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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.

RICARDO MENDOZA,

Defendant and Appellant.

G048949

(Super. Ct. No. 13NF0031)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla M. Singer, Judge. Affirmed as modified.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Paige B. Hazard, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Ricardo Mendoza appeals from a judgment sentencing him to four years and four months in state prison after a jury found him guilty of second degree robbery, commercial burglary, false imprisonment by violence, and dissuading a witness from reporting a crime. The sentence consisted of the three-year middle term for robbery, eight months for burglary, stayed under Penal Code section 654 (all further statutory references are to this code), and consecutive eight-month terms for both false imprisonment and dissuading a witness. Defendant raises two claims on appeal. First, asserting the convictions for false imprisonment and dissuading a witness were based on his aiding and abetting the robbery or the burglary, defendant argues the trial court erred in failing to stay the terms imposed for these crimes. Second, even assuming the court properly imposed a consecutive eight-month sentence for dissuading a witness, he argues it erred in failing to stay the sentence for false imprisonment because that crime was either incidental to the robbery or to dissuading a witness. We agree the sentence imposed for false imprisonment must be stayed, but affirm the consecutive sentence for dissuading a witness.

FACTS

Using the name “Jose,” Noe Lara made an evening appointment for a massage with Julie Nguyen, a licensed massage therapist who leased space in a chiropractor’s office. When Lara arrived at the office, Nguyen unlocked the front door with her key and let him into the premises. She then locked the door. Nguyen told Lara the price was \$30 for a one-hour massage, and he gave her a \$100 bill.

Nguyen led Lara to her room to give him change. When they entered, Lara punched Nguyen in the face and pinned her to the ground. Lara asked Nguyen, “[W]here is the keys? Where is the money?” He took the keys and the \$100 bill from Nguyen and

began dragging her to the chiropractor's interior office while also trying to use zip ties to restrain her hands.

Nguyen kept moving her hands to avoid being restrained and said she would call the police. Lara told her ““don't call the police. My friend has a gun. He's outside. He will come in here and shoot you. . . . Just give me the money and give me the key and I will leave.”” Nguyen looked towards the front door and saw a man standing outside looking in her direction.

Lara pushed Nguyen into the chiropractor's interior office, still attempting to bind her hands. During the struggle, Nguyen pulled off Lara's sweatshirt. Lara punched Nguyen several more times, then left the office, and closed the door. Nguyen attempted to leave, but Lara held the door shut.

Nguyen noticed the room had a telephone and called 911. While speaking with the dispatcher, the door opened and she saw the silhouette of two men enter the office. One of the men struck Nguyen, causing her to fall down and drop the phone. The other man approached Nguyen and placed what appeared to be a gun close to her cheek. Neither man said anything. The two of them left the office. They took the telephone, but dropped it before driving away.

Nguyen gave the police a description of Lara and chose his picture from a photographic lineup. Upon arresting Lara, the police found the replica of a handgun, numerous zip ties, and documentation, which led them to defendant.

After his arrest, defendant was questioned by the police. He admitted giving another man he referred to as “Primo” a ride to the chiropractor's office to commit a robbery. Initially, he remained in the car while Primo entered the office. After several minutes, defendant went to the front door where he saw Primo holding a door closed. Primo let defendant into the office and he heard a woman screaming in the room behind the door. Defendant denied having a gun or entering the room. But he admitted fleeing

from the premises to avoid being arrested. Shown several photographs, defendant chose Lara's picture, identifying him as Primo.

During closing argument, the prosecutor claimed defendant was guilty of robbery and burglary either because he aided and abetted Lara in committing the crimes or conspired with Lara to do so. The prosecutor asserted he was guilty of false imprisonment and dissuading a witness because these crimes were the natural and probable consequence of either the robbery or the burglary. But she also argued he could be convicted of dissuading a witness as a direct perpetrator, claiming he "held a gun to Miss Nguyen's face[]" after it became apparent that she was on the phone with 911."

DISCUSSION

On appeal, defendant contends the trial court erred by failing to stay the sentences imposed for false imprisonment and dissuading a witness. First, he notes the court instructed the jury that, to convict him of these crimes as the natural and probable consequence of his aiding and abetting or conspiring with Lara, it must "first decide whether [he] is guilty of robbery [or] burglary" as an aider and abettor or because he "conspired to commit" one of those crimes. Thus, defendant claims "the jury's verdicts necessarily imply that [his] only intent and objective was to commit robbery and burglary" and, when imposing sentence, the court was "bound by the jury's findings." Second, defendant argues that at least the court erred in failing to stay the sentence for false imprisonment because the evidence established that crime was incidental to either the commission of the robbery or the commission of dissuading a witness.

We agree the trial court erred in failing to stay defendant's sentence for false imprisonment, but affirm the consecutive term for dissuading a witness. Section 654, subdivision (a) declares, "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.” While section 654 “literally applies only where such punishment arises out of multiple statutory violations produced by the ‘same act or omission[,]’ . . . because the statute is intended to ensure that [a] defendant is punished ‘commensurate with his culpability’ [citation], its protection has been extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) ““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.”” (*People v. Capistrano* (2014) 59 Cal.4th 830, 885.)

However, if the “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.’” (*People v. Harrison, supra*, 48 Cal.3d at p. 335.) Also, “where a course of conduct is divisible in time it may give rise to multiple punishment even if the acts are directive to one objective.” (*People v. Louie* (2012) 203 Cal.App.4th 388, 399.)

Whether a defendant harbored more than one objective during a course of criminal conduct presents a question of fact to be decided by the trial court. We review its ruling for substantial evidence. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368.) Generally, “in the absence of some circumstance ‘foreclosing’ its sentencing discretion . . . , a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial, without regard to the verdicts.” (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1340.)

Defendant relies on two decisions to argue that the general rule of deference to the trial court's sentencing findings is inapplicable in this case. The first is *People v. Siko* (1988) 45 Cal.3d 820, where a single attack on a nine-year-old girl resulted in the defendant being convicted of felony assault, forcible rape, forcible sodomy, and lewd conduct with a minor and a true finding the latter offense involved substantial sexual conduct. The Supreme Court rejected an argument the consecutive sentence for lewd conduct did not violate section 654, noting "the charging instrument and the verdict both identify the lewd conduct as consisting of the rape and the sodomy rather than any other act. Nor did anything in the prosecutor's closing argument or in the court's instructions suggest any different emphasis." (*Id.* at p. 826.)

The second case is *People v. Bradley* (2003) 111 Cal.App.4th 765. There the defendant participated in a robbery by enticing the victim to leave a casino with her in a car. After pulling to the curb, the defendant left the vehicle and two armed confederates entered it to rob the victim. When the plan to lock the victim in the vehicle's trunk was frustrated because he lacked access to the compartment, the confederates shot him while the defendant sat in a nearby car. The Court of Appeal held the defendant could not be separately sentenced for attempted murder because it would be permissible only if she "had a dual rather than single objective" (*id.* at p. 770) and, at trial, "the prosecution tendered[] a theory only requiring appellant to entertain a single objective—to rob that victim." (*Ibid.*) Thus, *Bradley* held "the trial court cannot countermand the jury and make the contrary finding," particularly since "there is a complete absence of any evidence in this record to support" it. (*Ibid.*)

As to the dissuading a witness charge, we conclude *Siko* and *Bradley* are distinguishable from the present case. Contrary to the generic allegations of the information and the verdicts in the present case, *Siko* was charged with lewd conduct by raping and sodomizing the minor and the jury's verdicts expressly found him guilty of that crime based on those specific acts.

In *Bradley*, the prosecution relied solely on the defendant's intent to rob the victim to support her conviction of both that charge and the attempted murder. Further, the Court of Appeal concluded there was no evidence the defendant had an independent motive that would justify sentencing her for both crimes. Here, to support defendant's conviction of witness dissuasion, the prosecutor relied on both the natural and probable consequences theory *and* his direct participation in the crime. Further, the evidence supports the latter theory. After dragging Nguyen into the chiropractor's interior office, Lara shut the door and barred her from leaving the room. Nguyen saw a telephone and called 911. But while she was speaking with the dispatcher, *both* Lara and defendant entered the office. Lara knocked the telephone out of her hand while defendant held what Nguyen thought was a gun to her cheek before the assailants left taking the telephone.

Thus, as to the dissuading a witness charge, this is not a case where the information and verdicts, or the prosecution's theory of the case and the evidence constrained the trial court from finding defendant acted with a separate objective in preventing Nguyen from completing the 911 call. In addition, the momentary delay between Lara's initial assault of Nguyen, her fortuitous discovery of the telephone, and the perpetrators' subsequent entry of the chiropractor's interior office to stop her from completing the 911 call also supports imposing a separate sentence for witness dissuasion. Consequently, we reject defendant's claim he could not be separately sentenced for dissuading Nguyen from trying to report the robbery.

However, the same cannot be said for defendant's false imprisonment conviction. The prosecutor cited both Lara's "straddl[ing]" and "pin[ning]" Nguyen, plus his later "confin[ing] . . . Nguyen in the treatment room . . . and h[olding] the door closed while she tried to get out" to support a conviction for false imprisonment. Lara and defendant brought the zip ties with them to assist in committing the robbery. Nguyen's testimony reflects it was only after her struggle with Lara, which foiled the plan to use the zip ties to overcome her resistance, that he shut her in the office. Thus, contrary to

the Attorney General's argument, the evidence showed false imprisonment was part of the initial plan. Although the means of completing it changed, the objective of doing so as part of the robbery never did. Also contrary to the Attorney General's argument, it is clear the robbery was not complete when Lara grabbed the key and the money from Nguyen's hands. He kept demanding she show him where the money was kept. Thus, the key and \$100 bill were not the sole objectives of the robbery.

We conclude the trial court did err by not staying the sentence imposed for defendant's false imprisonment conviction.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment imposing, but staying the sentence for false imprisonment by violence (count 3) pursuant to section 654, subdivision (a) and to send the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.