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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN WAYNE COLE,

Defendant and Appellant.

B277141

(Los Angeles County
Super. Ct. No. GA097223)

APPEAL from the judgment of the Superior Court of Los Angeles County. Jon R. Takasugi, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

A jury found defendant and appellant Justin Wayne Cole guilty of assault with a deadly weapon and felony vandalism. The court imposed a two-year prison term on the assault charge and a concurrent 16-month term on the vandalism charge. Defendant raises two claims of error: (1) the court erred by failing to sua sponte give a unanimity instruction; and (2) the sentence on the vandalism charge should have been stayed pursuant to Penal Code section 654.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of July 16, 2015, Marc Thomas and his wife, Janeen Apodaca, were on their way to get an ice cream. They were in their 2002 Toyota Corolla and Mr. Thomas was driving. It was a warm evening and he had his window down about half way. As they headed south on El Molino Avenue, Mr. Thomas noticed a black Ford pickup truck was driving “uncomfortably close” behind them. There was less than a car length between the vehicles. Defendant was driving the truck.

At the intersection with Huntington Drive, the black truck was still behind them. Mr. Thomas made a right turn. After completing the turn onto Huntington Drive, Mr. Thomas began to merge into the left lane. In his rearview mirror, he noticed the truck was veering into the left lane, but Mr. Thomas unintentionally cut him off by making his lane change. He heard several honks. The truck then swerved into the lane on the passenger side of Mr. Thomas’s car. As the truck passed their car, it sideswiped them, striking the passenger-side mirror.

Mr. Thomas continued driving and saw the black truck stopped at the signal at the intersection with Los Robles Avenue. Mr. Thomas was still shaken from the car being hit, but pulled

up behind the black truck. It did not appear that defendant was going to pull over to exchange information. Mr. Thomas was not sure if defendant had intentionally hit him or if it was an accident, but he was scared to get out of his car. Mr. Thomas decided to take a picture of the truck and the license plate number.

When the light turned green, the truck did not move forward. Mr. Thomas saw defendant thrust both hands in the air and make gestures with both middle fingers. Defendant then got out of his truck, red-faced and looking “very angry.” Defendant grabbed a baseball bat from the cab of his truck and headed toward Mr. Thomas’s car.

Defendant started hitting the front driver’s side of Mr. Thomas’s car, repeatedly swinging the bat downward like he was swinging an axe. Mr. Thomas was scared because defendant appeared aggressive and seemed “out of control.”

Mr. Thomas was shocked by defendant’s behavior. He started to close his window, but then decided he better try to move his car. When he turned his head to see if traffic would allow him to pull away, he felt the bat hit him in the left temple. Defendant had “jabbed” the bat through the opening of the driver’s side window, striking Mr. Thomas in the head. Ms. Apodaca saw defendant trying to poke the bat through the window as her husband tried to roll it up, and the tip of the bat struck him on the side of his face. Mr. Thomas developed some redness and swelling where he was hit.

Mr. Thomas saw a woman get out of the passenger side of the truck and yell at defendant, “What the hell are you doing?” Defendant then got back into his truck and drove off. Mr. Thomas told his wife to call 911. She called 911 and reported

that someone hit their car with a baseball bat. Mr. Thomas pulled his car over and waited to speak with the police.

Joseph Pink was stopped at the same intersection where the incident occurred and saw defendant get out of his truck, grab a baseball bat and head toward Mr. Thomas's car. The light changed to green and the traffic started to move forward, so Mr. Pink had to look over his shoulder. He saw defendant start swinging the bat at Mr. Thomas's car. Mr. Pink called 911 as he drove away from the intersection and lost sight of the altercation.

On February 17, 2016, defendant was charged with one count of assault with a deadly weapon (baseball bat) (Pen. Code, § 245, subd. (a)(1); count 3), and one count of felony vandalism (§ 594, subd. (a); count 4). (At the preliminary hearing, the court dismissed two counts related to the truck striking the victims' car.)

The jury trial commenced in May 2016. The jury found defendant guilty on both counts. The court imposed a two-year middle term on the assault charge, plus a concurrent 16-month low term on the vandalism charge. Defendant was ordered to pay restitution, various fines, and was awarded 149 days of custody credits.

This appeal followed.

DISCUSSION

1. The Jury Instructions

Defendant contends the court failed to discharge its sua sponte duty to give a unanimity instruction. Defendant argues the instruction was necessary because there was conflicting evidence as to what act (which swing of the bat) constituted an assault on Mr. Thomas, and the prosecution never made an election. The contention lacks merit.

The court did not have any duty to give a unanimity instruction. (*People v. Davis* (2005) 36 Cal.4th 510, 561.) The record contains ample evidence demonstrating the applicability of the continuous course of conduct exception, and the prosecution proceeded on such a theory. (*People v. Jennings* (2010) 50 Cal.4th 616, 679 “[N]o unanimity instruction is required if the case falls within the continuous-course-of-conduct exception, which arises ‘when the acts are so closely connected in time as to form part of one transaction.’ ”).) The testimony at trial established that defendant, within a span of a few moments, repeatedly struck first the front driver’s side of the victims’ car, and then went up to the driver’s side door and jabbed the baseball bat through the partially open window, striking Mr. Thomas in the head. There was no ambiguity in the evidence about what conduct constituted the assault on Mr. Thomas that warranted a unanimity instruction.

2. The Concurrent Sentence on Count 4

Defendant contends the proscription against multiple punishment set forth in Penal Code section 654 mandates a stay of the 16-month sentence on the vandalism charge (count 4). We disagree.

The protections afforded by Penal Code section 654 have been “extended to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.] [¶] It is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Where, as here, a defendant harbors “ ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, he may be punished for each statutory

violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’” (*Ibid.*)

The record contains substantial evidence supporting a finding that defendant harbored two distinct criminal objectives. Defendant swung the bat repeatedly at the front driver’s side of Mr. Thomas’s car, evidencing an intent to cause damage to the vehicle. But, defendant did not limit his aggressive conduct to swinging the baseball bat at the exterior of the car. Defendant jabbed the baseball bat through the window, striking Mr. Thomas in the head. Such conduct, while undertaken in close proximity to the vandalism of the car, nonetheless demonstrates a distinct criminal objective of physically assaulting Mr. Thomas. The court did not err in imposing a concurrent sentence.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.