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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LEWIS AVILA,

Defendant and Appellant.

B277753

(Los Angeles County
Super. Ct. No. GA083067)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Michael Villalobos, Judge. Affirmed.

Karyn H. Bucur, 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, Assistant
Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Lewis Avila was charged with nine counts of robbery (Pen. Code, § 211),¹ one count of assault with a deadly weapon (§ 245, subd. (a)(1)), one count of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)), and one count of child abuse (§ 273a, subd. (a)). A jury found him guilty as charged and found true the allegations, as to all counts, that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)), and that, as to count 10, defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). The trial court found true the allegation that defendant suffered two prior strike convictions and a prior serious felony.

Defendant was sentenced to 12 consecutive terms of 25 years to life, plus 74 years based on the enhancements. Defendant appealed his conviction. On March 7, 2016, this court affirmed defendant's conviction in part, but concluded that the trial court misunderstood its authority in imposing, as mandatory, consecutive sentences. (*People v. Avila* (Mar. 7, 2016, B260179) [nonpub. opn.], at p. 16 (*Avila I*.) We remanded the matter to allow the trial court to exercise its discretion to impose concurrent or consecutive sentences as to counts 1, 2, 5, 6, 7, 8, 10, and 11. (*Avila I, supra*, B260179, at p. 16.)

Upon remand, the trial court resentenced defendant to an aggregate term of 312 years to life. The trial court selected count 1 as the base term and sentenced him to 25 years to life, plus one year based on the firearm enhancements, and five years based on the prior serious felony. As to counts 2 and 8 each, the trial court sentenced defendant to 25 years to life, plus one year based on

¹ All further statutory references are to the Penal Code unless otherwise indicated.

the firearm enhancement, and five years based on the prior serious felony. The trial court ordered the sentences on counts 2 and 8 to run concurrent as to all other counts.

As to each of counts 3, 4, 5, 6, 7, 9, 11, and 12, the trial court sentenced defendant to 25 years to life, plus one year based on the firearm enhancement, and five years based on the prior serious felony. It ordered the sentences on those counts to run consecutive to other counts.

As to count 10, the trial court sentenced defendant to 25 years to life, plus one year based on the firearm enhancement, and five years based on the prior serious felony, plus three years based on the great bodily injury enhancement. The trial court ordered the sentence on count 10 to run consecutive to all other counts.

Defendant timely appealed. He argues that the trial court erred when it ordered the sentences on counts 5 and 6 to run consecutively and when it ordered the sentences on counts 10 and 11 to run consecutively. In addition, he asserts that the trial court abused its discretion when it denied his motion to continue the resentencing hearing.

We affirm.

FACTUAL BACKGROUND²

Defendant “went on a crime spree lasting less than a month, from March 20, 2011, through April 15, 2011, but during which he committed follow-home robberies of nine separate victims while using a handgun, assault with a deadly weapon on a bystander, dissuading a witness from reporting a crime, and

² The summary of facts comes from our March 7, 2016, opinion. (*Avila I, supra*, B260179, at pp. 3–5.)

child abuse by shooting a robbery victim in the face as she held her two-year-old son.” (*Avila I, supra*, B260179, at p. 2.)

“1. *Robberies of Cuong Lieu and Lilian Nguyen (Counts 1, 2)*

“On March 20, 2011, about 8:15 p.m., Lilian Nguyen, who returned with her family from a visit with her father, drove down the driveway of their Alhambra home and parked. Once her husband, Cuong Lieu, exited, defendant pointed a gun at him and then at Nguyen, demanding money from each. Taking Lieu’s wallet and Nguyen’s purse, defendant fled.

“2. *Robbery of Jenny Chih (Count 3)*

“On March 25, 2011, about 10:00 p.m., after work, Jenny Chih returned to her Alhambra apartment and parked in her carport. After she exited her car, defendant approached, pointed a gun at her, and demanded her purse. Defendant shoved Chih to the ground and held the gun at her head. Chih gave up her purse.

“3. *Robbery of Xu (Count 12)*

“On April 7, 2011, about 11:00 p.m., Xu drove to her condominium in Monterey Park and parked. Defendant approached from the rear of her car. After Xu exited, he pointed a BB gun at her head and demanded her purse. Xu gave up her purse. As defendant fled, he fired three to five shots at Xu.

“4. *Robbery of Ping Chin (Count 4)*

“On April 8, 2011, about 12:40 a.m., Ping Chin returned to her San Gabriel home, parked her car, and exited. As she approached her front gate, defendant appeared suddenly, poked his gun into Chin’s back, and grabbed her purse. He ordered her to ‘move’ and not ‘turn back.’ As he fled, he fired a BB gun twice.

“5. Robbery of Chang (Count 9)

“On April 13, 2011, about 12:56 a.m., Chang was driving to her San Gabriel home when she noticed a dark-colored SUV following her. After Chang pulled into her driveway, the SUV parked in front of her house, and defendant exited. Quickly approaching with gun in hand, he ordered Chang, who screamed, to ‘shut up’ and grabbed her purse. Chang began to follow as defendant fled, but Chang stopped after defendant fired a BB gun at her, striking her left hand.

“6. Robbery of Sumei Lui and Assault with a Deadly Weapon on Diana Lui (Counts 5, 6)

“On April 13, 2011, about 10:18 p.m., Sumei Lui returned to her San Gabriel home from a supermarket trip, opened the gate, and parked in the carport. Defendant blocked her from closing the gate. Pointing a gun at Sumei, he demanded her purse. When she screamed, her daughter, Diana Lui, ran out of the house. Defendant fired a BB gun at Diana five to 10 times, striking her three times. Sumei gave up her purse.

“7. Robbery of Lin and Dissuading Lin from Reporting a Crime (Counts 7, 8)

“On April 13, 2011, about midnight, Lin returned home to her Alhambra apartment and parked in the detached garage. She was about to close the garage door when defendant came up behind her. At gunpoint, he ordered her to turn around and give up her purse. After Lin complied, he told her, ‘Don’t call the cops because I know where you live.’ He then told her to turn around and walk back into her garage. Lin had walked about halfway into the garage when she heard two to three ‘popping sound[s] that sounded like . . . firecrackers.’ Defendant drove off in a dark SUV.

*“8. Robbery of Hor Wong and Child Abuse of Wong’s Son
(Counts 10, 11)*

“On April 15, 2011, about midnight, Hor Wong returned to her Arcadia home and parked her vehicle in the driveway. A Dodge Magnum was parking in front of her neighbor’s house. Wong walked to her door with her two-year-old son. She was holding a purse and a laptop computer. Defendant rushed towards them with a BB gun in hand. As Wong kneeled while holding her son, he took her laptop and demanded her purse. He shot Wong in the face with the BB gun, just below her eye. Wong was holding her son as he shot. He then took her purse.”
(*Avila I, supra*, B260179, at pp. 3–5.)

DISCUSSION

I. The trial court properly sentenced defendant to consecutive terms on counts 5, 6, 10, and 11

Defendant argues that the trial court erred when it ordered the sentences on counts 5, 6, 10, and 11 to run consecutively.

Under the “Three Strikes” law, once the jury has made a determination of guilt, “the trial court reviews the relevant evidence concerning the unlawful acts the defendant was convicted of and determines whether they occurred on the same or different occasions and under the same or different circumstances.” (*People v. Coelho* (2001) 89 Cal.App.4th 861, 884.) “[W]here a sentencing court determines that two or more current felony convictions were either ‘committed on the same occasion’ or ‘aris[e] from the same set of operative facts’ . . . consecutive sentencing is not required under the [T]here [S]trikes law, but is permissible in the trial court’s sound discretion.” (*People v. Lawrence* (2000) 24 Cal.4th 219, 233.)

On the other hand, “if any two current felonies are serious or violent, and were not committed on the same occasion, and do not arise from the same set of operative facts, the trial court must impose the sentences for these offenses consecutive to each other and ‘consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.’” (*People v. Hendrix* (1997) 16 Cal.4th 508, 513–514.)

As the parties agree, the trial court retains discretion whether to impose concurrent or consecutive terms. (*People v. Durant* (1999) 68 Cal.App.4th 1393, 1396.) “Under the abuse of discretion standard, ‘a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

Defendant does not argue that the trial court abused its discretion. Rather, he contends that “[t]he trial court erred because the offense conduct was committed on the same occasion and arose from the same set of operative facts.” Thus, according to defendant, consecutive sentences were not required. While that may be true, the trial court found defendant’s “conduct . . . so reprehensible” that consecutive sentences were appropriate. Thus, there was no abuse of discretion.

But the record shows that the trial court was aware of its discretion but found that “the conduct was so reprehensible” that consecutive sentences were appropriate.

In counts 5 and 6, defendant pointed a gun at Sumei Lui and demanded her purse. When she screamed, her daughter, Diana, ran out of the house. Defendant fired a BB gun at Diana

five to 10 times, striking her three times. In counts 10 and 11, defendant rushed towards Wong and her two-year-old son with a BB gun. As Wong kneeled while holding her son, defendant took her laptop and demanded her purse. He shot Wong in the face with the BB gun as she held her son. In light of this evidence, the trial court did not abuse its discretion in finding that “the conduct was so reprehensible” as to warrant consecutive sentences.

II. *The trial court properly denied defendant’s motion to continue the resentencing hearing*

Defendant argues that the trial court abused its discretion when it denied his motion under section 1050 to continue the resentencing hearing.

The granting of a request made by a defendant for a continuance rests within the discretion of the trial court. (*People v. Wilson* (1965) 235 Cal.App.2d 266, 272–273.) Absent an abuse of discretion and a showing of prejudice, a denial of the continuance cannot serve as the basis for reversal of a judgment of conviction. (*People v. Justice* (1963) 211 Cal.App.2d 660, 665.) An exercise of discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

The trial court did not abuse its discretion in denying defendant’s request for a continuance. The resentencing hearing was held on July 22, 2016, for the sole purpose of determining whether defendant’s sentences should be consecutive or concurrent. At the hearing, defendant moved for a continuance pursuant to section 1050, “so that [he] might be able to obtain an

updated psychological evaluation, any mitigation expert to address and properly present a full scope of information for the court and then to address . . . whether to exercise its discretion or not.” The trial court denied the motion, stating: “I am not inclined to continue the matter for that purpose. The reason [is] that I think the [Court of Appeal’s] instructions are fairly clear that, first of all, the court, when I sentenced the defendant, I considered all of the relevant information at the time that was provided to me which included a lengthy sentencing brief that was prepared by counsel. It also had a full description of the defendant’s background, history, and psychological issues that may have been involved in the defendant’s history or background, which at the time counsel had indicated was, perhaps, a contributing factor as to the defendant’s conduct in these matters. [¶] And so I don’t believe it’s necessary at this point to go through a full blown evidentiary hearing.”

Defendant has not shown that the trial court’s decision was arbitrary or capricious. As the trial court aptly noted, the only question was whether the terms should be consecutive or concurrent. The trial court had before it all relevant information from defendant’s sentencing memorandum, in which defendant argued for concurrent sentences based on defendant’s psychological and medical history. Ultimately, the trial court’s decision hinged on the gravity of his offenses. It follows that the trial court did not abuse its discretion in determining that an updated psychological evaluation or a mitigation expert would not have been useful in this determination.

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT