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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ABRAHAM R. CORONA,** **Defendant and Appellant.**	**A113511** **(Mendocino County Super. Ct. No. 06-6980504)**

Abraham R. Corona appeals the sentence imposed following his guilty plea to second degree burglary (Pen. Code, §§ 459, 460, subd. (b))[1] (count two) and unlawful participation in criminal street gang activity (§ 186.22, subd. (a)) (count three). He also admitted a gang enhancement in connection with the burglary. (§ 186.22, subd. (b)(1).) He was sentenced to six years in state prison. He contends the sentencing court committed *Blakely* error (*Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*)) and that his sentence on count three should be stayed pursuant to section 654. We reject the contentions and affirm.

BACKGROUND

Since this appeal solely involves claims of sentencing error, a detailed recitation of facts is unnecessary. According to the probation report, on February 14, 2006, appellant and four others followed the victim into the victim's florist business and one of appellant's confederates grabbed two gold chains around the victim's neck. Appellant

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

and the four other suspects then fled. The suspects were identified as Sureño gang members.

The court imposed the upper three-year term on the count two burglary, a consecutive three-year midterm on the count two gang enhancement, and a concurrent two-year midterm on count three.

DISCUSSION

I. *There Was No Blakely Error*

Appellant contends the court committed *Blakely* error by imposing the upper term on the burglary count based on aggravating facts not determined by the jury beyond a reasonable doubt, or admitted by defendant, denying him the right to jury trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Appellant concedes that his argument was rejected by our Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) and that principles of stare decisis require us to follow *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) However, he raises the claim solely to preserve it for federal court review.[2]

We reject the People's argument that appellant waived this issue by failing to raise it below. Unlike the defendant in *People v. Hill* (2005) 131 Cal.App.4th 1089 (*Hill*) (upon which the Attorney General relies), who waived a *Blakely* challenge by failing to raise it at his sentencing which occurred *after Blakely* but *before Black*, appellant was sentenced *after Black*, at which point, a *Blakely* objection would have been futile under controlling law the court was compelled to follow. (*Hill, supra*, at p. 1103.) Under these circumstances, appellant did not waive the issue. (*People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 784-785.)

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[2] The United States Supreme Court has granted certiorari in a case presenting this issue. (Cert. granted *sub nom. Cunningham v. California* (2006) __ U.S. __ [126 S.Ct. 1329].)

II. *A Section 654 Stay Is Unwarranted*

Appellant contends the two-year concurrent term imposed on the count three gang participation offense should be stayed pursuant to section 654 because it was committed with the same objective as the burglary. He asks this court to modify his sentence accordingly.

In imposing the concurrent sentence on count three the court stated, "[I]n reviewing [California Rules of Court,] rule 4.425 in concurrent versus consecutive terms, I find that these should be run concurrent because the crimes and the objectives are not predominantly independent of the offense of Count 3. Participation in the criminal street gang was the same basis for the intent on the burglary, essentially, and so I think a concurrent sentence is in the interest of justice in that matter and required by law." Appellant contends that the court's finding that his participation in a gang was "the same basis for the intent on the burglary" required imposition of a section 654 stay on the count three sentence term.

Section 654 "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.* (2003) 106 Cal.App.4th 458, 469 (*Jose P.*).) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Whether a defendant entertained multiple criminal objectives presents a question of fact for the trial court, whose findings will be upheld on appeal if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466 (*Herrera*).)

Herrera held that the defendant's conviction for gang participation under section 186.22, subdivision (a), was divisible from his attempted murder convictions for purposes of section 654 because the gang participation charge required "a separate intent and

objective from the underlying felony committed on behalf of the gang." (*Herrera, supra*, 70 Cal.App.4th at p. 1468.) The court explained that section 186.22, subdivision (a), "is a substantive offense whose gravamen is the *participation in the gang itself.*" (*Herrera, supra,* at p. 1467, fn. omitted, italics in original.) To violate that statute, the defendant "must necessarily have the intent and objective to actively participate in a criminal street gang," but need not "have the intent to personally commit the particular felony . . . ." (*Ibid.*)

"The perpetrator of the underlying crime may thus possess 'two independent, even if simultaneous, objectives[,]' thereby precluding application of section 654. [Citation.]" (*Herrera, supra,* 70 Cal.App.4th at p. 1468, fn. omitted.) Otherwise, the court noted, the application of section 654 "would render section 186.22, subdivision (a) a nullity whenever a gang member was convicted of the substantive crime committed in furtherance of the gang. '[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability." [Citation.]' [Citation.] We do not believe the Legislature intended to exempt the most culpable parties from the punishment under the street terrorism statutes." (*Ibid.,* fn. omitted.)

The Sixth District reached a similar conclusion in *Jose P., supra,* 106 Cal.App.4th 458. In that case, in committing the minor to the California Youth Authority, the court included in the maximum period of confinement, nine years for the defendant's commission of a home invasion robbery, plus 10 years pursuant to the section 186.22, subdivision (b)(1)(C) gang enhancement, and eight months for the section 186.22, subdivision (a) gang offense. The minor contended the eight-month term on the gang crime should be stayed pursuant to section 654. (*Jose P., supra,* at pp. 468, 470.) The court reasoned that as in *Herrera,* given the minor's history of gang involvement, the minor's intent and objective in violating section 186.22, subdivision (a) necessarily must have been participation in the gang itself, and his intent in committing the robbery was to take property located in the victim's home. "Application of the enhancement does not alter the fact that he must also have had the intent to take the property. While he may have pursued the two objectives simultaneously, the objectives were nevertheless

independent of each other. Therefore, section 654 does not bar punishment for both the gang crime and the robbery." (*Jose P., supra*, at pp. 470-471.)

The reasoning and result in *Herrera* and *Jose P.* are applicable in the instant case. The probation report reveals appellant had a tattoo stating "CVC," which stands for Crazy Vatos Controllas, consistent with gang membership. A police search of appellant's residence turned up photographs of gang members wearing clothing depicting gang signs, gang writings, clothing with gang signs, a tray containing .38-caliber wadcutter handgun bullets, and a 20-guage shotgun hidden and wrapped in a sock. One of the other suspects stated that appellant was a member of the CVC gang. The 19-year-old appellant admitted to probation that he has been a member of the CVC gang since age 16. The probation report also stated that appellant has a "serious juvenile criminal history, which has progressed into adulthood in a very short time."

Given appellant's history of gang involvement, his intent and objective in violating section 186.22, subdivision (a) necessarily must have been participation in the gang itself, and his intent in committing the burglary was to take property located inside the florist business. Consequently, the court properly determined that the gang offense need not be stayed pursuant to section 654.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.*

* Judge of the Contra Costa County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.