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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS GERARDO SOTO,

Defendant and Appellant.

B231181

(Los Angeles County  
Super. Ct. No. MA049939)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Modified and affirmed with directions.

Randall Conner, 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, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Sonya Roth, Deputy Attorney General, for Plaintiff and Respondent.

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Defendant Jesus Gerardo Soto appeals from the judgment entered following a jury trial in which he was convicted of inflicting corporal injury on a spouse or cohabitant, with a finding of great bodily injury, mayhem, false imprisonment by violence, criminal threats, dissuading a witness from reporting a crime, driving under the influence of alcohol or drugs, evading an officer, and two counts each of assault on a peace officer, resisting an executive officer, and child abuse. Defendant contends the trial court erred by failing to stay the sentence on either the corporal injury to a spouse or cohabitant conviction or the mayhem conviction, and by imposing a domestic violence fund fine. We agree and modify the judgment.

### **BACKGROUND**

In January of 2010 Lisa Soto filed for dissolution of her marriage to defendant and moved from their home in Palmdale to San Diego. On August 3, 2010, Lisa traveled by train to Palmdale to visit her two young sons, who were living with defendant. Defendant repeatedly asked Lisa to give him another chance. She consistently refused, and defendant became sad and angry. Defendant dropped Lisa off at a motel, then called her numerous times throughout the night to talk about their relationship. He also said that he had someone watching the motel.

Defendant picked Lisa up the next morning, and they and the children drove around town in defendant's truck. Defendant accused Lisa of cheating on him and they argued. Defendant was enraged and threatened to force her out of the truck. He left Lisa and the children at a park for 90 minutes, and when he returned he seemed angry and agitated. They went to a pizza parlor and defendant consumed a pitcher of beer with food. He repeatedly called Lisa derogatory names and told the children not to listen to her or kiss her. When they left the restaurant, Lisa asked defendant to take her and the boys to the motel. Defendant agreed and repeated that someone was watching the motel.

As defendant drove, he screamed at Lisa and continued to call her names. When defendant pulled into the Primo Burger parking lot, Lisa asked him to let her and the boys out of the truck. He refused and said she could leave when he was finished with her.

Defendant said he was an “O.G.” from a gang in Pacoima and had “cliqued up” with members of “La Eme,” which Lisa knew to be a gang. Defendant said he could have her buried in the desert. Lisa screamed for help and banged on the car door to try to attract attention from people in the parking lot. She also called 911. Defendant struck her in the face and drove quickly from the parking lot. As he drove, he yelled at her and reached for her phone.

Less than a minute later, while Lisa was speaking to the 911 dispatcher, defendant pulled into a cul-de-sac, got out, and attempted to pull Lisa out of the truck. She clung to the seat. Defendant pulled on both of Lisa’s arms, her hair, and her clothing. He struck her repeatedly in the face, knocking out one of her teeth. Lisa first told the 911 dispatcher that defendant had broken her tooth, then, a few exchanges later, told the dispatcher that defendant had “busted” her nose. Defendant finally pulled her out, grabbed her phone, and smashed it on the street, which ended her brief 911 call, the transcript of which was just one page long. Lisa ran toward the truck to attempt to take it, but defendant got in first. Lisa got back in to prevent defendant from leaving with the children. As defendant drove, Lisa leaned out the window, banged on the door, and shouted for help. Los Angeles County Sheriff’s Deputy Gavin Spector saw defendant’s truck swerve across the median and saw Lisa waving frantically. Spector made a U-turn, turned on his patrol car’s siren and red and blue flashing lights, and followed defendant’s truck, which was also speeding.

Lisa testified that when the sheriff’s car began following them, defendant screamed and swerved the truck. Defendant went up on a curb at a shopping mall and struck a planter. Spector parked his patrol car behind the truck. Defendant shifted into reverse and backed into Spector’s patrol car. Spector’s partner, Deputy Thomas Kim, testified that defendant looked in the rear view mirror and looked Kim in the eyes before driving the truck into the patrol car.

Upon Spector’s order, defendant got out of the truck, but refused to take his hands out of his waistband. Spector took defendant to the ground, but defendant defied

numerous commands to pull his hand from beneath him. Kim punched defendant repeatedly in the lower back, then used a Taser on defendant. Defendant put one hand out and Deputy Gustavo Munoz, who had arrived to assist, pulled defendant's other hand out and handcuffed him. Defendant walked unsteadily, was belligerent, and had an odor of alcohol, watery and glassy eyes, and slurred speech.

Lisa suffered bruising on her arms, face, and neck, and a laceration on one breast. She testified that all of these injuries, as well as the loss of her tooth, occurred when defendant was attempting to pull her from the truck in the cul-de-sac. She also had a bloody nose, which she noticed after she got back into the truck at the cul-de-sac. She did not know precisely when her nose began to bleed.

Defendant had been convicted of inflicting corporal injury on a spouse in 2005 and 2006. Both were felony convictions, and the victim in the latter case was Lisa.

Defendant testified, denying all pertinent acts to which Lisa testified. According to defendant, Lisa was angry because he told her he was considering moving to Arizona for work. Lisa grabbed the steering wheel and gear shift while defendant was driving. Defendant grabbed Lisa's arms to try to maintain control of the truck. He put on the brakes and her face hit the dashboard. As defendant pulled into a driveway, Lisa grabbed the wheel again and caused the truck to hit the planter. She shifted the truck into reverse and caused it to strike the patrol car. When defendant got out of the truck to face the deputies, he held his hands out in the air in front of him, but the deputies kicked him, slammed him to the ground, and punched him. After they handcuffed him, they Tased him, kicked him, stomped on him, and dragged him to their car.

The prosecutor repeatedly told the jury that both the mayhem charge and the great bodily injury allegation attached to the infliction of corporal injury on a spouse or cohabitant charge were based upon defendant's knocking out Lisa's tooth.

The jury convicted defendant of inflicting corporal injury on a spouse or cohabitant, mayhem, false imprisonment by violence, criminal threats, dissuading a witness from reporting a crime, driving under the influence of alcohol or drugs, evading

an officer, and two counts each of assault on a peace officer, resisting an executive officer, and child abuse. With respect to the infliction of corporal injury on a spouse or cohabitant, the jury found that defendant personally inflicted great bodily injury (Pen. Code, § 12022.7, subd. (e); undesignated statutory references are to the Penal Code) and that defendant had suffered two prior convictions of this offense within seven years (§ 273.5, subd. (e)(1)). It further found that defendant had a passenger under the age of 14 while driving under the influence. Defendant admitted serving a prior prison term within the scope of section 667.5, subdivision (b).

The court sentenced defendant to prison for 18 years 8 months, consisting of the high term of 5 years for infliction of corporal injury on a spouse or cohabitant, plus 4 years for the great bodily injury enhancement to that charge, plus 1 year for the prior prison term enhancement; 16 months for mayhem; 16 months for each child abuse count; 16 months for each assault on a peace officer count; 8 months for dissuading a witness; 8 months for resisting an executive officer; and 8 months for evading an officer. The court stayed the sentences on the false imprisonment, criminal threats, and second resisting an executive officer counts and imposed a concurrent six-months jail term for driving under the influence.

## **DISCUSSION**

### **1. Section 654**

The prosecutor's sentencing memorandum suggested that the sentence on the mayhem conviction should be stayed pursuant to section 654. The trial court disagreed, saying, "There were [*sic*] a series of crimes committed here. And within that series, there was the [infliction of corporal injury on a spouse or cohabitant]. There's also this separate act of mayhem. I don't believe that the loss of the tooth merges in count one as contemplated under 654." The trial court did not address the basis for the great bodily injury enhancement to the infliction of corporal injury on a spouse or cohabitant count.

Defendant contends that section 654 precluded sentencing on both the mayhem and infliction of corporal injury on a spouse or cohabitant convictions, in light of the

great bodily injury enhancement to the latter. The Attorney General disagrees, arguing incorrectly that defendant hit Lisa on two separate occasions before they reached the cul-de-sac, and positing that Lisa sustained her bloody nose on one of those two other occasions.

Section 654, subdivision (a) provides 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.” The statute prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) But if a defendant had separate objectives that “were either (1) consecutive even if similar or (2) different even if simultaneous,” multiple punishment is permissible, even if the crimes shared common acts or were parts of an otherwise indivisible course of conduct. (*People v. Britt* (2004) 32 Cal.4th 944, 952; *Harrison*, at p. 335.) In applying section 654, the defendant’s objectives must not be “parse[d] . . . too finely.” (*Britt*, at p. 953.)

Section 654 applies only to “a course of conduct deemed to be indivisible in time”; if a course of conduct is “divisible in time,” section 654 is inapplicable. (*People v. Beamon* (1973) 8 Cal.3d 625, 639 & fn. 11.) Thus, even if offenses were committed with a single intent and objective, they may be punished separately if they were committed on different occasions. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) Factors often considered in determining the temporal divisibility of offenses are whether the defendant had an opportunity to reflect upon and renew his or her intent before committing the next offense and whether each offense created a new risk of harm. (*Id.* at p. 1255.)

The defendant’s intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) That is, there must be evidence to

support a finding that the defendant formed a separate intent and objective for each offense for which he was sentenced or to find the offenses temporally divisible.

Although defendant struck Lisa once at the Primo Burger parking lot, there was no evidence this blow resulted in any harm to her. Lisa did not know when her nose was bloodied, but she told the 911 dispatcher about it shortly after saying that her tooth was broken, and she testified that she noticed her nose bleeding after the cul-de-sac. As far as the record reveals, all of Lisa's injuries resulted from the struggle and multiple blows in the cul-de-sac. It would be speculative to conclude that the one blow in the parking lot caused the bloody nose. Nothing in the record provides a basis for concluding that the struggle and multiple blows in the cul-de-sac constituted a course of conduct that was in any way divisible in time or that defendant had separate objectives for individual blows he inflicted upon Lisa during the struggle in the cul-de-sac. In addition, it appears that Lisa's loss of a tooth was the basis for both the mayhem conviction and the true finding on the great bodily injury enhancement to the infliction of corporal injury on a spouse or cohabitant conviction. Thus, imposing an unstayed sentence upon both the infliction of corporal injury on a spouse or cohabitant count with the enhancement and the mayhem count punished defendant twice for a single act. Accordingly, as the prosecutor recognized, section 654 barred sentencing defendant upon both mayhem and infliction of corporal injury on a spouse or cohabitant.

Where section 654 applies to several counts, the longest term provided by any of those counts is the one imposed, while the shorter terms are stayed. (§ 654, subd. (a).) Here, the shorter term was that for mayhem, which must be stayed.

## **2. Section 1203.097 domestic violence assessment**

Defendant contends, and the Attorney General aptly concedes, that the trial court erred by imposing a \$400 domestic violence assessment under section 1203.097, which applies only when a defendant is granted probation. We agree, and strike the assessment.

### **DISPOSITION**

The sentence on count 2, mayhem, is stayed pursuant to Penal Code section 654. The \$400 domestic violence assessment imposed under Penal Code section 1203.097 is stricken. As amended, the judgment is affirmed. Upon remand, the trial court is directed to issue an amended abstract of judgment reflecting these modifications and the new total term of 17 years 4 months.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.