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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CURTIS JOHNSON, Defendant and Appellant.	B240999 (Los Angeles County Super. Ct. No. BA384415)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Kimberley J. Baker-Guillemet, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Curtis Johnson appeals from the judgment entered following a jury trial in which he was found guilty of assault with a firearm with a finding he personally used a firearm (Pen. Code, §§ 245, subd. (a)(2), 12022.5, subd. (a); count 1)[1], being a felon possessing a firearm (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1); count 2) and possessing a short-barreled shotgun (former § 12020, subd. (a)(1), now § 33210; count 3). Appellant admitted that he had two prior convictions of a serious felony (§ 667, subd. (a)), which were also strikes pursuant to the three strikes law (§§ 667, subds. (b)-(e), 1170.12, subds. (a)-(d)) and that he had served seven separate prison terms for a felony (§ 667.5, subd. (b)).

At sentencing, pursuant to section 1385, subdivision (a), the trial court struck one of two prior strike convictions, as well as the seven section 667.5, subdivision (b) service of a separate prison term enhancements. (See *People v. Superior Court* (*Romero*) 13 Cal.4th 497.) The trial court imposed a total second-strike term of 28 years in state prison, consisting of a doubled, upper term of 4 years, or 8 years, for the count 1 assault charge, enhanced by a term of 10 years for the personal use of a firearm and by another consecutive 10 years for the two prior serious felony convictions. For the count 2, being a felon possessing a firearm, the trial court imposed a concurrent term of a doubled, upper term of 3 years, or 6 years. For count 3, pursuant to section 654, it ordered stayed the term imposed for possessing a short-barreled shotgun.

BACKGROUND

In the trial court, appellant proceeded in propria persona.

1. *The prosecution case*

At trial, the witnesses, appellant's niece, Tikoa Carter (Carter), and Carter's daughter, Takierra Davis (Davis), recanted. The People proved their case by using the prior inconsistent statements the witnesses had made at the preliminary hearing

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

and out-of-court to Los Angeles Police Officer Carey Coco, Los Angeles Police Officer Joseph Graves, Los Angeles County Deputy District Attorney Kenneth Meyer and a 9-1-1 operator.

Viewed in the light most favorable to the judgment (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206) the trial evidence established that on September 9, 2010, appellant and Caroline Gayle Lord (Lord) were living together at least occasionally at the residence that belonged to appellant's grandmother on 5th Avenue in Los Angeles.[2] Lord wanted to move into their own apartment, and appellant had reneged on his promise to meet her to rent an apartment. That afternoon, Lord ransacked the grandmother's house and then packed up and left. Shortly thereafter, at about 6:00 p.m., Lord had a girlfriend drive her back to appellant's residence to retrieve her birth certificate. From the front yard, using expletives and calling appellant names, including "hillbilly," Lord yelled at appellant to return her birth certificate, which she told him she had left under a mattress.

In response, appellant burst out of the residence's front door holding a shotgun in both hands. He told Lord, "I don't have your birth certificate but I got something better than that for your f------- a--." He "racked" the shotgun and shot at Lord, who ran. The shot flew over Lord's head. Lord hurried to her friend's car and got in. Appellant immediately approached Lord in the car and placed the end of the barrel of his shotgun to Lord's mouth. He said, "I'll shoot your m----- f----- head off," or, "I will shoot your m----- f------ face." Lord got out of the car and ran down the street.

During the assault, Carter was parked across the street in her truck with her daughter, Davis. Appellant got into Carter's truck with his shotgun and ordered Carter to "Go on." Carter told appellant, "I'm not going to the pen for [your] a—" She ran from the truck. Appellant fled the area through the residence's rear yard,

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[2] At trial, the witnesses referred to Lord as "Gayle" or "Packy," which were apparently her nicknames.

and Carter telephoned the police. When the police arrived, they found a spent shotgun casing on the residence's front porch and the loaded shotgun in the backyard. The shotgun was an altered 12-gauge with a 16-inch barrel. It was described by the arresting officer as a "sawed-off" shotgun.

Carter telephoned the police later that night when appellant returned home, and the police arrested him.

After his arrest, appellant made harassing telephone calls to Carter from the jail demanding that she refuse to testify against him. She told a prosecutor preparing the case for trial she was afraid as appellant would be angry at her and he had a history of violence.

At trial, the prosecution played a compact disk for the jury containing a recording of one telephone call appellant made to Carter from the jail directing her not to appear in court to testify. It also played a recording of Carter's initial telephone call to the 9-1-1 operator describing the assault.

2. *The defense*

At trial, appellant testified on his own behalf. He denied he had anything to do with a shooting and said he did not own or possess a shotgun. He claimed he was a casual acquaintance of the "young lady," Lord, and she was at his residence that day to see his nephew, 25-year-old Phillip Parker (Parker). Appellant denied an argument with Lord over a birth certificate and explained that Lord had given appellant an astrology chart on a mirror to hold for her. Appellant said that he was in front of his residence gardening when Lord drove up in a car driven by another woman, L.K. The women were playing rap music. Appellant did not like the music and asked Lord to turn it down. His request was what had compelled Lord to call him a "hillbilly."

Appellant testified that suddenly, Parker emerged from the backyard and, just "fooling around," discharged a shotgun into the air. When Parker discharged the shotgun, appellant was holding a weedeater in both hands.[3] When Lord heard the shotgun blast, she ran. Appellant grabbed Parker, asked Parker why he had discharged the shotgun, had Parker drop the shotgun in the rear yard, and tried to get Carter to drive Parker away. When Carter refused, appellant put Parker into L.K.'s car, and he and Parker drove off in that car. Appellant watched the officers' arrival from a nearby elementary school, then returned home when the officers had departed.

Later that night when police arrived to arrest him, appellant did not tell them Parker was the gunman. Appellant told no one about Parker's role in the shooting until appellant testified at trial. Appellant claimed he was arrested because he did not tell the police what they wanted to hear and he told them he was on parole. He told the police that he knew nothing about a shooting.

In his testimony, he asserted Carter was not "in her right mind" when she telephoned 9-1-1 and when she testified at the preliminary hearing. He also speculated when Carter made her statements to the authorities, she may have been angry with him. He claimed Davis testified he had the shotgun at the preliminary hearing as her mother had told her to do so.

Appellant was impeached with prior felony convictions of "moral turpitude."

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[3] In recanting, Davis claimed she did not see a shotgun, and while appellant was outside the residence, appellant had been holding a long, thin instrument in both hands.

CONTENTIONS

1. *Unanimity instruction*

Appellant contends that the trial court erred by failing sua sponte to give a unanimity instruction, such as CALCRIM No. 3500.[4] He argues the instruction should have been given as the trial evidence showed two acts that might have constituted the charged assault. He asserts the prosecutor made no formal election between these acts, and the jurors might have disagreed among themselves as to which of these acts appellant committed. He urges that the exception for a continuous course of conduct does not apply as when he testified, he asserted different defenses to the two acts and there was a reasonable basis for the jury to distinguish between the acts. Accordingly, the unanimity instruction would have ensured agreement on the same underlying act, a constitutional requirement. He urges the error constitutes *Chapman* error, and a reversal of his conviction and a new trial is required. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

The People urge there was a continuous course of conduct, and the prosecutor argued in factual terms to the jury the arguably two discrete criminal acts constituted the one assault charged in the information. Accordingly, there was no error. Moreover, even the trial court erred, whether the error is evaluated pursuant to *Watson* or *Chapman*, any error is harmless. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

a. *The procedural facts*

The information charged appellant with one count of a violation of section 245, subdivision (a)(2), assault with a firearm. The prosecutor made no formal

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[4] The pattern instruction, CALCRIM No. 3500, concerning "Unanimity," is as follows: "The defendant is charged with [offense] in count [number of count] . . . [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

election of acts. In her final argument, the prosecutor said appellant committed the charged assault when he racked the shotgun and shot at Lord, then immediately thereafter went over to Lord as she sat in L.K.'s car and put the shotgun to Lord's face and threatened her.

After the parties delivered their final arguments to the jury, the trial court questioned appellant concerning the necessity of delivering to the jury a unanimity instruction. The trial court addressed appellant personally as he was in pro per. It provided appellant with a copy of the text of CALCRIM No. 3500. The trial court told appellant that it had not yet decided whether the jury should be charged with the instruction. It explained to appellant that if the trial evidence demonstrates two different "offenses" that might constitute the charged offense, and if the conduct constitutes separate acts, then the instruction should be given.

The trial court solicited the prosecutor's comment. The prosecutor replied that in this case, the People were charging appellant with a continuous course of conduct in that appellant shot at Lord and chased her with the shotgun. After Lord got into a car, appellant pointed the gun at her face. She said, "I think that occurred within a matter of seconds and within a matter of feet, and I didn't argue it as though it was two separate acts." Appellant stated his position: "There was no continuous action at all. There's no evidence of any shooting."

The trial court told appellant he did not understand the trial court's directions. The trial court again explained the reason for the unanimity instruction and there was a continuous course of conduct exception to the requirement for giving the instruction. After listening to the trial court explain the law on the point, appellant said, "I don't think it's necessary, [N]o."

The trial court ruled it would not give the instruction. The trial court then inquired of the prosecutor whether it should give the instruction in an abundance of caution, and the prosecutor replied that it was unnecessary.

The jury was instructed as to the elements of the assault with a firearm and that it must reach a unanimous decision as to guilt.[5] The trial court did not deliver CALCRIM No. 3500, or a similar unanimity instruction, to the jury.

b. *The applicable law*

Recently, the court in *People v. Hernandez* (2013) 217 Cal.App.4th 559 (*Hernandez*) summarized many of the pertinent principles concerning the unanimity instruction. We state the principles set forth there as they are pertinent to the contention.

"The importance of the unanimity instruction is rooted in the Fourteenth Amendment to the United States Constitution's requirement that all criminal defendants are afforded due process of law. The failure to give a unanimity instruction 'has the effect of lowering the prosecution's burden of proof.' [Citation.] Accordingly, a failure to give the instruction when it is warranted abridges the defendant's right to due process, as it runs the risk of a conviction when there is no proof beyond a reasonable doubt." (*Hernandez, supra*, 217 Cal.App.4th at p. 570.)

"In California, a jury verdict in a criminal case must be unanimous. [Citations.] Thus, our Constitution requires that each individual juror be convinced, beyond a reasonable doubt, that the defendant committed *the specific* offense he is charged with. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132 (*Russo*).) Therefore, when the evidence suggests more than one discrete crime, either (1) the prosecution must elect among the crimes or (2) the trial court must instruct the jury that it must unanimously agree that the defendant committed the same criminal act. [Citations.] The unanimity instruction must be given sua sponte, even in the absence of a

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[5] Section 245, subdivision (a)(2), provides as follows: "Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment."

defense request to give the instruction. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Carrera* (1989) 49 Cal.3d 291, 311, fn. 8.)" (*Hernandez, supra*, 217 Cal.App.4th at p. 569.)

"[A] 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." ' (*Russo, supra*, [25 Cal.4th] at p. 1132.) Thus, the instruction is given to ensure that all 12 jurors unanimously agree, and are unanimously convinced beyond a reasonable doubt, which instance of conduct constitutes the charged offense." (*Hernandez, supra*, 217 Cal.App.4th at p. 569.)

"In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on *two discrete crimes* and not agree on any particular crime or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a *single discrete crime*. (*Russo, supra*, 25 Cal.4th at p. 1135, italics added.) In the first situation, but not the second, it should give the unanimity instruction. (*Ibid*.)" (*Hernandez, supra*, 217 Cal.App.4th at p. 570.)

There is authority that an exception exists to the need for a unanimity instruction where the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct, or when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Crandell* (1988) 46 Cal.3d 833, 875; *People v. Diedrich* (1982) 31 Cal.3d 263, 282; see discussion in *Hernandez, supra*, 217 Cal.App.4th at pp. 571-573.)

In *People v. Lueth* (2012) 206 Cal.App.4th 189, 196, that court further explained the following. 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.]' [Citation.]" [Citation.]' (*People v. Bui* (2011) 192 Cal.App.4th 1002, 1011.)" While this scenario has been described as an exception to the requirement for the unanimity instruction, the recent authorities suggest that it is more accurate to say, in this situation, a unanimity instruction is required, but the failure to give one is harmless. (*People v. Leuth, supra,* at p. 196.)

c. *Discussion*

We conclude that the failure to give the instruction was at best nonprejudicial.

"Under *Chapman* [, *supra*], 386 U.S.18, the failure to give a unanimity instruction is harmless '[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.' (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853 (*Thompson*).) For example, where the defendant offered the same defense to all criminal acts, and 'the jury's verdict implies that it did not believe the only defense offered,' failure to give a unanimity instruction is harmless error. (*People v. Diedrich*[,*supra*,] 31 Cal.3d [at p.] 283.) But if the defendant offered separate defenses to each criminal act, reversal is required. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1071; *Thompson, supra*, at p. 853.) The error is also harmless '[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence . . . .' (*Thompson, supra,* at p. 853.)" (*Hernandez, supra*, 217 Cal.App.4th at p. 577; see also *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188 [finding that a failure to give a proper unanimity instruction constituted *Chapman* error and citing *Rose v. Clark* (1986) 478 U.S. 570, 579].)

Appellant argues the instruction was required because appellant asserted two different offenses to the one charge: (1) Parker was the person who fired the shotgun in the air, and (2) he did not waive a gun and threaten Lord after she called him a hillbilly because he was never holding a shotgun. We do not parse his defense so finely. In the context of the trial evidence, appellant's defense was a unitary one: I did not commit any assault as I never owned, nor on that occasion, did I ever possess the shotgun.

There was only one charge of assault. In the prosecutor's final argument to the jury, she informed the jury in factual terms that the two arguably discrete criminal acts constituted the course of conduct she was relying on to prove the one count of assault. Carter's and Davis's initial statements to the authorities set out the events that the prosecution believed had occurred. Appellant told the jury his version of the events during his trial testimony. The trial amounted to a credibility contest between these two versions of the evidence, and the jury verdict implies that the jury did not believe the only defense offered.

Also, the compact disk recordings of Carter's original 9-1-1 call and of appellant's threatening telephone call to Carter from the jail constituted objective corroboration of the prosecution's theory of the case. Accordingly, this court concludes that pursuant to *Chapman*, the error in failing sua sponte to charge the jury with a unanimity instruction is harmless beyond a reasonable doubt.

2. *Imposition of minimum restitution and parole restitution fines*

Appellant contends the "routine" imposition of minimum restitution fines of $240, when on the date of his offenses the minimum fines were $200, demonstrates an ex post facto application of the law.

Under ex post facto principles, the amount of a restitution fine is determined as of the date of the offense. (*People v. Souza* (2012) 54 Cal.4th 90, 143; *People v. Saelee* (1995) 35 Cal.App.4th 27, 30.)

Appellant committed the assault and other offenses on September 9, 2010. He was sentenced in April 2012. In imposing a restitution fine and a parole

restitution fine, the trial court merely said, "pay a restitution fine of $240; a parole revocation restitution fine of $240, which is stayed. . . ."

In 2010, sections 1202.4, subdivision (b), and 1202.45 provided that the trial court had the discretion to impose the restitution and parole restitution fines "not [to] be [set at] less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000) . . . ." (Stats. 2009, ch. 454, § 1.) An amendment to section 1202.4, subdivision (b) was passed as urgency legislation on July 1, 2011, and set the minimum restitution and parole restitution fines at $240, to become operative January 1, 2012. (Stats. 2011, ch. 45, § 1, p. 1830, eff. July 1, 2011; Stats. 2011, ch. 358, § 1, p. 3759.)

The People argue a forfeiture, and we agree. Appellant failed to enter an objection on this ground in the trial court, and his failure to object works a forfeiture. (*People v. Tillman* (2000) 22 Cal.4th 300, 302; *People v. Scott* (1994) 9 Cal.4th 331, 353-354.) There is no indication here of an unauthorized fine. The $240 restitution and parole restitution fines were imposed within the statutory range effective on the date he committed his offenses. There is no indication in this record the trial court abused its discretion by routinely using the wrong minimum fine, as opposed to having fully appreciated the breathe of its discretion and having properly exercised that discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 374-375; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497.) [6]

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[6] Nor can appellant reach this potential error by making a secondary claim of ineffective trial counsel. He engaged in self-representation in the trial court, and he is not permitted to raise that claim on appeal based on his own inadequate trial performance. (See *Faretta v. California* (1975) 422 U.S. 806, 834, fn. 46 [46 L.Ed.2d 562, 95 S.Ct. 2525] ["a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.' "]; *People v. Poplawski* (1994) 25 Cal.App.4th 881, 895 [" 'a defendant cannot claim "ineffective assistance of counsel" flowing from his failure to follow the rules of procedure or from his misinterpretation of the substantive law. If he chooses to defend himself, he must be content with the quality of that defense.' [Citation.]"]

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.