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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. FRANK CHRISTOPHER BORRUEL, Defendant and Appellant.	2d Crim. No. B229181 (Super. Ct. No. BA355635) (Los Angeles County)

Frank Christopher Borruel appeals his conviction, by jury, of three counts of assault with a firearm. (Penal Code, § 245, subd. (a)(2).)[1] The jury further found that the each assault was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(B).) It found not true the allegation that appellant personally used a firearm in the assaults (§§ 12022.5, 1192.7, subd. (c), 667.5, subd. (c)), and it found appellant not guilty of possession of a firearm by a felon. (§ 12021, subd. (a)(1).) The trial court sentenced appellant to a total term in state prison of 12 years. He contends there is no substantial evidence supporting his conviction on two of the three assault charges, that the trial court erred in responding to questions from the jury, that the sentence on one of the assault convictions should be stayed pursuant to section 654 if the conviction is not reversed, and

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

that he was deprived of due process when an expert witness on criminal street gangs referred to his tattoos as being "prison type." We affirm.

Facts

Shortly after midnight on April 20, 2009, Humberto Moreno and Roberto Chavarin walked toward a taco truck parked at the corner of Vernon Avenue and Wall Street in Los Angeles. They noticed two Hispanic men walking behind them. One of the men, later identified as Eswin Terraza, was more heavy-set; the other, later identified as appellant, was thinner. Terraza asked Moreno where he was from. Moreno had left the Playboys gang 10 years earlier, after getting married. He understood Terraza was asking about his gang affiliation and he answered, "nowhere." Moreno also understood that he was in an area "claimed" by 41st Street, a rival gang of the Playboys. When Terraza and appellant asked Moreno and Chavarin to come back to where they were, Moreno refused and told Chavarin to keep walking toward a nearby liquor store.

By the time Moreno and Chavarin reached the liquor store, appellant and Terraza had caught up with them. Terraza pointed a gun at Moreno's head and asked again where he was from. Moreno said he wasn't from anywhere, but he lived in the neighborhood. Then, appellant told Terraza the police were coming. They went inside the liquor store. Moreno and Chavarin walked back to the opposite street corner, by the taco truck. Moreno used his cell phone to call 911. While he was talking to the 911 operator, Terraza came out of the liquor store and started coming toward Moreno. He pointed his gun at Moreno and tried to get him to walk toward the intersection of Vernon and San Pedro Street, where it was darker. Moreno refused and continued talking on the phone, saying that he was talking to his girlfriend.

Terraza noticed that appellant, who had remained behind in the liquor store parking lot, was in a fight with some other men. Appellant was on the ground and Terraza shot at the other men. One doubled over, as if he had been shot. His companions helped him into a truck and the men drove away.

Appellant and Terraza began to run in the direction of Wall Street, and away from where Moreno and Chavarin were standing. As he ran, appellant turned back

and fired several shots toward Moreno and Chavarin. Moreno heard the bullets "ping" against an iron fence near the taco truck. One of the bullets lodged in Chavarin's wallet.

When Los Angeles Police Department officers arrived at the scene, Moreno and Chavarin told them where appellant and Terraza ran. One of the officers knew that a nearby house at 4320 South Wall Street was a hang-out for 41st Street. Searching the surrounding area, officers saw appellant jump from the roof of a building next door, at 4328 South Wall Street, onto the roof of a detached garage at the same address. He was taken into custody moments later. Terraza and a third person were detained when officers saw them walking away from the same buildings at 4328 South Wall Street.

Moreno and Chavarin participated in separate field "show ups." Moreno identified Terraza as the person who put a gun to his head and appellant as the person who shot at him. Chavarin said that appellant was the person who shot him and Terraza was the person who tried to shoot at them. Terraza tested positive for gunshot residue; appellant did not. A police officer recovered a handgun from the roof of the garage that appellant had jumped from. The bullet fragment removed from Chavarin's wallet did not match the gun.

The Judgment

Appellant and Terraza were charged with five counts of assault with a firearm in violation of section 245, subdivision (a)(2). Count 1 related to the shooting of the John Doe in the liquor store parking lot. Counts 2 and 3 related to the shots appellant fired at Moreno and Chavarin as he and Terraza fled toward Wall Street. Count 6 related to Terraza's initial confrontation with Moreno. Count 7 related to the second confrontation Terraza had with Moreno, while appellant was fighting in the liquor store parking lot and Moreno was using his cell phone. In counts 4 and 5, Terraza and appellant were each alleged to have been a felon in possession of a firearm, in violation of section 12021, subd. (a)(1). The information alleged that each assault was committed for the benefit of a criminal street gang and that each defendant personally used a firearm in the commission of each assault.

The trial court granted appellant's motion for a judgment of acquittal as to count 1. (§ 1118.1.) It later granted its own motion to dismiss count 7 as to appellant, pursuant to section 1385. The jury convicted appellant on counts 2, 3, and 6. It found the gang enhancement allegation true and the personal firearm use allegation not true. The jury acquitted appellant of the charge that he was a felon in possession of a firearm. (§ 12021, subd. (a)(1).)

Discussion

Substantial Evidence

Appellant contends there is no substantial evidence supporting his convictions on counts 2 and 3 because the jury's guilty verdicts on these counts are inconsistent with its findings that he did not personally use a firearm to commit them, and with his acquittal of the possession of a firearm offense. Counts 2 and 3 refer to the shots fired at Moreno and Chavarin while appellant and Terraza were running away. Both victims testified that appellant was the shooter; neither victim claimed that Terraza fired the shots at issue. Appellant contends that he could not have been the shooter if he did not personally discharge or possess a firearm. Because there is no evidence that he aided and abetted the shooting by Terraza, appellant contends his convictions of these counts must be reversed. We disagree.

Inherently inconsistent verdicts are allowed to stand. (*People v. Avila* (2006) 38 Cal.4th 491, 600.) "[I]f an acquittal on one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both." (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.) The verdict on each count must stand or fall on its own merits. (*People v. Guzman* (2011) 201 Cal.App.4th 1090, 1095, fn. 3.) "When a jury renders inconsistent verdicts, 'it is unclear whose ox has been gored.' (*United States v. Powell* [(1984) 469 U.S. 57,] 65.) The jury may have been convinced of guilt but arrived at an inconsistent acquittal or not true finding 'through mistake, compromise, or lenity . . . .' (*Ibid.*) Because the defendant is given the benefit of the acquittal, 'it is neither irrational nor illogical to require [him or] her to accept the burden

of conviction on the counts on which the jury convicted.' (*Id.* at p. 69. . . .)" (*People v. Santamaria, supra,* 8 Cal.4th at p. 911.)

The question presented to us, then, is not whether the guilty verdicts on counts 2 and 3 are inconsistent with other findings made by the jury, but whether those verdicts are supported by substantial evidence. As our Supreme Court held in *People v. Barnwell* (2007) 41 Cal.4th 1038, "A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. (See *People v. Johnson* (1980) 26 Cal.3d 557, 578 . . . .) Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*Id.* at p. 1052, emphasis omitted.) Here, both victims testified that appellant was the person who fired the "parting shots" at them, as he and Terraza ran away toward Wall Street. This constitutes substantial evidence supporting appellant's convictions on counts 2 and 3.

Jury Questions

The trial court instructed the jury on the principles of aiding and abetting liability in terms of CALCRIM 400 and 401, the pattern jury instructions on that issue.[2] During its deliberations, the jury asked two questions concerning aiding and abetting. Appellant contends the trial court provided erroneous responses which reduced the prosecution's burden of proof and denied him due process. We disagree.

The jury's first question was, "In charges 2 & 3, does Borruel have to be the shooter for us to find him guilty?" The court replied: "No. Borruel could be found guilty on a theory of aiding and abetting, if the jury finds Terraza committed an assault with a firearm in violation of counts 2 and 3. [¶] The jury cannot find the special allegation of personal use of a firearm to be true for counts 2 and 3, unless all jurors

[2] CALCRIM 400 informs the jury that a person may be guilty of a crime as a direct perpetrator or as an aider and abettor. CALCRIM 401 explains the circumstances under which a person may be found guilty based on aiding and abetting a crime.

unanimously agree that Borruel personally used a firearm in the commission of those offenses." Appellant's trial counsel did not object to this answer. The jury's second question was: "If 2 people are acting in concert and it is known at least 1 of the [people] committed an act, but it is not known who, are they both guilty, i.e., 1 is the perpetrator and 1 is aiding and abetting without specifying which is which[?]" The trial court answered: "Yes. It is not required that the jury decide unanimously whether a defendant was a perpetrator or an aider and abetter, as long as all jurors agree the defendant was one or the other." Appellant's trial counsel objected that "we're proposing to totally rework CALCRIM 401. And I believe it . . . will undermine the requirement that the jury find the elements beyond a reasonable doubt." The objection was overruled.

Appellant contends the trial court's answers misrepresented the elements of aiding and abetting they did not remind the jury that, to find appellant guilty on an aiding and abetting theory, the jury would have to find that he acted with knowledge of Terraza's criminal purpose and with an intent to commit, encourage or facilitate the commission of the offenses. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) We review the trial court's response to the jury's questions for abuse of discretion. There is none. (*People v. Waidla* (2000) 22 Cal.4th 690, 745-746 ["An appellate court applies the abuse of discretion standard of review to any decision by a trial court to instruct, or not to instruct, in its exercise of its supervision over a deliberating jury[.]"].)

The trial court's answers correctly stated the law. In the first question, the jury asked whether appellant had "to be the shooter for us to find him guilty?" The trial court answered no, because the jury could also find appellant guilty on a theory of aiding and abetting. The answer was correct. "[A]n aider and abettor with the necessary mental state is guilty of the intended crime." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

The trial court's answer to the jury's second question was also correct. Unanimity is required as to appellant's guilt of the substantive offense, but not on the question of whether he was a perpetrator or an aider and abettor. As our Supreme Court stated in *McCoy*, "It is often an oversimplification to describe one person as the actual

perpetrator and the other as the aider and abettor. When two or more persons commit a crime together, both may act in part as the actual perpetrator and in part as the aider and abettor of the other, who also acts in part as an actual perpetrator . . . . The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who as the aider and abettor and who the direct perpetrator or to what extent each played which role." (*People v. MCoy, supra,* 25 Cal.4th at p. 1120, emphasis omitted.)

Appellant did not request any further clarification of the trial court's proposed responses. Specifically, he did not request that the jury be referred back to the trial court's original instructions on aiding and abetting. If appellant believed the trial court's responses were unclear, "he had the obligation to request clarifying language." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.) His failure to do so waives the claim. (*People v. Marks* (2003) 31 Cal.4th 197, 237.)

Section 654

Appellant next contends his sentence on count 3 violates the prohibition imposed by section 654 on multiple punishments for a single criminal act. According to appellant, the shooting at Moreno which occurred while he and Terraza were running away from the liquor store (count 3) was part of a single course of conduct as the initial threatening of Moreno (count 6). The two offenses may not, he contends, be punished separately. We are not persuaded.

Section 654 bars multiple punishments where "there is a course of conduct that violates more than one statute but nevertheless constitutes an indivisible transaction." (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240.) If a defendant commits more than one offense, but " 'all the offenses were incident to one objective, the defendant may be punished for any one of such offense, but not for more than one.' (*People v. Perez* (1979) 23 Cal.3d 545, 551 . . . .)." (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215, emphasis omitted.) The statute does not apply to bar multiple punishments where the defendant held multiple objectives or intents. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) "Whether a course of conduct is divisible and therefore gives rise to more

than one act within the meaning of section 654 depends on the 'intent and objective' of the actor." (*People v. Hairston, supra*, 174 Cal.App.4th at p. 240, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The amount of time that elapses between criminal acts, "although not determinative on the question of whether there was a single objective, is a relevant consideration." (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.) Where the offenses are separated in time, affording the defendant "opportunity to reflect and to renew his or her intent before committing" the next offense, the trial court may conclude that the defendant had multiple objectives and committed more than one criminal act meriting multiple punishments. (*People v. Andra* (2010) 156 Cal.App.4th 638, 640.)

The question of whether appellant acted with multiple objectives is one of fact. We will affirm the trial court's finding on that issue if it is supported by substantial evidence. (*People v. Wynn, supra*, 184 Cal.App.4th at p. 1215.)

Appellant's first offense was to aid and abet Terraza in pointing his gun at Moreno's head while asking for Moreno's gang affiliation. Moments later, appellant told Terraza the police were coming, so he and Terraza went inside the liquor store. Moreno took the opportunity to walk back across the street while using his cell phone to call 911. While Moreno was on the phone, Terraza emerged from the liquor store to confront him again, as appellant began fighting with the other men in the parking lot. Terraza returned to the parking lot, shot at the other men, and then he and appellant began running back toward their "home base" on Wall Street. As they fled the scene, appellant turned back and fired shots at Moreno and Chavarin.

Appellant now contends the final shots fired before he ran away were part of an indivisible course of conduct that began with Terraza's original assault on Moreno. He is incorrect. The two assaults were separated in both time and physical space. After the first assault on Moreno, appellant had time to follow Terraza and Moreno to the liquor store, go inside the liquor store, exit the liquor store, start a fight with men in the parking lot, and begin running back to the house on Wall Street. He fired the shots at

Moreno and Chavarin only after all of those events had occurred.[3] Appellant had ample time to reflect on his actions and renew his intent to assault Moreno. Accordingly, as the trial court properly determined, the two assaults were not part of a single, continuous course of conduct and were properly punished as separate offenses.

Gang Expert Testimony

The prosecution's expert witness on street gangs testified that appellant is a member of the 41st Street gang. He described appellant as having several tattoos. Appellant has the number "4" and the word, "quarto" tattooed on his left arm. He has the number "1" and the word "uno" tattooed on the right arm. In addition, appellant has the letters "LA" and "SC" tattooed on his chest. The trial court asked the expert, "What significance, if any, does the L.A. tattoo on his chest have within gang culture?" The witness responded: "Just signifies that he's from the L.A. area. The S.C. indicates he's from South Central L.A. Those are more indicative of prison-type tattoos which will distinguish individuals . . . ." Defense counsel objected. The trial court immediately informed the jury, "There's no suggestion that he went to prison, ladies and gentlemen. Disregard that." The witness added, "Within gang culture it just signifies that he's a member of -- or he's from the south side of California I should say."

Appellant contends the witness' reference to "prison-type" tattoos violated his due process right to a fair trial. We cannot agree that the reference to prison " 'so infused the trial with unfairness as to deny due process of law.' " (*Estelle v. McGuire* (1991) 502 U.S. 62, 75, quoting *Lisenba v. California* (1941) 314 U.S. 219, 228.) The witness made a single, brief reference to prison which the trial court immediately instructed the jury to disregard. We presume the jury followed that instruction. (*People*

[3] Appellant contends the jury's verdicts are consistent only with the theory that Terraza fired these final shots. We disagree for the reasons stated above, but note that our analysis would be the same even if Terraza fired the final shots. The passage of time between the two incidents and the intervening events in the liquor store parking lot compel the conclusion that Moreno suffered two separate assaults. Appellant was therefore properly subjected to two separate punishments.

v. Bryden (1998) 63 Cal.App.4th 159, 184.) Nor was the statement especially outrageous or inflammatory. As respondent points out, the statement could also refer to the fact that that appellant's tattoos appeared to be "homemade," rather than professionally done. This single statement did not render appellant's trial fundamentally unfair. We can see no reasonable probability that appellant would have obtained a more favorable verdict absent the statement. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Robert Perry, Judge

Superior Court County of Los Angeles

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

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