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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. OSVALDO TINAJERO, Defendant and Appellant.	2d Crim. No. B182757 (Super. Ct. No. BA271590/PA046893) (Los Angeles County)

This appeal involves two separate cases. In case number BA271590, appellant appeals from the judgment entered after a jury had convicted him on one count of second degree attempted robbery (Pen. Code, §§ 664, 211),[1] two counts of second degree robbery (§ 211), and one count of possession of a firearm by a felon. (§ 12021, subd. (a)(1).) As to the attempted robbery, the jury found true an allegation that appellant had personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c). As to each of the two robbery counts, the jury found true an allegation that appellant had personally used a firearm within the meaning of section 12022.53, subdivision (b).

[1] All statutory references are to the Penal Code unless otherwise stated.

In the other case, number PA046893, appellant appeals from the judgment entered after a jury had convicted him of resisting an executive officer. (§ 69.)[2] (Augmented CT filed 9/14/05 In both cases, the trial court found true an allegation that appellant had been convicted of a "strike" within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds.(a)-(d), 667, subds. (b)-(i).)

In case number BA271590, the trial court sentenced appellant to prison for 41 years, 8 months. In case number PA046893, the trial court sentenced appellant to a consecutive term of 16 months. Accordingly, the total prison term for both cases was 43 years.

Appellant contends that the trial court erroneously (1) refused to exclude in-court identifications that were tainted by an unduly suggestive photo lineup; (2) imposed, in violation of section 654, a concurrent sentence for the conviction of possession of a firearm by a felon; (3) imposed, in violation of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), the upper term for the attempted robbery conviction; and (4) instructed the jury on the mens rea required for a violation of section 69.

We affirm the judgments. However, at respondent's request, we direct the trial court to correct its minutes and the abstract of judgment in case number PA046893 to conform to the judgment pronounced by the court.

Facts

Case Number BA271590

On October 21, 2003, Kyung Yoon was working at a market. (RT 1202) Appellant entered the market, approached Yoon, pointed a gun at her, and demanded money. Appellant had a white handkerchief on his head. Yoon sat on the floor. A female accomplice tried to open the cash register, but it would not open. Appellant fired

[2] Appellant originally filed a notice of appeal only as to case number BA271590. On August 10, 2005, we granted his motion to amend the notice of appeal nunc pro tunc to include case number PA046893.

a shot at Yoon, but the bullet missed her. Appellant and his accomplice then left the store without taking any property. (This is the attempted robbery.)

On October 21, 2003, Everardo Castaneda was working at a food store. Appellant and a female accomplice entered the store. Appellant had "a white thing on his head." Appellant approached Castaneda, "pulled out a gun from his pocket," and demanded money. Castaneda gave money to the female accomplice. Appellant and the accomplice then left the store.

On October 21, 2003, Alberto Alferez and Armando Ochoa were working at a restaurant. Appellant and a male accomplice entered the restaurant. Appellant, who had a white garment "tied around his head," was holding a gun. Appellant said: "Do you want to die[?]" Appellant continued to hold the gun while his accomplice took money from a cash register. Appellant and his accomplice then left the restaurant.

Case Number PA046893

On August 17, 2004, Deputy Sheriff Omar Chavez was working at a correctional facility. Appellant was an inmate in a "disciplinary dorm." Chavez tried to conduct a pat-down search of appellant, but appellant refused to cooperate. When Chavez tried to handcuff appellant, appellant elbowed him in the face. Appellant also threw a punch at Chavez's face, but missed. Chavez forced appellant down to the ground. While on the ground, appellant was throwing punches and kicking. Three other deputies helped Chavez subdue appellant. During the struggle, appellant scratched Chavez's right forearm. The wound left a scar.

Discussion – Case Number BA271590

Photo Lineup

Appellant contends that the trial court erred in refusing to exclude in-court identifications of him because they were tainted by an unduly suggestive six-man photo lineup. Appellant argues that the photo lineup was unduly suggestive for two reasons: (1) his facial image was "noticeably larger" than the facial images of the other five subjects, and (2) "his complexion was also darker" than their complexions.

" ' "In deciding whether an extrajudicial identification is so unreliable as to violate a defendant's right to due process, the court must ascertain (1) 'whether the identification procedure was unduly suggestive and unnecessary,' and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances." ' [Citation.] 'The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.' [Citation.] . . . [¶] We review deferentially the trial court's findings of historical fact, . . . but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive. [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942-943.) A photo lineup is unduly suggestive if " 'anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' [Citation.]" (*Id.*, at p. 943.)

The photo lineup here consisted of six photographs of equal size, each of which showed the face of a Hispanic man with a moustache. All of the men appear to be of approximately the same age. Their foreheads and hair have been whited out. (This was apparently done because the suspect with a gun was wearing a white garment on his head.) Appellant's face is somewhat larger than the other faces. His face is approximately 1 3/8 inches wide and 1 1/2 inches long. (Length is measured from the bottom of the chin to just above the eyebrows.) The smallest face is approximately 1 1/16 inches wide and 1 1/8 inches long. Appellant's complexion appears darker than that of four of the other men, but this difference is not marked and seems to be due to lighting conditions. (Exhibit 5)

Exercising our independent review, we conclude that there is nothing in the photo lineup that would cause appellant " 'to "stand out" from the others in a way that would suggest the witness should select him.' " (*People v. Gonzalez, supra,* 38 Cal.4th at p. 943.) Accordingly, the identification procedure was not unduly suggestive, and we need not consider " ' "whether the identification was nevertheless reliable under the totality of

the circumstances." ' " (*Id*., at p. 942.) The trial court, therefore, did not err in refusing to exclude the in-court identifications.

Concurrent Sentence

Appellant contends that the trial court erroneously imposed a concurrent sentence for the conviction of possession of a firearm by a felon. Appellant argues that, pursuant to section 654, the trial court should have stayed the sentence because appellant's "possession of the gun was an indivisible part of each robbery."

Section 654 " ' "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)" ' " " ' "Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense." ' [Citations.]" (*Id*., at pp. 1143-1144, fn. omitted.)

"It is clear that multiple punishment is improper where the evidence 'demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense . . . . ' [Citation.]" (*People v. Jones, supra*, 103 Cal.App.4th at p. 1144.) "On the other hand, it is clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent." (*Ibid*.) "Based upon these principles, . . . section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Id*., at p. 1145.)

Here appellant arrived at the scene of each robbery already in possession of the firearm. "It was therefore a reasonable inference that [appellant's] possession of the firearm was antecedent to the primary crime. [Citation.]" (*People v. Jones, supra,* 103 Cal.App.4th at p. 1147.) "The evidence likewise supported an inference that [appellant] harbored separate intents in the two crimes. [Appellant] necessarily intended to possess the firearm when he first obtained it . . . . That he used the gun [in the robbery] required a second intent *in addition* to his original goal of possessing the weapon. [Appellant's] use of the weapon after completion of his first crime of possession of the firearm thus comprised a 'separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.' [Citation.]" (*Ibid*.) The trial court, therefore, did not violate section 654 by imposing a concurrent sentence for the conviction of possession of a firearm by a felon.

Imposition of Upper Term

Based on appellant's having served a prior prison term, the trial court imposed the upper term for the attempted second degree robbery conviction. Appellant contends that, pursuant to *Blakely, supra,* 542 U.S. 296, imposition of the upper term violated his constitutional right to a jury trial.

Appellant forfeited his right to raise this issue because he failed to object on *Blakely* grounds in the trial court. Appellant was sentenced after *Blakely* was decided, so there is no excuse for his failure to object. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.) Furthermore, appellant's contention was rejected by our Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, 1244: "[T]he judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." In any event, *Blakely* does not apply when a prior conviction is used to increase a defendant's sentence. (*Blakely, supra,* 542 U.S. at p. 301.)

Discussion – Case Number PA046893

Jury Instructions

Appellant contends that the trial court erroneously instructed the jury on the mens rea required for a violation of section 69, which provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

"[S]ection 69 which actually describes two related offenses, attempting to deter and actually resisting an officer. These two offenses have different elements." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1530, fn. omitted.) For example, "a willful attempt to deter or prevent involves a specific intent. [Citations.]" (*Ibid*.) On the other hand, a resisting violation of section 69 is a general intent crime. (*People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9.)

Appellant contends that the trial court erred in failing to instruct the jury on the specific intent required for the "attempt to deter" offense. We need not decide this issue. Assuming that the trial court erred, the error was harmless beyond a reasonable doubt. The jury's verdict form shows that it convicted appellant of the resisting offense, not the "attempt to deter" offense. The form states: "We, the Jury in the above entitled action, find the defendant, Osvaldo Tinajero, GUILTY of the crime of RESISTING EXECUTIVE OFFICER, in violation of Penal Code section 69, a felony, as charged in Count 1 of the information." The verdict form does not mention the "attempt to deter" offense.

Remand

In case number PA046893, the trial court sentenced appellant to prison for 16 months and directed that this term run consecutively to the sentence of 41 years, 8 months, imposed in case number BA271590. However, the trial court's minutes and the

abstract of judgment in case number PA046893 state that the 16-month sentence shall run concurrently with the sentence imposed in case number BA271590. (ACT 37; ACT filed 2/16/06 20) "[I]f the minutes or abstract of judgment fails to reflect the judgment pronounced by the court, the error is clerical and the record can be corrected at any time to make it reflect the true facts. [Citation.]" (*People v. Little* (1993) 19 Cal.App.4th 449, 452.) We must therefore remand the matter to the trial court with directions that it correct the minutes and abstract of judgment in case number PA046893.

Disposition

The judgments in case numbers BA271590 and PA046893 are affirmed. The trial court is directed to correct the minutes and abstract of judgment in case number PA046893 to conform to the judgment pronounced by the court. As corrected, the minutes and abstract of judgment shall show that the 16-month sentence pronounced in case number PA046893 shall run consecutively to the sentence pronounced in case number BA271590. The court shall transmit the corrected abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Sam Ohta, Judge

Superior Court County of Los Angeles

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