

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

TORY J. CORPENING,

Defendant and Appellant.

Case No. S228258

**SUPREME COURT
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The Honorable Francis M. Devaney, Judge

Deputy

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INTRODUCTION

Penal Code section 654 bars multiple punishment for crimes that arise from a single act. Given that the vast majority of crimes do not arise from a single physical act, this Court has interpreted section 654 to prohibit multiple punishment for crimes that emerge from a course of conduct driven by a single intent or objective. Indeed, this Court explained in *Neal v. California* (1960) 55 Cal.2d 11, 19, that whether a course of conduct is divisible into multiple acts, for purposes of section 654 application, *depends* upon the intent or objective of the actor.

Here, Tory Corpening and four cohorts sought to rob the victim of rare coins. They drove a truck and a car to the victim's house where they watched and waited as the victim and his son loaded the coins into a van. Once the coins were loaded, the son left the victim in the van to go lock the house. As the victim waited in the driver's seat of the idling van, one of the codefendants walked up, pointed a gun at the victim, and ordered him out of the van. The victim complied. But as the codefendant started to enter the van, the victim attacked and tried to wrest the gun away from him. The codefendant scared the victim into temporary submission by again pointing the gun at him. But as the codefendant again reentered the van, the victim again lunged for the gun to stop the robbery. The codefendant threw the van into reverse gear. The victim grabbed the steering wheel and clung to it as the codefendant accelerated the van backwards. The victim fell to the ground and was almost run over. The codefendant picked up a fellow cohort about 50 yards from the house, and then drove away from the scene. The other cohorts, including Corpening, fled in the other two cars and reunited with the van at an apartment complex. There, as they quickly unloaded the coins from the van and placed them in one of their cars, police apprehended them.

Corpening pled guilty to several crimes, including robbery and carjacking. On appeal, he urged that multiple punishment for the carjacking and robbery was barred under Penal Code section 654, because those crimes arose from a single act: the forceful taking of the van, which contained the coins. The Court of Appeal disagreed, finding that substantial evidence supported the trial court's conclusion that the crimes were separate. The court observed that the carjacking and robbery arose from a course of conduct motivated by multiple intents and objectives—the intent to steal the coins and the separate intent, close in time, to jack the victim of his van when the victim fought back and resisted the robbery.

For over half a century, the rule has been that whether a course of conduct giving rise to multiple crimes is divisible, allowing for multiple punishment, depends on the actor's intent and objective. Where multiple intents and objectives animate the course of conduct, multiple punishment is permitted. Under this rule, this Court should affirm the judgment because substantial evidence supports the trial court's conclusion that the robbery and carjacking were separate, arising from a course of conduct, motivated by multiple intents and objectives. The trial court properly considered all the facts and circumstances of the crimes and appropriately applied the intent and objective test when it concluded multiple punishment for the robbery and carjacking was permissible.

STATEMENT OF THE CASE

Corpening pled guilty to carjacking (Pen. Code, §215, subd. (a)); robbery (Pen. Code, §211); assault with a deadly weapon (Pen. Code, §245, subd. (a)(1)); receiving stolen property (Pen. Code, §496, subd. (a)); and witness intimidation (Pen. Code, §136.1, subd. (a)(1)). (1 RT 1-5; CT 11-13.)

Because Corpening pled guilty, there was no trial in which the facts of the offenses were presented and developed. Instead, the sentencing court

had to rely upon the probation report to ascertain the facts about what happened. (CT 166-169.) In that report, the probation officer noted that the facts surrounding the robbery and carjacking could be construed as a course of conduct involving separate intents, thus warranting separate punishment. (CT 178.) In a sentencing brief, the prosecutor suggested, without explanation or analysis, that Penal Code section 654 barred punishment for the robbery, separate and apart from the punishment for the carjacking. (CT 48.)

The sentencing court disagreed with the prosecutor that section 654 applied to the robbery, and stated, “I think that is a separate offense with the carjacking.” (5 RT 839.) The court sentenced Corpening to six years, eight months in prison. The sentence consisted of the midterm of five years for the carjacking, with consecutive terms of one year for the robbery, and eight months for the witness intimidation. The court stayed the punishments for the assault with a deadly weapon and receiving stolen property convictions under section 654. (5 RT 839-840; CT 218.)

On appeal, Corpening asserted that the sentencing court erred by imposing a one-year consecutive term for the robbery conviction. He alleged that the robbery and carjacking arose from a single act and were punishable only once under section 654. The Court of Appeal thoroughly analyzed the evidence and concluded that substantial evidence supported the trial court’s implied finding of separate intents and objectives for the robbery and carjacking. Thus, the court rejected the claim. (*People v. Corpening* (October 21, 2014, D064986) [nonpub. opn.])

Corpening petitioned this Court for review and, for the first time, argued that *People v. Jones* (2012) 54 Cal.4th 350, required stay of the punishment for the robbery conviction. This Court granted review, vacated the Court of Appeal’s opinion, and transferred the matter back to the Court of Appeal with instructions to reconsider its decision in light of *Jones*.

(*People v. Corpening* (February 11, 2015, S222900) [order granting review].)

Following additional briefing by the parties on *Jones*, the Court of Appeal again rejected Corpening's contention, holding that the robbery and carjacking occurred during a course of conduct with separate purposes. Thus, the court concluded that punishment for both convictions was permitted and appropriate. (*People v. Corpening* (June 24, 2015, D064986) [nonpub. opn].)

This Court granted Corpening's petition for review.

STATEMENT OF FACTS¹

Walter Schmidt, Sr. was a currency dealer, who specialized in buying and selling rare coins. (CT 166.) He maintained a booth at a swap meet in San Diego where he bought and sold coins. (CT 168, 170.) Tory Corpening and Eduardo Guerra frequently sold things at the same swap meet and occasionally visited Schmidt's booth where they saw his coins and other currency. (CT 168, 170.)

Corpening wanted to help Guerra, who owed a significant amount of money to a drug dealer. (CT 170.) One day, while he and Guerra were with

¹ Corpening pled guilty. The factual basis for his plea amounted, in relevant part, to a statement that, "[he] unlawfully took a motor vehicle in possession of another against his will to permanently deprive him of said vehicle; that [he] unlawfully, by means of force, took personal property of another...." (1 RT 4; CT 13.) The probation report provided greater detail about the robbery and carjacking. (CT 166-169.) Consequently, the trial court relied upon the facts, as developed in the probation report to make its sentencing determination. This is consistent with the trial court's power to hold an evidentiary hearing to ascertain the necessary facts in order to properly exercise its sentencing power. (*People v. Ross* (1988) 201 Cal.App.3d 1232, 1240-1241; see also *People v. Rosenberg* (1963) 212 Cal.App.2d 773, 776-777 [trial court read and considered a probation report following entry of a defendant's guilty plea to supply the information necessary to determine whether section 654 applied].)

Jorge Aguila and Danny Molestina, they started talking about Schmidt's coin collection. Molestina offered to "jack the guy" – that is, to rob Schmidt. (CT 170.)

In preparation for the heist, Corpening and Guerra followed Schmidt home from the swap meet so they could determine where he lived and conduct surveillance. The night before executing the planned robbery, Guerra, Molestina, Aguila, and Celestina Rodriguez met together with Corpening in his garage to review and finalize their plans. (CT 168.) Guerra and Aguila were to park in front of Schmidt's house in Aguila's Pontiac. Corpening, Molestina, and Rodriguez were to park around the corner in Guerra's truck. Molestina was to then get out and hide behind some bushes. (CT 168, 170.) Guerra and Aguila were to report Schmidt's movements to Corpening via cell phone. Once it looked like Schmidt was ready to leave to go to the swap meet, Corpening was to issue the order to Molestina to commence the robbery. (CT 168.) Corpening had a facemask, gloves, and a stun gun. (CT 167, 169.)

In the early morning of July 22, 2012, Schmidt and his son packed their van, which was parked in the front driveway of their home, with the coins and other items they planned to sell at the swap meet. (CT 166.) They loaded the van with coins worth approximately \$70,000. (CT 167.) After loading the van, Schmidt got into the driver's seat and turned on the ignition while his son returned to the house to lock it up. (CT 166.)

Suddenly, Molestina came out of hiding, pointed a gun at Schmidt's face and repeatedly yelled, "Get out of the car or I'll shoot you." Because Schmidt feared for his life, he got out of the car. As Molestina started to climb into the van, Schmidt attempted to wrestle the gun away from him. However, he was unable to disarm Molestina, who again pointed the gun at his face. Schmidt backed away. (CT 167.)

As Molestina tried to get into the van a second time, Schmidt tried again to stop the robbery, and lunged for the gun. However, this time, Molestina quickly put the van into reverse gear. As the van rolled backwards, Schmidt grabbed the steering wheel to avoid being run over. Molestina dragged him about 18 feet down the driveway and into the street until Schmidt lost his grip and crashed to the pavement, striking his head and body, and narrowly avoided being run over. (CT 167.)

Molestina drove about 50 yards away from the Schmidt home where he stopped momentarily and picked up Guerra. Molestina then drove off in the van. Aguila followed in his Pontiac and Corpening followed in the truck. (CT 167, 170.) The group met at an apartment complex. (CT 170.) Meanwhile, Schmidt called the police. (CT 167.)

Police located the robbers at the apartment complex as they were unloading the coins from the van and placing them in the Pontiac. They arrested Molestina and Aguila. (CT 167.) They arrested Guerra and appellant, who had fled when police arrived, some days later. (CT 168-169.)

ARGUMENT

WHETHER MULTIPLE CRIMES ARISE FROM A DIVISIBLE COURSE OF CONDUCT OR FROM A SINGLE ACT DEPENDS UPON THE FACT INTENSIVE INQUIRY INTO THE ACTOR'S INTENT AND OBJECTIVES

Penal Code section 654 bars multiple punishment for multiple crimes that emerge from a single act or from a course of conduct motivated by a single intent or objective and is supposed to ensure punishment commensurate with culpability. While there are some instances in which it is quite easy to discern multiple crimes emerging from a single physical act, the vast majority of crimes arise from a course of conduct involving multiple acts. In determining whether multiple punishment is barred or

permissible for crimes arising from a course of conduct, the rule for over half a century has been that the divisibility of the course of conduct is dependent upon the actor's intent and objective. In that half century, this Court has shaped the contours of, provided limitations to, and overall reaffirmed the vitality of, the intent and objective test.

A defendant's intent and objective is an intensely factual question. Sentencing courts are tasked with resolving this factual question and are granted broad latitude in answering the question as they exercise their inherent discretionary power to fashion a suitable punishment commensurate with the defendant's culpability.

The appellate court reviews the sentencing court's section 654 sentencing ruling for substantial evidence. That is, if the sentencing court imposes multiple punishment because it concludes multiple intents and objectives motivated the defendant's course of conduct, and that factual conclusion is supported by substantial evidence, then the sentence is affirmed. If substantial evidence does not support the trial court's factual conclusion, the sentence is reversed.

Often, sentencing courts are not explicit upon the record as to why or how they found multiple intents or objectives. In such cases, appellate courts review the record to determine whether substantial evidence supported the sentencing courts' implicit factual conclusion that multiple intents and objectives warranted multiple punishment.

In determining the facts for section 654 purposes, courts should consider the nature of the acts giving rise to the crimes, the facts and circumstances of the crimes, the intent elements for the crimes, whether a defendant had an opportunity for reflection before committing additional criminal acts, and any other factors that might provide insight about a defendant's intent and objective and his or her criminal culpability.

Here, under the facts and circumstances of the case, the trial court properly concluded that the robbery and carjacking were committed with independent intents and purposes. Because substantial evidence supports the trial court's conclusion, this Court should affirm the judgment.

A. Historical Developments in Penal Code Section 654 Jurisprudence

Penal Code 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." As this Court has repeatedly recognized, the purpose of this section is to "ensure that the defendant's punishment will be commensurate with his culpability." (*People v. Sanders* (2012) 55 Cal.4th 731, 742; *People v. Jones* (2012) 54 Cal.4th 350, 367.) Deceptively simple in its construction, section 654's bar against multiple punishment has nonetheless bedeviled California courts for over a century. (*Jones, supra*, 54 Cal.4th at p. 361 (conc. opn. of Werdegar, J.)) One of the chief challenges section 654 presents in its application is what constitutes "an act." Additionally, how "an act" is defined (and thus, whether multiple punishment is permitted) can create tension between application of section 654 and its purpose to ensure punishment commensurate with culpability.

Sometimes, it is relatively simple to see that multiple crimes emerge from a single act. For example, in *Jones*, the defendant was a convicted felon who carried an unregistered, concealed, and loaded gun. By so doing, he violated three different laws: 1) being a felon in possession of a firearm; 2) carrying a concealed and unregistered firearm; 3) and carrying an unregistered loaded firearm in public. (*People v. Jones, supra*, 54 Cal.4th at p. 352.) This Court held that the three crimes emerged from a single act: the defendant unlawfully carried a firearm. This single act, though violating

multiple statutes, could only be punished once. (*Id.* at p. 358.) The Court reached this conclusion by relying upon the plain language in section 654: the crimes involved “a single act or omission that can be punished but once.” (*Id.* at pp. 359-360.)

Similarly, in *People v. Mesa* (2012) 54 Cal.4th 191, 197-198, this Court explained that section 654 barred multiple punishment for street terrorism (Pen. Code, §186.22, subd. (a)) and the underlying felony for that crime. As defined by the Legislature, street terrorism requires active participation in a criminal street gang together with the commission of felonious conduct. (Pen. Code, §186.22, subd. (a); *People v. Lamas* (2007) 42 Cal.4th 516, 523.) In other words, felonious conduct is embedded within the crime of street terrorism. In *Mesa*, on two separate dates, the defendant gang member, who was already a convicted felon, shot two different victims. For each shooting, he was convicted of assault with a firearm and possession of a firearm by a felon; he was also convicted of street terrorism, the substantive gang crime. (*Mesa*, at pp. 193-195.) The assault and firearm possession were embedded felonies that enabled conviction for street terrorism. (*Id.* at p. 197.) This Court concluded that the defendant could not be punished for both the underlying crimes (assault with a firearm or possession of a firearm) *and* street terrorism because the street terrorism was based on the same underlying act as either the assault or the gun possession. Because there was a single criminal act (either assault or firearm possession), there could not be multiple punishment for the street terrorism grounded upon that single act.² (*Id.* at p. 200.)

² Although the decision in *Mesa* rested upon the conclusion that the street terrorism crime was based upon the same “act” as its embedded felony, another analytical approach would have been to simply conclude that the embedded felony amounts to a lesser included offense, barring conviction of both. (See *People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

(continued...)

Jones and *Mesa* represent recent cases in which the literal language of section 654—barring multiple punishment for “an act or omission punishable in different ways by different provisions of law”—was determinative. But section 654’s reach is not “confined to its literal language, that is where multiple convictions are based on what is truly a single act or omission.” (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) Section 654 also applies where multiple crimes arise from courses of conduct, involving multiple acts.

In 1960, this Court recognized that few crimes arise from a single physical act; instead, crimes usually arise from a course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In *Neal*, the defendant threw gasoline into the victims’ bedroom and ignited it, causing the two victims to suffer severe burns. The defendant was convicted of two counts of attempted murder and one count of arson. (*Id.* at pp. 15, 18.) Because multiple punishment for different offenses arising from the same act is prohibited under section 654, the question in *Neal* was whether the arson and attempted murders constituted separate acts under that statute, or whether those crimes arose from a single act. (*Id.* at pp. 18-19.)

Noting that most crimes involve a course of conduct rather than a single act, the Court explained that “[w]hether 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.” (*Id.* at p. 19.) If a course of conduct, leading to multiple crimes, is animated by a single intent or objective, then multiple punishment is prohibited. (*Ibid.*) By

(...continued)

Such an approach avoids the potential confusion when one considers that the underlying felonious conduct in many street terrorism contexts are not single-act felonies (like possession of a firearm) but felonies that involve several acts (such as assaults and drug sales), or a course of conduct.

contrast, if the course of conduct is animated by separate or independent intents or objectives, multiple punishment for the various resulting crimes is permitted. (*Id.* at pp. 19-20; see also *People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) Thus, under *Neal*, the question of whether crimes arise from a single act, for which multiple punishment is barred, or a divisible transaction allowing multiple punishment, hinges upon the intent and objective of the actor.

Applying the intent and objective test, this Court concluded in *Neal* that the defendant could not be punished for both arson and the attempted murders. The Court explained that by throwing and igniting gasoline in the victims' bedroom, the defendant engaged in a course of conduct driven by a single intent: to kill the victims. Because there was only a single intent animating this course of conduct, the resultant crimes of arson and attempted murder could only be punished once. Arson was merely the instrumentality by which the defendant hoped to achieve his murderous intent and objective. He could not be punished for both arson *and* the attempted murders.³ (*Neal, supra*, 55 Cal.2d at p. 20.)

In the years since *Neal*, this Court has shaped the contours of the intent and objective test. In theft cases, for example, multiple punishment cannot be imposed for the taking of multiple different objects on a single occasion. In *People v. Bauer* (1969) 1 Cal.3d 368, 372, for instance, the defendant and an accomplice entered a home, tied up its occupants, took numerous items of personal property over the course of two hours, and, after loading the property into one of the victim's cars, drove off in the car.

³ This Court also held that consecutive sentences for the two attempted murder convictions were appropriate because those crimes involved separate victims. (*Neal, supra*, 55 Cal.2d at pp. 20-21.) Unless Schmidt's son is also considered to have been a victim, the so-called multiple victim exception to section 654 is not at issue here.

The defendant was convicted of, and punished for both robbery and car theft. On appeal, he challenged the dual punishment for those crimes. (*Id.* at p. 375.) In explaining why multiple punishment was barred, this Court reiterated that double punishment is barred where a course of conduct violating more than one statute comprises an indivisible transaction. The divisibility of the transaction “depends upon the intent and objective of the actor.” (*Id.* at p. 376.) Applying this principle the Court explained that “the taking of several items during the course of a robbery may not be used to furnish the basis for separate sentences.... [W]here a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible.” (*Id.* at pp. 376-377, citing *In re Ward* (1966) 64 Cal.2d 672, and *People v. Quinn* (1964) 61 Cal.2d 551.) It is the intent and objective of the actor that is determinative. In a typical robbery, the robber harbors one intent: to steal as much as possible. Thus, in a typical robbery in which multiple objects are stolen, only one punishment is permitted.⁴

While the stealing of multiple objects during the course of a robbery and theft cannot give rise to multiple punishment, a string of burglaries on one night in the same building can be. (*People v. James* (1977) 19 Cal. 3d 99, 119.) In *James*, the defendant broke into three separate offices in the same building. Relying on *Bauer*, he argued that he could not be punished for more than one. This Court disagreed and held that the three separate burglaries were independent and could each be punished. (*Ibid.*) *James*

⁴ Viewed another way, the holding in *Bauer* is nothing more than an extension of the unremarkable rule that theft of various items in a continuing transaction is “but one offense and the loot may not be splintered into separate counts of theft for purposes of multiple convictions.” (*People v. Rush* (1993) 16 Cal.App.4th 20, 25.)

suggests that if there is a meaningful way to divide crimes, even if they are committed with one main objective, then multiple punishment is permitted. In *James*, the burglar appeared to have the same singular objective that thieves generally have: steal as much as possible. But because his course of conduct could be reasonably broken into multiple burglarious entries of different locked offices, multiple punishment was appropriate. This illustrates a temporal limitation to the single intent and objective rule, or alternatively, a recognition of the different property rights at stake.

An additional limitation to the intent and objective rule occurs when a defendant engages in violence over and beyond what was originally intended. For example, in *People v. Massie* (1967) 66 Cal.2d 899, 908, the defendant held the victim at gunpoint and demanded his wallet. The victim first objected. However, after the defendant struck him with the gun, the victim surrendered his wallet. Because the victim was looking at him, the defendant demanded the victim to stop looking at him and fired a shot, which grazed the victim's temple. The defendant was convicted of robbery and attempted murder. On appeal he urged that he could not be punished for both offenses because the attempted robbery constituted a lesser included offense of the attempted murder. This Court disagreed, and explained that "[t]he attempted murder occurred as a separate and distinct act after the completion of the robbery; [defendant] contemplated an objective other than robbery." (*Ibid.*) Therefore, section 654 did not bar multiple punishment.

The conclusion in *Massie* reveals that where a defendant commences a crime with one intent or objective in mind, but then during the course of criminal conduct forms a separate intent to commit an additional crime, multiple punishment is warranted. It also suggests that gratuitous criminal acts of violence that are not necessary to the commission of the originally intended crime can be separately punished. (See also *People v. Nguyen*

(1988) 204 Cal.App.3d 181, 190-193 [observing that acts of violence whether gratuitous or to facilitate escape are not necessarily incidental to a robbery for section 654 purposes].) Thus, a defendant cannot avoid punishment commensurate with culpability by claiming that additional acts of violence were necessary to complete the originally intended crime.

Indeed, this Court has cautioned against “a ‘broad and amorphous’ view of the single ‘intent’ or ‘objective’ needed to trigger” section 654 application. (*People v. Harrison, supra*, 48 Cal.3d at pp. 335-336.) If the intent or objective is too broadly viewed, there is danger section 654 “would impermissibly ‘reward the defendant who has the greater criminal ambition with a lesser punishment.’” (*Ibid.*) In *Harrison*, the defendant sexually penetrated the struggling and resistant victim three times during an attack that lasted seven to ten minutes. (*Id.* at p. 325.) The defendant argued that section 654 barred multiple punishment for the three sex acts because they amounted to an indivisible transaction in furtherance of a “single intent and objective of obtaining sexual gratification.” (*Id.* at p. 335.) This Court disagreed, cautioning that broad and amorphous views of intent are not the standard for sex crimes and explaining that “there is no ‘universal construction’ directing section 654’s application in every instance. (*Id.* at p. 335-336.)

The Court also rejected the defendant’s argument that he would have only engaged in one sex act if the victim had not defended herself and resisted his attack. (*Harrison, supra*, 48 Cal.3d at p. 338.) The Court noted that each of the sex acts was “volitional, criminal, and occasioned by separate acts of force.” (*Ibid.*) The Court further observed that the defendant should “not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior.” (*Ibid.*)