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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD PRESCOTT ASHTON III,

Defendant and Appellant.

H039902

(Santa Cruz County

Super. Ct. No. F24423)

Defendant Harold Prescott Ashton III appeals from a judgment of conviction entered after a jury found him guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)¹ - count one), assault (§ 240 - count two), and battery (§ 242 - count three). The trial court sentenced defendant to three years for count one and concurrent sentences of 180 days for counts two and three. On appeal, defendant contends that there was insufficient evidence that he committed two assaults and a battery. Alternatively, he contends that the punishments as to counts two and three must be stayed pursuant to section 654. We find no error and affirm.

¹ All further statutory references are to the Penal Code.

I. Statement of Facts

On March 15, 2013, John Tripodi was working undercover as a loss prevention officer at the CVS store on Front Street in Santa Cruz. At about 12:30 p.m., he observed a man who left the store without paying for items that he had hidden in his pants. Tripodi followed the man outside and stopped him about 5 feet in front of the store's entrance. After Tripodi identified himself as a loss prevention officer and displayed his badge, the shoplifter swung at Tripodi and tried to leave. However, Tripodi tackled him to the ground where the shoplifter continued to struggle with him.

Greg Lodge, a CVS employee, exited the store and assisted Tripodi in detaining the shoplifter. Lodge, who was wearing his CVS uniform, knelt down and held the shoplifter's feet to prevent him from kicking Tripodi. Defendant approached and asked, "What are you guys doing?" Defendant's tone of voice was "very angry" and he began yelling at the CVS employees. After defendant told them that they should not be doing what they were doing, Lodge said, "Don't worry about it, just keep moving.'" Defendant placed his skateboard on a nearby vehicle and kicked "pretty much as hard as he could" towards Lodge's head.² Lodge raised his arm and blocked the kick. When Lodge stood up, defendant threw punches which Lodge was able to avoid. Defendant then dropped his head and charged at Lodge. However, Lodge stepped aside and put defendant in a headlock. As defendant and Lodge continued to fight on the ground, Lodge felt something cutting into his back. Defendant had removed a folding knife out of Lodge's pocket. Lodge immediately screamed, "He has a knife, get it away from him." A third CVS employee, Paul Wright-Javier, and some bystanders took the knife away from defendant and helped Lodge restrain him until the police arrived. Lodge sustained several cuts and two puncture wounds on his back and two cuts on his abdomen, and was unable to work for more than a week.

² Tripodi testified that defendant hit Lodge on the shoulder with his skateboard.

A video of the incident, which was taken by a bystander on his cell phone, was played for the jury.

II. Discussion

A. Multiple Convictions under Section 954

As previously stated, defendant was convicted of assault with a deadly weapon, assault, and battery arising from the March 15, 2013 incident. Defendant contends that the evidence established that only one crime occurred, because “separate acts occurring during the course of the attack [could not] be parceled out into separate crimes”

“Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct. It provides in relevant part: ‘An accusatory pleading may charge two or more different offenses connected together in their commission, or *different statements of the same offense* The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged’” (*People v. Pearson* (1986) 42 Cal.3d 351, 354.) The issue of whether multiple convictions may be based upon evidence of multiple blows during a single continuous assault is a question of law, which is subject to this court’s independent review. (See *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1474 (*Johnson*).)

In *People v. Harrison* (1989) 48 Cal.3d 321 (*Harrison*), the defendant was convicted of three counts of forcible acts of sexual penetration (§ 289). (*Harrison*, at p. 324.) The defendant argued “that multiple digital penetrations, committed during a brief ‘continuous’ assault upon a struggling victim, constitute only a single violation of section 289.” (*Id.* at p. 327.) *Harrison* focused on the conduct minimally necessary to result in a conviction. Though the statute did not specify what constituted a completed crime, *Harrison* discussed related sex crimes statutes and concluded that “a *new and*

separate violation of section 289 is ‘completed’ each time a *new and separate* ‘penetration, however slight,’ occurs.” (*Id.* at pp. 329.) Thus, *Harrison* concluded that multiple convictions were warranted. (*Id.* at p. 334.)

In *Johnson, supra*, 150 Cal.App.4th 1467, the defendant was convicted of three counts of corporal injury to a cohabitant (§ 273.5) arising out of a single attack. (*Johnson*, at p. 1471.) The defendant punched the victim in the nose, eyes, and mouth, blackening her eyes and splitting her lip; held her by the throat, bruising her back and neck; and stabbed her in the arm. (*Id.* at p. 1472.) Applying the *Harrison* analysis, *Johnson* concluded that “the crime described by section 273.5 is complete upon the willful and direct application of physical force upon the victim, resulting in a wound or injury. It follows that where multiple applications of physical force result in separate injuries, the perpetrator has completed multiple violations of section 273.5.” (*Johnson*, at p. 1477.) After reviewing the evidence, this court concluded that there was substantial evidence to support three convictions of section 273.5. (*Johnson*, at p. 1477.)

Defendant argues, however, that “[u]nlike a violation of section 273.5, subdivision (a) in *Johnson* or a violation of section 289 in *Harrison*, there is not an easily-defined point in which an assault has been completed.” We disagree.

An assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) In order to be convicted of assault, there must be evidence that the defendant performed “an act likely to result in a touching, however slight, of another in a harmful or offensive manner. [Citation.]” (*People v. Wyatt* (2012) 55 Cal.4th 694, 702.) An assault with a deadly weapon is “an assault upon the person of another with a deadly weapon or instrument other than a firearm” (§ 245, subd. (a)(1).) “Where the assault is committed with a deadly weapon, or with force likely to produce great bodily injury, the aggravated assault is complete upon the attempted use of the force.” (*People v. Yeats* (1977) 66 Cal.App.3d 874, 878.) In contrast to an assault, a battery requires a touching. A battery is “any willful and

unlawful use of force or violence upon the person of another.” (§ 242.) The crime of battery is complete when there is a single offensive or harmful touching. (*People v. Pinholster* (1992) 1 Cal.4th 865, 961, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

In considering the evidence in the present case, we “review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find [the] defendant guilty beyond a reasonable doubt of the . . . crimes he challenges [Citation.]” (*Johnson, supra*, 150 Cal.App.4th at p. 1477.)

Here, though his attack on Lodge was carried out over a short period of time, there was sufficient evidence to support convictions against defendant for two assaults and a battery. The present case is distinguishable from the hypothetical situation in which a defendant is convicted of two batteries after he punches a victim with his right hand and immediately punches him with his left. Defendant’s attack on Lodge occurred in three phases with different instrumentalities used in each phase. The assault was complete when defendant tried to kick Lodge in the head. Lodge then stood up and defendant charged him. The battery was complete when defendant hit Lodge while they were on the ground. The assault with a deadly weapon was complete when defendant tried to stab Lodge with a knife. Since the evidence supported three distinct offenses, we reject defendant’s contention that he was guilty of only one offense.

Defendant, however, relies on *People v. Djekich* (1991) 229 Cal.App.3d 1213, in which the court observed that “[a]bsent express legislative direction to the contrary, where the commission of a crime involves continuous conduct which may range over a substantial length of time and [a] defendant conducts himself in such a fashion with but a single intent and objective, that defendant can be convicted of only a single offense.” (*Id.* at p. 1221.) At issue in *Djekich* was whether a zoning ordinance specifically authorized a separate conviction for each violation. (*Id.* at pp. 1221-1224.) *Djekich* did not consider

whether section 954 barred multiple convictions for separate completed acts. Cases are not authority for propositions that were not considered. (*People v. Partida* (2005) 37 Cal.4th 428, 438, fn. 4 (*Partida*).

Defendant next relies on *People v. Jefferson* (1954) 123 Cal.App.2d 219 and *People v. Lawrence* (1956) 141 Cal.App.2d 630. While there is language in both cases that support defendant's argument, they were decided prior to *Harrison, supra*, 48 Cal.3d 321. Moreover, in both *Jefferson* and *Lawrence*, the defendant was charged with only one offense, and thus neither case considered the issue before us. As previously stated, cases are not authority for propositions that were not considered. (*Partida, supra*, 37 Cal.4th at p.438, fn. 4.)

People v. Thomas (1994) 26 Cal.App.4th 1328 also does not assist defendant. In *Thomas*, the defendant kidnapped the victim from a shopping mall with the intent to rob her, stopped the vehicle and sexually assaulted her, and then drove to her apartment to retrieve her ATM card. (*Id.* at pp. 1331-1332.) *Thomas* held that there was insufficient evidence to support two convictions for kidnapping for robbery, because the kidnapping was not complete until the detention of the victim ceased. (*Id.* at pp. 1334-1335.) In contrast to the kidnapping in *Thomas*, the offenses of assault and battery are not continuous offenses.

Citing *People v. Belton* (2008) 168 Cal.App.4th 432, 436, and *People v. McDaniel* (2008) 159 Cal.App.4th 736, 739-740, defendant argues that “[i]t is usually taken for granted that when a person hits, punches, and kicks a victim[] several times in one attack, there is one battery or one assault.” However, a prosecutor's decision to charge a single offense does not support defendant's conclusion that section 954 does not authorize conviction of multiple offenses under various circumstances.

Nor are we persuaded by defendant's reliance on *People v. Bailey* (1961) 55 Cal.2d 514 in which the court stated: “Whether a series of wrongful acts constitute a single offense or multiple offenses depends upon the facts of each case, and a defendant

may be properly convicted upon separate counts . . . if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan. [Citation.]” (*Id.* at p. 519.) As *In re David D.* (1997) 52 Cal.App.4th 304 noted: “Application of *People v. Bailey* has been limited not only to the crime of theft, but generally to thefts involving a single victim. [Citations.]” (*Id.* at p. 309, fn. omitted.)

In sum, we conclude that substantial evidence supports defendant’s convictions of assault, battery, and assault with a deadly weapon.

B. Section 654

Defendant contends that the trial court’s imposition of sentence as to the assault (count two) and battery (count three) must be stayed pursuant to section 654.

Section 654 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.” (§ 654, subd. (a).) Thus, section 654 prohibits multiple punishment for a single act or indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) “The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations 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. Beamon* (1973) 8 Cal.3d 625, 639.) Whether a defendant entertained multiple criminal objectives is a question of fact, which must be upheld on appeal if supported by substantial evidence. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

People v. Trotter (1992) 7 Cal.App.4th 363 (*Trotter*) is instructive. In *Trotter*, the defendant was fleeing in a taxi when he fired three shots at a police officer who was pursuing him. The first two shots were a minute apart, while the third shot was moments after the second. (*Trotter*, at p. 366.) The defendant argued that the trial court erred in imposing consecutive sentences for the first two assaults, because the assaults were part of a single course of conduct and thus barred by section 654. (*Trotter*, at p. 366.) Relying on *Harrison, supra*, 48 Cal.3d 321, the Attorney General argued that “when a defendant maintains one criminal objective, he may be convicted and punished for each crime of violence against the same victim.” (*Trotter*, at pp. 366-367.) *Trotter* stated: “[W]e see no reason to limit *Harrison’s* reasoning to sex crimes. In *Harrison*, it could not be seriously maintained that each sexual penetration evinced a different type of intent and objective. Yet our Supreme Court held each could be punished separately because their objectives and underlying intents were separate and distinct. [Citation.] ‘No purpose is to be served under section 654 by distinguishing between defendants based solely upon the type *or* sequence of their offenses. . . . It is defendant’s intent to commit a number of separate base criminal acts upon his victim, and not the precise code section under which he is thereafter convicted, which renders section 654 inapplicable.’” (*Trotter*, at p. 367.) In applying *Harrison*, *Trotter* reasoned that “[d]efendant’s conduct became more egregious with each successive shot. . . . [¶] Furthermore, this was not a case where only one volitional act gave rise to multiple offenses. Each shot required a separate trigger pull. All three assaults were volitional and calculated, and were separated by periods of time during which reflection was possible. None was spontaneous or uncontrollable.” (*Trotter*, at p. 368.)

Similarly, here, there was substantial evidence to support the trial court’s implied finding that defendant entertained a separate intent during each of the offenses to commit a violent act on Lodge. As in *Trotter*, though the offenses were committed within a few minutes, the offenses were separated by periods of time during which it was possible for

defendant to reflect on his conduct. Defendant first attempted to kick Lodge's head. After Lodge stood up, defendant did not walk away. Instead, he charged at Lodge and punched him while they were on the ground. Defendant then escalated the violence by removing Lodge's knife and stabbing and cutting him several times. Accordingly, the trial court did not err when it imposed 180-day concurrent sentences for the assault and the battery.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Márquez, J.