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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WILLIE NORTON,<br><br>Defendant and Appellant. | B234819<br><br>(Los Angeles County<br>Super. Ct. No. TA114930) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura R. Walton, Judge. Affirmed in part, modified in part, and remanded with directions.

Katharine Eileen Greenebaum, 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, Susan Sullivan Pithey and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Willie Norton, appeals from a judgment of conviction entered after a jury found him guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] and found true the allegation that he personally used a knife (§ 12022, subd. (b)(1)).

Appellant's sole contention on appeal is that the trial court committed reversible error by failing to give a unanimity instruction to the jury. We find no error in the trial court not giving a unanimity instruction to the jury and affirm the judgment.[2] We remand the matter to the trial court to correct sentencing errors.

## BACKGROUND

### *Procedural Background*

Appellant was charged in an information with two counts of assault with a deadly weapon (§ 245, subd. (a)(1)), for assaulting Donald Green and Denise Washington. He was also charged with personal use of a knife (§ 12022, subd. (b)(1)) in connection with the assaults. The information also alleged that appellant had served four prior prison terms (§ 667.5, subd. (b)), suffered two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and two prior serious or violent felony adjudications pursuant to the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).[3]

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

[2] Concurrently with this appeal, on July 9, 2012, appellant filed a petition for writ of habeas corpus alleging ineffective assistance of counsel in case No. B242369. He contends that his defense counsel failed to properly cross-examine the witnesses. The petition will be considered concurrently with, but separately from, the instant appeal. We shall dispose of the petition by a separate order.

[3] The information incorrectly states the dates of conviction for case Nos. FVI018336 and FVI023687. The correct dates are January 29, 2004, and May 23, 2006, respectively.

A jury found appellant guilty of assaulting Washington and found the knife-use allegation to be true but deadlocked on the charge of assaulting Green. That count was later dismissed.

In a separate proceeding, the trial court found that appellant had two prior convictions of a serious felony requiring five-year enhancements, and that he had served two prior prison terms.

The trial court sentenced appellant to state prison for a total of 35 years to life, consisting of the upper term of 25 years to life as a third strike, plus two five-year terms for the prior serious felony enhancements. The court stayed the two prior conviction allegations found true pursuant to section 667.5, subdivision (b), and the knife allegation found true pursuant to section 12022, subdivision (b)(1).

Appellant filed a timely notice of appeal.

***Prosecution Evidence***

Around 5:00 p.m. on October 19, 2010, appellant picked up Denise Washington from her workplace. They drove to a duplex in Compton that Washington shared with her son Donald Green and his girlfriend, Melissa Cole. Appellant and Washington sat outside and drank from a bottle of Rémy Martin cognac. Appellant and Washington had had an on-and-off relationship for almost 10 years, and drank together two or three times a week. After a few minutes, they drove to another location where they continued drinking. Washington asked appellant to drive to her sister's house so that she could use the restroom.

Appellant waited in the car while Washington went into her sister's house. Washington's brother-in-law told her that he would purchase a shifter cable for Green's car at a local junkyard store. Appellant, who appeared to be angry, approached the house and stated that that would be a waste of time as the part would break while he was trying "to pull it off." Washington asked appellant to take her home and they argued on the drive home.

Appellant parked on the street and followed Washington to the front door of her duplex. Appellant grabbed Washington's arm as she walked up the porch steps and tried

to stop her from entering. Washington snatched her arm away and in a loud voice told him she wanted to go inside. Washington struggled with appellant and flailed her arms in an effort to get away.

Green was inside the duplex and heard "arguing at the front door." He saw appellant and Washington "tussling" and "swinging at each other" and ran outside. Green swore at appellant, rushed towards him, and grabbed him from the back. Green and appellant wrestled to the ground as appellant reached for his pocket. Washington saw appellant reach into his pocket and retrieve a "grayish" pocketknife that was about three inches long. Green tried to prevent appellant from opening the knife. He called out "He's going to stab me," and "Mama, call the police."

Appellant was lying on the ground as Green knelt over him and tried to restrain him. Washington grabbed appellant's car keys and yelled "Melissa, Melissa, call the police." Washington then jumped on appellant's back and punched him. Washington testified that she did not remember too much after that because she had probably had too much to drink. She did not know how she ended up lying in the dirt.

A neighbor intervened in the struggle and stepped on appellant's hand. Green saw his mother come over and attempt to hit appellant while they continued to wrestle. Washington fell over Green. Appellant swung his arm backwards a few times and stabbed Green in the arm. People from across the street pulled Green off of appellant and when Green stood up he saw appellant sitting by his mother swinging the knife and making stabbing motions towards her. He yelled "He's swinging the knife at my mama." Washington could not remember if her eyes were closed or if she had gone blank but remembered hearing her son yelling "He's stabbing my mama. He's stabbing my mama." Green punched appellant about the head with his fists. Appellant stopped and within seconds the police arrived.

Los Angeles County Sheriff's Deputy Erick Martinez responded to a 9-1-1 call regarding an assault with a deadly weapon. He found Washington inside the gate screaming hysterically, and observed blood on her arm. When she removed her jacket it was discovered that her left arm had been stabbed. Green was standing calmly in front of

the location and had lacerations on his right arm. Appellant was on the sidewalk and was "very hostile, angry, yelling." He told Deputy Martinez that someone had struck him in the back with a baseball bat. He denied stabbing anyone or possessing a knife. Deputy Martinez recovered a knife in an open position from the front of the residence.

***Defense Evidence***

No evidence was presented on behalf of the defense.

## DISCUSSION

### I. Unanimity Instruction

Appellant contends that the evidence established two discrete events, each of which could have independently supported the assault conviction. He asserts that the jury could have determined that an assault occurred when both Washington and Green were hitting appellant while he was on the ground, or when Green was pulled off of appellant and appellant swung the knife at Washington while she was lying on her back in the dirt. As such, appellant contends that the trial court had the sua sponte duty to give an unanimity instruction (CALCRIM No. 3500).[4] We disagree.

A jury verdict must be unanimous in a criminal case. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Where the accusatory pleading charges a single offense, and the evidence shows the defendant committed more than one act that could constitute that offense, the prosecutor must elect among the crimes or the jury must be instructed that the defendant can be found guilty only if the jurors unanimously agree the defendant committed the same, specific act comprising the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity requirement is intended to eliminate the danger that the defendant will be convicted even though there is no single offense that all jurors

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[4] CALCRIM No. 3500 provides in relevant part: "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."

agree he or she committed. (*People v. Russo, supra,* at p. 1132.) "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. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at p. 1135.) Where required, a unanimity instruction must be given sua sponte. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 274–275.)

But a unanimity instruction is not required if the evidence shows a defendant's acts occurred during a "continuous course of conduct," that is when the acts alleged are so closely connected as to form part of one continuing transaction or course of criminal conduct. (*People v. Diedrich* (1982) 31 Cal.3d 263, 282 (*Diedrich*).) The "'continuous conduct'" rule also applies 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.) When the defendant offers the same defense to all the charged 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. (*Diedrich, supra,* at p. 283.)

No unanimity instruction was required here because the entire incident beginning first with appellant and Washington "tussling" on the porch, followed by appellant and Green wrestling in the yard, and culminating with Washington sustaining a stab wound occurred during a continuous course of conduct, in the same locale, during a brief period. Washington testified that she had difficulty remembering because everything "happened so fast" when her son came out to restrain appellant. She tried to help her son by punching appellant when her son yelled that appellant had a knife. Green recalled his mother falling over. Washington had no recollection and did not know whether she rolled off or was thrown but ended up lying in the dirt. Green sustained a stab injury and immediately after being pulled away from appellant by some neighbors observed appellant swinging the pocketknife at Washington.

Appellant cites to Washington's testimony that the incident "seemed like 30 minutes" and also "seemed like a long time." But Washington also testified that she had been drinking and was not sure of the time. There was no evidence that Green had been drinking and his testimony suggested that the entire incident lasted no more than a few minutes. The evidence showed that there was one argument at one location. Courts have routinely found a continuous course of conduct, obviating the need for a unanimity instruction, under less compelling circumstances than present here. (See, e.g., *People v. Percelle* (2005) 126 Cal.App.4th 164, 182 [continuous course of conduct where defendant's acts occurred during a one-hour period]; *People v. Dieguez, supra,* 89 Cal.App.4th at p. 275 [continuous course of conduct where defendant made a series of false statements during a medical visit to fraudulently obtain benefits; the statements were connected in time and purpose, were made at the same appointment, were interrelated, and were all aimed at a single objective]; *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1296 [continuous course of conduct where acts occurred "just minutes and blocks apart and involved the same property"]; *People v. Mota* (1981) 115 Cal.App.3d 227, 233 [sexual assaults by three men in a van, over the course of one hour, were committed in a continuous course of conduct].)

Appellant contends that the facts of this case take it out of the exception for multiple acts which are so closely connected as to form part of one transaction. Appellant argues that "[s]ince the jury found appellant not guilty of assaulting Green during the altercation, it is reasonable to think that some of the jurors did not believe appellant was guilty of assaulting Washington when she was on his back punching him" but believed Green's testimony that appellant attacked Washington while she was lying in the dirt.

But the jury resolved the credibility issue against appellant. Furthermore, appellant offered no defenses in the sense contemplated by the relevant authorities. (See, e.g., *Diedrich, supra,* 31 Cal.3d at pp. 282–283 [finding omission of unanimity instruction prejudicial where defendant's defenses to two possible acts of bribery underlying single charged offense differed]; *People v. Thompson* (1995) 36 Cal.App.4th

843, 853 [reversing judgment because defendant's "different defenses gave the jury a rational basis to distinguish between the various acts"].) Here, appellant's defense to the entire incident was self-defense. Contrary to his claim, there was no rational reason for the jury to find one of the acts took place and at the same time find that the other did not. (*People v. Leffel* (1988) 203 Cal.App.3d 575, 587.) The jury's verdict of conviction indicates that they did not believe the only defense proffered to the assault on Washington. (*Diedrich, supra,* at p. 283.) We find no instructional error.

## II. Sentencing Errors

The People assert several sentencing errors. Appellant did not address these issues in the reply.

### *A. Background*

The trial court found that appellant suffered two prior serious felony convictions within the meaning of section 667, subdivision (a)(1) in case numbers TA039312, and BA197473. The trial court also found that appellant had suffered two prior convictions for which he had served prison terms within the meaning of section 667.5, subdivision (b) in case numbers BA197473, and FVI023687. The trial court sentenced appellant to the upper term of 25 years to life as a third strike, plus two five-year terms for the prior serious felony enhancements, and stayed the two prior conviction allegations found true pursuant to section 667.5, subdivision (b). Although the record before this court indicates the trial court failed to address the knife-use allegation pursuant to section 12022, subdivision (b)(1), the minute order of the sentencing proceedings and the abstract of judgment both reflect that the allegation was imposed and stayed.

### *B. One Section 667.5, Subdivision (b) Conviction Must Be Stricken*

A sentencing court cannot separately enhance a sentence under both section 667.5, subdivision (b), and section 667, subdivision (a)(1) based on the same prior conviction. (*People v. Jones* (1993) 5 Cal.4th 1142, 1150–1153.)

Here, the trial court imposed a consecutive five-year enhancement under section 667, subdivision (a)(1), for a prior serious felony conviction (case

No. BA197473), and stayed a one-year prior prison term enhancement under section 667.5, subdivision (b), for the same prior conviction (case No. BA197473). The one-year section 667, subdivision (b) enhancement must be stricken. (*People v. Jones, supra,* 5 Cal.4th at pp. 1150–1153; *People v. Perez* (2011) 195 Cal.App.4th 801, 805–806.)

***C. The Other Section 667.5, Subdivision (b) Conviction Must Be Imposed or Stricken***

"The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. [Citations.]" (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) Accordingly, we may review this issue even if it was not raised in the trial court.

When the same prior conviction is found to violate both section 667, subdivision (a)(1) and section 667.5, subdivision (b), a trial court may impose only the greater enhancement. (*People v. Jones, supra,* 5 Cal.4th at pp. 1152–1153.) But, "[n]othing in section 667 prevents additional enhancement based upon other code sections that may apply to a particular case." (*People v. Medina* (1988) 206 Cal.App.3d 986, 991.) Section 667.5, subdivision (b) enhancements are subject to the exercise of the trial court's discretion to strike pursuant to section 1385, subdivision (a). (*People v. Bradley, supra,* 64 Cal.App.4th at p. 391.)

Here, in addition to the prior felony conviction for which he served a prison term in case number BA197473, appellant also served a prison term for a felony conviction in case number FVI023687. The trial court erred in failing to impose or strike the section 667.5, subdivision (b) enhancements as to case number FVI023687. (See *People v. Langston* (2004) 33 Cal.4th 1237, 1241 [a trial court must either impose sentence on, or strike a sentence enhancement under section 667.5, subdivision (b)].)

"The trial judge had (and continues to have) discretion to make numerous other sentencing choices, such as whether to . . . strike the punishment for an enhancement. (See Cal. Rules of Court, rule 4.406(b).)" (*People v. Sandoval* (2007) 41 Cal.4th 825, 850.) We cannot infer from the trial court's refusal to strike one or both of the prior

strikes that the trial court would exercise its discretion to impose the additional punishment. Because the record is silent as to the trial court's intention with respect to the section 667.5, subdivision (b) enhancement as to case number FVI023687, we remand this case to the trial court to impose or strike the enhancement. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 426.)

***D. Section 12022, Subdivision (b)(1) Conviction Must Be Stricken***

The People charged appellant with assault with a deadly weapon (§ 245, subd. (a)(1)) and alleged the personal use of a deadly and dangerous weapon, a knife, the use of which was an element of the crime of assault with a deadly weapon, within the meaning of section 12022, subdivision (b)(1).[5] The court's minute order and the abstract of judgment reflect that the allegation was imposed and stayed. The allegation should have been stricken because personal use of a weapon is an element of the crime of assault with a deadly weapon. (*People v. McGee* (1993) 15 Cal.App.4th 107, 110.)

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[5] Section 12022, subdivision (b)(1) provides: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

## DISPOSITION

The abstract of judgment is ordered modified as follows: (1) strike the one-year prior prison term enhancement under section 667.5, subdivision (b), in case number BA197473; and (2) strike the section 12022, subdivision (b)(1) allegation. We remand to the trial court to impose or strike the section 667.5, subdivision (b) sentence enhancement as to case number FVI023687. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ