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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. EDDIE NAVARRO et al., Defendants and Appellants.	B187468 (Los Angeles County Super. Ct. No. KA071410)

APPEALS from judgments of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed as modified as to Defendant and Appellant Eddie Navarro, and affirmed as to Defendant and Appellant Richard Navarro.

Maria Morrison, under appointment by the Court of Appeal, for Defendant and Appellant Eddie Navarro.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant Richard Navarro.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Eddie Navarro (Eddie), also known as Eduardo Navarro, and Richard Navarro (Richard) appeal from judgments entered upon their convictions by jury of assault with a deadly weapon or by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1), count 1).[1] Eddie also appeals from his conviction of making a criminal threat (§ 422, count 2) and Richard from his conviction of misdemeanor battery (§ 242, count 3). In connection with count 1, the jury found to be true the allegation that appellants had personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). Eddie admitted having suffered one prior felony conviction within the meaning of sections 1170.12, subdivisions (a) through (d), 667, subdivisions (b) through (i) and 667, subdivision (a)(1). The trial court sentenced Eddie to an aggregate state prison term of 12 years and Richard to an aggregate state prison term of seven years.

Appellants contend that (1) the trial court prejudicially erred and violated their due process rights by failing to give sua sponte a unanimity instruction with respect to the great bodily injury enhancement, (2) the group beating instruction, as set forth in CALJIC No. 17.20, violated their rights to a jury trial and due process by eliminating the requirement that the injury must be personally inflicted, and (3) imposition of their upper term sentences violated their constitutional rights 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 defendant's sentence beyond the statutory maximum, as set forth in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Eddie further contends that (1) the trial court erred in failing to stay execution of his sentence for making a criminal threat pursuant to section 654.

We affirm.

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

FACTUAL BACKGROUND

Just after midnight, on July 1, 2005, Pablo Tapia was on Garvey Avenue, in El Monte, selling tacos from his lunch truck. Ricardo Diaz was near Tapia's truck, placing inside the trunk of his car CDs that he had been selling. Appellants approached Diaz, each holding two beers, and Richard asked for a cigarette. When Diaz told him he did not have any, Eddie demanded money. Diaz responded that he had none.

Richard threw Diaz against a car and hit him in the face with his fist. Diaz fell backwards to the ground, and Richard got on top of him, grabbed his hair, and, banged his head against the ground, while continuing to hit him. Eddie was also hitting and kicking him. Diaz was covering his face from the blows. He tried to get up and run, but Eddie grabbed a metal bar from the trunk of Diaz's car and hit Diaz on his upper back, causing him to fall down again. Richard took the bar from Eddie, sat on Diaz and held the bar down at the base of Diaz's neck and chest area, preventing him from getting up. Eddie repeatedly yelled, "Kill him."

Tapia was inside his truck cooking when he heard screaming outside. He went outside and saw appellants beating Diaz. Tapia returned to his truck and telephoned 911. He then went outside again, and took the iron bar from Richard and Eddie. Richard threw a punch at Tapia, grazing his left cheek. While this was going on, Diaz was able to get up and run towards his house. Appellants ran after him, Richard yelling, "'We're going to come back and we're going to kill you.'" Eddie yelled, "'Yeah, we're going to kill you.'" He also mentioned the words "'illegals'" and "'wetbacks.'"

As a result of the beating, Diaz suffered injuries to his eyebrow, fingers, and left shoulder. He also lost three teeth. At the time of trial, his ring finger was still swollen, he had no strength in his hand and could not move his thumb.

At approximately 1:00 a.m., Sheriffs Deputy Rich Burgoyne arrived at the scene. He saw appellants chasing Diaz, and they were arrested. Diaz was bleeding from the face and was very agitated. He declined medical assistance, and said he would see his own doctor. While being transported to the station, Richard stated, "I had to beat that wetback, he gave me shit, I don't take shit off any wetbacks."

Deputy Russell Williams interviewed Diaz and Tapia at the scene. Diaz reported what happened, but did not mention that appellant had demanded his money, that he was pulled by the hair or that he was hit with an iron bar. Tapia mentioned the iron bar but failed to say anything about Diaz's hair being pulled or his head being beaten to the ground. Deputy Williams observed that appellants appeared intoxicated.

After the incident a defense investigator contacted Tapia. Tapia told him he did not want to disclose the names of the other people working in his truck on the night of the incident. Diaz refused to talk to Richard's attorney or investigator because he would "always . . . refuse with the person that is not in charge of [his] case."

DISCUSSION

I. Jury Instructions

A. Unanimity Instruction (CALJIC No. 17.01)

With respect to counts 1 and 2, the trial court instructed the jury on the unanimity requirement in accordance with CALJIC No. 17.01.[2] It did not make that instruction applicable to the great bodily injury enhancement in section 12022.7, subdivision (a), and the prosecutor did not elect which of Diaz's injuries constituted "great bodily injury." She argued to the jury that, "You don't have to name great bodily injury. So when you decide this, just think about was there significant or substantial physical injury."

Appellant contends that the trial court erred by not giving the jury a unanimity instruction sua sponte with regard to the great bodily injury enhancement, in accordance with CALJIC No. 17.01. This contention is without merit.

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[2] CALJIC No. 17.01, as given to the jury, provides: "Each defendant is accused of having committed the crime of P.C. 245(a)(1) in ctI & PC 422 [in Count II]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] upon which a conviction [on Counts 1 & 2] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he]/[she] committed any one or more of the [acts]. However, in order to return a verdict of guilty [to Counts 1 & 2], all jurors must agree that [he]/[she] committed the same [act] [or] [acts]. It is not necessary that the particular [act] agreed upon be stated in your verdict."

A defendant is entitled to a verdict in which all 12 jurors concur beyond a reasonable doubt as to each count charged. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "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. Maury* (2003) 30 Cal.4th 342, 422 ["A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses"]; *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""].) 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, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo, supra,* 25 Cal.4th at p. 1132.)

Section 12022.7 provides for an "additional and consecutive term," when great bodily injury is inflicted "in the commission of a felony or attempted felony . . . ." (§ 12022.7, subd. (a).) Subdivision (f) of section 12022.7 defines "great bodily injury" as "a significant or substantial physical injury." It is clear that section 12022.7 provides for an enhancement imposed in conjunction with the commission of an underlying offense.

It is not a separately chargeable offense. Consequently, regardless of which injury, or whether all of the injuries collectively, may have been viewed by the jury as "great bodily injury," it does not require a unanimity instruction.

An issue analogous to that before us was decided in *People v. Robbins* (1989) 209 Cal.App.3d 261. There, the defendant committed sex offenses accompanied by physical beatings against the victim, causing numerous injuries. The jury found to be true a great bodily injury enhancement pursuant to section 12022.8, a statute analogous to section 12022.7. On appeal, the defendant argued that because the victim suffered a variety of injuries in the attack, only some of which may have constituted great bodily injury, the trial court erred by failing to give a unanimity instruction. (*People v. Robbins*, *supra,* at p. 264.) The Court of Appeal rejected this argument. It reasoned: "In deciding whether a defendant inflicted great bodily injury during commission of a sex offense, thereby meriting a five-year enhancement under Penal Code section 12022.8, the jury is instructed to consider whether the victim suffered 'a *significant or substantial* physical injury . . . .' [¶] This is a different kind of analysis than that contemplated by CALJIC No. 17.01. Here, the jury is not called upon to engage in fact finding per se; there is no danger the jury will convict defendant of a crime based on two different factual scenarios, neither of which is believed by all twelve jurors. Instead, the jury performs a measuring function, deciding whether the victim suffered that quantum of injury legally defined as great bodily injury. To make this determination, the entire course of conduct and its overall result—not each act and individual injury—must be examined." (*Id.* at p. 265.) We agree with this analysis.

Appellants add a new wrinkle to the unanimity instruction argument. They assert that somehow the rules have changed after the United States Supreme Court's decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, which held that the proof of any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be subjected to jury trial and proof beyond a reasonable doubt. (*Id.* at p. 490.) "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, *it is the*

functional equivalent of an element of [a] greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19, italics added.) *Apprendi* has no application here. If the infliction of great bodily injury enhancement is equivalent to an element of the greater offense of assault with a deadly weapon, it was determined here by the unanimous verdict of the jury. *Apprendi* does not suggest that every fact that may be the basis of finding an element to exist must also be found by a unanimous jury.

B. Group Beating Instruction (CALJIC No. 17.20)

The trial court instructed the jury in accordance with CALJIC No. 17.20,[3] on the group beating exception to the requirement that a defendant must "personally" inflict great bodily injury in order to be subject to the section 12022.7 great bodily injury enhancement.

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[3] CALJIC No. 17.20, as given here, states: "It is alleged [in Count[s] 1] that in the commission of a felony [or attempted felony], the defendant[s] _____ personally inflicted great bodily injury on [a person] [(name)] [not an accomplice to the crime]. [¶] If you find a defendant guilty of P.C.245(a)(1), a felony, you must determine whether that defendant personally inflicted great bodily injury on [some person] [(name)] [not an accomplice to the crime] in the commission or attempted commission of Ct I. [¶] 'Great bodily injury,' as used in this instruction, means a significant or substantial physical injury. Minor, trivial or moderate injuries do not constitute great bodily injury. [¶] [When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if 1) the application of 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 2) 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.] [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose."

Appellants contend that the trial court erred in instructing the jury in accordance with the group beating portion of CALJIC No. 17.20 because it was erroneous and violated his state and federal constitutional rights to due process and to a jury trial. They argue that section 12022.7 requires that the injury be *personally* inflicted, and the group beating language in CALJIC No. 17.20 dispenses with that requirement. They further contend that the prosecution must prove each element of the offense beyond a reasonable doubt, and the language of CALJIC No. 17.20 lessens this burden because it allows the prosecution to prevail on a section 12022.7 enhancement without doing so. These contentions are without merit.

Section 12022.7, subdivision (a) applies to "[a]ny person who *personally* inflicts great bodily injury on any person. . . ." (Italics added.) Interpreting section 12022.7, subdivision (a), our Supreme Court in *People v. Cole* (1982) 31 Cal.3d 568, 572 (*Cole*) concluded that the meaning of that section was clear and that the Legislature's choice of the word "'personally'" "necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*Id.* at p. 572.) The court held "that in enacting section 12022.7, the 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." (*Id.* at p. 579.) In *Cole*, the defendant did not strike the victim but ordered his companion to kill him.

In *People v. Corona* (1989) 213 Cal.App.3d 589 (*Corona*), the Fourth District Court of Appeal distinguished *Cole*. In *Corona*, two victims were attacked by a group of men. While the defendants were identified as among the attackers who were hitting and kicking the victims, there was no evidence pinpointing that the defendants had inflicted any particular blows, and that they were therefore the ones who had inflicted great bodily injury. The Court of Appeal distinguished *Cole*, stating: "While *Cole* has logical application with regard to the section 12022.7 culpability of an aider and abettor who strikes no blow, it makes no sense when applied to a group pummeling. Central to *Cole* is the conclusion that the deterrent intent of section 12022.7 is served by directing its increased punishment at the actor who ultimately inflicts the injury. Applying *Cole*

uncritically in the context of this case does not create a deterrent effect. Rather, it would lead to the insulation of individuals who engage in group beatings. Only those whose foot could be traced to a particular kick, whose fist could be patterned to a certain blow or whose weapon could be aligned with a visible injury would be punished. The more severe the beating, the more difficult would be the tracing of culpability." (*Corona, supra,* at p. 594; see also *In re Sergio R.* (1991) 228 Cal.App.3d 588, 601–602.)

After appellants filed their opening briefs, our Supreme Court in *People v. Modiri* (2006) 39 Cal.4th 481 decided the question that appellants now present, sanctioning the result and analysis in *Corona.* It held that the group beating theories contained in CALJIC No. 17.20 satisfy the personal infliction requirement of section 1192.7, subdivision (c)(8) and do not cause any constitutional violation. (*People v. Modiri, supra,* at pp. 486, 493.) The Court stated, "*Cole* stands for the modest proposition that a defendant personally inflicts great bodily harm only if there is a direct physical link between his own act and the victim's injury. Under *Cole*, someone who does not strike or otherwise personally use force upon the victim does not qualify for enhanced punishment where the personal infliction of harm is required. As we have seen, CALJIC No. 17.20 follows this rule. However, consistent with the instruction, nothing in *Cole* precludes a person from receiving enhanced sentencing treatment where he joins others in actually beating and harming the victim, and where the precise manner in which he contributes to the victim's injuries cannot be measured or ascertained." (*Id.* at p. 495.)

II. Sentencing Issues

Appellants were found guilty of assault with a deadly weapon or by means likely to produce great bodily injury, in count 1. Eddie was also found guilty of making a criminal threat, in count 2 and Richard of misdemeanor battery, in count 3.

In sentencing Eddie, the trial court found as factors in aggravation that the offense was violent and callous and that he led and incited the attack. It sentenced him to the upper term of four years on count 1 plus a consecutive three years for the great bodily injury enhancement under section 12022.7, subdivision (a) and to a concurrent midterm

sentence of two years on count 2. It added an additional five years for the habitual offender enhancement in section 667.5.

In sentencing Richard, the trial court found as factors in aggravation that he had been unsuccessful on probation, as he had suffered 24 prior arrests and 17 convictions, and this was a crime of violence and callousness. It sentenced him to the upper term of four years on count 1 plus a consecutive three years for the great bodily injury enhancement under section 12022.7, subdivision (a) and to a concurrent six-month county jail term on count 3.

A. Section 654 Stay

Eddie contends that the trial court erred in failing to stay execution of sentence on the criminal threat count pursuant to section 654. He argues that the criminal threat conviction was part of the same course of conduct as the assault. This contention lacks merit.

Section 654 provides in 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*." (§ 654, subd. (a), italics added.) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

"If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez*, *supra*, 23 Cal.3d at p. 551.) If, on the other hand, "the [defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

Whether multiple convictions were part of an indivisible transaction is primarily a question of fact. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) By sentencing defendant concurrently on the criminal threat and the assault with a deadly weapon counts, the trial court impliedly found that defendant had a separate intent and objective with respect to each. We review such a finding under the substantial evidence test (see *People v. Osband* (1996) 13 Cal.4th 622, 730–731); we consider the evidence in the light most favorable to respondent and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.) We must determine whether the violations were a means toward the objective of commission of the other. (See *People v. Beamon, supra,* 8 Cal.3d at p. 639.)

The assault and criminal threat charges against Eddie were not incident to a single objective and were not part of an indivisible transaction. Without provocation Eddie punched, kicked and hit Diaz with an iron bar. After the beating was essentially concluded and appellants were chasing the fleeing Diaz, Richard yelled "We're going to come back and we're going to kill you." Eddie then shouted "Yeah, we're going to kill you." This threat was not a part of the physical attack but rather reflected a threat of a future act. The motive for a beating is not necessarily simply to terrorize, while the threat to kill can only be so construed.

B. Blakely

Appellants contend that imposition of upper term sentences deprived them of their right to a jury determination beyond a reasonable doubt of all facts necessary to increase their sentences beyond the statutory maximum and to due process, as set forth in *Blakely.* Respondent contends that Richard forfeited this claim by failing to object on this ground in the trial court and failing to join in Eddie's objection.

We need not decide whether, as respondent asserts, Richard's claim has been forfeited. Appellants' contention that *Blakely, supra,* 542 U.S. 296 renders the imposition of upper term sentences in this case unconstitutional is without merit. This contention was 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.)[4]

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ

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