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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTEMIO HERNANDEZ ROMERO,

Defendant and Appellant.

H036511

(San Benito County

Super. Ct. No. CR1000518)

I. STATEMENT OF THE CASE

After a court trial, the court found defendant Artemio Hernandez Romero guilty of three counts of robbery and one count of assault with a firearm. The court further found that each robbery was a serious and violent felony involving the personal use and discharge of a firearm and that defendant personally used a firearm in committing the assault. (Pen. Code, §§ 211; 1192.7, subd. (c); 667.5, subd. (c); 12022.53, subs. (b) & (c); 245, subd. (a)(2), 12022.5, subs. (a) & (d).)¹ The court sentenced him to an aggregate term of 31 years as follows: a four-year term for the assault with a four-year firearm enhancement; and three consecutive one-year terms for the three robberies along with consecutive 20-year terms for the personal-use and discharge enhancements, with two of the 20-year enhancements stayed under section 654.

¹ All unspecified statutory references are to the Penal Code.

On appeal from the judgment, defendant claims the court failed to ensure that his waiver of a jury trial was knowing, intelligent, and voluntary. He further claims the court committed numerous sentencing errors.

We agree that the court erred in sentencing defendant and remand the matter for resentencing.

II. BACKGROUND

Given the issues raised on appeal, we only briefly summarize the facts.

Sometime before 12:00 noon on September 16, 2009, Rodrigo Calderon and Luis Carrillo were working in a field on Scagliotti Road in Hollister. Defendant approached them, asked Mr. Calderon for directions, and then left. Twenty minutes later he returned. Mr. Calderon and Mr. Carrillo were standing next to a truck; their supervisor, Jorge Negrete Vega, was sitting inside it. Defendant, who had a shotgun, was angry and threatened to kill them because he thought they had given him bad directions. He then demanded their wallets and told Mr. Vega to turn off his truck. When Mr. Vega did not respond fast enough, defendant fired at the truck and said he was “not playing” around. All three men produced their wallets as demanded.

Defendant was later arrested, and all three victims identified him as the robber.

III. JURY WAIVER

Defendant contends that although he expressly waived his right to a jury trial, his waiver was nevertheless defective and invalid because the trial court failed to ensure that it was knowing, intelligent, and voluntary.

A. Background

Defendant is a Spanish-speaking native of Mexico who had been living in the United States for 14 years. He had no prior convictions. For the proceedings in this case, defendant had an interpreter/translator.

At a hearing on Friday, October 22, 2010, defense counsel noted that the case was scheduled for a jury trial the following Monday and then stated, “At this time with further

discussion with [defendant] we are prepared to enter a waiver for the right to a jury trial, but are still insisting on [a] court trial and have the court hear this on the facts.”

The court then advised defendant that he had a right to a trial before a jury or judge and asked if he understood that right. Defendant said he did. The court asked if he gave up his right to a jury trial at this time. Defendant said he did. The court asked if the People waived a jury, and the prosecutor also waived a jury trial. The court then scheduled the court trial for the following Monday.

On that Monday, the court noted that both parties had previously waived a jury. Defense counsel reaffirmed that defendant had waived a jury. The court asked if counsel concurred in that waiver, and counsel said that he did. The prosecutor also reaffirmed his previous waiver. The court then explained that although the parties had waived a jury, defendant had reserved all of his other trial rights.

B. Applicable Principles

A defendant in a criminal proceeding has a state and federal constitutional right to a jury trial. (U.S. Const., 6th Amend.; Cal. Const., art I, § 16.) Nevertheless, “the practice of accepting a defendant’s waiver of the right to jury trial . . . clearly is constitutional. [Citations.] . . . [A] defendant’s waiver of the right to jury trial may not be accepted by the court unless it is knowing and intelligent, that is, ‘ ‘ ‘made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it,’ ’ ’ as well as voluntary ‘ ‘ ‘in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.’ ’ ’ [Citations.]” (*People v. Collins* (2001) 26 Cal.4th 297, 305 (*Collins*)). As in *Collins*, “we are dealing with a fundamental constitutional right that, although clearly waivable, may be waived only if there is evidence in the record that the decision to do so was knowing, intelligent, and voluntary.” (*Id.* at p. 305, fn. 2.) Under the California Constitution, moreover, a waiver must be made “by consent of both parties expressed in open court by the defendant and the defendant’s counsel.” (Cal. Const., art I, § 16.)

C. Discussion

As noted, defense counsel told the court that he had discussed the right to a jury with defendant, and defendant was prepared to waive a jury. At that time, defendant did not suggest that they had not discussed the jury issue or that he had not understood their discussion. The court directly advised defendant of his right and then asked defendant if he understood it. Without hesitation, defendant said that he understood his right. Thereafter, the court asked him if he waived that right. Defendant did not ask to talk to counsel; nor did he indicate that he did not understand what waiving his right meant. Rather, he said he waived his right.

Although the waiver colloquy was minimal, it is clear and unambiguous. And given the circumstances, we do not consider it insufficient as a matter of law to support a finding that defendant's waiver was knowing, intelligent, and voluntary. This is especially so given counsel's representation that he had discussed the issue with defendant. Moreover, nothing in the record suggests that defendant was confused about what a jury is, his right to a jury, or what it meant to waive a right. Nor is there anything in the record to suggest that defendant might have felt coerced or deceived into waiving his right. (E.g., *People v. Acosta* (1971) 18 Cal.App.3d 895, 901 (*Acosta*).

Defendant notes that he is a non-citizen, Spanish speaking native of a Mexico with only a sixth grade education and no prior experience as a criminal defendant. He argues that these circumstances together with the seriousness of the charges demanded "special care to determine that [he] actually understood his jury-trial right and the consequences of waiving it." In particular, he claims the court had a sua sponte duty to explain the nature of a jury and a jury trial and the consequences of waiving it and then make sure defendant understood each of these things before accepting his waiver.

Where, as here, a defendant is represented by competent counsel, and counsel has discussed the right to a jury with the defendant, we are not aware of any rule of law entitling the defendant to have the court provide a more detailed explanation of and

advisement about the right. (*Acosta, supra*, 18 Cal.App.3d at p. 902.) “Certainly a court is in no position to discuss the merits of the two kinds of trial [a jury trial versus a court trial], either philosophically or tactically, with a defendant where the defendant is represented by competent counsel. It is enough that the court determine that the defendant understands that he is to be tried by the court and not a jury.” (*Ibid.*; see *People v. Wrest* (1992) 3 Cal.4th 1088, 1105 [no constitutional requirement that defendant understand “ ‘all the ins and outs’ of a jury trial in order to waive the right to one”]; *People v. Lookadoo* (1967) 66 Cal.2d 307, 311.)

Moreover, there is no evidence refuting counsel’s representation that he had discussed the issue with defendant. There is no evidence suggesting that their discussion was inadequate, that defendant was suffering from a mental deficiency, or that counsel had a problem communicating with defendant. Nor does the record reveal reasonable grounds for the court to suspect that defendant seemed confused about or misunderstood his right. Under the circumstances, we do not believe the trial court had a mandatory legal duty to pursue the issue further in order to ensure that defendant’s waiver was knowing, intelligent, and voluntary. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 83 [addressing the validity of a waiver of the right to appeal]; *People v. Castrillon* (1991) 227 Cal.App.3d 718, 722.)

Defendant notes there is no evidence that counsel spoke Spanish. He implies that their discussion about the right to a jury and whether to waive it might have been very limited and inadequate to render his subsequent waiver knowing, intelligent, and voluntary. However, such an implication is speculative.

We acknowledge that later at sentencing, defendant addressed the court and said that the proceedings were unfair because he “never had the right to have a jury the way it should have been.” He accused his attorney of deceiving him before trial into believing that he would go free that day. He further complained that there were no jurors and the proceeding was closed, except for the witnesses.

According to defendant, his statements at sentencing reveal that he did not accurately understand what was at stake in waiving a jury. However, defendant's complaints reveal that he knew the difference between a jury and court trial. Yet, when trial commenced, defendant did not protest or even ask the court about the absence of a jury. Nor, apparently, did he protest to counsel. Under the circumstances, defendant's post-conviction statements do not convince us that his previous waiver was defective.

Defendant's reliance on *Collins, supra*, 26 Cal.4th 297, *People v. Robertson* (1989) 48 Cal.3d 18, *People v. Aikens* (1969) 70 Cal.2d 369, and *People v. Monk* (1961) 56 Cal.2d 288 is misplaced. In each case either the trial court explained the right to a jury on the record or counsel expressly summarized his discussion with the defendant about the right to a jury. However, none of these cases hold that the court has a mandatory duty to explain in detail the nature of the right to a jury or to further advise a defendant despite counsel's representation that he or she had discussed the right and absent any basis to suspect that counsel's discussion had been inadequate or that defendant was confused about or misunderstood the right to a jury.

Defendant cites more pertinent federal appellate cases. Under federal precedent, a court must, at a minimum, explain to a defendant that a jury is composed of 12 members of the community; he or she may participate in jury selection; the jury's verdict must be unanimous; and if he or she waives a jury, the court alone would decide his guilt or innocence. (See, e.g., *United States v. Bailon-Santana* (9th Cir. 2005) 429 F.3d 1258; *United States v. Duarte-Higareda* (9th Cir. 1997) 113 F.3d 1000.)

Federal appellate decisions are not binding on state courts. (*In re Roderick* (2007) 154 Cal.App.4th 242, 307.) Nevertheless, they can be persuasive, and we agree with the general observation that "[i]t is probably the better practice for the trial judge, by inquiry, to make sure that the defendant understands the right to a jury trial." (5 Witkin, *Cal.Criminal Law* (3d ed. 2000) Criminal Trial, § 452, p. 648.) Indeed, in our view, the California and federal cases cited by defendant reflect the proper judicial attention to the

importance of the right to a jury and the gravity of a decision to waive it. They also reflect an appropriate and conscientious effort to make a record that unequivocally reflects a voluntary, knowing, and intelligent waiver. As noted, the court's effort in this case was minimal. Although we do not find the record insufficient to uphold defendant's waiver, we urge trial courts to make more of an effort than the court did in this case to ensure that a defendant's waiver is knowing, intelligent, and voluntary.

IV. SENTENCING

Defendant contends that in sentencing him, the court selected an erroneous principal term, improperly calculated the length of subordinate terms, erroneously stayed gun enhancements, and improperly imposed consecutive terms for two of the offenses.

A. Principal Term

Section 1170.1, subdivision (a) provides that when a defendant is convicted of two or more felonies and consecutive sentences are imposed, the aggregate sentence must be the sum of the "principal term" plus one-third of the middle base term and enhancement terms for any "subordinate offense." The "principal term" consists of "the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements." (§ 1170.1, subd. (a).)

Here, the court selected the upper term of four years for the assault with a four-year enhancement as the principal term. Defendant argues that the court erred because the term imposed for each robbery with 20-year enhancements rendered the sentence imposed for robbery "the greatest term of imprisonment" and thus the "principal term" for purposes of sentencing. The Attorney General agrees that the court erred, and so do we.

B. Subordinate Terms

Under section 1170.1, subdivision (a), the "subordinate term" "shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction

for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate terms.”

Here, the court properly calculated the subordinate terms for each of the robberies—one-third of the middle term of three years—and imposed three one-year terms. However, defendant argues that the court erred in imposing full 20-year enhancements for each robbery instead reducing the enhancements to one-third. The Attorney General again agrees that the court erred, and so do we.

C. Enhancement Terms

As noted, the court stayed two of the three gun-use enhancements. As defendant correctly notes, “Ordinarily, an enhancement must be either imposed or stricken ‘in furtherance of justice’ under Penal Code section 1385. [Citations.] The trial court has no authority to stay an enhancement, rather than strike it—not, at least, when the only basis for doing either is its own discretionary sense of justice.” (*People v. Lopez* (2004) 119 Cal.App.4th 355, 364.) The Attorney General concedes that the court erred in staying two enhancements. Again, we agree.

D. Multiple Punishment

Defendant argues that the imposition of consecutive terms for the assaulting Mr. Vega with a firearm and robbing him violated the section 654.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct.” (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) The purpose of the statute is “to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.) The protection of the statute also extends to cases in which a defendant engages in an indivisible course of conduct comprising different acts punishable under

separate statutes. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, “ ‘[i]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.’ ” (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1297.) Conversely, multiple punishment is permissible notwithstanding section 654 if the defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other. (*People v. Braz* (1997) 57 Cal.App.4th 1, 10.)

“A defendant’s criminal objective is ‘determined from all the circumstances and is primarily a question of fact for the trial court, whose findings will be upheld on appeal if there is any substantial evidence to support it.’ [Citation.]” (*People v. Braz, supra*, 57 Cal.App.4th at p. 10.) We view the evidence in a light most favorable to the court’s express or implied factual determinations and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

It is settled that where an assault is committed to facilitate a robbery, section 654 prohibits separately punishing a defendant for both offenses. (E.g., *People v. Miller* (1977) 18 Cal.3d 873, 886; *People v. Ridley* (1965) 63 Cal.2d 671, 678; *People v. Flowers* (1982) 132 Cal.App.3d 584, 588-590; *People v. Medina* (1972) 26 Cal.App.3d 809, 823-824; cf. *People v. Melton* (1988) 44 Cal.3d 713, 767 [same re burglary or murder to facilitate robbery].)

Here, defendant fired his gun at Mr. Vega in order to facilitate the robberies of all three men. Defendant demanded their wallets and told Mr. Vega to turn off his truck. When Mr. Vega did not respond fast enough, defendant shot at his truck and said he was not playing around. The three men immediately produced their wallets, and defendant took them.

The trial court did not explain its reasoning for punishing defendant for both the assault and robbery, but the record does not support the court's implied finding that defendant had separate, different objectives for committing each offense.

In support of separate punishments, the Attorney General's cites *People v. Phong Bui* (2011) 192 Cal.App.4th 1002. However, reliance on *Phong Bui* is misplaced. There, the court recognized that the commission of one crime to facilitate a robbery precludes separate punishment for both offenses. However, the court explained that "an act of 'gratuitous violence against a helpless and unresisting victim . . . has traditionally been viewed as not "incidental" to robbery for purposes of Penal Code section 654.' [Citations.]" (*Id.* at pp. 1015-1016.) The court upheld separate sentences for attempted murder and robbery because the record revealed that after defendant shot the victim and the victim fell to the ground face down and was unable to move, the defendant continued to shoot him. Such conduct supported a finding that the defendant intended not only to rob the victim but also to murder him.

Here, in contrast, defendant demanded Mr. Vega's wallet, and when Mr. Vega hesitated, defendant's shotgun blast achieved his purpose, and Mr. Vega produced his wallet.

In short, we agree with defendant that the court erred in separately punishing him for both the assault and robbery of Mr. Vega.

V. SENTENCE LIMITATION ON REMAND

Defendant contends that on remand for resentencing, the principles of double jeopardy bar the imposition of a sentence greater than the 31-year aggregate term that the court previously imposed. Thus, defendant requests a remand order imposing that limitation.

Defendant's claim is based on *People v. Torres* (2008) 163 Cal.App.4th 1420 (*Torres*) and *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 (*Mustafaa*) which together stand for the following proposition: when a trial court imposes an aggregate sentence that

is within the range of sentences that the court was legally authorized to impose but which the court arrived at in a legally unauthorized way—i.e., where a component of the aggregate is legally unauthorized—principles of double jeopardy prohibit the court on remand from imposing a sentence greater than that originally imposed; however, when the court imposes an aggregate sentence that falls *below* the prescribed legal minimum, the aggregate sentence *as a whole* is unauthorized because it is based on a legally impermissible act of judicial leniency, and double jeopardy does not bar the imposition of a greater sentence on remand. (*Torres, supra*, 163 Cal.App.4th at pp. 1429-1432; *Mustafaa, supra*, 22 Cal.App.4th at pp. 1311-1312.)

The Attorney General acknowledges the authority of *Torres* and *Mustafaa* but questions whether their reasoning and the proposition they stand for are correct. Nevertheless, citing *Mustafaa*, the Attorney General argues that the court’s unauthorized stay of the gun-use enhancements rendered the *entire* aggregate sentence legally unauthorized, and therefore double jeopardy would not bar imposition of a greater sentence on remand. However, the Attorney General misperceives the rule. The question is whether the trial court properly could have imposed an aggregate term of 31 years. If that sentence was within the range of permissible sentences, rather than below the legally authorized minimum, then the fact that the court impermissibly stayed the enhancements does not render the whole sentence an unauthorized act of judicial leniency.

Indeed, in *Mustafaa*, the trial court imposed consecutive terms for gun-use enhancements on two robbery counts but imposed concurrent sentences for the two underlying robbery convictions. The appellate court found this to be error. “*Mustafaa* pleaded guilty to three counts of robbery and admitted that he personally used a firearm during each robbery. The personal gun-use enhancements to which he admitted were not separate crimes and cannot stand alone. Each one is dependent upon and necessarily attached to its underlying felony. In separating the felony and its attendant enhancements by imposing a concurrent term for the felony conviction and a consecutive term for the

enhancement the court fashioned Mustafaa's sentence in an unauthorized manner under the sentencing procedure. We must therefore remand for resentencing." (*Mustafaa, supra*, 22 Cal.App.4th at p. 1311.) The court further noted that the prohibition against double jeopardy "generally prohibits the court from imposing a greater sentence on remand following an appeal." (*Ibid.*) And under the circumstances, the court concluded that double jeopardy protected defendant from imposition of a greater sentence. (*Id.* at pp. 1311-1312.) The sentencing error here is akin to that in *Mustafaa*.

Despite our discussion, we decline at this time to determine whether *Torres* and *Mustafaa* were correctly decided, and if so, whether here the court on remand is barred from imposing a sentence greater than 31 years. In this, we agree with the Attorney General that such a determination is premature. On remand, defendant can raise the issue, and if the trial court rejects his position and imposes a greater sentence, then defendant may appeal and thereby place the issue before us.

VI. DISPOSITION

The judgment is reversed, and the case is remanded for resentencing.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.