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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PHILLIP RICKY RODRIGUEZ, Defendant and Appellant.	H027362 (Santa Clara County Super. Ct. No. CC254542)

A. INTRODUCTION

This case involves a group beating that took place near the basketball courts in Campbell Park on July 8, 2002. Three men were charged in connection with the beating: Daniel Albert Delgado, Jr., Nathan Thomas Morris, and defendant Phillip Ricky Rodriguez. Midway through trial Morris and Delgado pleaded guilty and the matter proceeded with Rodriguez as the only defendant.

The jury found defendant guilty of battery with serious bodily injury (Pen. Code, §§ 242, 243, subd. (d)),[1] falsely identifying himself to a peace officer (§ 148.9), robbery (involving a bicycle) (§§ 211, 212.5, subd. (c)), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)). The jury also found that in connection with the assault, defendant had personally inflicted great bodily injury. (§ 12022.7, subd. (a).)

[1] Hereafter all unspecified statutory references are to the Penal Code.

The trial court sentenced defendant to a total unstayed term of 14 years in state prison. The aggregate term consisted of three years for the assault, doubled due to a prior strike conviction (§§ 667, subds. (b)-(i), 1170.2), plus five years for a prior serious felony conviction (§ 667, subd. (a)), and three years for the great bodily injury enhancement (§ 12022.7, subd. (a)). A six-year sentence for the robbery was ordered to run concurrent to the principal term and the court imposed but stayed a six-year sentence for battery pursuant to section 654. The court ordered $8,592 in direct victim restitution (§ 1202.4, subd. (a)), payable by defendant jointly and severally with the former codefendants.

Defendant makes a number of contentions on appeal. We find merit in one of them. Defendant contends that the trial court erred in instructing the jury in the language of CALJIC No. 17.20, which describes the infliction of great bodily injury for purposes of the section 12022.7 enhancement. Defendant argues that the portion of the instruction applicable in the case of a group beating is inconsistent with the statutory language requiring *personal* infliction of great bodily injury. We agree and reverse.

B. THE PROSECUTION'S CASE

1. The Victim

On or about July 8, 2002, at around 8:30 in the evening, José Guzman was attacked by a group of three men. Guzman made in-court identifications of the three codefendants. He described defendant and codefendant Delgado as being of Mexican descent and codefendant Morris as "the white guy."

Guzman had ridden a bicycle to Campbell Park and stopped to watch a basketball game. Guzman was straddling or leaning against his bicycle when either Delgado or Morris approached him and asked him where he was from. Guzman responded, "Mexico." The questioner then hit Guzman in the face, causing Guzman to fall to the ground. Guzman felt kicks and blows to his face. Guzman first stated that two of the assailants were hitting him and the other was giving him kicks. Later he said that all three defendants hit and kicked him. He also corrected himself and testified that he was

sure it was “the white guy” (Morris) who hit him first. He received about 20 blows to his face and lost two teeth.

When the assailants ceased their attack, Guzman got up and followed the trio out of the park and along the sidewalk toward the overpass that crosses a creek trail. He saw a police car and waved for the police to stop the men. When Guzman reached the top of the overpass he saw the three defendants being detained by the police and identified them as his assailants.

2. The Eyewitness

Geoffrey Shenk had been standing on the sidelines at Campbell Park waiting to get into one of the basketball games when he observed Guzman ride a bicycle into the area, cut across one of the courts, and come to a stop 12 or 15 feet away. Three men appeared from the grassy area between the two basketball courts and approached Guzman. One of them said something to Guzman and then that same person hit Guzman in the side of the head. Guzman turned his head, spit out a tooth, and then tried to ride his bicycle away, but one of the three men put his hand on the bicycle to prevent his leaving. Delgado then joined in and hit Guzman in the back of the head and the side of the face. At this point only two persons were hitting Guzman.

Guzman fell off the bicycle onto the grass. All three men kicked and punched him in the back, head, and chest. While he was down on the ground, Guzman spit out another tooth. Shenk was not sure whether all three men kicked Guzman in the head. He said that the kicks landed on the body or the head or both. Guzman kept trying to get up and would stagger for a couple of feet but would then fall down again. Shenk attempted to break up the attack by yelling, “Stop,” but one of the assailants told him to mind his own business.

The assault ended when someone yelled, “Cops” and a police vehicle showed up. The three assailants went as a group over to where the fight had begun and where Guzman’s bicycle was still located. They picked up some small items from around the

area and two of them picked up the bicycle. One of the two straddled the bicycle and tried to ride it but could not. He abandoned the bicycle at the bottom of the terraces that led uphill and out of the park. The three continued as a group and Shenk chased after them, keeping them in his sight until he saw them detained by the police officers.

At trial Shenk initially identified defendant as the person who approached Guzman and threw the first punch. Shenk had told the police on the day of the incident that it was the person without tattoos that hit first. When it was later brought out that defendant has numerous tattoos, Shenk acknowledged that he must have been mistaken in his earlier testimony in which he identified defendant as the person who hit first.

3. Campbell Police Officers

Sergeant Richard Shipman had been patrolling the area of Campbell Park when he saw Guzman with blood on his face, running up to Shipman's marked police vehicle. Guzman was pointing in the direction of three people who were running up the steps, away from the area of the basketball courts. Shipman kept the three in his line of vision, drove up to them, and told them to stop. Guzman came along and either spoke or gestured in a manner that indicated to Shipman that these were the individuals toward whom Guzman had been pointing.

Officer Martin Rivera responded to the scene and observed the three defendants on the overpass detained by Shipman. Guzman was standing nearby. Rivera interviewed Guzman who said that he was not sure how many people had been hitting or kicking him. Guzman identified all three defendants as the men who had approached him and identified Delgado as the person who hit him first. Guzman told Rivera that defendant was the second person to strike him and, although he knew that Morris had come up to him with the others, he was not sure whether Morris had done any of the punching or kicking.

Officer Lawrence Blanc arrived and assisted in trying to identify defendant. The name and birthdate defendant gave to him initially were false. Officer Blanc testified on

direct examination that defendant told him he had been walking away from the scene alone and did not know the other suspects. On cross-examination, defense counsel elicited the officer's acknowledgment that defendant had also denied having been involved in any physical confrontation that night.

Officer Ana Spear interviewed Shenk at the scene. She recalled that Shenk had told her that the two Hispanic assailants were the persons who walked over and picked up Guzman's bicycle after the beating had come to a halt. One of those two men straddled the bicycle and attempted to walk away with it.

C. THE DEFENSE CASE

The defense was directed solely to the issue of identity. After codefendant Morris entered his guilty plea, he testified that defendant was not involved in the fight. Morris said that he and Delgado had gone to the park in his truck along with defendant, defendant's brother Tommy,[2] and a friend of Delgado's named "Joe." Morris described Joe as having a "whole sleeve" tattoo on his left arm similar in coverage to the tattoo defendant had in the same location. According to Morris, Tommy started the fight with Guzman and it was Joe who joined in the beating. Tommy testified that he indeed had started the fight. He said that both Joe and Delgado got involved but that defendant had not participated.

D. CONTENTIONS

Defendant makes the following contentions on appeal:

(1) The trial court erred in permitting the prosecution to introduce evidence of his prior conviction to impeach his out of court statement denying any involvement in the beating (*People v. Jacobs* (2000) 78 Cal.App.4th 1444 (*Jacobs*));

[2] We use the witness's first name to avoid confusing him with his brother. No disrespect is intended.

(2) The prosecutor engaged in prejudicial misconduct by implying that defense counsel had fabricated the defense;

(3) There is no substantial evidence to support the robbery conviction;

(4) The trial court erred in instructing the jury in the language of CALJIC No. 17.20 because the instruction is inconsistent with the statutory language requiring *personal* infliction of great bodily injury (§ 12022.7, subd. (a));

(5) Section 654 requires that the sentence for the robbery be stayed;

(6) The trial court erred in making defendant jointly and severally liable for restitution to the victim.

E. DISCUSSION

1. Prior Conviction Evidence

Prior to trial the prosecutor informed the trial court that if defendant were to testify the prosecutor would seek to impeach his testimony with evidence of a 1994 felony conviction for assault that also carried a gang enhancement and a 1998 misdemeanor conviction involving domestic violence. The trial court ruled: "Both of these offenses are crimes of moral turpitude. They go to credibility. They are material. They are not remote because the defendant has not led a blameless life from 1994 to today's date. And they are more probative than prejudicial. So they can come in subject to [defense counsel's] reading the [probation] report."

Defendant did not testify. During the prosecution's rebuttal case, after Officer Blanc testified that defendant told him that he had been walking away from the scene alone, defense counsel asked the officer if defendant had denied having been involved in any physical confrontation that night. Officer Blanc acknowledged that defendant had denied being involved. Counsel elicited the testimony, he said, in order to establish the fact that defendant had denied his involvement from the very beginning.

The prosecutor then asked for permission to admit an exhibit containing the record of defendant's 1994 conviction for assault with force likely to produce great bodily

injury. (§ 245, subd. (a)(1).) The prosecutor argued that pursuant to *Jacobs*, *supra*, 78 Cal.App.4th 1444, the evidence was admissible to impeach defendant's out of court statement. The prosecutor also argued that even if the court did not want to admit evidence of the gang enhancement attached to the assault conviction (§ 186.22, subd. (b)), the court should admit evidence of a second count connected to the 1994 conviction--committing a crime for the benefit of a criminal street gang (§ 186.22, subd. (c)).

Defense counsel sought to have the court sanitize the evidence to show only a conviction of "a felony involving moral turpitude." The trial court found "that gang enhancement is more prejudicial than probative. So I am not going to allow that in." After an off-the-record discussion, the trial court determined that the gang crime had previously been stricken so that it could not be admitted for any reason. The exhibit was redacted and admitted into evidence showing a 1994 conviction for "assault with force likely to produce great bodily harm."

Defendant argues that the record does not show that the trial court in fact weighed the risk of prejudice against the probative value of the evidence as required by Evidence Code section 352. We disagree. A trial court does not have to provide detailed and precise descriptions of the weighing process so long as the record demonstrates that the court actually engaged in that process. (*People v. Crittenden* (1994) 9 Cal.4th 83, 135.) Here the trial court expressly stated that the gang enhancement was more prejudicial than probative and excluded it for that reason. Implied in that ruling was the court's finding that evidence of the assault conviction itself was not unduly prejudicial. Furthermore, at the time of the prosecution's in limine motion the court expressly found the assault conviction to be relevant, material, and not unduly prejudicial. Defendant argues that the earlier ruling was made in connection with his possible live testimony and since it was ultimately offered to impeach a hearsay statement the trial court was bound to reconsider the issue. We fail to see how the analysis would have been different. Since defendant does not elaborate on the point we need not consider it further. (See *People v. Barnett*

(1998) 17 Cal.4th 1044, 1107, fn. 37 [contention without analysis or argument not properly raised].)

Defendant also contends that to the extent the trial court conducted the Evidence Code section 352 analysis it abused its discretion in finding that the prejudicial effect of the evidence of the assault conviction did not outweigh its probative value. Incorporated within this argument is the suggestion that *Jacobs* is either distinguishable or wrongly decided. Again, we disagree.

In *Jacobs*, the appellate court held that a defendant's prior felony convictions were admissible under Evidence Code sections 1202 and 788[3] to attack his credibility when, at his own request, his exculpatory statement to the police was admitted into evidence but he did not testify at trial. (*Jacobs*, *supra*, 78 Cal.App.4th at p. 1446.) The court's holding was based upon the provisions of the Evidence Code as well as general concepts of fairness and the public policy incorporated into our state's Constitution. *Jacobs* reasoned that the Evidence Code did not affect the admissibility of prior conviction evidence for impeachment of the defendant's out of court statement and that it was not unfair or inappropriate to subject the defendant to impeachment by use of his priors when he did not testify. "Another party to the litigation should not be prevented from

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[3] Evidence Code section 788 provides in pertinent part: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony. . . ."

Evidence Code section 1202 provides in full: "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant."

legitimate impeachment of damaging evidence because of [the defendant's] decision not to testify." (*Id.* at p. 1451.)

The court also referred to subdivision (f) of article I, section 28 of the California Constitution, which states: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." *Jacobs* observed that although the Supreme Court has determined that this provision applies only to those prior felony convictions which involve moral turpitude (*People v. Castro* (1985) 38 Cal.3d 301, 313-317), and that the admissibility of prior felony convictions is still subject to trial court discretion under Evidence Code section 352 (38 Cal.3d at p. 312), the Supreme Court has not limited the application of subdivision (f) in any fashion relevant to the question of whether prior conviction evidence is admissible to impeach a defendant's out of court statements. *Jacobs* concluded that the Constitution "would seem to mandate admission of appellant's prior felony convictions--subject, of course, to the limitations of section 352." (*Jacobs, supra,* 78 Cal.App.4th at p. 1453.)

We are persuaded that *Jacobs* was correctly decided and find no basis upon which to distinguish it here. In this case, defense counsel elicited evidence of defendant's own exculpatory out of court statement. Because defendant chose not to testify, the validity of his assertion that he was not involved in any physical confrontation could only be challenged by way of an attack on his credibility. Use of the prior conviction evidence in this context was not unfair or inappropriate.

Nor do we agree with defendant that the prior conviction had little, if any, probative value. Evidence of a prior conviction for a crime involving moral turpitude reflects upon a witness's honesty and integrity and is relevant to the issue of the witness's credibility. (*People v. Castro, supra*, 38 Cal.3d at p. 314.) It is settled that the crime of assault with force likely to cause great bodily injury is a crime of moral turpitude.

(*People v. Elwell* (1988) 206 Cal.App.3d 171, 175.) Accordingly, evidence of defendant's prior conviction was probative of his credibility.

Defendant argues that the fact that the prior crime and the instant offense were identical makes the evidence unduly prejudicial. It is true that the prior conviction involved the same charge for which defendant was on trial, but that alone does not warrant excluding the evidence. It is merely one factor in the analysis. (*People v. Castro* (1986) 186 Cal.App.3d 1211, 1216.) It is also true that the evidence might have been sanitized to show only conviction of "a felony involving moral turpitude." There is the concern, however, that such a maneuver would increase the prejudicial effect of the evidence by diverting the jury's attention to the question of *which* crime was involved.

The potential for prejudice is that the jury will use the prior conviction as evidence of defendant's propensity to commit the crime charged. That potential was mitigated by several admonitions. The prosecutor followed his reading of the exhibit with the remark: "This is being admitted only for the purposes of impeaching the statement in evidence by counsel." Defense counsel stated in closing argument: "And it's very important that you keep in mind, even though that is the same charge that he has here, that is not before you for the purpose of saying, well, in 1994, he had this offense . . . so, gee, he must have done this one . . . . [¶] . . . it is before you for the purpose of what we call impeachment, which just means to bring up something against a person because you can use it to consider the truth of what they say." And finally, the trial court told the jury: "The only way you can use that [evidence] is to evaluate the defendant's credibility on those statements that came in. You can't use it to say, well, he did this one--he did that one; he must have done this one. [¶] Do you understand that? Okay."

The trial court enjoys broad discretion in determining whether the probative value of evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) A trial court's discretionary ruling under Evidence Code section 352 will not be disturbed on appeal absent an abuse

of discretion. (*People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1124.) The trial court did not abuse that discretion here.

2. Prosecutorial Misconduct

Defendant next argues that he did not receive a fair trial due to the prosecutor's misconduct. The examples of misconduct that defendant cites are as follows:

First, during the prosecutor's cross-examination of the defendant's brother the trial court reminded counsel that they were planning to complete the examination of the witness by noon. The prosecutor had just been questioning the brother about why he chose to take "hours and hours" to walk home rather than return to the truck that brought him to the park earlier that evening. Counsel responded to the trial court's reminder: "He is digging himself in deeper. I am sorry, Your Honor."

The court promptly admonished the jury: "That's not an appropriate comment. That's struck, and you will disregard it."

The next instance of alleged misconduct occurred during argument and again involved the testimony of defendant's brother. The prosecutor noted that the brother had made a statement to the defense investigator in 2002 but the defense did not provide the statement to the prosecution until much later: "Discovery of that statement was not provided to me until September of 2003, a year later. The defense sat on this testimony for a whole--this statement for a whole year before providing it. [¶] Now, I have to tell you that there is no obligation for the defense to provide me with anything. The only obligation to provide discovery is that if they have any evidence that they are going to use, they have to tell me one month prior to trial. And September of this year was about a month prior to this case coming up on the trial--that's when they are obligated to tell me. They don't have to tell me anything. [¶] But wouldn't you think that in a situation like this, if we really had the wrong person, they would tell me right at the beginning[?] Let's investigate it. Let's figure it out. But no. No. The defense is playing hide the ball until trial and then bringing [the brother] in . . . ." Defense counsel objected at this point

and the trial court told the jury the statement was "speculative" and that they should disregard it.

The prosecutor then immediately continued: "The defense is withholding this critical evidence until the eve of trial." This remark was followed by another defense objection and a discussion at the bench. The trial court then told the jury: "So 'defense is playing hide the ball' is struck."

Finally, in his closing argument the prosecutor referred to defense counsel's immediately preceding argument to the jury: "Our views of the facts are definitely very different. [¶] All right. You know how an octopus escapes when it feels it's in trouble? It shoots out a big cloud of ink so its pursuers can't see it and it can stay. That's what the defense is doing here, putting out a big cloud of ink so the defendant can escape. Other attorneys like to say, well, it's like a smoke screen, but I like an octopus, because that's exactly what's going on here." Defense counsel did not object to this portion of the argument.

Defendant now contends that the foregoing remarks are prejudicial misconduct requiring reversal and that his attorney was ineffective for failing to object. We disagree on both points.

" ' "[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" ' " (*People v. Williams* (1997) 16 Cal.4th 153, 221.) "What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant. [Citation.] When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.] If the remarks would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable." (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

Failure to raise a timely specific objection to the alleged misconduct at trial and to seek a curative admonition regarding the misconduct precludes the defendant from raising the issue on appeal, unless he had no opportunity to object, it would have been futile to do so, or an admonition would not have cured the resulting harm. (*People v. Welch* (1999) 20 Cal.4th 701, 753.) The waiver rule applies because a timely admonition will usually cure any potential prejudice arising from a prosecutor's harmful comments. For example, in *People v. Dennis* (1998) 17 Cal.4th 468, the Supreme Court acknowledged that the prosecutor's misstatements bore the potential for prejudice, but concluded that "none of the purported misdescriptions, misstatements, or misrepresentations defendant cites were so outrageous or inherently prejudicial that an admonition could not have cured it." (*Id.* at p. 521.)

In the present case, the first objectionable remark was not so egregious that it was not cured by the trial court's admonition. The prosecutor's comment about the witness digging himself in deeper was improper but the trial court immediately told the jury to disregard it.

As to the second set of remarks, we do not believe the jury reasonably could have construed the comments as implying that the defense had acted improperly. The trial court's first admonition specifically told the jury the comments were "speculative," which is the same thing as telling the jury that the prosecutor had no factual basis for the claim that the defense had delayed revealing the brother's statement. Even the prosecutor was careful to say, "They don't have to tell me anything." To the extent the jury could have construed the comments as implying something harmful, the implication was cured by the two admonitions.

That leaves the prosecutor's comments about the octopus defense. Counsel did not object to these comments and in our view, no objection was warranted. The prosecutor was not suggesting any improper conduct or impugning the integrity of defense counsel. Indeed, the prosecutor later noted, after discussing counsel's cross-

examination of the prosecution witnesses: "That's being a good defense attorney. [Defense counsel] is an excellent defense attorney, and he has done an excellent job. But that doesn't mean his client is innocent." The prosecutor's comment about "putting out a big cloud of ink" is fair comment upon the evidence. The prosecutor was urging the jury to consider the defendant's evidence as a distraction and to concentrate upon the evidence the prosecution submitted. That is not misconduct.

3. The Robbery Conviction

Defendant next contends that the evidence is insufficient to support the robbery conviction. He claims there is no evidence that he personally took the bicycle and, assuming he aided and abetted the assault, robbery of the bicycle is not a natural and probable consequence of that crime. As the Attorney General points out, there is one remaining theory--aiding and abetting robbery of the bicycle.

When an appellant challenges the sufficiency of the evidence, we "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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We reverse only where the record clearly shows there is no basis upon which the evidence can support the jury's verdict. (*People v. Montero* (1986) 185 Cal.App.3d 415, 424.)

Robbery is defined as the felonious taking of property in the possession of another, from his or her person or immediate presence, and against his or her will, accomplished by means of force or fear. (§ 211.) To convict a defendant on an aiding and abetting theory a jury must find the defendant "act[ed] with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) "[M]ere presence at the scene of a crime is insufficient to establish aider and abettor liability." (*People v. Salgado* (2001) 88 Cal.App.4th 5, 15.)

There is substantial evidence that, at minimum, defendant aided and abetted the robbery of the bicycle. There is no dispute that the elements of the crime of robbery have been met. The bicycle was taken from Guzman's immediate presence by means of force or fear. The only question was *who* took it. Both Guzman and Shenk identified defendant as one of the three men who assaulted Guzman. Shenk told Officer Spear that it was the two Hispanic assailants who picked up the bicycle after the beating had stopped. Since defendant was one of the two Hispanic assailants, this statement is sufficient evidence upon which to base a finding that he acted together with the other man to take the bicycle. That is enough to support the robbery conviction. (*People v. Cooper* (1991) 53 Cal.3d 1158.)

4. CALJIC No. 17.20

Section 12022.7, subdivision (a) provides, in pertinent part: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

CALJIC No. 17.20 is the instruction that defines the infliction of great bodily injury for purposes of the section 12022.7, subdivision (a) enhancement. The instruction includes an optional section that tells the jury how to decide the truth of the enhancement allegation in the context of a group beating. That portion of the instruction as read to the jury in this case states: "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he may have been found to have personally inflicted great bodily injury upon the person i[f], one, the application of the unlawful physical force upon the victim was of such a nature that by itself it could have caused the great bodily injury suffered by the victim; or, two, that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and the defendant then

knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim." Defendant argues that the first and second alternatives described in this part of CALJIC No. 17.20 permitted the jury to find the allegation to be true without making the legally necessary finding that he *personally* inflicted the great bodily injury. We agree that the second alternative is an incorrect statement of the law.

In *People v. Cole* (1982) 31 Cal.3d 568, 572, the Supreme Court held that the phrase "personally inflicts" in section 12022.7 is unambiguous and means what it says: "[T]he individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." The court further stated: "[T]he Legislature intended the designation 'personally' to limit the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim." (*People v. Cole*, *supra*, 31 Cal.3d at p. 579.)

The Fourth District Court of Appeal later expanded the concept of personal infliction to include those participants in a group beating where the victim's injuries could not be traced to a specific act by the defendant. The court declined to set forth a universally applicable test for distinguishing accomplices from direct participants in the infliction of great bodily injury, but concluded "only that when a defendant participates in a group beating and when it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a great bodily injury enhancement if his conduct was of a nature that it could have caused the great bodily injury suffered." (*People v. Corona* (1989) 213 Cal.App.3d 589, 594 (*Corona*).)

The first alternative contained in CALJIC No. 17.20 accurately tracks *Corona*'s reasoning. But even if the first alternative is appropriate, there is no support for the second alternative. The second alternative permits a true finding if at the time of the

incident the defendant knew or should have known that the cumulative effect of all the unlawful force applied by all the assailants would result in great bodily injury. This portion of the instruction is facially inconsistent with the statutory language requiring *personal* infliction of great bodily injury because it permits the jury to find the allegation to be true without finding that the defendant directly performed an act that caused or, as *Corona* held, could have caused, great bodily injury.[4]

Where, as here, the jury is instructed in alternate theories, one of which is legally inadequate, reversal is required unless the record reflects that the jury's finding was not based on the legally invalid theory. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1130.) Because the sentence enhancement increases defendant's penalty for the underlying crime, an erroneous instruction is reviewed under the standard of *Chapman v. California* (1967) 386 U.S. 18. The jury's true finding must be reversed unless we are satisfied beyond a reasonable doubt that the finding was not based on the erroneous second alternative theory in CALJIC No. 17.20. In making this determination, we examine the evidence, arguments of counsel, any communications from the jury, and the verdict. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

In the present case, Shenk acknowledged that it must not have been defendant that he saw throw the first punch. Guzman's testimony was consistent with Shenk's. It was one of the assailants without visible tattoos who hit him first. Both Guzman and Shenk testified that all three defendants joined in the hitting and the kicking. But the only act that could be directly linked with a serious injury was the first blow, which immediately dislodged a tooth. That blow indisputably did not come from defendant. Other than the

[4] The Supreme Court presently has under review the question of whether the instruction's "group beating exception" is consistent with *People v. Cole*, *supra*, 31 Cal.3d 568. (*People v. Modiri*, review granted Dec. 23, 2003, S120238 and *People v. Pena*, review granted July 27, 2005, S134354.)

first blow, there was no evidence the jury could have used to connect Guzman's injuries to any particular assailant.

The prosecutor recognized that it would be very difficult for the jury to find that defendant had personally inflicted the great bodily injury. Indeed, the battery count had included the allegation that defendant had personally inflicted great bodily injury within the meaning of sections 667 and 1192.7 but the jury instructions applied the group-beating exception only to the section 12022.7 enhancement connected to the assault. Referring to this distinction during argument, the prosecutor explained: "In Count 1 [the battery], you had to actually find that [defendant] personally inflicted the injuries, as opposed to aiding and abetting. I told you that's going to be really difficult. Th[e] enhancement is easier, because for this count and the great bodily injury for Count 6 [the assault], if you find--and this, again, is in the instructions. If you find that a victim is subject or was subject to a group beating, the victim received great bodily injury, but you don't know which one did it, but they all participated and all could have done it, then they are all guilty. [¶] *So this enhancement on this count is pretty easy to prove. Any one of them does the great bodily injury, then all of them who participated in the beating are guilty.* Okay? Does that make sense? I hope so." (Italics added.) Not surprisingly, the jury returned a not-true finding on the great bodily injury allegation connected to the battery and a true finding on the great bodily injury allegation connected to the assault.

Given the evidence, the argument, the instructions, and the jury's findings, we are not satisfied beyond a reasonable doubt that the jury's true finding was based upon the legally adequate first alternative theory in CALJIC No. 17.20. As a result, the true finding on the section 12022.7 enhancement must be reversed.

We disagree with defendant, however, that there is insufficient evidence to warrant a retrial. Under *Corona*, a proper basis for finding that a defendant personally inflicted great bodily injury is when it is impossible to determine which defendant caused the great bodily injury and the defendant's conduct could have caused the great bodily

injury. (*Corona*, *supra*, 213 Cal.App.3d at pp. 593-594.) The focus is upon the nature of defendant's conduct. If there is evidence from which to conclude that his acts could have inflicted great bodily injury, the jury may find the section 12022.7 allegation to be true even if it is impossible to link a specific injury to defendant's conduct.

There is ample evidence to support a finding that defendant participated in the group beating. There is also evidence that defendant's conduct could have caused great bodily injury. Guzman told the police that defendant was the second person to punch him and that he received a total of around 20 blows to his face. He ultimately lost a second tooth. All three of the assailants hit and kicked him while he was on the ground, landing their blows on Guzman's head and torso. Based upon this evidence, a reasonable jury could find that defendant punched, hit, and kicked Guzman in a way that could have caused great bodily injury.

5. Section 654

Defendant argues that the term for the robbery conviction, which the trial court ordered to run concurrent to the term for the assault, should have been stayed pursuant to section 654.[5] We reject this argument.

Section 654 prohibits multiple sentences where a single act violates more than one statute. (*In re Jose P*. (2003) 106 Cal.App.4th 458, 468.) Section 654 also prohibits multiple punishment if the defendant commits more than one act in violation of different statutes when the acts comprise an indivisible course of conduct having a single intent and objective. (*In re Jose P*., *supra*, 106 Cal.App.4th at p. 469.) Section 654 does not apply if a defendant entertained multiple criminal objectives independent of each other. The principal inquiry is whether the defendant's criminal intent and objective were single

[5] Section 654 states, in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

or multiple. (*In re Jose P.*, *supra*, 106 Cal.App.4th at p. 469.) The defendant's criminal intent and objective is determined from all the circumstances. The determination is primarily a question of fact for the trial court and the trial court's determination will be upheld on appeal if there is any substantial evidence to support it. (*Ibid.*)

In the present case the trial court ordered the term for the robbery count to run concurrent because the court found "that it was one course of conduct." Defendant argues that in addition to there having been only one course of conduct, there was but one intent and objective: to attack Guzman. We are not persuaded.

The court chose to impose the robbery sentence concurrently because the two crimes were not "predominantly independent of each other." (Cal. Rules of Court, rule 4.425(a)(1).) But the fact that the two crimes were part of a continuous course of conduct does not preclude a finding that defendant had a separate intent and objective as to each. This is not a case such as the one cited by defendant where one crime (burglary) was committed with the intent of perpetrating another crime (robbery). (See *People v. James* (1977) 19 Cal.3d 99, 120.) Indeed, it is difficult to see how taking the bicycle might have advanced the purported single object of attacking Guzman.

There is sufficient evidence to support the trial court's implicit finding that defendant's intent and objective in taking the bicycle was separate from, rather than incidental to, his intent and objective in joining in the group beating of Guzman. (See *People v. Coleman* (1989) 48 Cal.3d 112, 162.) The attack began with the assailants' asking Guzman where he was from; there was no evidence that it had anything to do with the bicycle. The bicycle was not taken until after the beating was over, when the assailants left Guzman in the grass and returned to where he had dropped the bicycle to pick up their things and take the bicycle away. Taking the bicycle was separate from the attack upon Guzman. Punishment for both crimes is not prohibited by section 654.

6. Joint and Several Restitution

Defendant finally contends that the trial court erred because it imposed joint and several liability for the victim restitution order entered pursuant to section 1202.4, subdivision (f). Numerous courts, including this one, have upheld joint and several restitution orders for compensating victims of crime. (*People v. Zito* (1992) 8 Cal.App.4th 736, 746 (*Zito*) [decided under former Gov. Code, § 13967]; *People v. Arnold* (1994) 27 Cal.App.4th 1096; *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1051; *People v. Blackburn* (1999) 72 Cal.App.4th 1520.) *People v. Hernandez* (1991) 226 Cal.App.3d 1374 is the only case defendant cites in support of his argument that joint and several liability is improper. We have previously disagreed with *Hernandez*. (*Zito, supra*, 8 Cal.App.4th at p. 744.)

Although *Zito* involved former Government Code section 13967[6] and not section 1202.4, the pertinent provisions of the two sections are sufficiently similar that *Zito*'s reasoning applies to the instant order. (See *People v. Madrana*, *supra*, 55 Cal.App.4th at p. 1051.) That is, joint and several liability is not prohibited by the statute, it increases the likelihood the victim will be compensated, it is more likely to cause the criminal to

[6] Former Government Code section 13967, subdivision (c) stated in pertinent part: "In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the defendant is denied probation, in lieu of imposing all or a portion of the restitution fine, the court shall order restitution to be paid to the victim. . . . The court shall order full restitution unless it finds clear and compelling reasons for not doing so, and states them on the record. A restitution order imposed pursuant to this subdivision shall identify the losses to which it pertains, and shall be enforceable as a civil judgment. . . . Restitution collected pursuant to this subdivision shall be credited to any other judgments for the same losses obtained by the victim against the defendant arising out of the crime for which the defendant was convicted. [¶] . . . [¶] For any order of restitution made pursuant to this subdivision, the defendant shall have the right to a hearing before the judge to dispute the determination made regarding the amount of restitution." (Stats. 1992, ch. 682, § 4.)

understand his actions have harmed a real victim, and the statutory requirements give the defendant sufficient civil due process rights. (*Zito, supra*, 8 Cal.App.4th at pp. 744-745.)

Defendant argues that even if joint and several liability is appropriate, we should order the abstract of judgment to be modified to insure that he receives notice of the amounts paid by his codefendants and that his liability be reduced by those amounts. This we decline to do.

We cannot modify defendant's judgment to require the codefendants, who are not before us in this appeal, to give him notice of their payments. Nor do we believe that such an order is necessary to insure that defendant's liability is reduced by the amount paid by the others since that what is presumed in a joint and several order. There can only be one satisfaction of the judgment. Under joint and several liability, payment of the full sum by one or more of the persons liable "extinguishes the obligation and discharges the liability of all the others." (*Kemp v. Barnett* (1976) 62 Cal.App.3d 245, 248.) Defendant's obligation under the order is clear; he must pay the full amount of restitution unless the other defendants also make payments. (*People v. Campbell* (1994) 21 Cal.App.4th 825, 833.)

If the codefendants satisfy the order, defendant will presumably receive notice, because the victim is required by law to inform the court whenever a restitution order is satisfied. (§ 1214.) In the event the victim receives more than the amount ordered, defendant would be entitled to have the excess applied to other judgments arising from the same loss (§ 1202.4, subd. (j)) or to receive a pro rata refund of any overpayment he made (*People v. Arnold, supra*, 27 Cal.App.4th at p. 1100). If necessary, defendant may always seek modification of the order to insure that he receives credit for actual payments made by his codefendants. (§ 1202.4, subd. (f)(1).)

We hold that the trial court correctly imposed restitution jointly and severally pursuant to section 1202.4, subdivision (f).

F. DISPOSITION

The judgment is reversed and the cause is remanded to the trial court for further proceedings, including retrial of the Penal Code section 12022.7, subdivision (a) enhancement if the district attorney elects to retry it.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Bamattre-Manoukian, J.