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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LAMONT MYLES, Defendant and Appellant.	B186146 (Los Angeles County Super. Ct. No. BA255077)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael E. Pastor, Judge. Affirmed with directions.

Law Offices of John F. Schuck and John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Lisa J. Brault, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Lamont Myles, also known as Michael A. Myles and booked as Melvin Thomas, appeals from the judgment entered upon his conviction by jury of force or violence upon a cohabitant (Pen. Code, § 243, subd. (e)(1),[1] count 1), as a lesser included offense of inflicting corporal injury to a cohabitant; attempted first degree murder (§§ 664/187, subd. (a), count 2); shooting at an inhabited dwelling (§ 246, count 4); and two counts of being a felon in possession of a firearm (§ 12021, subdivision (a)(1), counts 5 & 6).[2] The jury found to be true in connection with count 2 the allegation that defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court found to be true the allegation that defendant had served three prior prison terms within the meaning of section 667.5, subdivision (b). It sentenced defendant to an aggregate state prison term of 31 years to life.

Defendant contends that (1) in connection with count 2, the trial court erred in failing to instruct the jury on the lesser included offense of voluntary manslaughter, thereby violating his rights to due process, a fair trial, a jury trial and fundamental fairness under the United States and California Constitutions; (2) in connection with count 4, the trial court prejudicially erred by failing to instruct sua sponte on the unanimity requirement in accordance with CALJIC No. 17.01; (3) the trial court erred by staying rather than striking the section 12022.53, subdivisions (b) and (c) enhancements; and (4) imposition of the upper term sentence on count 6 violated his constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution to a jury determination beyond a reasonable doubt of facts necessary to increase a sentence beyond the statutory maximum, as set forth in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Defendant also requests that we correct the abstract of judgment to conform to the judgment.

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

[2] The jury acquitted defendant of attempted murder in count 3.

We affirm.

FACTUAL BACKGROUND

September 16, 2003 incident

In September 2003, Kimberly Huffman lived with defendant on West 98th Street, in Los Angeles. On September 16, 2003, shortly after 6:00 a.m., Huffman was at home with her 16-year-old son, her cousin, Ronnie Johnson, and her friend Naykomi Cole (Cole), when defendant returned home after an unexplained six-day absence. Huffman heard defendant's car and unlocked the door, as she had changed the locks in his absence. Defendant walked up the driveway yelling about her not answering her telephone. He broke the window next to the front door and entered the house.

Inside, defendant and Huffman argued, Huffman "grabbing" defendant in an effort to calm him. They were holding each other below the shoulder. The argument continued outside where defendant and Huffman "bounced each other on the car" and then reentered the house. Defendant pushed Huffman, and they both fell, Huffman hitting her head on a fountain located just inside the doorway to the house. Defendant got on top of her and had her in a choke hold. Huffman was gagging and grabbing defendant's arms. Cole yelled for defendant to get off of Huffman. Defendant released Huffman and approached Cole. Cole testified that she grabbed a steak knife and told him to stay away from her.[3] Defendant finally left, driving away in a mahogany colored Honda Accord.

Ronnie Johnson, who had spent the night of September 15-16, 2003 at Huffman's, saw her pull away from defendant, who was trying to pull her outside, lose her balance, fall against the waterfall and hit her head. Defendant got up, asked Ronnie Johnson what he was looking at and head-butted him in the face.

When the police arrived, Officer Stephen Wilson interviewed Huffman who told him what occurred, but failed to mention that defendant had choked her or the involvement of a knife. She had red marks to the face and around the eye and a bruise to

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[3] Huffman testified that Cole approached defendant with the knife when he was on top of Huffman.

the shoulder area and suffered swelling to both eyes, scraping on her right eye, a bruise over her right eyebrow, and a bruise on her right arm. The officers went to defendant's workplace and brought him to Huffman's house where she identified him. He was arrested, but posted bond and was released that same day.

September 18, 2003 incident

After September 16, 2003, Huffman received numerous telephone calls from defendant which she did not answer. On September 18, 2003, near noon, defendant visited Huffman's longtime friend, Joseph "Donny" Brown (Brown), at Brown's workplace, looking for Huffman's mother, who also worked there. Brown told defendant that she was not there, and he did not know when she would return. Defendant left.

At approximately 2:00 p.m., defendant returned and told Brown that he wanted to talk with Huffman. Brown agreed to call Huffman on defendant's behalf. When Brown called her,[4] she was at the home of Cole's parents, Lavonne and Michael Burch, with the Burchs, Cole, Terzeta Hebert (Hebert), and 10 children. The adults were in the living room chatting, with a few of the children present. Brown told Huffman that defendant was standing next to him and wanted to speak with her. Huffman said she would not speak with him, which Brown told defendant. Defendant said, "Oh, she don't' want to talk." "Okay, I gave her a chance. I gave her a chance." As defendant walked out the door, he continued, "I gave her a fair chance, man. Now I have to do what I have to do." Brown asked defendant if he was "going to fuck off your life behind two females." Defendant said, "I'm going to handle court in the street." He raised his coat and showed Brown an "old raggedy nine millimeter" gun, and said, "If I'm going to get struck out, I'm taking the two bitches with me, Kim and Nicky."

Between 8:00 and 8:30 p.m., on September 18, 2003, Reginald Johnson, the Burch's next door neighbor, was driving home when he saw a dark-colored, late model Camry or Honda parked at an odd angle on the opposite side of the street from his house.

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[4] While Brown's testimony suggests that the call occurred in the mid afternoon, Huffman testified that she received the call from Brown after 7:30 p.m.

As he approached his driveway, he saw defendant exit the car and cross the street heading towards the Burch's house, approach their living room window and crouch, as if listening. Defendant then yelled at someone inside to come out and yelled the name Kim. Huffman heard defendant's voice outside yelling, "Bitch, Kim, I know your mother fucking ass is in there." He added, "Bring your M.F.S. ass out." She immediately heard 15 shots fired into the living room from outside.[5]

Someone telephoned 911. The police arrived, as did paramedics, who treated Hebert who had been hit by a bullet at the scene and then transported her to the hospital. While the police were outside with the occupants, Cole telephoned defendant from her "walkie-talkie" type cell phone. The police recorded the call. During the conversation, Cole accused defendant of shooting at her house. Defendant responded that, "You know who I was shooting at." "[W]hat's done is done, baby, I wasn't aiming for no kids. I'm aiming for Kim." Defendant also stated that, "Hey, I play for keeps, baby, and . . . if I can't get you, I'm going to get you where it hurts."

Los Angeles Police Officer Detective Alberto Rosa and his partner Detective Hampton responded to the Burch residence. Detective Rosa found four .45-caliber bullet casings at the scene and a bullet fragment in the living room and two on the windowsill. The next day, while repairing the window frame, Michael Burch found a .45-caliber brass casing in front of his house and two bullet fragments.

On November 6, 2003, at approximately 5:00 a.m., Officer David Angel was at the Travel Plaza Inn motel in Compton. Defendant pulled into the parking lot in a Honda with another male and a female in the car. Officer Angel spoke with defendant, who identified himself as Melvin Lamar Thomas. Defendant told the officer which room he was staying in and that it was in the name of the other man. He said that that property inside the room was his. In the room, Officer Angel found a black, Glock nine-

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[5] Reginald Johnson heard three shots, saw defendant enter his car and fire additional shots. Cole heard one gun unload and then a brief pause and a second gun unload.

millimeter handgun loaded with 14 bullets. It was stipulated that .45-calibur cartridges cannot be fired from a nine-millimeter firearm.

DISCUSSION

I Instructional Errors

A. Lesser included offenses

Defendant was charged with the attempted murder of Huffman in count 2. During the instruction conference, defense counsel requested an instruction on the lesser included offense of attempted voluntary manslaughter. He argued that his attack on Huffman was provoked by their earlier altercation, coupled with Huffman's rebuke by refusing to talk with him. He then immediately went to the Burch's house and acted in the heat of passion. The trial court rejected this contention, stating: "[N]ot only is there not substantial evidence, there is zero evidence to give an objective excuse instruction under the voluntary manslaughter category."

Defendant contends that the trial court erred in refusing to give the requested voluntary manslaughter instruction, depriving him of his rights to due process, a jury trial, a fair trial, and fundamental fairness under the United States and California Constitutions. He argues that there was substantial evidence that he "acted during the heat of passion as a result of his anger and frustration at Huffman." This contention is patently meritless.

A trial court must instruct on general principles of law relevant to the issues raised by the evidence. (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) It must instruct the jury sua sponte "'"on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] . . . ."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) The trial court is obliged to instruct on all theories of lesser included offenses supported by substantial evidence. (*Id.* at pp. 159-160, 162.) Substantial evidence is evidence from which a jury composed of reasonable persons could conclude that the defendant was guilty of the lesser crime. (*Id.* at p. 162.) Any evidence, no matter how weak, will not justify instruction on a lesser included offense. (*Ibid.*) It has no duty to instruct on a lesser

included offense when there is no evidence the offense is less than that charged. (*Id*. at p. 154.)

"[V]oluntary manslaughter, *whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion*, . . . is a lesser offense included in the crime of murder" (*Breverman*, *supra*, 19 Cal.4th at p. 159), and attempted voluntary manslaughter is the lesser offense included in the crime of attempted murder (see *People v. Fields* (1996) 13 Cal.4th 289, 304; see also *People v. Lopez* (1992) 11 Cal.App.4th 1115, 1118). Therefore, if there was substantial evidence to support a voluntary manslaughter conviction, the trial court erred in not instructing on that offense.

An intentional killing is reduced from murder to manslaughter "if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause '"an ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment."'" (*Breverman*, *supra*, 19 Cal.4th at p. 163.) No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any '"'violent, intense, high-wrought or enthusiastic emotion.'"'" (*Ibid*.) A person who is provoked by sudden quarrel or heat of passion to kill lacks malice. A conviction of manslaughter based on heat of passion requires proof of (1) an objective element that there was sufficient provocation "to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment"'" (*ibid.*), and (2) a subjective element that the defendant's reason was in fact overcome by an overwhelming passion. (*Ibid.*)

There was insufficient evidence of objective provocation here. While defendant's counsel argued that defendant had provocation to shoot Huffman because she refused to talk to him when he tried to do so, that was not such provocation as would cause an "'"'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than judgment."'" (*Breverman*, *supra*, 19 Cal.4th at p. 163.) A person of average disposition does not shoot up a residence, endangering all those inside, trying to hit a woman because she refused to speak with

him. Consequently, the trial court was not required to instruct on attempted voluntary manslaughter as a lesser included offense.

Even if the trial court erred in failing to instruct on the lesser included offense of attempted voluntary manslaughter, it is not reasonably probable that absent that error the result would have been more favorable to defendant. (*Breverman, supra*, 19 Cal.4th at p. 165 [the failure to instruct on a lesser included offense in a non-capital case is evaluated under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836].) The evidence against defendant was overwhelming. Brown testified that defendant showed him a gun and, because Huffman would not speak with him, said "Okay, I gave her a chance. I gave her a chance. . . . I gave her a fair chance, man. Now, I have to do what I have to do." Minutes later, Reginald Johnson, a neighbor of the Burchs saw defendant shooting into the Burch's living room window after yelling the name "Kim" and asking someone to come out. Huffman testified that she heard defendant's voice calling her out just prior to the shootings. In defendant's recorded telephone conversation with Cole, he admitted shooting at the residence and trying to hit Huffman. As respondent argues, the jury found that defendant acted willfully, deliberately and with premeditation, a finding directly conflicting with a claim of heat of passion. If defendant was guilty of anything, it was attempted murder.

B. CALJIC No. 17.01

In count 4, the information charged defendant with shooting at an inhabited dwelling. The evidence established that he shot at the Burch's house from under the front window and again as he was driving away. The prosecution did not elect which of those acts constituted the charged offense.

Defendant contends that the trial court erred in failing to give the jury sua sponte a unanimity instruction in accordance with CALJIC No. 17.01.[6] He argues that there were

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[6] CALJIC No. 17.01 provides: "The defendant is accused of having committed the crime of _____ [in Count _____]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _____] may be based. Defendant may be found guilty if the proof

two separate acts on which the jury could base its guilty verdict, between which the prosecutor did not elect, and therefore the instruction was necessary to insure that the jurors unanimously agreed upon the same guilty act. This contention is without merit.

A defendant is entitled to a verdict in which all 12 jurors concur beyond a reasonable doubt as to each count charged. (*People v. Jones* (1990) 51 Cal.3d 294, 305.) "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534; *People v. Mota* (1981) 115 Cal.App.3d 227, 231 ["'"where there are multiple acts placed before a jury, each being a separate chargeable offense in itself, the prosecution must elect the act on which the charge will stand," or otherwise "the jurors [might] range over the evidence at will and pick out any one of the offenses upon which to found its verdict." [Citations.]'"].) If a case requires use of the unanimity instruction, the court must give it sua sponte. (See *People v. Hefner* (1981) 127 Cal.App.3d 88, 97.)

"'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' [Citation.] [¶] On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it,

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shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _____], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

The "continuous conduct exception" is a limited exception to the unanimity requirement. It applies where the acts have such a close temporal relationship that they are part of one transaction or the offense is one that may be continuous in nature. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.) "The 'continuous course of conduct' exception -- when the acts are so closely connected that they form one transaction -- is meant to apply not to all crimes occurring during a single transaction but only to those 'where the acts testified to are so closely related in time and place that the jurors reasonably must either accept or reject the victim's testimony in toto.' [Citation.]" (*People v. Melendez* (1990) 224 Cal.App.3d 1420, 1429, disapproved on other grounds in *People v. Majors* (1998) 18 Cal.4th 385, 408.) Where there is no evidence from which the jury could have found the defendant guilty of one act, but not the other, such as where different defenses are asserted as to each, there is no danger that different jurors would find him guilty of different acts. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.)

This case falls within this exception. Defendant went to the Burch's residence, exited his vehicle and fired numerous shots into the residence. Moments later, he entered his vehicle and poured additional rounds into the residence as he sped away. All of the shots were part of one continuous attack. They occurred so close in time that they amounted to one transaction that the jury had to accept or reject in total. The defense to each was identical; that defendant was not the shooter. Thus, the jury's conclusion would have been the same as to the shots fired from below the window and those fired as defendant sped away. There was no error.

II Sentencing

A. Defendant's sentence

Defendant was convicted of attempted first degree murder (count 2); shooting at an inhabited dwelling (count 4); force or violence upon a cohabitant (count 1), as a lesser included offense of attempted murder; and two counts of being a felon in possession of a

firearm (counts 5 & 6). The jury found the gun use enhancements within the meaning of section 12022.53, subdivisions (b), (c) and (d) to be true.

The trial court sentenced defendant to a life term on count 2, as the base count, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), staying sentence on subdivisions (b) and (c). Additionally, it sentenced defendant to a consecutive upper term sentence of three years on count 6, plus three one-year prior prison term enhancements under section 667.5, subdivision (b), and to a six-month concurrent county jail sentence on count 1. Sentences on counts 4 and 5 were stayed pursuant to section 654.

B. Dismissing section 12022.53 enhancements

Defendant contends that the trial court erred in staying rather than dismissing the firearm enhancements within subdivisions (b) and (c) of section 12022.53. He argues that section 12022.53, subdivision (f) permits only one additional term of imprisonment for each crime and if more than one enhancement per person is found true under that section, only the longest may be imposed. This contention is without merit.

In *People v. Bracamonte* (2003) 106 Cal.App.4th 704 (*Bracamonte*), the Court of Appeal analyzed the apparent conflict between subdivisions (f) and (h) of section 12022.53. Subdivision (f) states that only one enhancement may be imposed under section 12022.53, but subdivision (h) prohibits striking any enhancement imposed under section 12022.53. Harmonizing the two sections, the court held that each section 12022.53 enhancement should be imposed with a stay of execution for all but the enhancement with the greatest term of imprisonment. (*Bracamonte*, *supra*, at p. 713; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061.)

This result is also justified by the analysis of our colleagues in Division Six of this District, who stated, in connection with the jury's true finding of multiple firearm enhancements (not under section 12022.53), "'"A stay is a temporary suspension of a procedure in a case until the happening of a defined contingency . . . ,"' whereas striking an enhancement '". . . implies that the enhancement is legally insupportable, and must be dismissed . . . ."' [Citation.] Here, there is no basis to reject the jury's factual findings as

to both personal use allegations, and a reversal on appeal of one enhancement is a 'defined contingency' where imposition of a term of imprisonment for the other would be warranted." (*People v. Crites* (2006) 135 Cal.App.4th 1251, 1255-1256; see also *People v. Jones* (2000) 82 Cal.App.4th 485, 493.)

Here, there is no basis for rejecting the jury's true findings with respect to subdivisions (b), (c) or (d) of section 12022.53 for which there is ample evidentiary support. Sentence on the lesser enhancements should therefore be stayed and not dismissed.

C. Blakely

Defendant contends that imposition of an upper term sentence for his conviction of count 6 deprived him of his right to a jury determination beyond a reasonable doubt of all facts necessary to increase his sentence beyond the statutory maximum and to due process, as set forth in *Blakely*. Respondent contends that defendant forfeited this claim by failing to raise it in the trial court.

We need not resolve the forfeiture question for defendant's claim was expressly rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, which concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id*. at p. 1244.) We are, of course, bound by this decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[7]

D. Correcting abstract of judgment

The abstract of judgment indicates that defendant was sentenced to the upper term of six years on count 6 and does not indicate the imposition of three prior prison term

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[7] The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], certiorari granted *sub nomine Cunningham v. California* (Feb. 21, 2006, No. 05-6551) ___ U.S. ___, on the issue of whether *Blakely* applies to California's determinate sentencing law.

enhancements of one year each. Defendant requests that we order the abstract corrected because the judgment sentenced him to the upper term of only three years on that count and to three one-year prior prison term enhancements. Respondent agrees that the correction is appropriate as do we.

DISPOSITION

The judgment is affirmed. On remand, the trial court is directed to correct the abstract of judgment to reflect that defendant was sentenced to the upper term of three years on count 6 and to three one-year enhancements under section 667.5, subdivision (b).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST