

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD JENKINS,

Defendant and Appellant.

C049573

(Super. Ct. No.
04F07641)

APPEAL from a judgment of the Superior Court of Sacramento County, Gary S. Mullen, Judge. Affirmed as modified.

E. Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, Catherine Chatman, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Parts I, II and IV of the Discussion.

Defendant appeals from the judgment of conviction after a jury found him guilty as charged of two counts of battery with serious bodily injury (Pen. Code, § 243, subd. (d); counts 1 and 3)¹ and two counts of assault with a deadly weapon upon the victims Seeva and Steven Cherms. (§ 245, subd. (a)(1); counts 2 and 4.) The jury found true the great bodily injury enhancements alleged in connection with the aggravated assault charges (§ 12022.7, subd. (a)) and the criminal street gang enhancement alleged as to all four counts. (§ 186.22, subd. (b)(1).) The court sentenced defendant to a total unstayed prison term of 22 years and four months. It made count four, the aggravated assault on Steven Cherms, the principal term, imposed a consecutive term on count two for the aggravated assault on Seeva Cherms, and imposed concurrent terms on counts one and three for felony battery. The court stayed the sentence on count three but did not stay the sentence on count one.

On appeal, defendant contends the judgment must be reversed because the trial court committed prejudicial error by denying his motion to bifurcate trial of the criminal street gang allegation enhancement and there was prosecutorial misconduct and cumulative error.

Defendant also claims the constitutional doctrine of double jeopardy requires that the battery convictions be vacated and the abstract of judgment be amended to reflect that a stay of

¹ A reference to a section is to the Penal Code unless otherwise specified.

the sentence was imposed on count one pursuant to Penal Code section 654.

With respect to double jeopardy, respondent contends this claim has no merit because the double jeopardy clause does not apply to a unitary criminal case and the use of a sentence enhancement to determine whether one offense is included in another is an unauthorized expansion of section 954. We agree.

In the published portion of the opinion we will conclude that the multiple punishment proscription of the double jeopardy clause does not prohibit multiple convictions for the offenses of aggravated assault resulting in great bodily injury and battery with serious bodily injury.

However, we agree with defendant that the sentence on count one should be stayed pursuant to section 654 and shall direct that the trial court amend the judgment to reflect a stay of the sentence imposed on count one. In all other respects, we shall affirm the judgment.

FACTUAL BACKGROUND

A. The Assaults

In August 2004, Seeva and Steven Cherms² were looking for their 15-year-old daughter, Hailey, who had run away from home. On August 13th, Steven received a telephone call advising him that his daughter may be at a certain apartment complex off of

² In the interests of clarity, we shall refer to Mr. and Mrs. Cherms by their given names and intend no disrespect.

Edison and Howe Avenue in Sacramento County. The complex was in the same area the Cherms had lived in 25 years earlier.

Joshua, a friend of theirs, drove the couple to the apartment complex in his sport utility vehicle (SUV). He parked across the street from an apartment complex on Edison Avenue and he and Steven walked up to the iron gate. Just as the manager opened the gate for them, Steven thought he saw his daughter walking down the street and shouted to Seeva, "hey, that looks like Hailey right there."

Seeva exited the SUV and followed Steven, but then looked back and saw two people in the SUV, a young adult later identified as defendant and a 12 to 14-year old juvenile. Seeva could see defendant trying to start the vehicle and shouted for Steven because many of their valuable personal belongings, contained in several bags, were in the SUV.³ Defendant and the juvenile took the bags and ran between the apartments.

As Seeva walked towards Howe Avenue looking for defendant and the juvenile, she asked a man and woman who were standing near the corner if they had seen where the two males had gone with her bags. The couple was cordial but told Seeva her belongings were gone and advised her to "write it off." Seeva called 911 from her cellular phone to report the theft. After she made the call, the woman told her the "kid" had gone in the

³ Because Steven was in the process of changing banks when he went to look for his daughter, the entire contents of the Cherms' safe deposit box were in the SUV that day.

direction of Howe and Edison and pointed out an apartment complex where the stolen property would be unloaded.

Meanwhile, Joshua picked Seeva up in the SUV and drove down Howe Avenue looking for defendant and the juvenile. Unable to find them, he drove back to the apartment complex and parked the SUV in front of the Royal Gardens Apartments on Howe Avenue. Seeva exited the vehicle and saw Steven walking towards her. Meanwhile, a group of about 10 individuals had gathered nearby, all wearing white T-shirts and jeans. As the group started to approach the Chermis, Seeva recognized defendant as the person who tried to take the SUV. When he stepped toward her in a threatening manner, she realized she was in danger, took a step back, and told him she had no problem with him, she was just trying to retrieve her belongings.⁴

At that time, Steven approached and Seeva told him they should wait for the police, however defendant pushed her to get to Steven who was bewildered and backing away. At the same time, defendant also began giving orders to the other males in the group, directing some to take the SUV and telling others to make sure Steven did not go anywhere. When Steven was surrounded, a male known as J-Mack hit him in the head, followed by defendant, who hit him using what appeared to be homemade brass knuckles. Defendant struck Steven in the temple and eye

⁴ Seeva identified defendant in court as the adult who tried to steal the SUV and then assaulted her. Steven also identified defendant in court as the one who hit him in the face.

and than hit him in the right cheek, causing Steven to stumble and fall to the ground.

Seeva began yelling, "Stop, he's disabled . . . [h]e doesn't want to fight you. He wants nothing to do with this. Stop. Please stop." Hoping to scare them, she also told the group "the police are on their way." Undeterred, defendant walked towards her, smiled, showing gold teeth, and then hit her in the face with his fist. The blow knocked her off her feet, causing her to fall to the ground and lose consciousness. Defendant ran away, but 15-year old Terrance C. (hereafter Terrance) began kicking her in the head and stomping on her stomach and the left side of her body. In an effort to protect his wife, Steven ran over to Seeva and lay on her, suffering a few additional kicks before the police arrived.

When Seeva regained consciousness, she felt searing pain in her head and her sides. She had difficulty breathing and was intubated and taken by ambulance to the hospital where she spent a week. She had a dislocated jaw, a closed head injury associated with amnesia and loss of consciousness, a fractured rib, and bruising around her ribs and back. Dr. Owens, director of the Mercy San Juan Trauma Center, characterized her injuries as "moderately severe" and consistent with a "rather significant" beating.

As a result of the beating, Steven sustained a "giant retinal tear" and "traumatic vitreous hemorrhage" in his right eye. He underwent surgery on August 27, 2004, to re-attach his retina and will require two or three additional surgeries. At

the time of trial, he had no actual sight in his right eye and his visual prognosis was guarded due to the severe trauma to his eye. The blows to his face also broke two of his teeth and knocked the shell of a recent root canal and temporary filling out of his mouth.

B. The Investigation

Terrance advised law enforcement officers that after the Chermes confronted defendant and another friend about taking their property, defendant punched the man in the face a couple of times and when the woman yelled at defendant, he turned and punched her in the face, causing her to fall. Terrance refused to give the deputy any further information about his two friends because he was scared they would kill him if he did.

On September 1, 2004, Ken Silva, defendant's probation officer, went with his partner and a detective to defendant's address. When they arrived, Silva saw defendant standing outside. When they made eye contact with him, he ran away. Later that day, Silva was asked to identify a patient at Kaiser Permanente Medical Center who was giving a false name and was believed to be defendant. Silva identified defendant who was sitting in the emergency room with a heavily bandaged arm. He was awaiting surgery. Defendant told Silva he cut his arm on a fence he jumped over while running from Silva earlier that day.

The following day, on September 2, 2004, defendant agreed to speak with Detective Rivera. He told Rivera the Chermes approached him and accused him of taking their property. Steven became verbal with him, punched him in the face, and a fistfight

ensued. Defendant denied hitting Seeva but said Terrance was present.

C. The Gang Enhancement

Defendant and Terrance are both members of the street gang known as the Del Paso Heights Bloods (DPH Bloods). Terrance carved the letters "DPH" in his arm because it was a "gang thing" and showed he was from Del Paso Heights.

Detective Elaine Stoops of the Sacramento County Sheriff's Department gang unit testified as an expert on gang psychology and gang-related crime. The DPH Bloods are a gang with over 200 validated members in the northern area of Sacramento County. The letters DPH are a symbol commonly used to signify that gang and are used by gang members as a verbal challenge. The gang has been present in the Del Paso Heights area since the late 1980's and gang members have been seen in the area of the Royal Gardens Apartments, which is within a couple of miles of Del Paso Heights.

To be a validated member, an individual must meet two of 10 standard criteria and have been an active gang member within the last five years. Members of the DPH Bloods frequently engage in the sale of narcotics, robberies, drive-by shootings, and homicides.

According to Detective Stoops, defendant has been a validated member of the DPH Bloods since February 2003. The validation was based upon a field contact by Deputy Jaymon Martinez, at which time defendant admitted he was a member of that gang while he was in the company of two other validated

gang members and was wearing red clothing, the color associated with the DPH Bloods. Additionally, he had committed a gang-related crime, which may be a crime involving narcotic sales, arson, robbery, drive-by shootings, or homicide.

According to Stoops, a gang member's whole livelihood is about respect and disrespect. Gang members want and expect others to "respect" them, meaning to fear them. Gang members do not like to be labeled as snitches and a snitch can expect severe retribution from other members in the form of a "beat down" or shooting. A "beat down" occurs when the gang surrounds a person and beats the person up until he or she goes down and is no longer moving or causing the gang a problem. Some of these beat downs result in homicide.

Committing a theft and participating in a beat down as in the present case benefits a gang member by bolstering his status in his gang and other gang sets and reinforces the fear and intimidation of the community. Other members of the community are reluctant to speak to law enforcement authorities because they fear reprisal from gang members.

Males as young as seven are brought into the gang because they are naïve and impressionable and are willing to do what they are told without asking a lot of questions. Older gang members test young males by ordering them to do various acts in the commission of a criminal offense to prove their trustworthiness and loyalty to the gang.

Stoops also testified that Charles Yerger and William Fields are validated members of the DPH Bloods, that in October

2002, Yerger made a threat to commit a crime resulting in great bodily injury or death (§ 422) for which he was charged and convicted with a gang enhancement (§ 186.22), and that Fields suffered two prior convictions for assault with a firearm sometime in December 2002 or 2003.

D. Defense

Defendant took the stand, denied he was a gang member, and testified he was acting in self-defense when he hit Steven Cherms. According to defendant, the day of the attack, he went to the Royal Gardens Apartments with his girlfriend to visit friends. While they were sitting in front of the apartment complex, he heard a lot of yelling, which drew his attention to a white couple. The man was upset and was yelling at some kids saying "You little bastards, where's my stuff at?" while the woman was pointing at people. The woman approached him, pointed at him and said "He's one of the ones that took my property." When the man started yelling at him, defendant stood up and said he did not know what they were talking about. The man hit him in the face and a fight ensued. Defendant stopped fighting when his girlfriend pulled him away and he went back into the apartment complex. He left the area a short time later when his ride arrived. At that time, the man and the woman were both standing on their feet yelling at the kids. He never hit the woman and never saw anyone else hurt her.

DISCUSSION

I. Bifurcation

Defendant contends the trial court's denial of his motion to bifurcate the trial of the gang enhancement allegation resulted in the denial of his right to due process. Respondent contends the trial court did not abuse its discretion in denying the motion because the evidence was independently relevant on the issues of motive, intent, and defendant's credibility. We agree with respondent.

A. Procedural Background

The prosecution alleged that all four charged offenses were "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1).)

Prior to trial, defendant moved for a bifurcated trial on the gang enhancement allegations. The trial court denied the motion stating as follows: "The conduct that's alleged, the reason for the crime, the resulting [theft], whose conduct inflicted which blow, the motive . . . for crimes, all of those things . . . are inextricably intertwined . . . in the case such that it would make no sense to prosecute the case and not tell the jury why this group of young men would assault these people just out of the blue. [¶] The victims are just driving up, have their possessions loaded in the vehicle and are swarmed by the defendant and the others. [¶] And I would note that defendant

is alleged -- he's 20. The others are all juveniles. He's the older and it's the People's theory of the case that he is the leader of the group. And, thus, it would explain what's occurring and the reasons behind the actions."

B. Bifurcation

Section 186.22 is part of the Street Terrorism Enforcement and Prevention Act (STEP Act), which prescribes increased punishment for commission of a felony committed in connection with criminal street gangs. Under this provision, "the prosecution must prove that the crime for which the defendant was convicted had been "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." [Citation.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (§ 186.22, subds. (e) and (f).)" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047, quoting *People v. Gardeley* (1996) 14 Cal.4th 605, 616-617, fn. and italics deleted.) The statute specifies 30 predicate offenses. (§ 186.22, subd. (e).)

In *People v. Hernandez, supra*, 33 Cal.4th 1040, the court held that section 1044 provides the trial court with discretion to bifurcate the trial of the charged offense from the trial of a gang enhancement allegation. However, the court found "less need" for bifurcation of gang enhancement allegations than for prior conviction allegations. "A prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Id.* at p. 1048.)

The court in *Hernandez* explained that "evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation-- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, *modus operandi*, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Hernandez*, 33 Cal.4th at pp. 1049-1050.)

Thus, the trial court's discretion to deny a motion to bifurcate the trial of a charged gang enhancement is broader than its discretion to admit gang evidence when a gang enhancement is not charged. (*Hernandez, supra*, 33 Cal.4th at

p. 1050.) Indeed, bifurcation is warranted only when (1) proof of the predicate offenses offered to establish a "pattern of criminal gang activity" are "unduly prejudicial" because they are unrelated to the crime or the defendant or (2) when the other gang evidence is "so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1049.)

Applying these standards, we find no abuse of discretion because the gang evidence was relevant on the issues of motive, intent, and defendant's credibility and was not so extraordinarily prejudicial that it threatened to sway the jury's verdict. (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1049, 1051.)

Evidence of the charged offenses shows that an unarmed and unsuspecting middle age couple wandered into an apartment complex in an area where they used to live 25 years earlier. They were looking for their teenage daughter who had run away from home. Their property was taken and two witnesses told them to forget about their property. When the Chermers continued their search, they were approached and surrounded by a group of males who engaged in a violent and unprovoked attack or "beat down" of the couple. By denying he assaulted Seeva and testifying he hit Steven in self-defense, defendant placed his identity, intent, and credibility, in issue.

As the trial court found, without the gang evidence, these beatings appeared random and senseless as did the eye witnesses'

reaction to the theft, namely to "write it off." Evidence that gangs commit "beat downs" to create fear and intimidation and that older members order younger members to commit such offenses to prove their loyalty was relevant to explain the modus operandi and motive for the beatings. Evidence that gangs recruit boys to the gang was relevant to explain how defendant could order this group to cooperate in the attack and why Terrance participated in it. Evidence that a gang member who snitches can expect severe retribution explained the inconsistencies between his trial testimony and his prior statements to the officers. Thus, the gang evidence allowed the jury to properly evaluate the credibility of the Chermes and defendant so that they could properly assess the Chermes' testimony that defendant attacked them without provocation and weigh their testimony against defendant's testimony that he acted in self-defense.

Nor was the evidence of the prior convictions suffered by defendant, Yerger, and Fields prejudicial. That evidence was offered to prove the gang enhancement element of "pattern of gang activity" and the jury was so instructed. As to defendant, Stoops testified he was convicted of the sale of cocaine base. However, that evidence was also properly admitted to impeach his credibility on cross-examination (Cal. Const., art. I, § 28, subs. (d) and (f); Evid. Code, § 788; *People v. Castro* (1985) 38 Cal.3d 301, 317), and defendant does not claim it was erroneously introduced for that purpose.

The prior convictions pertaining to Yerger and Fields were not the same offenses as those charged herein, they were not of a particularly inflammatory nature, there was no evidence defendant was personally involved in any of them, and no details were elicited about them. Thus, for the same reason these predicate offenses were not relevant to the charged offenses, they also were not prejudicial and there was no danger the jury would be confused or seek to punish defendant for the predicate offenses rather than the charged offenses.

Defendant argues that contrary to the trial court's finding, the gang evidence was not inextricably intertwined with the facts of the underlying offenses. He also argues that much of the expert gang evidence was unnecessary. He does not claim however, that the evidence was erroneously introduced nor could he, given the gang enhancement allegation. The question of bifurcation turns in large part on the relevancy of the gang evidence to the charged offenses, not whether it is "inextricably intertwined" with the facts of the charged offenses.

Accordingly, because the gang evidence was relevant to the charged offenses and was not unduly prejudicial, we conclude the trial court did not abuse its discretion in denying the motion to bifurcate the trial on the gang enhancement allegation.

II.

Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct by asking him on cross-examination to comment on the

veracity of other witnesses, and that the misconduct deprived him of a fair trial. Respondent contends this claim was forfeited by counsel's failure to make a timely objection and request for admonition and there was no misconduct. We find defendant's claim has no merit.

A. Factual Background

Defendant took the stand and testified he was not and had never been a gang member. His testimony contradicted prosecution witnesses who testified that he was a gang member and had made admissions to that effect. More specifically, the prosecutor cross-examined him on the following inconsistencies:

Probation officer Wendy Reyes testified that in 2003 defendant admitted to her that he was a member of the DPH Bloods. On cross-examination, the prosecutor asked defendant whether he heard Reyes testify that he had told her he was a gang member, and when defendant denied making any such statement, the prosecutor stated, "Okay. So I don't want you to characterize what her state of mind is, meaning I don't want you to say if she's mistaken or lying or anything like that, but when she said that, she was just flat out wrong; correct?" Defense counsel objected on the ground the question called for speculation and the objection was overruled. The prosecutor then asked, "Wrong as far as you being a Blood. Is that correct?" and defendant said "Yes, sir."

Detective Stoops testified that in 2003 defendant admitted his gang membership during a field contact with Officer Jaymon Martinez. After defendant denied making that admission, the

prosecutor again said, "So I'm not asking you to characterize someone as lying or mistaken, but whatever the facts are, that person would be wrong, too; correct?" Defendant responded, "Exactly." Counsel again objected on the grounds of speculation and the trial court overruled the objection.

Detective Stoops also testified that defendant had "numerous altercations with Crips gang members as well as with staff in which he made references to the fact he was a DPH gang member" while in juvenile hall and county jail. The prosecutor questioned defendant about eight incident reports reflecting those altercations. Defendant said he did not remember the incidents, denied invoking his status as a gang member, and indicated as to two of the incidents that the officers were "lying." The prosecutor concluded his questioning as to five of the incidents by asking defendant if the person reporting the incident was "flat-out wrong?" The prosecutor concluded his questioning about these incidents by asking "[a]nd for all those people who said you were [a DPH Blood], they were just wrong" and "I'm not going to go through all of these, sir, if your position is that everybody in here is just wrong. That is your position, right?" to which defendant responded "Basically."

Defense counsel objected to the prosecutor's questions relating to the sixth incident on the ground it was cumulative and the objection was overruled. Counsel also objected as argumentative to the prosecutor's question "and why is it that when you get into assaults with other inmates, they tend to be Crips?" The court agreed "[a]s phrased." No other objection

was made to this line of questioning nor did counsel request an admonishment.

B. Misconduct

To preserve a claim of prosecutorial error on appeal, defendant must have made a timely and specific objection to the alleged misconduct and requested that the jury be admonished to disregard the impropriety. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.) A defendant is excused from these requirements if either would be futile. (*People v. Hill, supra.*)

Defendant invokes the futility exception because the trial court erroneously overruled his objections, making additional objections and any request for an admonishment futile. We agree that he did not forfeit his claim. Because the trial court overruled his two objections to the challenged question, additional objections to the same question on the same ground and any request for an admonishment would have been futile. (*People v. Chatman* (2006) 38 Cal.4th 344, 380.)

Turning to the merits, we reject defendant's claim of misconduct. "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods

to persuade the trial court or the jury. [Citation.]” (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

Defendant contends a prosecutor may not compel a defendant to offer an opinion regarding the credibility of a prosecution witness, particularly a peace offer. As he recognizes however, he relies on cases where the prosecutor asked the defendant a different question, namely whether various prosecution witnesses had “lied” rather than whether the witness was “wrong.” Moreover, as noted in *People v. Foster* (2003) 111 Cal.App.4th 379, the courts have reached different conclusions on whether it is misconduct for a prosecutor to ask the defendant whether another witness was lying.

“One line of cases holds that asking ‘were they lying’ questions is always misconduct. [Citations.] The courts in these cases explain that these questions infringe on the jury’s right to make credibility determinations [citations], or that the questions are misleading because they suggest that the only explanation for the discrepancy between defendant’s testimony and the other witness’ testimony is that one of them is lying [Citations]. Moreover, the questions might be considered misleading or calling for a conclusion in that they suggest that the defendant can know what another witness was thinking.

“Another line of cases holds that asking ‘were they lying’ questions is not misconduct. [Citations]. The courts in these cases explain that these questions ‘‘merely emphasize[] the conflict in the evidence, which it was the jury’s duty to resolve.’’’ [Citation.] . . . [¶] A third line of cases holds

that 'were they lying' questions are neither categorically improper nor categorically proper, but are proper under certain limited circumstances. [Citations.] The courts in these cases held that these questions may be appropriate when the only possible explanation for the defendant's inconsistent testimony is that either the defendant or the other witness is lying [citations], or when the defendant has opened the door during direct examination by testifying about the veracity of other witnesses [citations], or when the 'were they lying' questions 'have a probative value in clarifying a particular line of testimony' [Citations]." (*People v. Foster, supra*, 111 Cal.App.4th at pp. 384-385.)

Most recently, the California Supreme Court took the second view and rejected a claim of misconduct based upon "was she lying" questions. (*People v. Chatman, supra*, 39 Cal.4th at p. 378; *People v. Guerra* (2006) 37 Cal.4th 1067, 1126.)

In *Chatman*, the prosecutor questioned the defendant about the veracity of three prosecution witnesses and whether they lied about him in their testimony. The court rejected the argument that such questions invade the jury's province finding it empty rhetoric that is misleading and unsound. (39 Cal.4th at p. 380.) The court also rejected the argument that "were they lying?" questions are argumentative and call for speculative or irrelevant testimony. The court found the questions proper where the defendant was a percipient witness to the events at issue. The court reasoned that such a defendant "has personal knowledge whether other witnesses who describe those events are

testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken. When, as here, the defendant knows the other witnesses well, he might know of reasons those witnesses might lie." (38 Cal.4th at p. 382.)

In *Guerra*, a prosecution witness testified regarding a conversation she had with the defendant and on cross-examination, the defendant denied the conversation took place. The court concluded the question did not ask the defendant to give his opinion on the veracity of the witness or to characterize her as a liar. The question was proper because it merely "highlight[ed] the discrepancies between defendant's testimony and that of the witnesses." (37 Cal.4th at p. 1126.)

Although the questions asked here were not "were they lying" questions as in *Chatman* and *Guerra*, the defendant was a percipient witness to the events at issue and the questions "were they flat wrong?" merely highlighted the conflict between defendant's testimony and that of other witnesses by asking defendant to comment on the witnesses' version of the facts, not on their veracity. Moreover, we think this case falls into the category of cases where the only possible explanation for the defendant's inconsistent testimony is that either he or the other witnesses are lying. In light of the Supreme Court's ruling in *Chatman* and *Guerra*, it cannot be said the prosecutor's questions were deceptive or reprehensible so as to persuade the jury to convict an innocent man. This is particularly true here

where the defendant's testimony that he acted in self-defense was patently false in light of the Cherm's testimony, the circumstances of the crime, the injuries inflicted, and the corroborating statements made by Terrance. (*People v. Watson* (1956) 46 Cal.2d 818, 835.) Accordingly, we reject defendant's claim of prosecutorial misconduct.

Moreover, because we have rejected this claim as well as defendant's claim relating to bifurcation, we also reject his claim of cumulative error.

III. Double Jeopardy

Defendant contends the double jeopardy clause of the state and federal constitutions require that his convictions for battery with serious bodily injury be vacated because that offense is a lesser included offense of assault with a deadly weapon coupled with a great bodily injury enhancement.⁵ Respondent contends this claim has no merit because the double jeopardy clause does not apply to a unitary criminal case and the use of a sentence enhancement to determine whether one offense is included in another is an unauthorized expansion of section 954. We agree with respondent.

The multiple punishment proscription of the double jeopardy clause does not prohibit multiple conviction for the offense of

⁵ A similar issue is presently before the California Supreme Court. (*People v. Izaguirre*, rev. granted June 8, 2005, S132980; *People v. Sloan* (2005) 126 Cal.App.4th 1148, review granted June 8, 2005, S132605.)

aggravated assault resulting in great bodily injury and battery with serious bodily injury.

Defendant was charged with and convicted of battery with serious bodily injury (§ 243, subd. (d); counts 1 and 3) and assault with a deadly weapon (§ 245, subd. (a)(1); counts 2 and 4) with a sentence enhancement he personally inflicted great bodily injury. (§ 12022.7, subd. (a); counts 2 and 4.) The trial court sentenced him to an aggregate prison term of 22 years four months. It made count four, the aggravated assault on Steven Cherms, the principal term, imposed a consecutive term on count two for the aggravated assault on Seeva, and imposed concurrent terms on counts one and three for felony battery. The court stayed the sentence on count three but did not stay the sentence on count one.⁶

A. Federal Law

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the states, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life

⁶ On count four the court imposed the upper term of four years (§ 245, subd. (a)(1)) plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)) and 10 years for the gang enhancement. (§ 186.22, subd. (b).) On count two it imposed a consecutive term of one year (§ 245, subd. (a)(1)) plus one year for the great bodily injury enhancement (§ 12022.7, subd. (a)) and three years four months for the gang enhancement. (§ 186.22, subd. (b).) On counts one and three the court imposed concurrent sentences as follows: on count one, a three-year term (§ 243, subd. (d)), on count three, a five-year term and five years for the gang enhancement (§ 186.22, subd. (b)) as to both counts.

or limb" The clause "'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' [Citation.]" (*Brown v. Ohio* (1977) 432 U.S. 161, 165 [53 L.Ed.2d 187, 194]; quoting *North Carolina v. Pearce* (1969) 395 U.S. 711, 717 [23 L.Ed.2d 656, 664-665, overruled on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794, 802 [104 L.Ed.2d 865, 874].)

The applicable rule for determining whether two offenses are the same for purposes of double jeopardy was stated in *Blockburger v. United States* (1932) 284 U.S. 299, 304 [76 L.Ed. 306, 309] (*Blockburger*). If "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (*Ibid.*) Typically, the greater offense is said to be the "same offense" as the lesser included offense. (*Rutledge v. United States* (1996) 517 U.S. 292, 297 [134 L.Ed.2d 419, 426]; *Whalen v. United States* (1980) 445 U.S. 684, 691-695 [63 L.Ed.2d 715, 723-726].)

Assault with force likely to produce great bodily injury is not a lesser included offense of battery with serious bodily injury. (*In re Jose H.* (2000) 77 Cal.App.4th 1090, 1095-1096.) Defendant contends, however, that one who assaults another with a deadly weapon and in so doing, personally inflicts great bodily injury, necessarily commits a battery with serious bodily

injury. Relying on the third aspect of double jeopardy,⁷ defendant argues that in determining whether double jeopardy prohibits multiple punishment for the two offenses, we must consider the great bodily injury enhancement to determine whether the battery conviction is a lesser included offense of aggravated assault. We decline to do so.

The United States Supreme Court has held that the Double Jeopardy Clause limits multiple punishment for the same offense when such punishment occurs in a successive proceeding. (*Hudson v. United States* (1997) 522 U.S. 93, 99 [139 L.Ed.2d 450, 459].) As to cumulative sentences imposed in a single trial, the clause does no "more than prevent the sentencing court from prescribing greater punishment than the legislature intended." (*Missouri v. Hunter* (1983) 459 U.S. 359, 366 [74 L.Ed.2d 535, 542].) In making that determination, the court assumes the legislative body "ordinarily does not intend to punish the same offense under two different statutes." (*Whalen v. United States, supra*, 445 U.S. at pp. 691-692 [63 L.Ed.2d at p. 724].) Cumulative sentences may be imposed under two statutes, even where they proscribe the same offense under *Blockburger*, if the Legislature clearly authorizes cumulative punishment. (*Ibid; Missouri v. Hunter, supra*, 459 U.S. at p. 366 [74 L.Ed.2d at p. 542].)

⁷ The instant case does not implicate either of the first two protections because it does not involve a second or successive prosecution.

Turning to the statutory scheme, we conclude the Legislature has proscribed cumulative punishment. We first note that section 954 clearly and directly authorizes the conviction of a defendant for "any number of the offenses charged" (*People v. Pearson* (1986) 42 Cal.3d 351, 357-358.) While this language seems absolute, the rule prohibiting multiple convictions based on necessarily included offenses stands as a limited exception to the statutory rule. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson, supra*.) The courts have shown no inclination to expand that exception. For example, in *Pearson*, the court declined to expand the rule to include a "specifically included" offense reasoning that "strict application of the rule conflicts with the plain language of section 954 . . . which does not contemplate exceptions for 'specifically included' offenses." (42 Cal.3d at p. 357-358; see also *People v. Wolcott* (1983) 34 Cal.3d 92, 101 [for purposes of sua sponte instructions]; *In re Jose H., supra*, 77 Cal.App.4th at p. 1095 [for purposes of multiple conviction].)

By contrast, section 654 prohibits multiple punishment for convictions based upon a single act. (*People v. Pearson, supra*, 42 Cal.3d at p. 359; *People v. Ortega, supra*, 19 Cal.4th at p. 692.) It provides in pertinent part that "[a]n 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." (§ 654, subd. (a).) Recognizing the tension between sections

954 and 654, the court in *People v. Pearson, supra*, 42 Cal.3d 351, noted that it had "long struggled with the problem of permitting multiple convictions while protecting the defendant from multiple punishment." (*Id.* at p. 359.) The court harmonized these two statutes by adopting a solution in which multiple convictions are permitted on counts arising from a single act or course of conduct, while multiple punishment is avoided by staying execution of sentence on all but one of the convictions. (42 Cal.3d at p. 360; *People v. Ortega, supra*, 19 Cal.4th at p. 692.)

Thus, the protection afforded by section 654 is considerably broader than that provided by *Blockburger*. Application of section 654 turns on the factual circumstances of the offense rather than on the statutory comparison required to determine whether one offense is necessarily included in the other. Under section 654, an act punishable by different provisions, whether or not the act is subject to an enhanced penalty, may not be punished under more than one provision defining an offense. Therefore, because the applicable test under section 654 does not hinge on whether or not an offense is a lesser included offense, the problem raised by defendant evaporates. As we shall discuss in Part IV, defendant may not be punished for both the aggravated assault with the enhancement (§§ 245, subd. (a)(1), 12202.7, subd. (a)) and felony battery. (§ 243, subd. (d).)

Defendant argues however that multiple convictions subject him to harsher punishment under the Three Strikes law in any

future prosecution. He reasons that the purpose of that law is to mete out more severe punishment for recidivists, a purpose not served by punishing a defendant who commits a single criminal act that violates more than one statute. We disagree.

The court in *Pearson, supra*, 42 Cal.3d 351, considered a similar claim where the defendant was convicted of both sodomy and lewd and lascivious acts on a child for each of two acts. The defendant argued that use of more than one conviction based on a single act for the purpose of enhancing a subsequent sentence constituted multiple punishment. (*Id.* at p. 358.) The court recognized the potential problem, noting that the "appropriate procedure . . . is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned.'" (*Id.* at pp. 359-360.) This is accomplished by staying execution of sentence on all but one conviction arising out of each act, the stays to become permanent on completion of the sentence on the more serious offense. (*Id.* at p. 360.)

Additionally, the *Pearson* court held that a defendant cannot be subjected to future enhancements based on multiple convictions for the same offense. (42 Cal.3d at pp. 361-363.) In so doing, the court stated that "[a]ny subsequent sentences imposed on defendant can be enhanced on the basis of the convictions for which he served a sentence; but convictions for which service of sentence was stayed may not be so used unless the Legislature explicitly declares that subsequent penal or administrative action may be based on such stayed convictions. Without such a declaration, it is clear that section 654

prohibits defendant from being disadvantaged in any way as a result of the stayed convictions." (*People v. Pearson, supra*, 42 Cal.3d at p. 361.)

More recently, the court has taken a similar position with respect to convictions charged as strikes under the Three Strikes law. In *People v. Benson* (1998) 18 Cal.4th 24, the defendant was charged with two prior convictions, which arose out of the same set of facts where the trial court imposed sentence on one count while staying sentence in the other. The question was whether defendant had one or two strikes. The Supreme Court held that "the plain language, legislative history, and legislative purpose of the Three Strikes law compel the conclusion that when a court has stayed sentence on an otherwise qualifying conviction under section 654, the stayed conviction may be treated as a strike." (*Id.* at p. 26.) However, the court cautioned that "there are some circumstances in which two prior felony convictions are so closely connected . . . that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8; in accord *People v. Sanchez* (2001) 24 Cal.4th 983, 993.)

In conclusion, we find that the Legislature has prohibited cumulative punishment for multiple offenses arising out of the same act. However, because that prohibition provides greater protection than would *Blockburger* by encompassing an offense that is subject to an enhancement, we reject defendant's claim the multiple punishment prohibition of the federal double

jeopardy clause requires reversal of his conviction for felony battery.

B. California Law

The California Constitution provides similar double jeopardy protections. (Cal. Const., art. I, § 15 ["Persons may not twice be put in jeopardy for the same offense"].) Like the federal clause, the California clause protects against both multiple prosecution and multiple punishment for the same offense. (*People v. \$1,930 United States Currency* (1995) 38 Cal.App.4th 834, 845-846.) Because California's provision is similar to the federal provision and shares the same purposes, the courts have generally construed it consistent with its federal counterpart. (*People v. Monge* (1997) 16 Cal.4th 826, 844.) When construing the California clause, the California Supreme Court has said, "'cogent reasons must exist'" before we will construe the Constitutions differently and "'depart from the construction placed by the Supreme Court of the United States.'" [Citations.]" (*Ibid.*)

We find no cogent reasons to construe the clause differently. As stated above, under the federal provision, the question of multiple punishment is a question of legislative intent. Because we have concluded the Legislature has provided broader protection than does *Blockburger*, we see no reason to depart from our conclusion that the prohibition against multiple punishment does not include a prohibition against multiple convictions for the same offense.

Our conclusion is also consistent with *In re Jose H.*, *supra*, 77 Cal.App.4th 1090, where the court rejected the defendant's claim he cannot be convicted of both aggravated assault enhanced by a great bodily injury allegation and battery with serious bodily injury. The court looked first to *People v. Wolcott*, *supra*, 34 Cal.3d 92, where the Supreme Court held that enhancements should not be considered in determining lesser included offenses for purposes of the trial court's sua sponte duty to instruct on lesser included offenses. (*In re Jose H.*, *supra*, 77 Cal.App.4th at p. 1094.) Next, the court looked to section 954, which permits multiple convictions and the exception for lesser included offenses recognized in *Pearson*, *supra*, 42 Cal.3d 351. (*In re Jose H.*, *supra*, 77 Cal.App.4th at pp. 1094-1095.) In reconciling the clear statutory language authorizing multiple convictions for the same offense with the rule stated in *Pearson*, the court in *In re Jose H.* noted that "we are not, in this case, asked to consider the burden on the court of determining sua sponte jury instructions, due process issues of notice to a defendant of what charges he or she may have to defend against at trial, double punishment upon conviction or double jeopardy following a mistrial of one count. These considerations are present in cases using the phrases lesser included and necessarily included in their analyses." (*Id.* at p. 1095.) Although the court found "the impact of declining to consider count II a necessarily included offense of count I is considerable," it nevertheless concluded that "[b]ecause the rule recognized in *Pearson* carves out an

exception to a statute that appears to specifically authorize multiple convictions based on the same conduct, we decline to accept appellant's invitation to expand the definition of necessarily included offenses beyond its existing boundaries. Those boundaries limit our consideration of whether count I and count II are necessarily included offenses of one another to the elements of the offenses charged, not the stated offenses with their attached enhancements." (*Ibid.*)

We agree with the court's conclusion in *In re Jose H.* However, we find the potential impact of multiple convictions has been considerably reduced given the procedure and limitations set forth in *Pearson, supra*, 42 Cal.3d at page 360, the cautionary advisement in *People v. Benson, supra*, 18 Cal.4th at page 36 regarding the use of multiple convictions as strikes, and the breadth of section 654. Accordingly, we reject defendant's claim that double jeopardy requires reversal of his battery conviction.

IV.

Stay of Concurrent Sentences

Defendant contends the abstract of judgment must be amended pursuant to section 654 to reflect a stay as to the sentence imposed as to count 1. Respondent contends the case should be remanded to the trial court to clarify the sentence on count 1. We agree with defendant and shall order that the abstract of judgment be amended as requested.

Counts three and four alleged offenses against Steven Cherms while counts one and two alleged offenses against Seeva

Cherms. The transcript reflects that the trial court imposed sentence on count three but stayed execution of that sentence pursuant to section 654 because it involved the same conduct alleged in count 4. It then imposed a consecutive sentence on count two finding it involved a separate victim and a separate criminal act. As to count one, the court stated defendant is "committed to state prison for the mid term as to that count, which is three years, and the gang enhancement, the 186.22(b) enhancement, is imposed, and that's five years, and that is *concurrent, pursuant to Penal Code section 654.*" (Italics added.)

We find the trial court erred, and in all probability misspoke, when it imposed a concurrent sentence on count one, rather than staying execution of that sentence. (*People v. Pearson, supra*, 42 Cal.3d at p. 360.) The battery charged in count one against Seeva was based on the same act charged in count two for aggravated assault.⁸ Because section 654 prohibits multiple punishment for a single act, the sentence on count one must be stayed. (*People v. Pearson, supra*, 42 Cal.3d at p. 360.)

Respondent contends the court's pronouncement of sentence on count one was ambiguous because it is unclear whether the court was imposing a concurrent sentence or one that must be stayed pursuant to section 654. He argues that the court may have intended to impose a concurrent sentence because there were

⁸ The probation report recommended a stay for either count one or two because one was an alternative statement of the other.

two acts involved in the attack on Seeva; defendant punched her in the face and Terrance kicked her and stomped on her after she fell. We disagree. Even if we assume the court's pronouncement was ambiguous, we find no ambiguity in the record to justify a remand.

According to the evidence, defendant ran away from the scene before Terrance began kicking Seeva. While the jury was instructed on aiding and abetting, that instruction was given in connection with the instructions on how to consider Terrance's testimony as an accomplice. The prosecutor's theory of the attack on Seeva was that defendant delivered a single powerful blow to her jaw that resulted in great bodily injury. He never argued that defendant was liable for the injuries inflicted by Terrance. To the contrary, while the prosecutor indicated this was a group beating, he did not discuss aiding and abetting liability or the natural and probable consequences doctrine, nor did he mention the injuries to Seeva's ribs, which were inflicted by Terrance.⁹ Moreover, there is nothing in the probation report upon which the court relied or the court's

⁹ In speaking about the charges of battery with serious bodily injury, the prosecutor merely argued that the Chermes suffered devastating injuries that caused them great bodily injury, which is equivalent to serious bodily injury. (*People v. Corning* (1983) 146 Cal.App.3d 83, 90.) In speaking about the charge of assault with a deadly weapon, the prosecutor focused on the single punch to Seeva's jaw that knocked her off her feet and dislocated her jaw. "The force required to do that to a human being is tremendous. . . . You know by the extent of those injuries from a single punch that there is assistance there. It's a weapon. It's in his hand."

statement at sentencing to suggest the trial court imposed sentence on count one based upon the injuries caused by Terrance. Accordingly, we find the judgment must be amended to stay execution of the sentence imposed on count one.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment staying the sentence on count one and to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation. As modified, we affirm the judgment of conviction.

BLEASE, Acting P. J.

We concur:

MORRISON, J.

CANTIL-SAKAUYE, J.