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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. OMAR RENDON, Defendant and Appellant.	B243852 (Los Angeles County Super. Ct. No. YA079148)

APPEAL from a judgment of the Superior Court of Los Angeles County, Arthur Jean, Jr., Judge. Reversed in part and remanded for resentencing; otherwise affirmed.

Susan Pochter Stone, 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, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Omar Rendon guilty of, among other things, first degree murder and multiple counts of shooting at an occupied vehicle and assault with a firearm. Because his trial counsel conceded guilt on some counts, defendant contends that his counsel provided ineffective assistance. Although we reject that contention, we reverse and remand for resentencing because certain counts must be stayed under Penal Code section 654.[1] We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *September 16, 2010: the murder of Vincenson Edwards*.

In 2010, defendant bought a BMW with a license plate number of 6KIG708. When an officer stopped defendant in that car on September 3, 2010, defendant admitted he was a Harbor Lomas gang member.

Two weeks later, on September 16, 2010, Vincenson Edwards, a Harbor City Crip, was in his Chevy Caprice at the intersection of Pacific Coast Highway and Figueroa. A white car was next to Edwards's car. Edgar Onofre, who was stopped behind Edwards, saw a hand reach from the white car and fire a gun at Edwards's car. The shooter was a Latino male. Onofre wrote down the license plate number of the shooter's car, 6KIG708.

Edwards was shot six times, and he died as a result. Five bullets were recovered from his body.

B. *September 19, 2010: the Expedition shooting*.

Three days later, on the early morning of September 19, 2010, John Eatman and Caprice White were in a Ford Expedition driven by Kim Munson. At about 3:00 a.m., they entered the parking lot of the Harbor Hills Housing Project via the driveway closest to Palos Verdes Drive North. Munson stopped the vehicle, and Eatman got out. Glancing over his shoulder, Eatman saw a Latino man wearing a red hoodie and red scarf. The red scarf was tied around the man's head so that it covered his nose. Uneasy,

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[1] All further undesignated statutory references are to the Penal Code.

Eatman got back into the car. Munson reversed the Expedition, and, looking back, Eatman saw that the man had a gun, which he raised using both hands. The man fired the gun two to three times.[2] They drove away, unhurt, although a bullet struck the car. The bullet was later recovered. As they left Harbor Hills, Eatman saw another car coming into the parking lot.

C. *September 19, 2010: the Yukon Shooting*.[3]

At approximately the same time (3:00 a.m. on September 19, 2010), Terresha Lacey was driving to Harbor Hills in her Yukon with her friends: Nicole Nathan, Latrease Strange, and Vanessa Cary.[4] As Lacey pulled into the driveway closest to Palos Verdes North, Lacey and Nathan saw a man wearing a red hoodie[5] that covered his head walking toward their car. Strange, however, thought that the man wore a black zip-up hoodie with a red design and a yellow, blue and white paint spatter design on the front; blue gym shorts; long white socks; and no shoes. Nathan also thought that the man wore white socks and no shoes. Neither Lacey nor Nathan remembered a red bandana.

When the man raised his right arm, Lacey backed the car up. The man fired at least two gun shots at them. Nobody was hurt.

At trial, Nathan, Lacey, and Strange identified defendant as the shooter.

D. *Defendant's arrest and the investigation.*

When Los Angeles County Deputy Sheriff Christine Clotworthy arrived at Harbor Hills at about 3:00 a.m., she saw defendant, who matched the description of the shooter. Defendant ignored her directives to stop and to show his hands. After taking cover behind a tree, he came out and threw a gun over a wall. Defendant wore a red hooded sweatshirt, a red bandana around his neck, long blue jean shorts, and black athletic shoes.

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[2] Neither Eatman nor Munson could identify the shooter.

[3] Although Eatman saw a car coming into the lot as he left, it is not clear that the car coming in was the Yukon, and, therefore, it is unclear which car was first shot at.

[4] Lacey, Strange, and Nathan testified. Cary did not testify.

[5] Nathan described it as a "bright red sweater."

At a field show-up, Lacey, Nathan and Strange individually identified defendant as the man who shot at them. Strange heard defendant say, "You all bitches is snitching." Lacey and Strange had previously seen defendant in the area, and Strange saw him with Harbor Lomas gang members.

Behind the wall where defendant took cover, deputies found a revolver containing six expended shell casings. The bullet recovered from the Expedition and the bullets recovered from Edwards's body were fired from the revolver.

E. *Gang evidence.*

Defendant is a member of Harbor Lomas, a Mexican gang that hangs out in the Harbor Hills Housing development. The gang's primary activities are robberies, burglaries, drug dealing, and assaults with "fists" and weapons. Lomas's rivals include the Harbor City Crips. Harbor Lomas does not like Black people, and Lomas members have shot at random Black people living at Harbor Hills. Based on hypotheticals modeled on the facts of this case, the People's gang expert opined that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang.

II. Procedural history.

A. *The verdict.*

On June 19, 2012, a jury found defendant guilty as follows:

Counts relating to the Expedition shooting: count 1, shooting at an occupied vehicle (§ 246) with true findings on gun (§ 12022.53, subd. (c)) and gang (§ 186.22, subd. (b)(4)) allegations; counts 7 (Munson), 8 (White) and 9 (Eatman), assault with a firearm (§ 245, subd. (a)(2)) with true findings on gun (§ 12022.5, subd. (a)) and gang (§ 186.22, subd. (b)(1)(B)) allegations.

Counts relating to the Yukon shooting: count 2, shooting at an occupied motor vehicle (§ 246) with true findings on gun (§ 12022.53, subd. (c)) and gang (§ 186.22, subd. (b)(4)) allegations; counts 3 (Strange), 4 (Cary), 5 (Nathan), and 6 (Lacey), assault with a firearm (§ 245, subd. (a)(2)) with true findings on gun (§ 12022.5, subd. (a)) and gang (§ 186.22, subd. (b)(1)(B)) allegations.

Count 10, relating to both the Expedition and Yukon shootings: In connection with the events of September 19, 2010, the jury found defendant guilty of count 10, possession of a firearm by a felon with a prior (former § 12021, subd. (a)(1)).

Counts relating to the murder of Edwards: count 11, first degree murder (§ 187, subd. (a)) with a true finding on gun (§ 12022.53, subd. (d)) and gang (§ 186.22, subd. (b)(1(C)) allegations; count 12, possession of a firearm by a felon with a prior (former § 12021, subd. (a)(1)) with a true finding on a gang allegation (§ 186.22, subd. (b)(1)(C)); and count 13, shooting at an occupied motor vehicle (§ 246) with true findings on gun (§ 12022.53, subd. (d)) and gang (§ 186.22, subd. (b)(4)) allegations.

B. *The sentence.*

On August 2, 2012, the trial court imposed consecutive sentences as follows: count 1, 50 years to life (15 years to life, doubled to 30 years to life based on a prior strike allegation that the court found true, plus 20 years to life for the firearm enhancement); count 2, 50 years to life (15 years to life doubled to 30 years to life, plus 20 years for the firearm enhancement); and count 11, 75 years to life (25 years to life doubled to 50 years to life, plus 25 years to life for the gun enhancement). The court sentenced him to an additional five-year term for his prior prison term (§ 667, subd. (a)).

The trial court imposed concurrent sentences on counts 3 through 10 and 12. On count 13, the court imposed but stayed under section 654 a 30-years-to-life sentence.

DISCUSSION

I. Defendant's trial counsel did not provide ineffective assistance.

Defendant contends that his trial counsel's concession he was guilty of counts related to the Expedition shooting constituted ineffective assistance of counsel.[6] Because the concession was a reasonable tactical strategy, we find no ineffective assistance of counsel on this ground.

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[6] Defendant's trial counsel conceded that the prosecution proved beyond a reasonable doubt that defendant was guilty of assaulting Eatman (count 9), possessing the firearm used to assault Eatman (count 10), and firing at an inhabited vehicle (count 1). He did not concede the assaults on Munson or White, the Expedition's other passengers.

"To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1211-1212; *Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Homick* (2012) 55 Cal.4th 816, 893, fn. 44.) If there is an insufficient showing on either component, the claim fails. (*Homick*, at p. 893, fn. 44.) If the record sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

A reviewing court defers to " ' "counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " [Citation.]' " (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.] There are countless ways to provide effective assistance in any given case.

Even the best criminal defense attorneys would not defend a particular client in the same way." (*Strickland v. Washington, supra,* 466 U.S. at p. 689.)

Here, defense counsel's strategy was to argue that there were two shooters: defendant and someone else. This decision—how to argue the case to the jury after presentation of evidence—was inherently tactical. (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) Counsel therefore conceded that defendant shot at the Expedition, but he maintained that someone else shot at the Yukon. To support his argument, counsel pointed out that the bullet recovered from the Expedition was shot from the revolver defendant threw over the wall. That physical evidence, coupled with Eatman's accurate description of what defendant wore (a red hoodie and a red scarf) and that defendant was arrested in the immediate vicinity soon after the shooting, left little room for reasonable doubt that defendant shot at the Expedition. Given this overwhelming evidence, defendant's trial counsel could have decided that candor was his best strategy. (See, e.g., *People v. Gamache* (2010) 48 Cal.4th 347, 393 [counsel's frank acknowledgment of the seriousness of his client's actions was "tactically justifiable"]; *People v. Gurule* (2002) 28 Cal.4th 557, 610-612 [counsel's concession that his client was guilty of robbery and of felony murder did not constitute ineffective assistance]; *People v. Mayfield* (1993) 5 Cal.4th 142, 177 [candor can be an effective tool].)

Because the Expedition and Yukon shootings occurred minutes apart, defendant contends it was "illogical" for his counsel to argue he was guilty of shooting at the Expedition but not at the Yukon. There was, however, no ballistics evidence connecting defendant to the Yukon shooting. Instead, his liability for those crimes depended largely on the witnesses' descriptions of the shooter. Lacey said the shooter wore a red hoodie. Nathan said the red hoodie had "Fubu" written across it. Strange said that the shooter wore a black sweatshirt with a multicolored paint spatter design. Neither Lacey nor Nathan remembered a red bandana. Nathan and Strange said that the shooter did not have shoes. But when he was arrested, defendant's red sweatshirt did not have "Fubu" on it, and he wore black athletic shoes and a red bandana. None of the women therefore

accurately described the shooter's clothing.[7] These inconsistencies in the Yukon eyewitness testimony left room for doubt as to the shooter's identity, whereas the strong ballistics evidence clearly linked defendant to the Expedition shooting.

Defendant, however, argues that conceding he shot at the Expedition would have led to the inexorable conclusion he also murdered Edwards, because the gun used to shoot at the Expedition was used to kill Edwards. The gun certainly linked the two crimes. But it did not, by itself, establish that defendant shot Edwards. No witness to Edwards's murder could identify the shooter, except to say he was a Latino male. Defense counsel could therefore have made the tactical decision to argue that someone other than his client used the gun (and defendant's car) to kill Edwards.

Given the evidence, conceding that defendant shot at the Expedition was a reasonable tactical strategy. We therefore conclude that defense counsel did not provide ineffective assistance.

II. The sentence on either count 10 or on count 12 must be stayed under section 654.

Defendant was convicted of two counts of being a felon in possession of a firearm (former § 12021, subd. (a)(1)); namely, count 10, which concerned the events of September 19, 2010, and count 12, which concerned the events of September 16, 2010. The trial court imposed concurrent sentences on both counts.[8] Defendant now contends,

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[7] Defense counsel also suggested that there were two shooters because Lacey and Strange said that the shooter pointed the gun at them by raising his right hand, while Eatman said that the shooter used two hands to point the gun.

[8] There is confusion in the record as to the sentences the trial court imposed on counts 10 and 12. The court, at the sentencing hearing, said: "Getting back now to count ten, that was also a violation of Penal Code section 12021. And that related to the September 19 incident because all [of] the other sentences [were] concurrent, although this would be a determinate sentence, whether it is three years, the high term times two totaling six years or eight months times two, which would be one year or four months either way[,] pursuant to the court's order. That would also be a concurrent sentence."

the People concede, and we agree that one of the sentences must be stayed under section 654.

Section 654, subdivision (a), provides: "An 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." (See also *People v. Akins* (1997) 56 Cal.App.4th 331, 338.) Section 654 therefore " 'precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. "Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor." [Citations.] "[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once." [Citation.]' [Citation.]" (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129 (*Spirlin*).) Whether a defendant entertained multiple criminal objectives is one of fact for the trial court, and its findings on the issue will be upheld on appeal if there is substantial evidence to support them. (*Akins*, at p. 339.)

Spirlin considered whether the defendant, who used the same firearm to rob a gas station on two separate occasions and was in possession of the firearm on the day of his arrest, could be "thrice punished" for violating section 12021. (*Spirlin*, *supra*, 81 Cal.App.4th at p. 130.) The "key inquiry . . . is whether defendant's objective and intent in possessing the handgun on all three occasions were the same, thus making the crime one indivisible transaction subject only to one punishment under section 654." (*Ibid.*) Section 12021 requires only a general intent to commit the proscribed act—possession of a firearm by a convicted felon. Possession may be either actual or constructive as long as it is intentional. (*Spirlin*, at p. 130.) The evidence showed that the defendant had

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The minute orders state that the court imposed a six-year-term on count 10 and an eight-year-term on count 12, both concurrent.

The abstract of judgment states that the trial court imposed concurrent six-year-terms on counts 10 and 12.

continuous constructive possession of the gun during the relevant time period. (*Id.* at pp. 130-131.) His "intent to possess the weapon as a felon did not change each time he committed a robbery or when he was arrested and the gun confiscated," and therefore his "possession of the handgun was a single act with a single objective." (*Id.* at p. 131.) *Spirlin* concluded that the trial court should have stayed the imposition of sentence on two of the counts, rather than run them concurrently. (*Ibid.*)

Similarly, here, defendant possessed the same gun on two separate occasions, September 16, 2010 when he shot Edwards and three days later, on September 19, 2010, when he shot at the Expedition and the Yukon. There is no evidence suggesting that his actual or constructive possession of the gun was interrupted during this short time period or that he used different guns during the incidents. Rather, the evidence is that the gun used to murder Edwards was the same gun used in the Expedition shooting. The facts therefore reflect a single intent and objective to possess a gun, warranting only one punishment. The sentence on either count 10 or count 12, whichever provides the lesser punishment, must be stayed under section 654. (See generally, *Spirlin, supra,* 81 Cal.App.4th at p. 131 [where multiple punishment has been improperly imposed, the sentence should be modified to stay imposition of the lesser term].)[9]

III. Two of the sentences on the assault with a firearm counts must be stayed under section 654.

Defendant was sentenced for shooting at the Expedition (§ 246), which carried three people, and for shooting at the Yukon (§ 246), which carried four people. He was also sentenced on seven counts of assault with a firearm (§ 245, subd. (a)(2)), one for each of the seven people. Defendant contends that section 654 requires that the sentences on two of his assault with a firearm convictions be stayed. We agree.

As we said above, section 654 prohibits multiple punishment for a single act or omission. (*People v. Pearson* (1986) 42 Cal.3d 351, 359; *People v. Reed* (2006) 38 Cal.4th 1224, 1226.) There is, however, a " 'multiple victim' " exception to section 654.

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[9] Because of the confusion regarding the sentences on counts 10 and 12, the trial court shall decide which sentence should be stayed.

"Under this exception, 'even though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim.' " (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.) "The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent." (*Id.* at p. 1784.) But this exception does not apply where one person is the victim of both a shooting at an occupied motor vehicle and a simultaneous assault. In such a case, "the trial court can impose an unstayed sentence for one or the other, but not for both." (*Ibid.*; see also *People v. Masters* (1987) 195 Cal.App.3d 1124, 1128 [multiple punishments may be imposed if "each violent crime involves at least one different victim"; the defendant therefore was subject to multiple punishment for shooting at a car and the assault of two of the car's three occupants].)

Under *Masters* and *Garcia*, where, as here, the defendant shoots at an occupied vehicle containing multiple persons, there is a "leftover" victim. The "leftover" victim is a victim of both the shooting at an occupied vehicle and of an assault. Because the leftover victim is a victim of two crimes with a single objective, the sentence on one of those counts must be stayed under section 654. Applied here, the trial court could properly impose unstayed sentences on defendant as to the Expedition shooting for (1) shooting at an occupied vehicle and (2) two of the three assault counts; and, as to the Yukon shooting, for (1) shooting at an occupied vehicle and (2) three of the four assault counts.

The People, however, argue that section 654 does not apply because defendant had separate intents and objectives with respect to the shootings at the occupied vehicles and the assaults on the vehicles' occupants; namely, his intent in shooting at the Expedition and the Yukon was to demonstrate his gang's supremacy. But he committed the assaults to scare the individual victims away from Harbor Hills.

The People parse too finely defendant's intent and objective. The divisibility of a course of conduct depends upon the defendant's intent and objective. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) "If all the offenses are incidental to one objective,

the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose [a] punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*Ibid.*; see also *Neal v. State of California* (1960) 55 Cal.2d 11, 19.)

The evidence does not show that defendant entertained multiple, independent criminal objectives. To the contrary, the shootings and the assaults were simultaneous events. And, as argued by the prosecutor, all of the crimes were motivated by gang animus, because defendant belonged to a Mexican gang which did not like Black people. Defendant's act of shooting at the occupied vehicles was therefore incidental to any intended assault upon the cars' occupants, and the acts were inextricably intertwined. One assault conviction per vehicle therefore must be stayed under section 654.

IV. The abstract of judgment must be corrected to reflect that the firearm enhancement imposed in count 4 was under section 12022.5, subdivision (a).

The jury found true, in count 4, a firearm enhancement under section 12022.5, subdivision (a). The trial court imposed but stayed a sentence of three years four months under that section. The abstract of judgment, however, states that the enhancement was under section 12022.53, subdivision (c). The abstract of judgment must be corrected to reflect the correct section.

DISPOSITION

The judgment is reversed and remanded so that the trial court can stay, under section 654, one of the sentences on count 10 or on count 12, whichever provides the lesser punishment. The trial court shall also stay, under section 654, either count 7 or count 8 or count 9. The trial court shall stay, under section 654, the sentence on either count 3, count 4, count 5 or count 6. The abstract of judgment shall be corrected to reflect that the firearm enhancement found true on count 4 was imposed under section 12022.5, subdivision (a). The corrected abstract of judgment shall be forwarded to the Department of Corrections. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

KITCHING, Acting P. J.

EDMON, J.*

* Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.