentences for kidnapping for robbery and for the same robbery. (*People v. Beamon, supra*, 8 Cal.3d at pp. 639-640.) The Attorney General does not explain why false imprisonment to facilitate a robbery should be treated differently under section 654 than kidnapping for the purpose of robbery.

Finally, in *People v. Felix* (2001) 92 Cal.App.4th 905, the court held that two counts of criminal threats (§ 422, subd. (a)) could be punished separately because although both took place on the same day, they were separated by two hours. One was made in person to the defendant's former girlfriend and her current boyfriend, and the second was made to the former girlfriend alone by telephone. (*Felix*, at p. 909.) In response to the defendant's argument that both threats were part of a pattern of anger against his former girlfriend, the court held that because the acts were separated in time and because the defendant had time to reflect between the two acts, the trial court could properly conclude that the defendant intended the second threat to cause "new emotional harm" to his former girlfriend. (*Id.* at pp. 915-916.) This situation bears little, if any, similarity to an ongoing robbery in which the robber detains a victim within a structure and causes the victim to move around in order to obtain money from different locations within the structure. We see no factual basis for concluding that moving Ortega to the back room in order to obtain whatever money was in her purse was in any sense divisible, either in time or in intent and objective, from defendant's objective of robbing the individuals in the store of any money they possessed. Accordingly, section 654 bars imposition of sentence on count 5 as well.

Kidnapping and Robbery of Doe (Counts 3 & 4)

Finally, the Attorney General contends that section 654 does not bar imposition of separate sentences for the kidnapping and robbery of Doe because the evidence showed that defendant had different objectives. She contends that defendant was already in the

process of robbing Ortega and Hernandez when he saw Doe standing outside the store. Defendant then opened the door and pulled Doe inside to prevent him from calling the police. Although Ortega testified that Doe walked into the store on his own and that defendant then grabbed him and made him get down on the floor, the store's surveillance video evidently showed that Doe opened the door and that defendant then grabbed him and forced him into the store. Defendant then pushed Doe to the floor and robbed him of his wallet. This evidence is ambiguous as to defendant's intent with respect to Doe: His intent might simply have been to rob him, or it might have been, as the Attorney General contends, to prevent him from calling the police before he and his accomplice could complete the robbery and escape. Viewed in the light most favorable to the judgment, the evidence does support the inference that defendant forced Doe into the store to prevent him from calling the police and then developed the intent to rob him as an afterthought. Accordingly, section 654 does not bar imposition of a separate sentence on count 4.

Conclusion

Section 654 bars imposition of unstayed sentences on counts 5, 6, 8, 9 and 10, including any associated enhancements and/or fines or assessments.

DISPOSITION

The judgment in case No. RIF1101662 is affirmed.

As to case No. RIF1101838, the conviction on count 7 is reversed. The judgment is affirmed as to the convictions on the remaining counts and as to true findings on any enhancements associated with the remaining counts.

The cause is remanded for further proceedings, as follows:

Within 30 days after finality of this opinion, the superior court shall hold a new sentencing hearing. Upon resentencing, the court shall stay imposition of sentence on counts 5, 6, 8, 9 and 10, including any associated enhancements and/or fines or assessments. The court shall dismiss count 7. The court shall state on the record the disposition of all enhancements alleged in the information as to the remaining counts. The court shall provide a copy of the minutes of the new sentencing hearing and an amended abstract of judgment to the parties and to the Department of Corrections and Rehabilitation.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.
RICHLI
J.