Filed 5/30/07 P. v. Pacheco CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DAVID MICHAEL PACHECO, ANTHONY VILLA, ADOLFO VILLEGAS, Defendants and Appellants.	2d Crim. No. B188797 (Super. Ct. No. GA059672-01, -02, -03) (Los Angeles County)

David Michael Pacheco, Anthony Raymond Villa, and Adolfo Villegas, Jr. appeal from the judgment entered following their conviction by a jury of the attempted murder of Randall Shoemaker (count 1) and Darryl Yon (count 2) (Pen. Code, §§ 664, 187, subd. (a));[1] kidnapping to commit robbery (count 3) (§ 209, subd. (b)(1)); second degree robbery (count 4) (§§ 211, 212.5); carjacking (count 5) (§ 215, subd. (a)); and discharging a firearm from a vehicle (count 6). (§ 12034, subd. (c).) The jury found true allegations that the attempted murder of Yon was willful, deliberate, and premeditated. The jury also found true allegations that all of the crimes had been

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

committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) In addition, as to all of the crimes except the attempted murder of Yon by Pacheco, the jury found true allegations that either the defendant or a principal had personally and intentionally discharged a firearm, which had proximately caused great bodily injury. (§ 12022.53, subd. (d) & (e)(1).). As to the attempted murder of Yon by Pacheco, the jury found true an allegation that a principal had personally and intentionally discharged a firearm. (§ 12022.53, subd. (c) & (e)(1).) The trial court imposed prison terms as follows: Pacheco, 186 years to life; Villa, 142 years to life; and Villegas, 191 years to life.

Villa and Villegas claim that the trial court erroneously admitted statements made by Pacheco that implicated them. They argue that these statements were inadmissible under the hearsay exception for declarations against interest (Evid. Code, § 1230). They also argue that the trial court abused its discretion in refusing to exclude Pacheco's statements under Evidence Code section 352. In addition, all appellants contend that the trial court made numerous sentencing errors.[2] We reverse the sentences and in all other respects affirm the judgment.

Factual and Procedural Background

On July 16, 2004, Randall Shoemaker asked a neighbor, Anthony, where he could purchase marijuana. Another neighbor, Darryl Yon, approached them and said he knew someone who would sell marijuana to Shoemaker. Yon used to a be member of the Lomas criminal street gang. His gang moniker was "Droopy."

Shoemaker drove Yon to a house. They both got out of the car and approached Villa, who introduced himself as "Crow." Villa was a Lomas gang member. Shoemaker, Yon, and Villa entered Shoemaker's car, and Villa directed Shoemaker to drive to a different, yellow house. A Jeep Cherokee followed them there.[3] Three men were inside the Jeep Cherokee. One of the occupants, Pacheco, was a Lomas gang

[2] Pursuant to California Rules of Court, rule 8.200(a)(5), each appellant joins in all arguments raised by his coappellants that may benefit him.

[3] Shoemaker mistakenly identified the Jeep Cherokee as a Ford Expedition.

member with the same moniker as Yon: "Droopy." Another occupant was a Lomas gang member with the moniker of "Snoopy."

Upon arriving at the yellow house, Yon and Villa got out of Shoemaker's car and started talking to the men in the Jeep Cherokee. Shoemaker remained in the driver's seat of his car. The three men in the Jeep Cherokee exited the vehicle, and two of them walked into the house. Later, some of the men who had been in the Jeep Cherokee started walking toward Shoemaker. One of the men had a silver handgun. Yon and Villa reentered Shoemaker's car and sat in the back seat. Villa was directly behind Shoemaker.

Shoemaker saw Pacheco walking toward him while carrying a blue gun cover. Pacheco pulled a rifle out from inside the cover. Shoemaker said to Yon, " 'I don't like how this is looking. He has a gun. I feel like just getting out of here and running 'em over . . . .' " Villa hit Shoemaker in the back of the head. Villa said, " 'Shut the fuck up white boy. Don't worry about what he has' . . . ." Pacheco entered Shoemaker's car through the front passenger door and seated himself next to Shoemaker. Pacheco "shoved the rifle to [Shoemaker's] neck," and said, " 'Shut the fuck up white boy and drive the car.' "

Shoemaker drove the car as directed. He was followed by three men in the Jeep Cherokee, including Villegas. Villegas was a Lomas gang member with the moniker of "Shaggy." Villegas had a silver handgun.

Shoemaker stopped his car in a dead-end street. The Jeep Cherokee pulled in front of the car and also came to a stop. The men inside the Jeep Cherokee exited the vehicle. Pacheco and Villa demanded Shoemaker's "money and everything [he] had." Shoemaker replied that he did not have any money. Pacheco and Villa told Shoemaker to " 'quit lying.' " Yon testified that Pacheco ordered Shoemaker to get out of the car and to give the car to appellants. Shoemaker said: " 'No' and chaos broke out."

Pacheco, Villa, and the men from the Jeep Cherokee started hitting Shoemaker. They pulled him out of the car and forced him down on his knees. Villa said, " 'Shoot 'em in the head. We need no witnesses.' " Shoemaker grabbed a silver handgun, which discharged in front of his face. The bullet penetrated his hand. Shoemaker did not see who was holding the silver handgun when it discharged, but it was the same handgun he had earlier seen in the possession of Villegas. Shoemaker got up and started running until he was shot in the neck. He "fell down flat on [his] face and . . . couldn't move."

With the exception of Yon, the other persons got into the Jeep Cherokee. Yon went over to Shoemaker to check on his condition. The Jeep Cherokee drove by Yon, and the driver fired two shots at him. One of the bullets struck Yon in the shoulder and shattered the bone in his upper arm.

A witness who lived nearby heard several shots fired. He saw a Jeep Cherokee driving away. The Jeep Cherokee reversed course and returned to the scene. A person got out of the Jeep Cherokee, entered Shoemaker's car, and drove it away.

Yon testified in court that he had not seen the person who had shot him. However, at a photo lineup shortly after the incident, Yon identified Villegas as "the driver of the Jeep Cherokee." Yon went on to state, "I believe he was the one that shot me." Yon identified Pacheco as the person who had shot Shoemaker in the neck with a rifle.

Shoemaker was rendered quadriplegic by the bullet wound to his neck. Appellants took Shoemaker's car, money, cellular phone, and gold chain necklace. The car was recovered in El Monte.

Discussion

I

Declaration Against Interest

Pacheco was arrested and placed in a jail cell with Gilbert Padilla, a fellow gang member. On July 21, 2004, they had a conversation that was recorded. The tape

and transcript of the conversation were received in evidence. Villa and Villegas claim that the trial court erred in admitting portions of Pacheco's statements that implicated them. They also contend that the trial court abused its discretion in refusing to exclude the entire conversation under Evidence Code section 352.

Contents of the Conversation

During the recorded conversation, Pacheco stated as follows:

Droopy (Yon) and "some other vato" (Shoemaker), who was "a white boy," "came to the neighborhood." Pacheco and "Snoopy," who were in "a brand new Jeep Cherokee," encountered "Crow" (Villa). Villa said: "[T]his fool's . . . got feria [cash/money] on him . . . . He wants to buy some *yesca* [weed] [.] I say we just . . . take his shit, right."

Villa told Pacheco to get into the front of Shoemaker's vehicle. Pacheco sat next to Shoemaker, who was in the driver's seat, and pointed an M1 rifle at him. Villa and Yon were seated behind them. Villa said to Shoemaker, " 'Where do you have the money at fool?" Shoemaker replied, " 'I'm scared, man, what the fuck.' " Villa said, " 'Man, what the fuck you mean you're scared.' " " '[W]hat about when you said . . . that you're gonna run . . . me and my homies over?' " Pacheco exclaimed, " 'What? . . . You said you're gonna run me and my homies over?' " Shoemaker responded, " 'No. No man . . . shit.' " Pachecho then "put the gun somewhere like . . . right here."

Pacheco told Shoemaker where to stop. Shoemaker pulled over and stopped as directed. He then grabbed the barrel of Pacheco's rifle, and the rifle discharged. Pacheco and Shoemaker were "wrestling with the . . . rifle," and Pacheco was "socking him." Yon "got out [of] the car [and was] jumping around . . . ."

Snoopy came and "socked [Shoemaker] a couple times . . . ." Either Villa or Snoopy fired two shots at Shoemaker. Shoemaker got out of the car and started to run away. Pacheco said, " 'No, he's getting away.' " Pacheco shot at Shoemaker with his rifle, and Shoemaker fell down. Pacheco said, "I hit that fool and that fool just fell,

bam." When Pacheco fired the rifle, he did not think that he was going to hit Shoemaker.

Pacheco and his accomplices got into the Jeep Cherokee. They noticed that Yon was running away. A person whose moniker was either "Shaggy" (Villegas) or "Shady" fired four times from the jeep at Yon.[4]

Pacheco and the others were about to drive away in the Jeep Cherokee when they realized that they could not leave Shoemaker's car at the scene. Pacheco said, "We can't leave that shit there." "I got my fingerprints in there. Crow has his fingerprints there . . . ." Pacheco jumped out of the Jeep Cherokee, got into Shoemaker's car, and drove it to El Monte. Pacheco and his accomplices poured gas over Shoemaker's car with the intent of setting it on fire. The person referred to as "Shaggy" or "Shady" gave some matches to Pacheco. Pacheco lit the matches and threw them at the vehicle, but the matches went out before they hit the vehicle. Everyone then left.

The Trial Court Did Not Err in Admitting the Conversation

As to Villa and Villegas, Pacheco's statements were admitted as declarations against interest under Evidence Code section 1230 (hereafter section 1230), which provides in relevant part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true."

Our Supreme Court has "declared section 1230's exception to the hearsay rule 'inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 612.) Thus, "only those portions of [Pacheco's]

[4] The transcript of the conversation refers to this person as "Shaggy/Shady/Shady" and "Shaggy/Shady"

statements that were 'specifically disserving' [citation] to his penal interests were admissible under section 1230." (*Ibid*.)

"[E]ven when a hearsay statement runs generally against the declarant's penal interest . . . , the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission [under section 1230]. [Citations.]" (*People v. Duarte, supra,* 24 Cal.4th at p. 614.) "There is no litmus test for the determination of whether a statement is trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.] [¶] Clearly the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. 'Once partners in crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.' [Citation.] However, the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures. [Citations.]" (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 334-335.

Villa and Villegas contend that the trial court "erred in admitting Pacheco's statements implicating [them] because [the statements] were not specifically disserving to Pacheco and were unreliable." A similar contention was rejected under similar circumstances in *People v. Cervantes* (2004) 118 Cal.App.4th 162. In *Cervantes* three gang members were convicted of first degree murder and attempted murder. Statements by one of the defendants, Morales, to a neighbor were admitted against his codefendants pursuant to section 1230. Morales told the neighbor that he and his codefendants had participated in the crimes. Morales admitted shooting one victim. Morales said that both he and a codefendant had shot the second victim.

The *Cervantes* court concluded that, although Morales attributed blame to his codefendants, his statements were still specifically disserving to his penal interests and sufficiently trustworthy to qualify for admission under section 1230. The court noted that Morales "accepted for himself an active role in the crimes and described how he had directed the activities of [one of the codefendants]." (*People v. Cervantes, supra,* 118 Cal.App.4th at p. 175.) The court also noted that Morales's statements implicating his codefendants were incriminating as to Morales because he was acting in concert with them. (*Id.*, at p. 176.) Moreover, the statements were made to a friend in a noncoercive atmosphere shortly after the shootings.

Like Morales, Pacheco also accepted for himself an active role in the crimes. Furthermore, Pacheco's statements implicating his fellow gang members were incriminating as to him because he was acting in concert with them. Pacheco was not " 'trying to fasten guilt' on others,' . . . while 'keeping his own skirts as clean as possible' [citation] under the circumstances." (*People v. Duarte, supra,* 24 Cal.4th at p. 616.) Pacheco admitted pointing an M1 rifle at Shoemaker while Shoemaker was driving. He also admitted shooting Shoemaker with the rifle because he was concerned that Shoemaker was " 'getting away.' " Pacheco did not say that a codefendant had directed him to shoot Shoemaker. Thus, Pacheco's statements implicating Villegas and Villa were specifically disserving to his penal interests within the meaning of section 1230.

Pacheco's statements were particularly trustworthy because he was conversing with a fellow gang member in a noncoercive setting that fostered uninhibited disclosures. Moreover, Pacheco had personal knowledge of the events that he was recounting. The events were still fresh in his memory, since the conversation occurred only five days after the commission of the crimes.

Nevertheless, Villegas argues that the statements implicating him were unreliable because it was not clear from the tape whether Pacheco had said "Shaggy," Villegas's moniker, or "Shady." But this alleged ambiguity did not affect the

trustworthiness of Pacheco's statements. "Courts applying section 1230 to determine the basic trustworthiness of a proffered declaration are . . . to 'consider all the surrounding circumstances to determine if a reasonable person in [the declarant's] position would have made the statements if they weren't true.' [Citation.]" (*People v. Duarte, supra,* 24 Cal.4th at p. 618.) Irrespective of whether Pacheco said "Shaggy" or "Shady," a reasonable person in Pacheco's position would not have made the statements if they had not been true.

Whether Pacheco said "Shaggy" or "Shady" was a question for the trier of fact. Villegas was free to argue this issue to the jury, and he did argue it. The jury impliedly found that Pacheco had said "Shaggy."[5]

Villegas also argues that Pacheco's statements implicating him were unreliable because Pacheco did not expressly state that Villegas had shot Yon. The portion of the transcript in which Pacheco described the shooting of Yon reads as follows: "That fool Droopy [Yon] starts running away . . . . So we're driving and shit and he's like – they're like, 'Oh there's that bitch ass fool Darryl [Yon],' and Shaggy/Shady/Shady pulls up to the side of him like (noise) lah, lah, lah. He goes, like four times. (*Laughing*)" Pacheco said that "Shaggy/Shady/Shady" had used a "3" against Yon. Pacheco did not describe what he meant by a "3," but, since Yon was shot, the only reasonable inference is that Pacheco was referring to the firing of a gun by Villegas at Yon. In any event, this issue concerns not the trustworthiness of Pacheco's statements but the interpretation of those statements, which is also a question of fact for the jury.

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[5] The trial judge listened to the conversation and concluded that it was clear Pacheco had said "Shaggy." However, because Villegas insisted that there was an ambiguity, the judge edited the transcript so that the jury would have the option of finding that Villegas had said "Shady." The trial judge stated, "We are going to give transcripts to the jury and I think where it has 'Shaggy' I would write in the top and I will tell the jury to do this, 'Shady'. . . . [T]hey can determine if it's one or the other. I felt when I listened to it I heard the G's for Shaggy. I was quite clear it's 'Shaggy' but I will have [the jury] write ['Shady'] in there so they know they have to listen carefully." "[T[he defense translation seemed to say Shady but I think it's clear it's Shaggy."

In *Cervantes* the court observed that "there is some disagreement as to whether the trial court's ruling [admitting Morales's statements under section 1230] should be reviewed for an abuse of discretion or de novo." (*People v. Cervantes, supra,* 118 Cal.App.4th at p. 174.) The *Cervantes* court applied de novo review. (*Ibid*.) We need not resolve this issue. Under either standard of review, the trial court did not err in admitting Pacheco's statements implicating Villa and Villegas under section 1230.

Villa and Villegas also contend that the trial court abused its discretion in refusing to exclude the entire conversation between Pacheco and Padilla under Evidence Code section 352 because the conversation "was substantially more prejudicial than probative." Villegos alleges that the conversation "was extremely prejudicial because Pacheco was laughing and ridiculing Shoemaker and Yon . . . . The bragging, mocking tone of the entire statement makes Pacheco and, by association, [Villegas] and Villa, seem very heartless and cruel."

" '[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations]. Evidence is substantially more prejudicial than probative (see Evid.Code, § 352) if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [Citation.]' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) Pacheco's statements to his fellow gang member were highly probative. The trial court did not abuse its discretion in impliedly concluding that the statements did not pose " 'an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." ' " (*Ibid*.)

II

As to Villegas, the Trial Court Erred in Imposing Enhancements Under Both Sections 186.22 and 12022.53, Subdivisions (d) and (e)(1)

As to Villegas, on each of counts 1 (attempted murder of Shoemaker), 3 (kidnapping to commit robbery), and 5 (carjacking), the trial court imposed an

enhancement of 25 years to life for discharging a firearm and proximately causing great bodily injury. (§ 12022.53, subds. (d) & (e)(1).) If such an enhancement is imposed, the trial court is not permitted to impose an additional enhancement for participation in a criminal street gang (§ 186.22) unless the defendant personally discharged a firearm. (§ 12022.53, subd. (e)(2).) On counts 1, 3, and 5, the jury did not find true allegations that Villegas had personally discharged a firearm. Thus, as to Villegas, the trial court did not have the authority to impose an additional enhancement for participation in a criminal street gang on counts 1, 3, and 5.

However, on each of counts 1 and 3, the trial court imposed an enhancement of 10 years for participation in a criminal street gang. (§ 186.22, subd. (b)(1)(C).) Count 5 (carjacking) was punishable by imprisonment for three, five or nine years. (§ 215, subd. (b).) But because of Villegas's participation in a criminal street gang, the trial court imposed an enhanced sentence of 15 years to life pursuant to section 186.22, subdivision (b)(4)(B).

Respondent concedes that the gang enhancements as to Villegas on counts 1, 3, and 5 were erroneous. We accept this concession.

III

As to Pacheco, the Trial Court Imposed a Gang Enhancement Under the Wrong Subdivision

As to Pacheco, on each of counts 1 (attempted murder of Shoemaker) and 3 (kidnapping to commit robbery), the trial court imposed an enhancement of 25 years to life for personally discharging a firearm and proximately causing great bodily injury (§ 12022.53, subd. (d) & (e)(1).) In addition, it imposed a 10-year enhancement for participation in a criminal street gang. (§§ 186.22, subd. (b)(1)(C).) Respondent concedes that the gang enhancements as to Pacheco on counts 1 and 3 were erroneous because "the jury did not find that he personally used a firearm." We reject this

concession because the verdict forms show that, on counts 1 and 3, the jury found true the allegations that Pacheco had personally discharged a firearm.

Although a gang enhancement was properly imposed as to Pacheco on count 3, it was imposed under the wrong subdivision - section186.22, subdivision (b)(1)(C) - which provides for a 10-year enhancement. Because the underlying felony – kidnapping to commit robbery – is punishable by life imprisonment with the possibility of parole (§ 209, subd. (b)(1)), the trial court should have imposed a gang enhancement pursuant to section 186.22, subdivision (b)(5), which provides: "[A]ny person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served." In *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, our Supreme Court noted: "Penal Code section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) . . . imposes a 10-year enhancement when such a defendant commits a violent felony. Section 186.22(b)(1)(C) does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' (Pen.Code, § 186.22, subd. (b)(5).) Instead, section 186.22, subdivision (b)(5) . . . applies and imposes a minimum term of 15 years before the defendant may be considered for parole."

IV

Substantial Evidence Supports the Finding that, in the Commission Of the Attempted Murder of Yon, Villegas Personally Discharged a Firearm

As to count 2 (attempted murder of Yon), the jury found true an allegation that Villegas had personally discharged a firearm and had proximately caused great bodily injury to Yon. Villegas contends that the evidence is insufficient to support the true finding. "In determining the sufficiency of the evidence, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of

solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Horning* (2004) 34 Cal.4th 871, 901.)

Substantial evidence supports the true finding. Shoemaker testified that Villegas possessed a handgun. Yon testified that the driver of the Jeep Cherokee had shot him. Yon's testimony was consistent with his statements to a deputy sheriff who had responded to the scene of the shooting. According to the deputy sheriff, Yon "said that the driver opened fire on him with a semiautomatic handgun." Yon testified that he had not seen the person who had shot him. But shortly after the incident, at a photo lineup, Yon identified Villegas as the driver of the Jeep Cherokee. At the time of the identification, Yon stated, "I believe he [Villegas] was the one that shot me." According to the transcript of the conversation between Pacheco and Padilla, Pacheco said that either "Shaggy" or "Shady" had fired four times at Yon from the Jeep Cherokee. The jury could have reasonably concluded that Pacheco was referring to Villegas, whose moniker was "Shaggy."

V

The Judgment Does Not Accurately Reflect the Sentence Required To Be Imposed on Villegas for the Attempted Murder of Yon

Based on the jury's finding that Villegas had personally discharged a firearm and had proximately caused great bodily injury to Yon, Villegas received a 25-year-to-life enhancement on count 2 (attempted murder of Yon). (§ 12022.53, subd. (d).) Since the jury also found true an allegation that the attempted murder was willful, deliberate, and premeditated, the offense was punishable by imprisonment for life with the possibility of parole. (§ 664) Because Villegas had personally discharged a firearm and had participated in a criminal street gang, the trial court imposed an enhanced sentence for the attempted murder of 15 years to life pursuant to section 12022.53, subdivision (e)(2), and section 186.22, subdivision (b)(5). In *People v. Montes* (2003) 31 Cal.4th 350, 361, fn. 14, our Supreme Court noted: "[S]ection 186.22(b)(5) still has vitality where the defendant is convicted of attempted murder

with premeditation. In this situation, section 186.22(b)(5) raises the seven-year minimum eligible parole date (see § 3046, subd. (a)) to a 15-year minimum eligible parole date. [Citation.]"

Thus, the total sentence properly imposed on count 2 as to Villegas was 40 years to life. (See *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228-1229.) The trial court, however, did not expressly state that Villegas would be ineligible for parole for 15 calendar years, and the abstract of judgment does not reflect this fact. The judgment must be modified to show the 15-year minimum period of parole eligibility. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 101-102, fn. 3.) On the abstract of judgment, an appropriate place for this information would be in section 11, where "[o]ther orders" are to be specified.

VI

Section 654 Prohibited the Trial Court From Punishing Appellants for Kidnapping to Commit Robbery and Carjacking

Appellants contend that section 654 prohibited the trial court from punishing appellants for kidnapping to commit robbery (count 3) and carjacking (count 5). The jury verdict forms name Shoemaker as the sole victim on both counts. " 'Carjacking' is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, . . . against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215.)

Section 654 subdivision (a) 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 term of imprisonment, but in no case shall the act or omission be punished under more than once provision." The section prohibits "multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Miller* (1977) 18 Cal.3d 873, 885, disapproved on another ground in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068, fn. 8.) A defendant's

intent and objective generally determine whether a course of conduct is divisible. " '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.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) "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.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134.)

" 'Whether the defendant held "multiple criminal objectives is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." [Citations.]' [Citation.] We must 'view the evidence in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)

The trial court did not set forth its rationale for determining that the kidnapping to commit robbery and the carjacking were separately punishable. The court merely stated that it found the carjacking to be "a separate crime." The court impliedly found that appellants had entertained multiple objectives in committing the offenses. (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Respondent contends: "Appellants' crimes occurred one after the other, to be sure, and overlapped somewhat, but each was supported by a separate intent, that led to separate harms. Substantial evidence supported the trial court's implicit conclusion that this was not a kidnapping for the purpose of carjacking. It was kidnapping that turned into a carjacking."

We conclude that substantial evidence does not support the trial court's implied finding that appellants entertained multiple objectives. Yon testified that, when Shoemaker stopped his car in the dead-end street, Pacheco ordered Shoemaker to get

out of the car and to give the car to appellants.[6] Shoemaker said, "'No' and chaos broke out." Yon's testimony was not inconsistent with Shoemaker's. Shoemaker testified that Pacheco and Villa had demanded his "money and everything [he] had." "[E]verything [he] had" would include Shoemaker's car.

Respondent does not dispute Yon's testimony that Pacheco demanded Shoemaker's car. In its statement of facts, respondent alleges: "Shoemaker was directed to a dead end street, where he was told to stop. . . . Appellants Villa and Pacheco demanded Shoemaker's money, car, and everything he had."

The only reasonable inference to be drawn from Pacheco's demand for Shoemaker's car is that the objective of the kidnapping was not only to steal Shoemaker's money, but to take his car as well. Because the kidnapping to commit robbery and the carjacking shared a common objective, punishment for both offenses is prohibited under section 654. (See *People v. Beamon* (1973) 8 Cal.3d 625, 639-640 [section 654 prohibited punishment for both kidnapping to commit robbery and the commission of the robbery].)

In open court at the time of sentencing, respondent argued that section 654 should not bar punishment for both offenses because the carjacking "may have been an afterthought when [appellants] were fleeing" and "didn't want to have their fingerprints discovered in the vehicle . . . ." Respondent's argument was based on Pacheco's statement to Padilla that appellants were about to drive away in the Jeep Cherokee when they realized that they could not leave Shoemaker's car at the scene because it contained incriminating evidence. Pacheco said: "We can't leave that shit there." "I got my fingerprints in there. Crow has his fingerprints there . . . ."

If the carjacking were a separate and distinct act that had occurred as a result of an afterthought when appellants were fleeing, the jury would not have found true the

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[6] Yon's exact words were as follows: "We started going towards the middle of it [the dead-end street] and then that's when [Pacheco] told 'em to stop . . . and [Shoemaker] stopped and that's when [Pacheco] told 'em get out the car and give 'em the car." Twice during cross-examination, Yon reiterated this version of events.

allegation that, in the commission of the carjacking, Pacheco had personally and intentionally discharged a firearm causing great bodily injury to Shoemaker. In such circumstances, the firing of Pacheco's rifle at Shoemaker would have preceded the inception of the carjacking.

Based on *People v. Duran* (2001) 88 Cal.App.4th 1371, it appears that a carjacking was committed when appellants forced Shoemaker at gunpoint to drive to the dead-end street. In *Duran* the defendant entered the victim's car and forced him at gunpoint to drive for 20 minutes. Defendant "told [the victim] at gunpoint when to speed up and slow down, when to get on the freeway and when to get off, as well as where and when to turn." (*Id*., at p. 1377.) The defendant then exited the car, and the victim drove away. The court concluded that "a felonious taking can occur under the carjacking statute when the victim remains with the car." (*Id*., at p. 1375.) It therefore held that the defendant's actions constituted carjacking: "A taking occurred when [the defendant] imposed his dominion and control over the car by ordering [the victim] to drive; [the victim's] response in driving the car where [the defendant] directed him provided the asportation element of the completed crime." (*Id*., at p. 1377.)

Respondent argues that the trial court nevertheless could have punished appellants for both the kidnapping to commit robbery and the carjacking because "the carjacking involved multiple victims, Shoemaker and Yon." "[T]here is a 'multiple victim' exception to section 654. Under this exception, 'even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim.' [Citations.]" (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.) This exception is inapplicable here because the jury verdict forms name Shoemaker as the sole victim of the carjacking.

As to all appellants, the maximum sentence that may be imposed on count 5 is less than the maximum that may be imposed on count 3. Therefore, execution of the sentences on count 5 must be stayed. (§ 654; *People v. Kramer* (2002) 29 Cal.4th 720,

725.) The court must also stay execution of the 25-year-to-life enhancements imposed on count 5 pursuant to section 12022.53, subdivisions (d) and (e)(1). (*People v. Bracamonte* (2003) 106 Cal.App.4th 704, 709 ["Where the base term of a sentence is stayed under section 654, the attendant enhancements must also be stayed."]; accord, *People v. Smith* (1985) 163 Cal.App.3d 908, 914.)

VII

Section 654 Prohibited the Trial Court From Punishing Appellants for the Attempted Murder of Yon and Discharging a Firearm at Yon from a Vehicle

The trial court imposed consecutive sentences for the attempted murder of Yon with premeditation (count 2) and for discharging a firearm at Yon from a vehicle (count 6). Both convictions were based on the shots fired by Villegas at Yon from the Jeep Cherokee. The verdict forms for count 6 state: "We the jury . . . find the Defendant . . . guilty of shooting from a motor vehicle, at Darryl Yon, in violation of Penal Code Section 12034(c) . . . ." There is no substantial evidence that, in committing these offenses, appellants entertained multiple objectives. Because counts 2 and 6 involve only one victim – Yon – the multiple victims exception to section 654 does not apply.

Since the maximum sentence that may be imposed on count 6 is less than the maximum that may be imposed on count 2, execution of the sentences on count 6 must be stayed. (§ 654; *People v. Kramer, supra,* 29 Cal.4th at p. 725.) The court must also stay execution of the 25-year to life enhancements imposed on count 6 pursuant to section 12022.53, subdivisions (d) and (e)(1). (*People v. Bracamonte, supra,* 106 Cal.App.4th at p. 709; accord, *People v. Smith, supra,* 163 Cal.App.3d at p. 914.)

VIII

Section 654 Prohibits the Imposition of Consecutive 25-Year-to-Life Enhancements on Counts 1 and 3

Pursuant to section 12022.53, subdivisions (d) and (e)(1), as to all three appellants the trial court imposed consecutive 25-year-to-life enhancements on count 1

(attempted murder of Shoemaker) and count 3 (kidnapping to commit robbery). On each of these counts, the jury found true an allegation that, during the commission of the offense, Pacheco had personally and intentionally discharged a firearm proximately causing great bodily injury to Shoemaker. Villegas contends that, pursuant to section 654, the trial court should have stayed the enhancement on count 3 because it was based on the same act against the same victim as the enhancement on count 1. Respondent, on the other hand, argues that section 654 does not apply in this situation. The issue of whether section 654 applies to sentence enhancements generally, and in particular to sentence enhancements under section 12022.53, subdivision (d), is currently before the California Supreme Court in *People v. Palacious,* review granted May 11, 2005, S132144.

In resolving this issue, we look for guidance to *People v. Oates, supra,* 32 Cal.4th 1048. In *Oates* the defendant fired two shots at a group of five people, but hit and injured only one. The defendant was convicted of five counts of attempted premeditated murder - one for each person in the group. As to each count, the jury found true an alleged enhancement under section 12022.53, subdivision (d). The Supreme Court held that section 654 did not prohibit the imposition of multiple enhancements under section 12022.53, subdivision (d), even though there was only a single act and qualifying injury, since each enhancement was based on a separate conviction involving a crime of violence against a separate victim. The court reasoned: "We have long held that 'the . . . limitations of section 654 do not apply to crimes of violence against multiple victims.' [Citation.] As we have explained: 'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is

properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not "applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual." [Citations.]' [Citation.]" (*Id*., at p. 1063.)

Here the multiple victims exception is inapplicable. The section 12022.53, subdivision (d), enhancements in counts 1 and 3 were based on a single act committed with a single objective against a single victim. The jury verdicts on these counts refer only to Shoemaker. They do not even mention Yon. To permit the imposition of two consecutive 25-year-to-life enhancements in these circumstances would render appellants as culpable as a defendant who commited an act of violence with the intent to harm two victims. Yet, in *Oates* our Supreme Court made it clear that they are not equally culpable. (*People v. Oates, supra,* 32 Cal.4th at p. 1063.)

" 'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability.' " (*People v. Oates, supra,* 32 Cal.4th at p. 1063.) The imposition of two consecutive 25-year-to-life enhancements would not be commensurate with appellants' criminal liability for the act of discharging a firearm at a single victim. Appellants should be punished once for this act, not twice. (See *People v. Reeves* (2001) 91 Cal.App.4th 14, 56-57 [section 654 prohibits the imposition of multiple enhancements for the single act of inflicting great bodily injury upon a single victim].)

Thus, we conclude that section 654 prohibits the imposition of consecutive 25-year-to-life enhancements on counts 1 and 3. The 25-year-to-life enhancements imposed on count 3 must be stayed.

IX

The Trial Court Committed Blakely

Error in Imposing Upper Term Sentences

Pacheco and Villegas contend that, pursuant to *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], the trial court violated their constitutional rights when it imposed the upper term on count 1 (attempted murder of Shoemaker) and count 6 (discharging a firearm from a vehicle).[7] In addition, all appellants contend that the trial court violated their constitutional rights when it imposed consecutive terms. Appellants argue that they were entitled to have a jury determine beyond a reasonable doubt the existence of each of the aggravating factors justifying imposition of upper and consecutive terms.

In *Cunningham v. California* ___ U.S. ___, [126 S.Ct. 856, 166 L.Ed.2d 856] (hereafter *Cunningham*) the high court held that California's Determinate Sentencing Law violates a defendant's Sixth Amendment right to a jury trial insofar as it permits a court to impose an upper term sentence based on facts found by the court, instead of facts found by the jury and proved beyond a reasonable doubt. *Cunningham* overruled a contrary holding in *People v. Black* (2005) 35 Cal.4th 1238. In *Black* the California Supreme Court held that, when a trial court exercises discretion to select the upper term sentence based on facts found by the court, the defendant's right to a jury trial is not violated.

Respondent contends that Pacheco and Villegas waived their right to claim *Blakely* error because they failed to raise the issue in the trial court. But since *Black* was controlling authority when Pacheco and Villegas were sentenced, it would have been futile for them to have raised the issue at that time. In these circumstances, a waiver did not occur. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.)

Pursuant to *Cunningham*, we must reverse the trial court's imposition of the upper term on counts 1 and 6 as to Pacheco and Villegas. However, *Cunningham*

[7] On counts 1 and 6, the trial court imposed the middle term as to Villa.

does not affect the validity of the trial court's imposition of consecutive sentences. *Cunningham* dealt exclusively with the imposition of an upper term sentence. In *People v. Black, supra,* 35 Cal.4th at pp.1262-1263, the California Supreme Court held that a jury trial is not required on the aggravating circumstances that justify imposition of a consecutive sentence. That holding still stands, and is binding on this court under the principles of stare decisis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

X

Appellants Are Entitled to Presentence Conduct Credits

The trial court denied appellants presentence conduct credits. Appellants contend that, as a matter of law, they are entitled to such credits. Respondent argues that the contention is waived because appellants failed to raise the issue in the trial court. Respondent's argument is without merit. (See *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 ["A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered."]; *People v. Aguirre* (1997) 56 Cal.App.4th 1135, 1139 [issue of calculation of presentence conduct credits is not waived by failure to object].)

Respondent maintains that, pursuant to *In re Cervera* (2001) 24 Cal.4th 1073, appellants are not entitled to presentence conduct credits. In *Cervera* our Supreme Court held that California's "Three Strikes" law does not authorize or allow a defendant with three strikes to be awarded *prison* conduct credits for use against his mandatory indeterminate term of life imprisonment. (*Id*., at p. 1076.) *Cervera* is distinguishable because we are here concerned with presentence, not prison, conduct credits and because the "Three Strikes" law is inapplicable.

In *People v. Philpot* (2004) 122 Cal.App.4th 893, 908, the court held that "presentence conduct credits are available to a defendant sentenced to an indeterminate life term under the three strikes law." Based on *Philpot*, we conclude that the trial court erroneously denied appellants presentence conduct credits pursuant

to sections 2933.1 and 4019. The Board of Parole Hearings may use the conduct credits to determine appellants' release date, but only after they have served the minimum term of their indeterminate sentences. (*Id*., at pp. 908-909; *People v. Carpenter* (1979) 99 Cal.App.3d 527, 535.)

Disposition

The judgment is reversed only as to the sentence and in all other respects is affirmed. The matter is remanded to the trial court for resentencing in accordance with the views expressed in this opinion. In resentencing appellants, the trial court shall: (1) as to Villegas, strike the gang enhancements (§§ 186.22, subds. (b)(1)(C) & (b)(4)(B)) on counts 1 (attempted murder of Shoemaker), 3 (kidnapping to commit robbery), and 5 (carjacking); (2) as to Pacheco, strike the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) imposed on count 3 and instead impose a minimum parole eligibility date of 15 calendar years (§ 186.22, subd. (b)(5)); (3) as to Villegas, impose a minimum parole eligibility date of 15 calendar years on count 2 (attempted murder of Yon) (§ 186.22, subd. (b)(5)); (4) as to all appellants, stay execution of the sentences imposed on count 5 (carjacking), including the 25-year-to-life enhancements imposed pursuant to section 12022.53, subdivisions (d) and (e)(1); (5) as to all appellants, stay execution of the sentences imposed on count 6 (discharging a firearm from a vehicle), including the 25-year-to-life enhancements imposed pursuant to section 12022.53, subdivisions (d) and (e)(1); (6) as to all appellants, stay execution of the 25-year-to-life enhancements, imposed pursuant to section 12022.53, subdivisions (d) and (e)(1), on count 3; (7) as to Pacheco and Villegas, select the appropriate term of imprisonment for the offenses in counts 1 and 6 pursuant to the principles of *Cunningham*; and (8) as to all appellants, grant presentence conduct credits pursuant to sections 2933.1 and 4019. The court is directed to prepare amended abstracts of

judgment and to forward certified copies to the Department of Corrections.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Janice C. Croft, Judge

Superior Court County of Los Angeles

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Victoria H. Stafford, under appointment by the Court of Appeal, for Anthony R. Villa, Defendant and Appellant.

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