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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH HERNANDEZ ADAME,

Defendant and Appellant.

E039298

(Super.Ct.No. RIF113660)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Russell F. Schooling, Judge. (Retired judge of the Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed as modified.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia,

Supervising Deputy Attorney General, Stephanie H. Chow, Deputy Attorney General, for Plaintiff and Respondent.

On September 2, 2005, a jury found defendant and appellant Joseph Hernandez Adame guilty of attempted robbery (Pen. Code, §§ 664, 211)<sup>1</sup> with a deadly weapon (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)). The jury found that during the commission of the attempted robbery, defendant inflicted great bodily injury upon a person. (§§ 12022.7, subd. (a), 1192.7, subd (c)(8).) The jury also found defendant guilty of assault with a deadly weapon. (§ 245, subd. (a)(1).) The jury found that during the commission of the assault with a deadly weapon, defendant inflicted great bodily injury upon a person. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).) On the same day, defendant admitted and the trial court found true his four prison priors. On October 14, 2005, the trial court sentenced defendant to 20 years 8 months in state prison.

On appeal, defendant contends that: (1) one of defendant's convictions for attempted robbery and assault with a deadly weapon must be stayed under section 654; (2) an enhancement under section 667.5 must be stricken because the court used the same prior conviction to impose an enhancement under section 667; and (3) his sentence to the upper term violated *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*). The People concede, and we agree, that one of defendant's convictions must be stayed under section 654 and defendant's enhancement under section

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

667.5 must be stricken. Defendant's sentence, however, does not violate *Blakely*.

Therefore, defendant's sentence is reversed in part, and affirmed in part.

## I. FACTUAL BACKGROUND

On November 28, 2003, Dick Hwang (the victim) was working in his daughter's store, Rubidoux Discount Outlet (the store). The victim's job was to stop people from shoplifting. The victim noticed a Hispanic man, later identified as defendant, picking up some merchandise. The victim went to a vending machine that was inside the store and purchased a soda. As he turned around, he saw defendant walking out of the store with about three sweatshirts without having paid for them. The victim grabbed at one of the sweatshirts, but defendant suddenly stabbed the victim in the left side of his neck. The victim did not see what he had been stabbed with because it all happened in the "blink of an eye." The victim, however, was aware that he was bleeding and in pain.

Defendant ran off with maybe two of the sweatshirts, and the victim told store employees to call the police and an ambulance. The victim was taken to the hospital and received approximately five or six stitches. The victim only saw defendant from the back, but noticed that he had several tattoos on his face, including one on the back of his neck, and that he was wearing dark clothing.

About the same time, Robert Gomez was tiling a floor at a home near the store. Gomez took a break and walked over to a fast food restaurant nearby. As he walked to the restaurant, he saw defendant fumbling around a dumpster in an alley. As Gomez left the restaurant with his order, he saw defendant in the parking lot of the restaurant, and noted that defendant was putting on his jacket and fumbling with his sleeve. Gomez then

saw defendant walk toward the store, and heard police sirens coming about three to five minutes later. The next day, Gomez identified defendant from a photographic lineup.

At 5:30 p.m. on November 28, Deputy Chris Barajas approached a car that was blocking a lane at an intersection about one mile away from the store. The driver, Raymond Chavez, got out of the car and began to vomit. Defendant, who was sitting in the front passenger seat, opened the car door. Deputy Barajas asked defendant to wait in the car, but defendant stumbled out of the car and started walking toward the deputy. As defendant approached the deputy, he stated, “What the [f—k] do you want?” Deputy Barajas told defendant twice to stay where he was, but defendant kept coming toward the deputy. When defendant was within arm’s reach, Deputy Barajas reached out and pushed defendant in the chest; defendant stumbled back and fell against the side of the car. As defendant fell, Deputy Barajas heard the sound of metal hitting the asphalt. The deputy noticed a thin, 10-inch long knife on the ground. In the car, Deputy Barajas saw an 18-pack of beer with the top ripped open and cans missing. Deputy Barajas arrested defendant and recovered the knife.

## II. ANALYSIS

### A. *One of Defendant’s Convictions Must Be Stayed Under Section 654*

Defendant contends that section 654 prohibits punishment for both his attempted robbery and assault with a deadly weapon convictions because the two offenses were committed with the same intent. The People agree with defendant.

Section 654, subdivision (a) provides, in pertinent 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.” Section 654 precludes multiple punishments not only for a single act, but for an indivisible course of conduct. (*People v. Hester* (2000) 22 Cal.4th 290, 294; see also *People v. Centers* (1999) 73 Cal.App.4th 84, 98; *People v. Akins* (1997) 56 Cal.App.4th 331, 338-339; *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the actor. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers, supra*, 73 Cal.App.4th at p. 98.) The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. (*People v. Beamon* (1973) 8 Cal.3d 625, 636-639.)

In this case, the trial court sentenced defendant to the upper term for count 2, assault with a deadly weapon, and sentenced him to one-third the midterm for count 1, attempted robbery. However, there was no evidence to show that defendant harbored multiple criminal intents, independent of and not merely incidental to each other, when he committed count 1 (attempted robbery) and count 2 (assault with a deadly weapon).

In fact, the evidence showed the contrary -- that defendant harbored the same criminal intent when he committed both counts. Here, defendant's assault in stabbing the victim in the neck was the act of force which elevated his attempted theft of the sweatshirts to a robbery. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 185 [robbery is a crime which is generally committed in three phases: assault, seizure of property, and escape to a location of temporary safety].) Defendant's apparent objective was to steal the sweatshirts; stabbing the victim was defendant's means to achieve the robbery.

Accordingly, the judgment is modified to reflect the imposition of the sentence on count 2 (assault with a deadly weapon), which provides the longest term of imprisonment, and a stay of the sentence as to count 1 (attempted robbery) and its accompanying enhancements. (§ 654; *People v. Smith* (1985) 163 Cal.App.3d 908, 914.)

*B. The Imposition of a Section 667.5 Enhancement Must Be Stricken*

Defendant contends that the one-year term enhancement imposed under section 667.5, subdivision (b), must be stricken because the trial court used the same prior offense to impose a five-year term enhancement under section 667, subdivision (a). The People concede, and we agree, that the one-year term enhancement under section 667.5 must be stricken because it is based on the same prior conviction that forms the basis for the prior serious conviction enhancement, and only the greater of the two enhancements may be imposed. (§ 654; *People v. Jones* (1993) 5 Cal.4th 1142, 1150.)

*C. Defendant's Sentence Did Not Violate Blakely*

Defendant claims that under *Blakely, supra*, 542 U.S. 296, the trial court's imposition of the upper term sentence of eight years on count 2 (assault with a deadly

weapon) violated his constitutional rights to a jury trial. The California Supreme Court addressed and rejected the precise issue defendant raises in this appeal. (*People v. Black* (2005) 35 Cal.4th 1238.) Under the doctrine of stare decisis, we likewise must reject defendant's claim. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

### III. DISPOSITION

The judgment is modified under section 654 to stay the sentence on count 1 (attempted robbery), one-third the midterm of four years, or one year four months. The judgment is also modified to strike the one-year enhancement imposed under section 667.5, subdivision (b). In all other respects, the judgment is affirmed. The trial court is directed to amend the abstract of judgment and its minute order so as to reflect these modifications and to forward a certified copy of the amended abstract of judgment to the Director of the Department of Corrections.

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/s/ King  
J.

We concur:

/s/ McKinster  
Acting P.J.

/s/ Miller  
J.