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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS RAMIREZ, Defendant and Appellant.	B265567 (Los Angeles County Super. Ct. No. MA062277)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed as modified and remanded with directions.

Tracy L. Emblem, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jesus Ramirez challenges the judgment regarding his convictions for torture, corporal injury to a cohabitant, and criminal threats. He contends that the jury was misinstructed, and that the trial court improperly imposed multiple punishments in contravention of Penal Code section 654.[1] We agree that section 654 barred the imposition of unstayed punishment on appellant's conviction for corporal injury to a cohabitant, but reject his remaining contentions. We modify the judgment with respect to appellant's sentence, and affirm the judgment as modified.

RELEVANT PROCEDURAL BACKGROUND

On April 9, 2014, an information was filed, charging appellant with the following offenses against Daniele Scutero: attempted willful, deliberate, and premeditated murder (count 1; §§ 187, subd. (a), 664); assault with a deadly weapon, namely, a hammer (count 2; § 245, subd. (a)(1)); corporal injury to a spouse or cohabitant (count 3; § 273.5, subd. (a)); criminal threats (count 4; § 422); false imprisonment by violence (count 5; § 236); torture (count 6; § 206); and forcible rape (count 7; § 261, subd. (a)(2)). Accompanying the charges (with the exception of the torture and rape charges) were allegations that appellant inflicted great bodily injury (§ 12022.7, subd. (e)); in addition, accompanying the charges (with the exception of the assault,

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[1] All further statutory citations are to the Penal Code, unless otherwise indicated.

torture, and rape charges) were allegations that he used a deadly weapon, namely, a hammer (§ 12022, subd. (b)(1)). Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty of assault with a deadly weapon (count 2), corporal injury to a cohabitant (count 3), criminal threats (count 4), false imprisonment by violence (count 5), and torture (count 6). The jury further found the special allegations asserted in connection with these offenses to be true, with the exception of the special allegations accompanying the charge of false imprisonment by violence. The jury found appellant not guilty on the remaining counts.

In sentencing appellant, the trial court imposed an aggregate term of ten years plus life, comprising a ten-year term for corporal injury to a cohabitant (count 3), a six-year concurrent term for criminal threats (count 4), and a life term for torture (count 6). The remaining sentences for assault with a deadly weapon (count 2) and false imprisonment (count 5) were stayed (§ 654).

FACTS

A. *Prosecution Evidence*

The principal witness presented by the prosecution was Daniele Scutero, who testified that in March 2013, she and appellant began living together. In January 2014, they moved into a mobile home located in Pearblossom. Scutero developed problems with her wisdom teeth, and required surgery on her gums. Because she was in the final months of

pregnancy with appellant's child, that surgery was postponed. In mid-February 2014, appellant punched her jaw, causing her to experience persistent pain. Scutero did not report that incident to anyone. At some point, appellant changed the password on the cell phone that he and Scutero shared so that only he could use it.

On March 2, 2014, at approximately 1:00 a.m., Scutero and appellant were sitting on the couch in the mobile home's living room. Also present was Scutero's seven-year-old son Jonathan M., who was asleep next to appellant. According to Scutero, a dispute commenced when appellant accused her of being unfaithful to him. When she denied that accusation, he punched her face, which was sore due to her dental problems and his prior punch. She began to cry, and insisted that she had not been unfaithful to him. In response, appellant punched her head four or five times with a closed fist. At some point, Jonathan awoke and went to a bedroom.

After punching Scutero, appellant left the couch, returned with a hammer, and swung it at Scutero's legs. The hammer struck Scutero's arm, which she had raised to block appellant's blow. Appellant delivered more blows with the hammer, including several to Scutero's legs, and said that he would continue striking her until she stopped crying. In order to halt the attack, Scutero told appellant that she had been cheating on him. Scutero testified, "[H]e wasn't taking 'No' for an answer. And I wanted him to stop."

When appellant discontinued his attack, Scutero's head and legs were bleeding. Appellant directed her to take a

shower to wash off the blood. Scutero complied, and decided not to seek help because she did not "want to get the police involved." Following the shower, Scutero went to her bed. After joining her in the bed, appellant demanded that she reaffirm her infidelity. Scutero again agreed that his accusations were true, and they fell asleep.

At approximately 7:00 a.m., when Scutero awoke, she saw that her leg was still bleeding. Appellant refused to permit her to leave the mobile home to obtain medical help. Scutero then readied Jonathan for school and saw him to the door. She tried to return to bed, but appellant ordered her to prepare food for him. As she limped to the kitchen, appellant told her to "walk straight."

When Scutero began frying ground beef and threw a towel under the sink where she kept dirty towels, appellant accused her of trying to poison him, in the apparent belief that she had obtained some poison. He dumped the ground beef into the trash, asserted that the child she was carrying was not his, and demanded that she have an abortion. Scutero replied that she would look for an abortion clinic in the yellow pages. Appellant went to the living room, returned with a heavy crystal ball, and repeatedly hit Scutero on the head with it while calling her a liar.

After appellant stopped hitting her, Scutero returned to her bed. Appellant joined her there and talked to her in an "aggravated" manner. At some point, they engaged in sex. According to Scutero, she did not resist the sex because appellant "wasn't hurting [her] anymore." She testified, "[I]t

was a peaceful time, as crazy as it sounds, because we weren't fighting. He wasn't hitting me." After the sex, they slept.

Later, Scutero awoke and found that her leg was continuing to bleed. She also saw that Jonathan was playing outside the mobile home. Appellant woke up, told Scutero to contact an abortion clinic, "unlocked" his cell phone, and gave it to her. After walking into another room, Scutero fled to a nearby mobile home occupied by her neighbors, Annie and Pete. There, Scutero told Annie that she "didn't know what to do," but "wanted [appellant] to stop." Scutero heard appellant outside yelling that they "were just arguing." When appellant assured Scutero that he merely wanted to talk, she returned to her mobile home.

Upon Scutero's return, appellant said that "he was going to beat [her] up really bad, worse than already, because [she] had [run] to the neighbors." Scutero began to cry, and asked for permission to go to the bathroom. After replying that Scutero "could pee on [her]self," appellant said he "was going to make [her] really black and blue," and that she "would look like a Chinese person." Fearful, Scutero ran toward the front door. Appellant grabbed her, threw her violently to the floor, and held her down by placing his forearm in a chokehold position on her neck. As he pressed her against the floor, he said he "was going to kill [her]."

Scutero struggled free and banged on a window, alerting Annie, who was walking to a nearby mobile home occupied by Annie's mother, Janice Crum. Moments later,

Crum appeared at Scutero's mobile home and escorted Scutero to her own home. There, Scutero made a 911 call.[2] After police officers responded to the call, Scutero was taken to a hospital, where she was determined to have a fractured arm. She also displayed an open wound on her leg and cuts on her head. Photographs of her injuries taken at the hospital were submitted to the jury.

Janice Crum testified that on the day of the incident, at approximately 4:00 p.m., she heard people arguing outside Scutero's mobile home. Crum looked into Scutero's backyard, and saw the boyfriend of her daughter Annie holding appellant. Crum also saw Scutero, to whom she offered refuge. When Scutero arrived at Crum's home, her face was "puffed out," and there were marks on her head and legs. Crum advised her to make a 911 call.

Scutero's son, Jonathan M., testified that on or about March 2, 2014, there was an argument between appellant and his mother regarding whether she was cheating on him. According to Jonathan, appellant beat his mother with a hammer. Jonathan became afraid and went to his bedroom. Later, he heard appellant talk to his mother in a "mean voice," and direct her to take a shower. When Jonathan peeked out from his bedroom, he saw his mother return to the living room, where appellant pushed her, and she fell on her stomach. Jonathan was too frightened to try to intervene, and eventually fell asleep. The next morning, his

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[2] The jury heard an audio recording of the 911 call.

mother sent him to school. When he returned, he discovered that his mother was in Crum's mobile home.

James Nieman, a senior criminalist employed by the Los Angeles County Sheriff's Department, testified that he examined Scutero's mobile home, where he found bloodstains in the kitchen, bathroom, and bedroom. He also located a hammer, a hatchet, and a crystal ball. According to Nieman, no blood was found on the hammer, hatchet, or crystal ball, and the crystal ball displayed a mixture of DNA from two contributors. Scutero's DNA matched the profile of the major contributor to the mixture, and appellant was excluded as the second contributor to that mixture. Niemann testified that it was possible for DNA to be absent from an object used in a crime.[3]

B. *Defense Evidence*

Appellant presented no evidence.

DISCUSSION

Appellant contends (1) that the trial court erred in failing to give a unanimity instruction in connection with the charge of torture, and (2) that his sentence contravenes section 654. For the reasons discussed below, we reject his challenges to the judgment, with the exception of his

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[3] The jury also heard testimony from Los Angeles County Sheriff's Department Detective Michael Baker regarding appellant's arrest.

contention that under section 654, the punishment imposed on his conviction for corporal injury to a cohabitant (count 3) must be stayed.

A. *Unanimity Instruction*

Appellant contends the trial court improperly failed to provide a unanimity instruction relating to count 6, which charged appellant with torture. As discussed below, he has shown no reversible error.

1. *Governing Principles*

The principles applicable to unanimity instructions stem from the "'constitutionally based concept that "the defendant is entitled to a verdict in which 12 jurors concur, beyond a reasonable doubt, as to each count charged."'" (*People v. Jenkins* (1994) 29 Cal.App.4th 287, 298-299 (*Jenkins*), quoting *People v. Melendez* (1990) 224 Cal.App.3d 1420, 1427-1428 (*Melendez*), disapproved on another ground in *People v. Majors* (1998) 18 Cal.4th 385, 408.) That constitutional requirement supports three principles. (See *Jenkins, supra,* at pp. 298-299.)

"'First, if the prosecution shows several acts and each act is a separate offense, a unanimity instruction is required'" (*Jenkins*, *supra*, 29 Cal.App.4th at p. 298, quoting *Melendez*, *supra*, 224 Cal.App.3d at p. 1428.) Thus, "'where violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged,' either the state must '"'"select the

particular act upon which it relied to make good the allegation of the information"'" or the jury must be instructed 'that they must agree unanimously on which act they based their guilty verdict.'" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1427 (*Hamlin*), quoting *People v. Thompson* (1984) 160 Cal.App.3d 220, 223-224 (*Thompson*).) Second, no unanimity instruction is required when the case falls within so-called "'continuous course of conduct exception.'" (*Jenkins*, *supra*, 29 Cal.App.4th at p. 299.) That exception arises when the pertinent acts are so closely connected, by law or fact, "that they form part of one and the same transaction, and thus one offense. [Citation.]" (*Thompson*, *supra*,160 Cal.App.3d at p. 224.) Third, the failure to give a unanimity instruction is subject to harmless error analysis (see *Jenkins*, *supra*, 29 Cal.App.4th at p. 298), although there is a division of opinion whether prejudice is assessed under the test in *People v. Watson* (1956) 46 Cal.2d 818, 836, or the more stringent test for federal constitutional error in *Chapman v. California* (1967) 386 U.S. 18, 24 (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576 (*Hernandez*)).

Under section 206, "torture has two elements: (1) a person inflicted great bodily injury upon the person of another, and (2) the person inflicting the injury did so with specific intent to cause cruel and extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." (*People v. Baker* (2002) 98 Cal.App.4th 1217, 1223.) The offense "focuses on the mental state of the

perpetrator and not the actual pain inflicted." (*People v. Hale* (1999) 75 Cal.App.4th 94, 108.) Although torture may be predicated on a single attack (see *Hale*, *supra*, 75 Cal.App.4th at pp. 105-108), it may also be charged as a "course of conduct" crime in which a course of conduct is subject to punishment as a single violation of the statute (*Hamlin*, *supra*, 170 Cal.App.4th at p. 1427). Thus, when "the cumulative result of the course of conduct is great bodily injury, and the requisite intent can be found, . . . the crime of torture has been committed under the course of conduct exception to the election/unanimity requirement." (*Id.* at p. 1429.)

2. *Analysis*

Appellant contends a unanimity instruction was required because the prosecution presented evidence of "two discrete assaultive crimes" potentially constituting torture, namely, appellant's attack with a hammer, and his attack with a heavy crystal ball several hours later. Appellant's contention fails, however, as no unanimity instruction regarding torture is required when the prosecution informs the jury that it is proceeding on a "'course of conduct'" theory. (*People v. Jennings* (2010) 50 Cal.4th 616, 680.) That is what occurred here.

The prosecutor's opening statement commenced with a chronological description of appellant's misconduct, including his initial punches to Scutero's head, repeated blows with a hammer, beating with a crystal ball, threatening to make her

"black and blue" after she briefly fled the mobile home, and subsequent attack on her. The prosecutor then stated: "This happened over the course of almost two days. *That's why we filed a torture allegation against him*." (Italics added.) During the closing argument, in discussing the elements of the torture charge, the prosecutor placed special emphasis on several events spanning a significant interval of time, namely, that appellant aimed his initial punches at Scutero's face, which was tender due to dental problems and his previous assault; that he sought out a hammer in order to continue his attack; that he ordered her to prepare food for him; and that she "was bleeding over the course of hours." Accordingly, during the opening statement and closing arguments, the prosecutor predicated the torture count on a course of conduct.

Appellant suggests that no course of conduct theory was available to the prosecution because the information did not expressly allege that theory. We disagree. When an information charges the violation of a criminal statute and the evidence shows several acts potentially constituting that violation, the prosecution must make an election among the acts at the commencement of trial, absent circumstances supporting an exception, such as a course of conduct theory. (*People v. Dell* (1991) 232 Cal.App.3d 248, 265; *Thompson*, *supra*, 160 Cal.App.3d at pp. 223-224.) Here, count 6 of the information alleged that on or about March 2, 2014, appellant violated section 206. The information was consistent with a course of conduct theory, as the trial

evidence showed that all of appellant's pertinent misconduct occurred on or about that date; furthermore, at the commencement of trial, the prosecutor stated that count 6 relied on such a theory. Accordingly, a course of conduct theory was properly available to the prosecution.

Appellant also maintains that a unanimity instruction was necessary to ensure that the jury agreed when he formed the specific intent to inflict severe pain required for torture, arguing that the jurors might have divided over whether he first manifested that intent during his attack with a hammer or later, during his attack with a crystal ball. We reject that contention.

Generally, when a torture charge relies on a course of conduct theory, the prosecution is not required to establish that each act in the course of conduct, viewed separately, was undertaken with the intent to cause severe pain. (*Hamlin*, *supra*, 170 Cal.App.4th at p. 1431.) Rather, the prosecution must establish that the defendant "had the requisite intent when he engaged in the course of conduct, and that the course of conduct resulted in great bodily injury . . . ." (*Ibid*.) That intent "need not be proven by direct evidence, but can be inferred from the circumstances of the offense, such as a focused attack on a particularly vulnerable area." (*Id*. at p. 1429.) Here, in closing argument, the prosecutor maintained that from the inception of appellant's misconduct, he engaged in "depraved" conduct aimed at causing pain, as his first blows were to Scutero's face, which was sore from a prior punch and dental problems, and he

immediately inflicted additional blows with a hammer. No unanimity instruction was thus necessary to ensure agreement among the jurors as to when appellant formed the intent required for torture.

People v. Milosavljevic (2010) 183 Cal.App.4th 640, upon which appellant relies, is distinguishable. There, the defendant was charged with 57 counts of sexual offenses, including violations of section 222, which prohibits the administration of a drug in order to facilitate a felony.[4] (*Milosavljevic*, *supra*, at pp. 643-644.) The trial court gave unanimity instructions that omitted a count charging the defendant with a violation of section 222 against a specific victim "in or about May 2005." (*Milosavljevic*, at p. 646.) At trial, the evidence showed that on multiple occasions in May 2005, the defendant administered a stupefying drug to the victim before engaging in an offense against her. (*Id*. at pp. 646-647.) The appellate court concluded that because the prosecution made no election among the acts potentially constituting the charged offense, the defendant's conviction failed for want of an adequate unanimity instruction. (*Id*. at pp. 645-647.) In contrast, no unanimity instruction was

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[4] Section 222 provides: "Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anaesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony . . . ."

required here, as the prosecution properly relied upon a course of conduct theory. In sum, the trial court did not err in giving no unanimity instruction relating to the torture charge.[5]

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[5] We also conclude that had a unanimity instruction been required, the failure to give such an instruction would not be prejudicial, even if assessed under the stringent test applicable to federal constitutional error. "Under *Chapman,* '[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.' [Citation.] For example, where the defendant offered the same defense to all 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. [Citation] But if the defendant offered separate defenses to each criminal act, reversal is required. [Citations.] The error is also harmless '[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence . . . .' [Citation]." (*Hernandez*, *supra,* 217 Cal.App.4th at p. 577.)

Here, appellant offered precisely the same defenses with respect to the charge of torture, insofar as it was predicated on the two events identified on appeal, namely, the attack with a hammer, and the later attack with a crystal ball. Although appellant offered no evidence at trial, defense counsel relied in his closing argument on the fact

(Fn. continued on next page.)

B. *Section 654*

Appellant contends the trial court contravened section 654 in sentencing him. In addition to imposing a life term on count 6 (torture), the trial court imposed a ten-year term on count 3 (corporal injury to a cohabitant), comprising the four-year upper term, a five-year enhancement for infliction of great bodily injury (§ 12022.7, subd. (e), and a one-year enhancement for use of a deadly weapon (§ 12022, (b)(1)). The court also imposed a concurrent six-year term on count 4 (criminal threats), comprising the two-year middle term and a four-year enhancement for infliction of great bodily injury (§ 12022.7, subd. (e)).[6]

Appellant maintains that section 654 obliged the court to stay the punishment imposed on count 3 and the great bodily injury enhancement imposed on count 4. As explained below, we agree with his contention regarding

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that appellant's DNA was found on neither the hammer nor the crystal ball. Furthermore, defense counsel argued that although some domestic violence may have occurred, none of it satisfied the demanding requirements for torture. Nothing before us suggests any rational basis for the jury to credit these defenses with respect to only one event, as the jury found appellant guilty of assault with a deadly weapon -- which the prosecutor predicated on the hammer attack -- and the evidence surrounding each event was essentially similar, namely, that appellant repeatedly hit Scutero with an object as a sanction for her purported infidelity and dishonesty.

[6] Punishment regarding the remaining counts (counts 2 and 5) was stayed under section 654.

count 3, but reject his contention regarding the enhancement under count 4.

1. *Governing Principles*

Subdivision (a) of section 654 prohibits multiple punishment for "[a]n act or omission that is punishable in different ways by different provisions of law . . . ." Generally, when several counts are properly subject to section 654, a court must identify the count carrying the longest sentence, including enhancements, and stay the sentence imposed under the other pertinent counts. (*People v. Kramer* (2002) 29 Cal.4th 720, 722.) Thus, "if . . . a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) However, multiple punishment is proper if the defendant pursues suitably independent criminal objectives. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1473-1474.) "Whether the defendant held 'multiple criminal objectives is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it.' [Citations.]" (*People v. Galvan* (1986) 187 Cal.App.3d 1205, 1218.)

Here, counts 3, 4, and 6 implicated a course of conduct, within the meaning of section 654. The test governing the application of section 654 in such circumstances was first stated in *Neal v. State of California* (1960) 55 Cal.2d 11, 19,

overruled in part in *People v. Correa* (2012) 54 Cal.4th 331, 334: "Whether a course of criminal 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. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal, supra,* at p. 19.) Under the *Neal* test, "if the offenses were independent of and not merely incidental to each other, the defendant may be punished separately even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [Citation.]" (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.)

Appellant contends the torture charge (count 6), if properly viewed as a course of conduct offense, necessarily "subsumed" the charge of corporal injury to a cohabitant (count 3) and the great bodily injury enhancement accompanying the charge of criminal threats (count 4), rendering unstayed punishment improper for those matters. We find guidance regarding appellant's contention from *People v. Assad* (2010) 189 Cal.App.4th 187 (*Assad*). There, the defendant was charged with several offenses against his 12-year-old son, namely, one count of torture, one count of aggravated mayhem, and three counts of inflicting corporal injury. (*Id*. at pp. 190, 200-201.) At trial, the prosecution presented evidence that the defendant repeatedly abused his

son over a two-year period, and based the charges of torture and aggravated mayhem on course of conduct theories. (*Id.* at pp. 191-194, 201.) Regarding those charges, the jury received unanimity instructions, and was directed to consider the counts separately and return a separate verdict for each count. (*Id.* at p. 200.) In contrast, regarding the three counts of inflicting corporal injury, the jury was directed to agree on the specific discrete incident supporting each count. (*Id.* at p. 201.) After the jury found the defendant guilty on all the counts in question, the trial court declined to stay the punishment imposed on any of the counts under section 654. (*Id.* at pp. 199-201.)

On appeal, the defendant contended that under section 654, the imposition of punishment for torture required that punishment be stayed for aggravated mayhem and the three counts of inflicting corporal injury. (*Assad*, *supra*, 189 Cal.App.4th at pp. 199-201.) Rejecting those contentions, the appellate court held that in view of the jury instructions, "the trial court -- like the jury -- reasonably could have concluded the torture and aggravated mayhem counts were not based on the same conduct or course of conduct . . . ." (*Id.* at p. 200.) The appellate court further held that multiple punishments were properly imposed on the three counts for infliction of corporal injury, as the jury expressly based its verdicts regarding these counts on discrete incidents, which the appellant had not shown to be constituents of the course of conduct underlying the torture conviction. (*Id.* at p. 201.)

2. *Corporal Injury to a Cohabitant (Count 3)*

We begin with the unstayed punishment for count 3, the charge of corporal injury to a cohabitant. Section 273.5 provides that "[a]ny person who willfully inflicts corporal injury" upon a cohabitant "resulting in a traumatic condition . . . is guilty of a felony . . . ." (§ 273.5, subds. (a), (b)(2).) Under the statute, "'[t]raumatic condition'" is defined as "a condition of the body, such as a wound, or external or internal injury, . . . , whether of a minor or serious nature, caused by a physical force." (§ 273.5, subd. (d).)

As charged in the information, count 3 displays significant similarities to count 6, the charge of torture. Like torture, corporal injury upon a cohabitant may be predicated on a single act or a course of conduct theory. (*Thompson*, *supra*, 160 Cal.App.3d at pp. 225-226; *Hamlin*, *supra*, 170 Cal.App.4th at p. 1429.). As in count 6, count 3 alleged that the pertinent offense occurred "[o]n or about March 2, 2014." Furthermore, as charged in the information, count 3 was accompanied by an allegation that appellant inflicted great bodily injury, within the meaning of section 12022.7, subdivision (e).[7] Under that provision, "'great bodily injury'"

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[7] Subdivision (e) of section 12022.7 provides in pertinent part: "Any person who personally inflicts great bodily injury under circumstances involving domestic violence 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 three, four, or five years."

signifies "a significant or substantial physical injury" (§ 12022.7, subd. (f)), which also is the meaning conveyed by the term "'great bodily injury'" in the statute defining torture (§ 206). (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042.) Thus, for purposes of the enhancement established in section 12022.7, subdivision (e), and the offense of torture, "[a]brasions, lacerations, and bruising can constitute great bodily injury." (*Jung, supra,* at p. 1042.)

At trial, the prosecutor effectively predicated count 3 on a course of conduct theory, as he never identified any specific act as responsible for the injury alleged under count 3. When Scutero testified, the jury was presented with 12 photographs taken at a hospital after the incident, which showed injuries to her legs, bruises and cuts to her head, and bruises on her wrists and hands. Scutero stated that the photographs reflected injuries due to appellant's initial punches to her face and later attacks with a hammer and crystal ball. Addressing count 3 in closing argument, the prosecutor referred to no specific act by appellant, but asserted that the photographs described above "directly prove[d]" the existence of "bodily injury result[ing] in a traumatic condition." Count 3 was thus predicated on a course of conduct that included appellant's initial punches and later attacks with the hammer and crystal ball.

Because that course of conduct materially coincided with the course of conduct on which the prosecution based the torture charge (see pt. A.2. of the Discussion, *ante*), section 654 bars the imposition of unstayed punishment on

count 3. In sentencing appellant, the trial court declined to stay the punishment on that count in the apparent belief that the torture charge and the corporal injury charge were based on discrete acts by appellant, namely, the hammer attack and the attack with a crystal ball. However, the record indicates the prosecution predicated the two offenses on significantly overlapping events, and unlike *Assad*, the jury received no instructions directing it to assess or evaluate the offenses as separate crimes. In sum, section 654 mandates that the punishment imposed on count 3 be stayed.

3. *Great Bodily Injury Enhancement for Criminal Threats (Count 4)*

We reach a contrary conclusion regarding the great bodily injury enhancement attached to the criminal threats charge. The application of section 654 to that type of enhancement was examined in *People v. Wooten* (2013) 214 Cal.App.4th 121, 130 (*Wooten*), in which the defendant was convicted of forcible oral copulation and attempted murder, and the jury found true allegations as to each count that the defendant had inflicted great bodily injury. (*Id*. at pp. 127-128.) The evidence at trial showed that the defendant forcibly entered the victim's motel room, punched and choked her, dragged her into the bathroom and sexually assaulted her. (*Id*. at p. 133.) After the victim attempted to escape, the defendant bit and repeatedly kicked her in the head, inflicting life-threatening injuries. (*Id*. at pp. 125, 126, 133.)

The trial court imposed separate enhancements for great bodily injury (§§ 12022.7, 12022.8) on each of the convictions for forcible oral copulation and attempted murder. (*Wooten, supra,* at p. 124.)

On appeal, the defendant argued that one of the enhancements should have been stayed under 654, because they arose from a single indivisible course of conduct. (*Wooten*, *supra*, 214 Cal.App.4th at p. 130.) Rejecting that contention, the appellate court concluded that section 654 does not bar enhancements on separate offenses: "When the criminal acts forming the basis for convictions of multiple substantive offenses are divisible . . . then section 654 has been held inapplicable. [Citation].) Thus, it follows that if section 654 does not bar punishment for two crimes, then it cannot bar punishment for the same enhancements attached to those separate substantive offenses." (*Ibid*.) The court rejected the defendant's contention that the assault constituted an indivisible course of conduct, noting that he engaged in separate attacks with separate purposes. (*Id*. at p. 133.) Accordingly, the court upheld imposition of a separate great bodily injury enhancement for each offense. (*Ibid*.)

Although infliction of great bodily injury is an element of torture, rather than the subject of a special allegation, we find the rationale in *Wooten* applicable here. If section 654 does not bar unstayed punishment for great bodily injury alleged in connection with enhancements attached to separate offenses, it cannot reasonably be regarded as doing

so when great bodily injury is an element of an offense and the subject matter of an enhancement attached to a separate offense. Accordingly, our focus is on whether the charges of torture and criminal threats constituted "separate substantive offenses," for purposes of section 654. (*Wooten*, *supra*, 214 Cal.App.4th at p. 130.)

Under section 654, "a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." (*People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 11.) As explained in *People v. Gaio* (2000) 81 Cal.App.4th 919, 935, "[t]his is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken. [Citation.]" (See also *People v. Trotter* (1992) 7 Cal.App.4th 363, 366-369 [unstayed consecutive terms properly imposed on three counts of assault predicated on defendant's successive gunshots at pursuing police, as defendant had time to reflect between each shot].)

The trial court, in declining to stay the punishment imposed for criminal threats, impliedly found that appellant's offense of torture was separate from his criminal threats. Appellant has not challenged that determination, and the record does not show that it was incorrect. During the closing argument, in discussing the offense of torture, the prosecutor mentioned several acts, but did not refer to

appellant's threats to Scutero after she returned from her neighbors' mobile home, that he intended to make her "black and blue," "look Chinese," and kill her. In contrast, in discussing the offense of criminal threats, the prosecutor focused exclusively on those threats. Because the record shows that the threats occurred after Scutero fled and returned home, it supports the reasonable inference that the threats were separate from the torture, as appellant made them after an "opportunity to reflect and to renew his . . . intent" (*Gaio*, *supra*, 81 Cal.App.4th at p. 935). Appellant's contention regarding the great bodily injury enhancement relating to the criminal threats conviction thus fails for want of a showing that the criminal threats were part of "the course of conduct" underlying the torture charge, for purposes of section 654. (*Assad*, *supra*, 189 Cal.App.4th at p. 201.)

Appellant's reliance on *People v. Mesa* (2012) 54 Cal.4th 191 is misplaced. There, on two separate occasions, the defendant, a gang member and convicted felon, shot a victim. (*Id*. at p. 193.) With respect to each incident, a jury found the defendant guilty of assault with a firearm, possession of a firearm as a felon, and actively participating in a criminal street gang (§ 186.22, subd. (a)). (*Mesa, supra,* at pp. 193-195.) In sentencing the defendant, the trial court declined to stay the punishment imposed for the gang participation offences, even though with respect to each incident, the defendant's possession and use of a firearm were relied upon at trial to establish the elements of the

gang participation charge, and a gang enhancement was imposed on the conviction for assault with a firearm. (*Id*. at pp. 193, 197-198.) Our Supreme Court concluded that section 654 barred unstayed punishment for the gang participation convictions, as each was based on a single act for which punishment was separately imposed for the use and possession of a firearm. (*Mesa, supra,* at p. 200.) Here, in contrast, appellant's convictions for torture and criminal threats do not arise from a single act. Accordingly, the trial court properly declined to stay the great bodily injury enhancement imposed on appellant's conviction for criminal threats.

DISPOSITION

The judgment is modified under count 3 (corporal injury to a cohabitant) to reflect that the ten-year term of imprisonment is stayed. In all other respects, the judgment is affirmed. The superior court is directed to prepare an amended abstract of judgment to reflect the modification to appellant's sentence under count 3, and to forward a copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.