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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL HERNANDEZ, Defendant and Appellant.	B186089 (Los Angeles County Super. Ct. No. BA250842)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul M. Enright, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Modified and affirmed.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Manuel Hernandez (appellant) was convicted by a jury of first degree robbery (count 1, Pen. Code, §§ 211, 212.5),[1] aggravated mayhem (count 2, § 205), and dissuading a witness by force or threat (count 3, § 136.1, subd. (c)(1)). The jury also found as to all counts that he personally used a firearm, as to counts 1 and 2, that he intentionally discharged a firearm causing great bodily injury, and as to counts 1 and 3, that he personally inflicted great bodily injury. (§§ 12022.53, subds. (b)-(d), 12022.5, subd. (a), 12022.7, subd. (a).) In a bifurcated trial, the jury found that he committed all three offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Appellant was sentenced to a determinate term of 31 years, two terms of life with the possibility of parole, and a term of 25 years to life. The court ordered the sentences to run consecutively.

Appellant appeals, contending that there is insufficient evidence to support the aggravated mayhem conviction, the trial court erred by imposing consecutive sentences, and his constitutional rights were violated when the court imposed consecutive sentences, relying on facts not found true by the jury.

We conclude the evidence supports the jury verdict, and determine the court erred when it ordered consecutive sentences for all three counts. We modify the judgment by staying the sentence imposed for dissuading a witness, as alleged in count 3, and affirm.

STATEMENT OF FACTS

Jose Nunez testified that on July 16, 2003, he was working as a taxicab driver when he received a call at approximately midnight to pick up some passengers at 610 South Kenmore in Los Angeles. When Nunez arrived at the address, one of the passengers, whom he identified as appellant, got into the front seat, and the other got in the back. They told Nunez to pull into a parking lot. Appellant then produced a chrome handgun and pressed the barrel of the gun to Nunez's head. Appellant said he was from the 18th Street gang and demanded Nunez's money. Nunez handed over some money

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[1] All further undesignated statutory references are to the Penal Code.

from the compartment in the dashboard and his cell phone. Appellant continued to point the gun at Nunez and ordered him out of the car. Once outside the car, appellant stood about five feet away from Nunez and told him to empty his pockets. Nunez gave appellant his wallet. Appellant pointed the gun at Nunez's chest, repeated that he was from the 18th Street gang, and threatened to kill Nunez and his family if Nunez said anything about the incident. Appellant then lowered the gun towards Nunez's groin and fired a single shot. The bullet went through the base of Nunez's penis and entered his left thigh. Nunez fell to the ground and the two men ran off. Nunez managed to get back into the cab. He drove home, and his wife took him to the hospital. Police arrived at the hospital and appellant described the two men who had robbed him.

The next morning, Los Angeles Police Detective John Hernandez, a gang investigator, showed Nunez two sets of photographs. Nunez immediately identified appellant as the shooter, but could not identify the second man.

Nunez testified that as a result of the shooting, he suffers erectile dysfunction and has a burning sensation when he urinates. He has numbness in his knee. The bullet remains in his leg.

Nunez testified that a week before trial started, three men with tattoos came to his apartment and told his wife that if Nunez were to testify, something bad would happen to him. Nunez told the prosecutor he did not want to testify.

The mother of appellant's children, Flor Gonzalez, testified that she was living at 610 South Kenmore on the day of the shooting. Appellant appeared at her apartment briefly at approximately 11 p.m. Detective Hernandez testified that the day after the shooting, Gonzalez told him that when she saw appellant on the prior evening, he was carrying a shiny handgun and that he associated with 18th Street gang members. She signed a written statement, but told Detective Hernandez that she was afraid of testifying. At trial, Gonzalez would only say that she saw appellant carrying something shiny on the evening of the shooting, and that she did not remember telling Detective Hernandez that appellant was an 18th Street gang member.

Los Angeles Police Officer Edgar Hernandez testified that he is assigned to the Department's gang detail and works exclusively on the 18th Street gang. 610 South Kenmore is within the gang's territory. Appellant is an admitted 18th Street gang member, and has tattoos on his knuckles to signify this membership.

A forensic print specialist from the police department testified that the only readable fingerprints lifted from Nunez's vehicle did not match those of appellant.

The only defense witness was Rigoberto Hernandez Gutierrez, appellant's uncle. He testified that on the date of the shooting, appellant was working for him and living at his home in San Diego. During the entire six-month period that appellant was living with him, appellant never left the home in the evening.

During the bifurcated portion of the trial, Officer Edgar Hernandez testified that appellant committed the crimes to benefit the 18th Street gang. He opined appellant also promoted himself within the gang by instilling fear in the community.

DISCUSSION

I. Sufficiency of the Evidence

"A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole." (§ 205.)

Appellant contends that his conviction for aggravated mayhem cannot stand because there is insufficient evidence showing that he specifically intended to cause permanent injury to Nunez's penis. He argues Nunez's injury was the result of an indiscriminate attack, citing *People v. Sears* (1965) 62 Cal.2d 737 (overruled on another point in *People v. Cahill* (1993) 5 Cal.4th 478, 494, 509), *People v. Anderson* (1965) 63 Cal.2d 351, and *People v. Lee* (1990) 220 Cal.App.3d 320. In *Sears*, the defendant

admitted he struck his daughter several times with a steel pipe, lacerating her lip and nose. This occurred during an attack on his wife, mother-in-law, and brother-in-law. (62 Cal.2d at pp. 743-745.) In *Anderson*, the victim had 41 wounds over her entire body from her head to her torso. (63 Cal.2d at p. 356.) In *Lee*, the defendant punched the victim in the face three times and kicked him on his body at least twice. (220 Cal.App.3d at p. 326.) In each of these cases, the court found the defendant lacked the specific intent to commit mayhem. (*Sears, supra*, 62 Cal.2d at p. 745, *Anderson, supra*, 63 Cal.2d at p. 359, and *Lee, supra*, 220 Cal.App.3d at p. 326.) We find the cases distinguishable.

When reviewing a case for sufficiency of the evidence, we "consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) Here, the evidence supports a finding that Nunez's injury was the result of an attack that was controlled and focused. The uncontroverted testimony was that appellant deliberately and directly aimed at the area of Nunez's groin from a distance of approximately five feet and fired a single shot. Of significance is that just prior to the shooting, appellant was aiming the gun at Nunez's chest, whereupon he lowered the barrel and fired. While appellant contends there is no evidence to suggest that he was specifically aiming at Nunez's penis, given the manner in which the shooting was carried out, substantial evidence supports the jury's conclusion to the contrary. The fact finder could reasonably deduce that the defendant's intent was to disfigure or permanently disable his victim. (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 835-836.)

II. Sentencing

Appellant's trial counsel argued that section 654 required the court to sentence appellant to concurrent terms because all of the crimes were committed with robbery as the sole objective. The prosecutor argued that the robbery was completed when the appellant decided to shoot the victim. Thus, she argued the aggravated mayhem had a separate objective independent of the robbery. The court agreed, and sentenced appellant to consecutive terms on all counts. It selected count 2 as the principal term. Appellant

was sentenced to life with the possibility of parole for the aggravated mayhem and a consecutive 25 year-to-life term for the section 12022.53, subdivision (d) enhancement. He was given a life sentence with the possibility of parole for dissuading a witness and a consecutive three-year term, which the court indicated was the middle term for the underlying crime, and a four-year term for using a firearm. The court did not impose a sentence for the infliction of great bodily injury pursuant to section 12022.7. As to the robbery, he was sentenced to four years and two consecutive 10-year terms for the firearm use and gang allegation enhancements.

Appellant contends that "[b]ecause the robbery, shooting and threat constituted an indivisible course of conduct with the single intent to successfully rob Nunez, section 654 prohibited punishment on all three offenses." Alternatively, he claims that "[e]ven if section 654 did not prohibit multiple punishment, the trial court erred in imposing consecutive sentences on the (1) the robbery count because the court was fundamental[ly] incorrect as to when the robbery was complete and (2) the threat count because the court failed to give any reason for its decision." As we explain, the trial court properly imposed consecutive sentences for the robbery and the aggravated mayhem convictions, but not for the dissuading of a witness charge.

"The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were 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 parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.] The question whether the defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on this

question will be upheld on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135-1136.)

The evidence supports the trial court's finding that the robbery and the mayhem had separate objectives. It was established that appellant took money and a cell phone from Nunez's cab, and then demanded that Nunez empty his pockets. After Nunez exited the cab and surrendered his wallet, appellant pointed the gun at him and warned him not to tell anyone about the robbery. Appellant, who had been pointing the gun at Nunez's chest, then lowered the weapon toward Nunez's groin and fired. Appellant could easily have left the scene of the robbery before uttering the threat, and since Nunez was out of the cab, appellant's escape would have been unhindered. Whether we characterize the threat and the subsequent shot as acts of gratuitous violence or an attempt to avoid prosecution, clearly, the acts were carried out with an objective separate from the theft. "[A] separate act of violence against an unresisting victim or witness, whether gratuitous or to facilitate escape or to avoid prosecution, may be found not incidental to robbery for purposes of section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193, questioned on another ground in *People v. Miles* (1996) 43 Cal.App.4th 364, 370, fn. 6.)

As noted, appellant contends that since the robbery was not completed at the time of either the threat or the shooting, we must conclude that all three crimes were carried out with the same objective. Not so. While appellant is correct that a robbery may be considered to be an ongoing crime until the perpetrator reaches a place of temporary safety, the test for purposes of section 654 is the intent of the perpetrator. "If the trier of fact determines the crimes have different intents and motives, multiple punishments are appropriate. This is so notwithstanding that for purposes of the felony-murder rule the robbery is still considered to be ongoing." (*People v. Nguyen*, *supra*, 204 Cal.App.3d at p. 193.) The fact that the robbery may not be completed "cannot mean every act a robber commits before making his getaway is incidental to the robbery." (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 171.) Appellant was properly sentenced to consecutive terms for the robbery and aggravated mayhem convictions.

We cannot say the same for the sentence imposed for count 3, dissuading a witness. Appellant correctly points out that the trial court failed to give reasons for imposing a consecutive sentence for that count. After a review of the record, we cannot conclude that the threat and the shooting that constituted the aggravated mayhem had separate objectives. After appellant had taken possession of Nunez's property, appellant warned him of the consequences of telling the authorities and almost immediately fired the shot. There is no evidence to suggest that appellant shot Nunez for any reason other than that of reinforcing his threat. We therefore stay the sentence for count 3.

Finally, appellant contends that the trial court's decision to impose consecutive sentences was unconstitutional in that it was based on a fact not found true by the jury. Appellant's opening brief was filed before the United States Supreme Court's decision in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 166 L.Ed.2d 856]. However, he cited the case in his reply brief to preserve the issue for federal review. In *Cunningham*, the Supreme Court held that a defendant's right to a jury trial, as provided for by the Sixth and Fourteenth Amendments of the federal Constitution, is violated by the imposition of a prison sentence greater than the statutory maximum based on a fact, other than a prior conviction, that is not found true by a jury or admitted by a defendant. (*Id.* at p. ___ [127 S.Ct. at p. 860].)

Cunningham did not address the constitutionality of a trial court's decision to impose consecutive sentences. *Blakely v. Washington* (2004) 542 U.S. 296, upon which appellant relies, does not apply to consecutive sentencing. (*People v. Black* (2005) 35 Cal.4th 1238, 1262, vacated in *Black v. California* (Feb. 20, 2007, No. 05-6793) ___ U.S. ___ [2007 WL 505809]; *People v. Hernandez* (2007) 147 Cal.App.4th 1266, 1270-1271.) Accordingly, appellant's constitutional rights were not violated when the trial court imposed consecutive sentences.

DISPOSITION

The consecutive sentence imposed for dissuading a witness (count 3) is stayed pursuant to section 654. In all other respects, the judgment is affirmed. The trial court is

directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections.

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SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

WILLHITE, J.