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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RODERICK A. JUNIOR,

Defendant and Appellant.

G045486

(Super. Ct. No. 10SF1088)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Marta I. Stanton, 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, Scott C. Taylor and Nguyen Tran, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

This appeal presents the sometimes tricky problem of ascertaining whether, under Penal Code section 654,¹ assaults committed in the general course of an armed robbery are divisible from the robbery itself. Assaults committed to accomplish the robbery are not separately punishable, while assaults committed not to further the robbery but for some independent objective are separately punishable. Here, as in *People v. Watts* (1999) 76 Cal.App.4th 1250 (*Watts*), the assaults occurred well after the robbery was under way, and those assaults were not “simply a means” of committing the robbery. (See *id.* at p. 1265.) The trial court’s conclusion these assaults were committed for separate objectives was amply supported by the evidence. We therefore affirm the judgment.

I

Because section 654 issues often turn on a close analysis of the sequence of events, we relate the evidence of the crimes that occurred in this case in “slow motion,” that is, as the witnesses actually related them in court:

Three men, each in a distinctive form of disguise, walked into a bank in Lake Forest just after it opened on the morning of November 10, 2008. We will identify the three by their disguises: Blond Wig, Ski Mask, and Sombrero. Appellant Roderick Junior was subsequently shown to be Sombrero based on DNA evidence.

One of the three yelled, “Everybody get down. Everybody, get the fuck down.” The customers in the bank – there were about 10 to 15 of them – went down on the floor.

¹ All statutory references in this opinion are to the Penal Code.

Blond Wig screamed, “Who’s the manager.”

The assistant manager said the manager was not there that day. He was the assistant. Blond Wig grabbed him by the collar, shoved a pistol into the back of his head, and asked, “Where’s the fucking vault?” Seconds later Blond Wig ordered the assistant manager to “Take me to the fucking vault.”

The assistant manager explained that two keys were needed to open the vault. “Where is the money?” Blond Wig demanded. The assistant manager thought to take Blond Wig to the merchant tellers area, because that is the area where usually there is the most money on hand.

The assistant manager took Blond Wig to Matt, the merchant teller. Matt was ducking underneath the counter.

The assistant manager opened the drawers. “No, you get the money,” said Blond Wig. The assistant manager started taking money out of the merchant teller’s drawer and putting money into the bag that Blond Wig was carrying.

Ski Mask saw Matt and figured out he had pulled the alarm underneath the counter. “You hit the alarm, didn’t you, prick?” (A bank customer heard “You fucking hit the alarm, didn’t you?”) Ski Mask hit Matt with the butt of his pistol with a great “whack sound.”

The assistant manager’s thoughts turned to ways to get Blond Wig as much money as he could. He thought of the “cow,” a nickname for a small, secondary vault used to get money to tellers. Even so, the cow required two keys, and the assistant manager only had one.

But another teller, named Maha, had her keys in a drawer. The assistant manager got her keys out of the drawer and opened the drawer to give Blond Wig more money.

Blond Wig kept looking at his watch. He started a countdown. “Ten, nine, eight.”

Meanwhile, Maha was at the copier. Ski Mask had a gun to Maha's head. "Give me the money, baby. Let's make it easy," Ski Mask ordered. "Okay," she replied.

"Come on, open the cash box," was the response.

"This is a copier. I have to go to my cash box" explained Maha.

Ski Mask grabbed Maha by the arm, gun still pointed at her head. The two went to Maha's drawer. She tried to open it. "Hurry up" he told her. "I'm trying my best," she said.

Maha managed to get the drawers open. "Put everything in the bag" was the command. Maha began putting "everything" in Ski Mask's bag. When Maha looked at the robber, he told her "Don't look into my eyes."

Ski Mask demanded that Maha open other drawers. She said she didn't have the keys. "Don't argue, just open them" was the response. She reiterated that she didn't have the keys.

Maha heard screaming and yelling coming from the assistant manager. "Please don't kill me. I have kids."

Maha also heard Matt yelling in some sort of "painful" way.

The next thing she knew, Ski Mask was telling her to go back and lay down close to the cow. "Get on the floor and don't look around."

"You guys all seem going to be dead [*sic*]," said Ski Mask.

As Maha was getting on the floor, Ski Mask kicked her with his feet. "Come on, go, go faster." And then Ski Mask hit her with his gun on her head, kicked her in her side close to her stomach, and she went down on the floor. His kick was hard. Maha lay flat on the ground.

For his part, Matt, already down on the ground, heard "We got to go." Ski Mask and Blond Wig jumped over the counter and left through the glass door entry.

All this time Sombrero was pointing his gun at the customers on the floor. He joined his compatriots as they left the bank. The three men got away with about \$55,000.

II

Appellant Junior, whom we have called Sombrero, was charged with eight counts in an information filed by district attorney's office on May 9, 2011. He was convicted of all them. They were:

Count (1): second degree robbery by taking property from Matt.

Count (2): second degree robbery by taking property from the assistant manager.

Count (3): second degree robbery by taking property from Maha.

Count (4): second degree robbery by taking property from Nicole, another bank employee.

Count (5): assault on Maha with a semiautomatic firearm.

Count (6): assault on Matt with a semiautomatic firearm.

Count (7): assault on Maha with a firearm.

Count (8): assault on Matt with a firearm.

Junior's total sentence was 13 years, 4 months. The court found that counts 1 through 6 involved independent objectives and separate acts of violence. The court imposed consecutive sentences on counts 1 through 6, making up 12 years of Junior's sentence.² The balance was in firearm enhancements. The court stayed sentence of counts 7 and 8 as a matter of compliance with section 654, since it was imposing sentence on counts 5 and 6.

² Consecutive sentences of one year for each of the 4 second degree robbery counts, 6 years on count 5 (the assault on Maha with the automatic firearm), plus 2 years on count 6 (the assault on Matt with the automatic firearm). Another 4 months was added for firearm enhancements on each of the 4 robbery counts, totaling 16 months, giving the total of 13 years, 4 months.

On appeal, Junior now claims counts 5 and 6 – the assaults on Maha and Matt with the semiautomatic firearm – should have been stayed under section 654 because the robbery of the bank constituted a single, indivisible course of conduct.

III

Section 654 precludes multiple punishments under different provisions of law for the same act or omission.³ While interpretations of the statute “have varied somewhat over the years” (*People v. Mesa* (June 4, 2012, S185688) ___ Cal.4th ___, ___, California courts have been consistent in holding that *gratuitous* violence committed *after* a crime is well in progress does not come within the rule. The robbery and subsequent violence may be punished independently.

A simple example of violence following robbery can be found in *People v. Houghton* (1963) 212 Cal.App.2d 864. A gunman entered the “showroom” of a filling station, brandished a revolver in front of the 16-year old sole attendant, and ordered the attendant to remove money from the cash register. The attendant was then ordered to take the money to a restroom in the back of the station. The gunman followed the attendant into the restroom, took the money from the attendant, and ordered the attendant to face the wall and put his hands behind his back. The gunman told the attendant he wasn’t going to hurt him. Then he shot the attendant in the back. (*Id.* at pp. 867-868.) The attendant lived to testify against the gunman, and the appellate court held that the robbery and the shooting were *not* part of the same criminal venture, noting the intent to shoot the attendant could have been “formulated” after the gunman had taken the money. (*Id.* at p. 874.)

A more recent example is *Watts, supra*, 76 Cal.App.4th 1250, involving similar facts to the case before us: Three robbers entered a restaurant and robbed at

³ The language from the statute is: “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.”

gunpoint two employees. The robbery also involved multiple assaults: One gunman grabbed a hostess by her neck, told her he wanted the money in the cash register, then hit her with a heavy object as she tried to pull away. Another gunman held a gun to a kneeling employee, trying to get her to open a computer he mistook for a cash register; she said the machine had no money, but the lady up front would have it. She then got down on the floor and the gunman struck her with a gun. The bartender was forced to open a cash register, the gunman took the money from the register and her tip jar, told her to get down on the floor, then threw a glass at her and threw the tip jar down by her head. (See *id.* at pp. 1254-1256.)

The trial court's decision that the robberies were separate from the assaults was upheld. The court noted that in each case of an assault, each of the victims "was assaulted either as she was attempting to comply with her assailant's demand for money or was attempting to escape." The hostess was struck as she attempted to pull away. The kneeling employee was struck after she told the gunman where the money was. The manager had a gun put to her head after she took her assailant to a back office and tried to open the safe. The bartender had a glass jar and a tip jar hurled at her *after* she had complied with her assailant's demands to open the cash register. (*Watts, supra*, 76 Cal.App.4th at p. 1265.) From these facts the *Watts* court opined that the evidence showed "the robberies were well under way at the time the assaults occurred, and thus supports the conclusion of the trial court that the assaults therefore were not simply a means of committing the robberies." (*Ibid.*) The assault on each victim "was not merely incidental to the objective of robbing that victim, but a separate act with a separate objective."

Watts is indistinguishable from the case before us – the assaults here are, if anything, more gratuitous and less connected to the underlying heist than the ones in *Watts*. And indeed, Junior makes no attempt in his reply brief to try to distinguish either *Watts* or *Houghton*.

Here, as our slow motion recount shows, Ski Mask’s great “whack” of Matt because he had pulled the alarm came after the assistant manager had already put money into Blond Wig’s bag. Likewise, Ski Mask hit Maha with his gun after she had put “everything” into his bag. The necessary dominance to commit the bank robbery had already been established. Ski Mask’s use of his gun to strike two prone bank employees after money was already “in the bag” was thus wholly unnecessary for the bank robbery. The strike on Matt nothing but retaliation for pulling the alarm. The strike on Maha was an independent gesture of contempt.

By contrast, the robbery cases relied on by Junior all involved violence necessary to accomplish the robbery in the first place. *People v. Beamon* (1973) 8 Cal.3d 625 was not a robbery followed by an assault, but, as the court described events, a “kidnaping for the purpose of robbery and for the commission of that very robbery,” in that case of a truck making a liquor delivery. (*Id.* at pp. 630, 639.) In *People v. Logan* (1953) 41 Cal.2d 279, the victim was first hit with a baseball bat, rendered unconscious, and *then* robbed of her purse. (See *id.* at pp. 282, 290.) In *People v. Medina* (1972) 26 Cal.App.3d 809, hitting the victim as he was being bound and gagged was itself the very means of effectuating the robbery of his home. (See *id.* at p. 824 [“The assault by Morrison was the means of committing the robbery and was merely incidental to the primary object of robbing Bumb.”].) And in *People v. Flowers* (1982) 132 Cal.App.3d 584, as in *Logan*, the victim was struck first (there, as he was trying to enter his motel room), rendered unconscious, and *then* robbed. (*Id.* at pp. 587-588 & p. 589 [“On the contrary, it seems clear that the whole purpose of the confrontation in the motel room was to commit a robbery.”].)

These cases do nothing to undermine the conclusion of the trial judge that the assaults here were independent crimes carried out for independent purposes.

IV

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.