

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGELO ATENCIO, JR.,

Defendant and Appellant.

C063710

(Super. Ct. No. CM030868)

APPEAL from an order of the Superior Court of Butte County, Thomas W. Kelly, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

This case deals with the vexing issue of when one physical act can constitute multiple criminal "acts" for purposes of Penal Code¹ section 654.

A jury found defendant Angelo Atencio, Jr., guilty of two felonies -- grand theft of a firearm and firearm possession by a felon. The trial court found defendant had a prior serious

¹ Further undesignated section references are to the Penal Code.

felony conviction and a prior strike and had served a prior prison sentence. The court sentenced defendant to an aggregate prison term of 12 years 4 months.

On appeal, defendant contends his sentence for the unlawful firearm possession conviction must be stayed pursuant to section 654 because his two offenses were incidental to only "one criminal intent and objective, namely to possess the [firearm]." In the alternative, he argues the trial court abused its discretion by imposing consecutive sentences after finding that his two offenses were predominantly independent of one another. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 2009, Vanessa Trew went to the house of her mother, Debra Trew, to clean for money.² Defendant joined Vanessa at the house. After looking around, defendant brought a lockbox and small caliber handgun to Vanessa, which she told him to put back.

Vanessa called Jason Duensing and asked him to pick her and defendant up from Debra's house. Around noon, Vanessa and defendant loaded three or four garbage bags, a box, a duffel bag, and a lamp into the back of Duensing's truck. Vanessa asked Duensing to take defendant to her apartment and to return for her in about an hour. After unloading all the items at Vanessa's apartment, except the duffel bag, which defendant kept

² We refer to Vanessa Trew and Debra Trew by their first names to avoid confusion.

in his possession, defendant asked Duensing to drive him to Thermalito. Duensing dropped defendant off at an intersection and returned to Debra's house to pick up Vanessa. Later that afternoon, Debra's husband, John Kuhn, found five guns missing from the unlocked gun safe, including a .45-caliber semiautomatic pistol.

The next day, defendant called Shannon McCraney "wanting to sell [her] some jewelry or something." Before noon, defendant stopped by McCraney's home carrying a plastic bag. McCraney saw jewelry and a handgun in the bag and asked defendant why he had a gun in her home. Defendant responded that the gun was not loaded. Approximately 10 minutes later, "cops surround[ed] [the] house," and McCraney left the home. Defendant hid behind the couch and remained in the home for approximately four and one-half hours before being taken into custody.

On May 8, 2009, the Butte County Sheriff's Department searched McCraney's home and found a loaded semiautomatic .45-caliber AMT firearm among other items in the stove's broiler pan. Kuhn identified the gun as his, and the serial number confirmed his ownership.

Defendant was charged with grand theft of a firearm, receiving stolen property, and firearm possession by a felon. All charges pertained to the same firearm, Kuhn's .45-caliber gun.

The trial court instructed the jury that defendant could not be found guilty on both the grand theft and receipt of the stolen property charges. The court explained that the unlawful

firearm possession charge was "independent of that instruction" because "[i]t's legally possible to steal something or receive it, and then be a felon in possession of it."

The jury found defendant guilty of grand theft (finding that defendant acted with the "intent to permanently deprive a person of property") and firearm possession by a felon. The trial court found defendant had served a prior prison term, had a prior serious felony conviction, and had a prior strike. After finding the "two crimes and their objectives were predominantly independent of each other," the court imposed consecutive sentences and sentenced defendant to the upper term of six years for the grand theft of a firearm and one-third of the middle term (16 months) for the unlawful firearm possession. In accordance with the three strikes law, the court further imposed a five-year enhancement for defendant's prior serious felony and a stayed one-year enhancement for his prior prison term. Defendant filed a timely notice of appeal.

DISCUSSION

I

Standard Of Review

Whether section 654 applies to the facts in a given case is one of fact for the trial court to decide, and such findings will be upheld on appeal if there is any substantial evidence to support them. (*People v. Akins* (1997) 56 Cal.App.4th 331, 339, citing *People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.) We review the trial court's findings "in a light most favorable to the respondent and presume in support of the [sentencing] order

the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085, quoting *People v. Holly* (1976) 62 Cal.App.3d 797, 803.)

II

Section 654: The Statute And The Judicial Interpretation

Section 654, subdivision (a), provides in relevant part that "[a]n 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." "Notwithstanding the apparent simplicity of [section 654's] language," the statute has proven difficult to apply. (*In re Adams* (1975) 14 Cal.3d 629, 633.) At its simplest, "section 654 proscribes double punishment for multiple violations of the Penal Code based on the 'same act or omission.'" (*People v. Siko* (1988) 45 Cal.3d 820, 822.) "The 'singleness of the act,' however, is [not] the sole test of the applicability of section 654." (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) Our Supreme Court's decisions "have engrafted onto section 654 a judicial gloss interpreting 'same act or omission' to include multiple violations committed in an 'indivisible' or 'single transaction.'" (*Siko*, at p. 822.)

This judicial gloss was introduced in *Neal v. State of California* (1960) 55 Cal.2d 11. In *Neal*, the defendant was convicted on two counts of attempted murder and one count of

arson after he threw gasoline into his victims' bedroom and ignited it. (*Id.* at p. 15.) Our Supreme Court established the following rule: "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." (*Id.* at p. 19.) Applying this rule, the court found "the arson was the means of perpetrating the crime of attempted murder" and that "the arson was merely incidental to the primary objective of killing" the victims. (*Id.* at p. 20.) Therefore, the defendant could be punished only for attempted murder, the more serious crime. (*Id.* at p. 19.)

Conversely, if a defendant "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, supra*, 8 Cal.3d at p. 639.) In other words, "what may appear on the surface to be a single act may embody separately punishable violations." (*Id.* at p. 638.)

The *Neal* formulation was criticized from the beginning. (See *Neal v. State of California, supra*, 55 Cal.2d at pp. 25-26. (dis. opn. of Schauer, J.).) In a subsequent attack on *Neal*, our Supreme Court explained that the *Neal* test defeats the

purpose of section 654, which is to provide punishment commensurate with criminal liability, in some circumstances. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) The *Latimer* court indicated that, if faced with the issue for the first time, it might "adopt a rule that is truer to the language of section 654 and its purpose," but declined to overrule *Neal* on stare decisis grounds due to the long-standing judicial and legislative reliance on the rule. (*Id.* at pp. 1212-1216.) The court endorsed subsequent limitations on the *Neal* rule's application as more consistent with the purpose of section 654. (*Latimer*, at pp. 1211-1212.) For example, multiple punishment will not be prohibited if, under the particular circumstances of the case, it appears the defendant acted pursuant to similar but consecutive objectives, if the defendant harbored separate, although simultaneous, criminal objectives, or if the defendant committed crimes of violence against multiple victims. (*Ibid.*)

"Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon*, *supra*, 8 Cal.3d at p. 636.) Therefore, whether unlawful firearm possession constitutes a divisible transaction from another offense depends on the facts and evidence of each individual case. (*People v. Brown* (1958) 49 Cal.2d 577, 591.)

III

Both Sentences Were Appropriate Because

Defendant Harbored Two Criminal Intentions And Objectives

Defendant claims his two offenses were incidental to one objective and "[t]o justify multiple punishment, the evidence must show 'a possession distinctly antecedent and separate from the primary offense.'" In applying the *Neal* analysis to the present facts, one could conclude that the theft was incidental to defendant's objective to possess the gun, in the same sense that "the arson was merely incidental to the primary objective of killing" the victims in *Neal*. (*Neal v. State of California, supra*, 55 Cal.2d at p. 20.) However, to do so would result in what our Supreme Court has expressly cautioned against -- "the gloss [would defeat] its own purpose." (*People v. Latimer, supra*, 5 Cal.4th at pp. 1211-1212.) In keeping with the intent of section 654 and established case law, as explained further below, we reject such an application of the rule here.

Relying on *People v. Bradford* (1976) 17 Cal.3d 8³ and *People v. Venegas* (1970) 10 Cal.App.3d 814, defendant contends that because his possession of the firearm was "physically simultaneous" to the theft of the same firearm, "the possession was incidental only to one objective.'" Defendant's reliance on these cases is misplaced for two reasons.

³ Defendant incorrectly cites this case as *People v. Bradford* (1990) 223 Cal.3d 8. No such case exists.

First, *Bradford* and *Venegas* set forth the "principle that if the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense, section 654 will bar a separate punishment for the possession of the weapon by an ex-felon." (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412.) In contrast to the defendants in *Venegas* and *Bradford*, here, defendant had possession of the gun for greater than the "instant of committing" the theft. The theft was incidental only to his *acquisition* of the gun. Where his dominion and control over the gun extends beyond the mere "instant of committing" another offense, a trial court may reasonably find that the firearm possession was separate and distinct from the fortuitous possession of the gun at the moment of the theft. (See *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1566-1567.)

Second, defendant's argument fails because "[i]t is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Therefore, the mere fact that the theft was "physically simultaneous" to the possession of the firearm does not prohibit multiple punishment.

Defendant further argues that he "harbored one criminal intent and objective, namely to possess the [firearm]." A broad and amorphous intent and objective, such as a desire for sexual gratification or the desire to accumulate wealth, cannot preclude multiple punishment for separate offenses. (*People v.*

Perez (1979) 23 Cal.3d 545, 552-554.) "To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability." (*Id.* at p. 552.) Rather, we must "give heed to an accused's objectives when they can be ascertained." (*People v. Beamon, supra*, 8 Cal.3d at p. 638.) We must focus on the factors that made the conduct criminal to determine whether defendant had multiple *criminal* intents or objectives. (*In re Hayes* (1969) 70 Cal.2d 604, 607.) If defendant had more than one criminal intent or objective, he would fall outside the *Neal* rule.

Although both parties failed to raise *People v. Taylor* (1969) 2 Cal.App.3d 979, we believe the case is instructive here. In *Taylor*, the defendant was convicted of receiving stolen property (a gun) and firearm possession by a felon (the same gun).⁴ (*Id.* at pp. 982-984.) The defendant argued he could "not be convicted and sentenced for two crimes covering the same act, i.e., possession of a particular gun." (*Id.* at pp. 984-985.) The court disagreed and explained: "The neutral noncriminal common element of Taylor's crimes was *possession* of the [firearm]. On the other hand the acts made punishable by

⁴ The receipt of stolen property conviction is analogous to defendant's grand theft conviction. Defendant was charged with both receipt of stolen property and grand theft, but could only be convicted of one or the other. (*People v. Recio* (2007) 156 Cal.App.4th 719, 722.)

the respective Penal Code sections were *possession of* (receiving) *stolen property*, and *possession by* [a convicted felon] *of a concealable gun.*" (*Taylor*, at p. 985.) The court focused on the defendant's culpability and pointed out: "The public insult done by Taylor, an ex-convict, in possessing the loaded revolver was compounded by the fact that the weapon was stolen, and known by him to be stolen. As to each offense Taylor had a separate and distinguishable mens rea. It does not seem reasonable that the state should be required to indulge in the fiction that but one crime had been committed." (*Id.* at pp. 985-986, italics omitted.)

Taylor was subsequently applied in *People v. Garfield* (1979) 92 Cal.App.3d 475 and *People v. Rowland* (1971) 21 Cal.App.3d 371. In *Garfield*, the court found independent the defendant's offenses of first-degree burglary and firearm possession by a narcotics addict (the firearm being common to both offenses). (*Garfield*, at pp. 477-478.) The court applied *Taylor's* reasoning and found that Garfield's personal possession of the stolen gun after the burglary "supported the conclusion that a separate offense had occurred." (*Garfield*, at p. 478.) Similarly, in *Rowland*, the court found independent the defendant's offenses of receiving stolen property and acquiring credit cards with intent to use, sell or transfer (the credit cards being common to both offenses). (*Rowland*, at pp. 372,

375.) Citing *Taylor*, the court explained that "defendant had a separate and distinguishable *mens rea* -- to receive stolen property, and to keep credit cards for use in violation of a different law." (*Rowland*, at p. 375.) The court upheld the two sentences because the defendant's acts involved "two separate hazards, one, the possession of stolen property, and the other, acquiring a credit card for illegal use." (*Id.* at p. 376.)

The reasoning in *Taylor* was based on our Supreme Court's decision in *In re Hayes*, *supra*, 70 Cal.2d 604. Hayes was convicted of and punished for both driving with a suspended license and driving while under the influence of alcohol. (*In re Hayes*, at p 605.) In arguing for the application of section 654, Hayes focused upon the act of driving as the basis of his commission of both offenses. (*In re Hayes*, at pp. 606-610.) However, the Supreme Court noted that section 654 is not concerned with neutral, noncriminal acts that may be common to multiple crimes; rather, "[t]he proper approach, therefore, is to isolate the various *criminal* acts involved, and then to examine only those acts for identity." (*In re Hayes*, at p. 607.) Simultaneity must not be confused with identity. (*Ibid.*) Hayes's criminal objective in driving with a suspended license was distinct from his criminal objective in driving while intoxicated, and he could be punished for both offenses. (*Id.* at pp. 607-608; see also *In re Michael B.* (1980) 28 Cal.3d 548, 556.)

The same reasoning applies to defendant's crimes here. In the abstract, possession of a gun is not a crime. However, the purpose of the law making it a crime for convicted felons to possess firearms "is to protect public welfare by precluding the possession of guns by those who are more likely to use them for improper purposes." (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037.) Defendant's intent to possess a firearm despite his past felony conviction was itself a criminal objective independent from his criminal intent to "permanently deprive a person of property." Similar to the defendants in *Taylor* and *Rowland*, "[a]s to each offense [defendant] had a separate and distinguishable *mens rea*" -- to steal another's property and to keep the gun in violation of a different law. (*People v. Taylor, supra*, 2 Cal.App.3d at pp. 985-986; *People v. Rowland, supra*, 21 Cal.App.3d at p. 375.) Additionally, defendant's acts mirror the independent acts in *Garfield* because defendant maintained personal possession of the gun after the theft, supporting "the conclusion that a separate offense had occurred." (*People v. Garfield, supra*, 92 Cal.App.3d at p. 478.) Therefore, substantial evidence supports the court's imposition of two separate sentences.

Our decision furthers the intent of section 654 to punish commensurate with culpability. (*People v. Latimer, supra*, 5 Cal.4th at p. 1211.) Defendant's acts involved two separate hazards, one, the theft of personal property, and the other,

illegal possession of a gun. (*People v. Rowland, supra*, 21 Cal.App.3d at p. 376.) Because defendant's conduct involved two distinct and separate criminal acts that made his conduct more culpable than if only one circumstance were present, section 654 does not prohibit punishing him for both offenses.

IV

The Trial Court Did Not Abuse Its Discretion

By Imposing Consecutive Sentences

Defendant contends the trial court erred "when it imposed a 16-month consecutive sentence for the felon in possession of a firearm conviction" because "it found that the two offenses were predominantly independent of one another." Defendant relies on essentially the same argument considered above. The People contend defendant forfeited this argument when he failed to raise it in the trial court. We need not address the question of forfeiture because defendant's claim fails on the merits.

As we have already explained, defendant's grand theft and unlawful firearm possession offenses constituted separate criminal acts with different criminal intents. Thus, the trial court did not abuse its discretion in concluding those crimes were predominantly independent of each other. Because defendant's challenge to the consecutive sentences is limited to the claim that the court erred in finding the "offenses were predominantly independent of one another," defendant's claim fails.

DISPOSITION

The judgment is affirmed.

ROBIE _____, J.

We concur:

NICHOLSON _____, Acting P. J.

BUTZ _____, J.