Filed 4/23/14 P. v. Echols CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. STEVEN ALLEN ECHOLS, Defendant and Appellant.	F067175 (Super. Ct. No. F12906370) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

---

* Before Cornell, Acting P.J., Kane, J., and Franson, J.

A jury convicted appellant, Steven Allen Echols, of receiving stolen property (Pen. Code, § 496, subd. (a);[1] count 1) and possession of ammunition by a felon (§ 30305, subd. (a)(1); count 2),[2] and appellant admitted enhancement allegations that he had served three separate prison terms for prior felony convictions (§ 667.5, subd. (b)). The court imposed a prison term of five years, consisting of two years on the possession conviction and one year on each of the three prior prison term enhancements. The court imposed a concurrent two-year term on appellant's receiving conviction.

On appeal, appellant's sole contention is that the imposition of sentence on both his possession conviction and his receiving conviction violated the section 654 proscription against multiple punishments. We find merit in appellant's contention and modify the judgment accordingly.

FACTS

Steven Sturgeon testified to the following. When he returned home on the morning of August 7, 2012,[3] after being gone for two days, he discovered the back window of his house was broken. He soon discovered that "[l]ots of things [were] missing," and later that night he determined the missing items included more than 20 firearms and "a few thousand rounds" of ammunition. He had these items because he collects firearms and is an avid hunter.

Sturgeon went to bed around midnight on August 7 but was awakened at approximately 3:30 a.m. by the voices of two people inside his house. Shortly thereafter, he "caught a burglar inside the house" and telephoned his stepfather, Glen Movey, who

---

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

[2] We sometimes refer to the two instant offenses, respectively, by the short-hand terms "receiving" or "the receiving offense" and "possession" or "the possession offense."

[3] All references to dates of events are to dates in 2012.

lives across the street from Sturgeon. Movey arrived at Sturgeon's house and called the police, who arrived approximately 10 minutes later.

Movey testified to the following. After receiving a telephone call from Sturgeon around 4:35 a.m. on August 8, he dressed and walked over to Sturgeon's house. As he was standing on the porch, fumbling with his keys, he looked up and saw appellant standing approximately 100 yards away in the parking lot of a convenience store. Appellant crossed the street, walked up to Sturgeon's house, saw Movey, and turned around, walked away and stopped on the other side of the street. Movey and appellant "looked at each other for a few seconds," and then Movey entered the house. Inside, Movey saw Sturgeon and "the burglar." Movey called the police.

Various Fresno police officers testified to the following. On August 21, police went to a house in Fresno for the purpose of locating and arresting two individuals. After taking these persons into custody, officers conducted a protective sweep of the house and found appellant lying on his stomach in a crawl space. Appellant came out of the crawl space upon being directed to do so, and was handcuffed, and after police contacted dispatch, he was placed under arrest. Thereafter, an officer conducted a search of appellant's person and found, in one of appellant's pants pockets, various items including some ammunition.

There was a backpack located near the entryway to the crawl space. Inside the backpack one of the officers found ammunition, both loose and contained in multiple bags. The ammunition included .380-, .40- and .22-caliber rounds.

Fresno Police Detective Daniel Vandersluis testified he spoke with appellant later that day at the police station. He told appellant the address of Sturgeon's house and that a burglary had occurred there, and appellant told him the following. He had heard about the burglary of Sturgeon's house. He found the items police found in the backpack in a dumpster near where the burglary had occurred. He was a convicted felon and "he knew

he wasn't supposed to possess the ammunition, but he was homeless at the time and tried to sell it, essentially, just to feed himself."

At trial, Sturgeon was shown photographs of ammunition that had been found in the backpack. He identified these items as .22-caliber, .45-caliber or .40-caliber and shotgun shells. He identified some of the shotgun shells as belonging to him. He "couldn't say for sure" that the other shells depicted belonged to him because they "all look the same," but some ammunition of that kind was missing from his house.

Sturgeon was also shown actual pieces of ammunition that had been found in the backpack. He identified some "vintage" shotgun shells and some .40-caliber pistol ammunition as belonging to him. He was unable to identify some .20-gauge shells as belonging to him, but some shells of that kind were missing from his house. He was also unable to identify some .22-caliber shells as belonging to him. Such shells "all look[] pretty much the same." He also testified that a .380-caliber bullet was something that "could have been in something that [he] bought."

DISCUSSION

Section 654, subdivision (a) provides, in relevant 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." Thus, "section 654 proscribes double punishment for multiple violations of the Penal Code based on the 'same act or omission.'" (*People v. Siko* (1988) 45 Cal.3d 820, 822.) "The 'singleness of the act,' however, is [not] the sole test of the applicability of section 654." (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) In addition, "[d]ecisions of [the California Supreme Court] have engrafted onto section 654 a judicial gloss interpreting 'same act or omission' to include multiple violations committed in an 'indivisible' or 'single transaction.'" (*Siko*, at p. 822.)

A course of conduct is "indivisible" if the defendant acts with "a single intent and objective." (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Where multiple offenses are based on "the same act, not … separate acts," a court need not consider whether the defendant had a "single objective" in committing the offenses. (*People v. Jones* (2012) 54 Cal.4th 350, 359, 360.)

"'The defendant's intent and objective are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]'" (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) The court's findings on the question of whether a course of conduct was indivisible may be either express or implied from the court's ruling (*People v. McCoy* (1992) 9 Cal.App.4th 1578, 1585), and we review such findings under the substantial evidence test (*People v. Osband* (1996) 13 Cal.4th 622, 730-731). Under this test, "We review the trial court's findings 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.) But, "To be sufficient, evidence must be 'substantial.' [Citation.] Evidence is substantial only if it "'reasonably inspires confidence and is of 'solid value.'"' [Citation.] By definition, 'substantial evidence' requires evidence and not mere speculation. In any given case, one 'may speculate about any number of scenarios that may have occurred.… A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition,

surmise, conjecture, or guess work. [¶] … A finding of fact must be an inference drawn from evidence rather than … a mere speculation as to probabilities without evidence.”” (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.)

The People first argue that the court impliedly found that appellant formed a separate objective and intent for each of the two instant offenses and that this finding was supported by substantial evidence because Sturgeon was able to identify only a portion of the ammunition as belonging to him, and therefore not all the ammunition found in appellant’s possession can be “directly attributed to the stolen property.”[4] We disagree.

According to Sturgeon’s testimony, the ammunition shown to him, all of which was found in the same backpack, either belonged to him or could have belonged to him. There was no evidence appellant acquired any of the ammunition Sturgeon could not positively identify as his separately from the ammunition Sturgeon could so identify. Indeed, the presence of ammunition Sturgeon identified as his along with other ammunition that could have been his strongly suggests all the pieces of ammunition in the backpack were among the items stolen from his house. And although some ammunition was found on appellant’s person, Sturgeon was not asked about it and there is nothing to suggest it was not part of the stolen property. The suggestion that some of the ammunition found in appellant’s possession was not part of the property stolen in the Sturgeon burglary is nothing more than conjecture. On this record, substantial evidence does not support the conclusion, which forms the major premise of the People’s argument, that some of the ammunition found in appellant’s possession was stolen and some was not. Therefore, to the extent the court’s implied finding that appellant harbored

---

[4] We assume without deciding that imposition of sentence on the receiving and possession convictions does not punish the same single act, and that therefore the question before us is whether the two offenses were committed as part of an indivisible course of conduct.

separate intents and objectives in committing the instant offenses was based on the conclusion that, as the People argue, not all the ammunition found in appellant's possession can be "directly attributed to the stolen property," that finding is not supported by substantial evidence.

The People also argue that even assuming that not all the ammunition in appellant's possession was part of the stolen property, appellant's intent and objective with respect to ammunition in his possession changed over time. The People assert that appellant's original intent was to sell the stolen property, but that he "gave up on trying to sell the ammunition," at which point, "apparently deviat[ing] from his original intention, purpose, or plan," appellant held on to the property for some separate and independent—but unspecified—reason(s). Again, we disagree. Appellant testified he tried to sell the ammunition, but he did not testify, nor was there any other evidence, that he abandoned that intention. The People's claim to the contrary is not supported by the evidence.

We find instructive *People v. Atencio* (2012) 208 Cal.App.4th 1239 (*Atencio*). In that case, the defendant had taken a semiautomatic pistol from a residence, and he had discarded the pistol in another residence the following day after trying to sell some jewelry to the resident. (*Id*. at pp. 1241-1242.) The defendant was convicted of grand theft of a firearm and possession of a firearm by a felon. (*Id*. at p. 1241.) The *Atencio* court rejected the People's argument that the defendant harbored multiple criminal objectives, and held that section 654 prohibited imposition of sentence on both offenses: "To say that defendant's objective on the first day was to take the gun, while his objective on the next day was to possess it is cutting the point too fine. The only point in taking the gun was to gain possession of it, so that he could then do with it what he pleased, whether 'possess[ing] [it] while selling jewelry' or something else. The fact that defendant kept possession of the gun for a period of 24 hours did not, without more, alter his intent and objective such that his course of criminal conduct can be deemed to consist

of more than one act for purposes of section 654.… [D]efendant's theft of the pistol was merely the means by which he gained possession of the pistol. Under these facts, without more, there was no substantial evidence to support the trial court's double punishment of defendant for taking the pistol and subsequently possessing it." (*Id*. at p. 1244, italics omitted.)

We recognize that unlike the defendant in *Atencio* who was in possession of the contraband for one day, appellant apparently possessed the stolen ammunition for almost two weeks before he was caught with it. Nonetheless, as in *Atencio*, "the only point" in acquiring the ammunition—"receiving" it in the language of section 496, subdivision (a)—was to "gain possession" of it, so that he could sell it or do whatever else he may have wanted to do with it. (*Atencio*, *supra*, 208 Cal.App.4th at p. 1244.) To employ and adapt the language of *Atencio* further, "what we have here is a course of conduct pursuant to one criminal objective—to possess the [ammunition]—and based on that there is but one act that can be punished under section 654." (*Id*. at p. 1245.)

Where, as here, multiple punishments are precluded by section 654, both concurrent and consecutive sentences are prohibited. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) Where a sentence violates section 654, the proper appellate response is to "'stay the sentence on the lesser offenses while permitting execution of the greater offense consistent with the intent of the sentencing court.'" (*People v. Pitts* (1990) 223 Cal.App.3d 1547, 1560.) However, the punishments for receiving and possession are identical and therefore either count could be stayed with the same result. Under these circumstances, we deem it appropriate to leave intact the sentence imposed on the possession conviction and stay imposition of sentence on the conviction for which the trial court imposed the concurrent term, viz., the receiving conviction.

DISPOSITION

Appellant's sentence is modified to stay the term of imprisonment on his conviction of receiving stolen property, the stay to become permanent upon appellant's completion of the sentence imposed on his conviction of possession of ammunition by a felon. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.