Filed 12/5/17 P. v. Martinez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. EDWARD L. MARTINEZ, Defendant and Appellant.	B279417 (Los Angeles County Super. Ct. No. MA069304)

Appeal from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed as modified with directions.

Alex Green, 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, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Edward L. Martinez of two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] (counts 1 and 3)[2]; battery with serious bodily injury (§ 243, subd. (d)) (count 2); misdemeanor victim intimidation (§ 136.1, subd. (b)(1)) (count 4);[3] attempted premeditated murder (§§ 664 & 187) (count 5); and mayhem (§ 203) (count 6). The jury also found true special allegations of inflicting great bodily injury (§ 12022.7, subd. (a)), as to counts 1 and 5, and use of a deadly and dangerous weapon (§ 12022, subd. (b)(1)), as to counts 2, 5 and 6. In a bifurcated trial, the court found that Martinez had suffered a prior conviction which qualified as both a strike conviction (§§ 667, subds. (b)-(j), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)). The trial court sentenced Martinez to 32 years to life.[4] Martinez filed a timely notice of appeal.

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[1] Further statutory references are to the Penal Code.

[2] Counts 1 and 3 charged Martinez with assaults upon Thomas Newson and Israel Munoz, respectively.

[3] In count 4, Martinez was charged with dissuading a witness by force or threat. (§ 136.1, subd. (c)(1).) The charge initially pertained to Munoz, but was amended to reflect Newson as the alleged victim. The jury acquitted Martinez of the charged count and convicted him of the lesser crime of misdemeanor victim intimidation.

[4] The sentence is comprised of seven years to life for the attempted premeditated murder conviction, doubled to 14 years to life due to the prior strike, plus three years for the great bodily injury enhancement, one year for the deadly and dangerous weapon enhancement, and five years for the prior serious felony conviction (count 5); four years for the assault against Munoz, doubled to eight years due to the prior strike (count 3); and one

On appeal Martinez challenges the sufficiency of the evidence to support both the jury's finding that he acted with premeditation and deliberation when he attempted to murder Newson, and his conviction for mayhem. He also contends that the trial court inadvertently imposed and then stayed a great bodily injury enhancement on the mayhem conviction after striking it as unauthorized from the jury's verdict form. As to the first two contentions, we conclude that substantial evidence supports the finding and conviction. As to the latter contention, the People concede and we agree that the judgment must be modified to reflect the corrected sentence.

FACTUAL AND PROCEDURAL SUMMARY

Newson and Munoz were next door neighbors and, according to Newson, close friends.[5] Munoz resided with his son, his girlfriend, Angela Alarcon, and Alarcon's three children. On the morning of August 10, 2016, Newson went to Munoz's home to help Munoz paint the interior walls. Sometime around 7:30 p.m. or 8:00 p.m., Martinez dropped by unexpectedly. Newson and Martinez had known each other for a few years; they used to live in the same neighborhood and Newson considered Martinez to be a friend. Munoz and Martinez had met a few times before, including two days earlier when Martinez came by

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year for the misdemeanor (count 4), for a total of 32 years to life. The trial court also imposed and stayed sentence on the remaining counts and enhancements.

[5] Newson and Munoz both admitted to having criminal backgrounds. Newson had been convicted of welfare fraud, petty theft, commercial burglary, and receiving stolen property. Munoz had been convicted of commercial burglary and receiving stolen property.

looking for Newson. Newson asked Munoz if it was okay for Martinez to hang out with him in the living room and Munoz said he did not mind. While Munoz continued to paint, Newson and Martinez sat at opposite ends of the couch. Martinez asked Newson if he had any crystal methamphetamine and Newson directed Martinez to a pipe under a cushion on the couch. Martinez found the pipe and began smoking. According to Newson, Martinez's demeanor did not change after he started to smoke; Martinez appeared to be sober, not high. Newson did not smoke, although he and Munoz had smoked methamphetamine earlier in the day. Newson had also had two beers around 4:00 p.m. and had smoked marijuana around 5:00 p.m. Newson and Martinez sat on the couch for the next hour and a half without saying much to each other. During this time, Newson played some music on his phone at Martinez's request.

During the time Newson and Martinez were sitting on the couch, Martinez got up occasionally and walked around. At one point, Martinez went into the kitchen and opened up a few drawers. He also went into the garage where he saw a "really big hammer" on the work bench and asked Munoz if he could borrow it. Martinez said he needed it to fix something at his house. Munoz did not want Martinez to take that particular hammer because it was expensive, so he offered him a smaller hammer, which Martinez agreed to bring back the next day. Martinez returned to the couch and placed the hammer beside him. He got up several times to walk around and each time left the hammer on the couch.

A short time later, Munoz and Alarcon went out to get something to eat. While they were away, Newson and Martinez remained seated on the couch. Martinez told Newson, "T.N., you

are fuckin' up." When Newson asked Martinez "why [Martinez] would say that," Martinez said, "I don't know." Munoz and Alarcon returned about 20 minutes later and went into the garage to eat their food. Martinez got up from the couch again, but this time he took the hammer with him. He walked to the sliding glass door and looked outside at the backyard. Newson asked Martinez if he was taking the hammer with him for protection, and Martinez replied, "Yeah." Newson asked Martinez if he had asked Munoz for a ride home, and Martinez said he had not. Concerned that Martinez might try to use the hammer on him, Newson stood up in order to keep an eye on Martinez. Martinez turned, walked around the table, and sat down. Newson said he was going to leave to get something to eat. Martinez said, "Just hang out for a little longer." Newson said he was hungry and would be back a little later, and went into the garage to say goodbye to Munoz. As Newson stepped back into the living room and started walking towards the front door, Martinez ran from behind and struck Newson in the head with the hammer. Newson fell down and had a "flash of the wood floor." Wondering what had just happened, he turned around and saw Martinez standing over him with the hammer raised above his head, ready to swing. Martinez swung the hammer down a few more times, striking Newson in the head and shoulder. Newson tried to block the strikes and yelled for help. Newson felt like "something cold [was] splitting [his] head."

Munoz and Alarcon heard the screaming and ran into the living room. They saw blood everywhere. Martinez was standing over Newson and swinging the hammer down, while Newson was on his knees trying to block the hits with his hand. As Martinez was about to hit Newson with the hammer, Alarcon

screamed for him to stop. Martinez was silent, even when Newson asked him why he was hitting him. Munoz tried to separate the two, and as he did, Martinez struck Munoz once in the elbow. As Martinez tried to strike Newson again, Munoz picked up a statue and hit Martinez in the neck. Martinez backed away and swung the hammer towards Munoz. When Martinez continued to go after Newson, Munoz grabbed Martinez from behind and placed him in a headlock. This did not stop Martinez, however, who tried to swing the hammer towards Munoz's face. Newson slammed Martinez on the table and they both fell to the floor. Newson began punching Martinez as Martinez continued to swing the hammer at Newson. Newson held Martinez on the ground and asked Munoz to get the hammer from Martinez's hand. Once Munoz got the hammer away from Martinez, Newson urged Munoz to smash Martinez with it. Munoz refused, fearing he would kill Martinez if he did. Meanwhile, Martinez struggled back and forth with Newson, who was losing strength due to his blood loss. Munoz demanded that they stop and said the police were on their way. Munoz tried to scare Martinez by saying that he would go get his gun. Instead, Munoz retrieved a baseball bat from the garage, and when he returned to the living room, Martinez stopped wrestling with Newson and stood up. As Newson stumbled towards the front door on his way outside, Martinez said, "You better not snitch." Martinez left through the sliding glass door and jumped over a wall in the backyard. The entire attack lasted about 8 to 10 minutes.

Alarcon's son, Jimmy, was in his bedroom when he heard Newson screaming, "What are you doing?" He saw Martinez sneak behind Newson and strike his head with the hammer.

Jimmy ran into the garage, but by this time Munoz and Alarcon were in the living room. Jimmy left the garage and ran upstairs. As he ran back and forth between rooms, he saw Martinez use the hammer to hit Newson one more time and to hit Munoz on the elbow. He also saw Munoz attempting to get the hammer out of Martinez's hand. At one point Alarcon yelled out Jimmy's name, and when Jimmy ran downstairs, they both went outside and Alarcon called 9-1-1.

When the police arrived, Newson was waiting outside with people standing around him. He was disoriented and "out of it," and blood was all over his shirt and running down his face. The police recovered the hammer from the top of the mailbox where Munoz had placed it. Newson was taken to the emergency room. He suffered a skull fracture consistent with being hit in the head with a hammer. He had three lacerations to his head requiring 19 staples, a two-centimeter impression on his skull, and partial skull fragments floating around in his head. He was in a lot of pain for two weeks after the attack. As a result of his head wound, Newson has scarring and bald spots where hair no longer grows. He said he was unable to see the scars, so he does not know if they are visible.

DISCUSSION

A. Substantial Evidence Supports the Jury's Finding That Martinez Committed the Attempted Murder with Premeditation and Deliberation.

The jury found that Martinez acted with premeditation and deliberation in his attempt to murder Newson with a hammer.[6]

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[6] The court instructed the jury as follows: "It is also alleged in count five that the crime attempted was willful, deliberate and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. Willful means intentional. Deliberate relates to how a person thinks and means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. Premeditated relates to when a person thinks and means considered beforehand. A person premeditates by deliberating before taking action. If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is an attempt to commit willful, deliberate and premeditated murder. The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not in the duration of time but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation. To constitute willful,

Martinez contends there is not substantial evidence from which the jury could reasonably infer that the attempted murder was "the result of 'a preexisting reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.' " (*People* v. *Anderson* (1968) 70 Cal.2d 15, 27 (*Anderson*).) We disagree.

To determine the sufficiency of the evidence, we consider the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*Jackson* v. *Virginia* (1979) 443 U.S. 307, 319; *People* v. *Johnson* (1980) 26 Cal.3d 557, 577; *People* v. *Mendoza* (2011) 52 Cal.4th 1056, 1068-1069.)

In *Anderson*, our Supreme Court identified three categories of evidence an appellate court should consider in deciding whether the evidence is sufficient to support a finding of premeditation: planning activity, motive, and the manner of killing (or, as in this case, attempted killing). (*Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) Planning activity is activity prior to the killing that was "directed toward, and explicable as intended to result in, the killing." (*Id*. at p. 26.) To support a finding of premeditation, such evidence must show that the "defendant considered the possibility of murder in advance" of the

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deliberate and premeditated attempted murder the would-be slayer must weigh and consider the question of killing and the reasons for and against such a choice and having in mind the consequences decides to kill and makes a direct but ineffectual act to kill another human being. The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

killing. (*People* v. *Young* (2005) 34 Cal.4th 1149, 1150.) Motive evidence includes facts about the defendant's relationship with the victim or his or her conduct toward the victim that implies a motive to kill. (*Anderson, supra*, 70 Cal.2d at p. 27.) Evidence of the manner of killing may indicate that the defendant must have committed the murder according to a preconceived design. (*Ibid*.)

Anderson observed that courts have upheld findings of premeditation and deliberation when all three types of evidence are present. (*Anderson*, *supra*, 70 Cal.2d at p. 27.) Even in the absence of motive or manner of killing, however, the findings have been upheld when there is "extremely strong" evidence of planning activity. (*Ibid*.) Indeed, planning is "the most important prong of the *Anderson* test." (*People v. Alcala* (1984) 36 Cal.3d 604, 627.)

Although the *Anderson* factors are "helpful for purposes of review," our Supreme Court has cautioned against "[u]nreflective reliance" on them. (*People* v. *Thomas* (1992) 2 Cal.4th 489, 517.) The factors provide a framework to help the court assess whether the evidence presented supports an inference that the killing resulted from a "preexisting reflection and weighing of considerations," but they are not an exclusive or exhaustive list of considerations. (*People* v. *Koontz* (2002) 27 Cal.4th 1041, 1081.)

Applying the foregoing principles, we conclude that substantial evidence supports the jury's finding that Martinez acted with premeditation and deliberation in attempting to kill Newson. With respect to "planning activity," we disagree with Martinez's contention that the *only* evidence of planning is that he had obtained the hammer from Munoz.

Prior to the assault and after obtaining the hammer, Martinez sat on the couch with the hammer beside him, walked

to the sliding glass door with the hammer in hand, and looked through the patio door into the backyard, actions which viewed together support a reasonable inference that he began planning for an escape. Moreover, even before he obtained the hammer, he walked into the kitchen and opened up a few drawers, an action from which the jury reasonably could have inferred that Martinez was searching for another weapon, perhaps a knife.

As for motive, Martinez maintains that there is no evidence of a prior relationship between Newson and himself from which the jury could infer a motive for the assault. He points out that he and Newson had been friends for a period of time prior to the assault, and contends that, based upon Newson's questioning as to why Martinez was hitting him, the assault "came out of the blue." More importantly, he insists that his statement to Newson, "T.N., you are fucking up," is not solid evidence of ill will or a motive to murder Newson. To find otherwise, he contends, is to speculate that his words meant that Newson had done something warranting death. Again, we disagree. Although Martinez and Newson did not engage in an argument prior to the assault, and Martinez did not provide an answer when Newson asked why he was making such a statement, the jury could reasonably infer from Martinez's comment that he was angry with Newson about something and for whatever reason chose not to reveal why. (*People* v. *Pensinger* (1991) 52 Cal.3d 1210, 1238 [incomprehensibility of motive does not mean jury could not reasonably infer defendant entertained and acted on it]; *People* v. *Daniels* (1971) 16 Cal.App.3d 36, 46 [evidence showing jealousy, quarrels, antagonism or enmity between accused and victim of violent offense is proof of motive to commit offense].)

Lastly, Martinez contends, borrowing language from *Anderson,* that there was no solid evidence from which the jury could infer that the manner in which he assaulted Newson was "so particular and exacting" that he must have acted with a "preconceived design" to take Newson's life in a "particular way" and for a "reason" which the jury could reasonably infer from the evidence of planning and motive. (*Anderson*, *supra*, 70 Cal.2d at p. 27.) Rather, he maintains that the evidence showed that he was high on crystal methamphetamine and that he "suddenly and unexpectedly attacked a friend for no apparent reason." To the contrary, Newson testified that Martinez's demeanor did not change after he started to smoke and that he did not appear to be high. More importantly, Martinez had initiated a surprise, unprovoked attack upon Newson which lasted about 10 minutes. During this time, Martinez was relentless; he continued to smash the hammer into Newson's head, despite Newson's attempts to block him, thereby demonstrating a cold, calculated desire to kill. (*People* v. *Alcala, supra,* 36 Cal.3d at p. 627 [beating victim repeatedly in the head supports inference of calculated design to ensure death, rather than unconsidered explosion of violence].) Furthermore, Martinez's post-attack directive to Newson and Munoz not to snitch demonstrated a consciousness of guilt consistent with a premeditated and deliberate decision to kill. (*People v. Perez* (1992) 2 Cal.4th 1117, 1128 [conduct after attack is inconsistent with state of mind that would have produced rash, impulsive actions and may be reasonably considered by jury in relation to manner of killing].)

In sum, "the relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a

reasonable doubt that [Martinez] premeditated the [attempted] murder." (*People v. Perez, supra,* 2 Cal.4th at p. 1127.) Having reviewed the record in the light most favorable to the judgment, as we must, we conclude that there is sufficient credible evidence to reasonably support the conclusion that Martinez acted with premeditation and deliberation.

B. Substantial Evidence Supports the Jury's Conviction of Mayhem.

Martinez contends that because the scars on Newson's head are not visible to others, there is insufficient evidence to support the mayhem conviction.[7] We disagree.

A person is guilty of mayhem if he or she "unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip." (§ 203.) "Section 203 generally prohibits six injurious acts against a person, three that specify a particular body part and three that

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[7] The trial court instructed the jury as follows: "Every person who unlawfully and maliciously deprives a human being of a member of his body or disables, permanently disfigures, or renders it useless, or who cuts or disables the tongue, or puts out an eye or slits the nose, ear or lip is guilty of the crime of mayhem, in violation of . . . section 203. In order to prove this crime, each of the following elements must be proved: One, one person unlawfully and by means of physical force deprived a human being of a member of his body or disabled, permanently disfigured or rendered it useless of a human being; and [t]wo, the person who committed the act causing the bodily harm did so maliciously; that is, with an unlawful intent to vex, annoy or injure another person. It is not a defense that a disfigurement has been or may be medically alleviated."

do not: (1) dismembering or depriving a part of someone's body; (2) disabling or rendering useless a part of someone's body; (3) disfiguring someone; (4) cutting or disabling the tongue; (5) putting out an eye; and (6) slitting the nose, ear or lip. [Citation.] California remains one of only a few jurisdictions that have retained mayhem as a distinct crime. [Citations.] [¶] Though section 203 contains 'verbal vestiges' of the common law and the Coventry Act of 1670, ' "the modern rationale of the crime may be said to be the preservation of the natural completeness and normal appearance of the human face and body, and not, as originally, the preservation of the sovereign's right to the effective military assistance of his subjects." ' " (*People* v. *Santana* (2013) 56 Cal.4th 999, 1003–1004.)

"To prove mayhem based on a disfiguring injury, the injury must be permanent." (*People v. Hill* (1994) 23 Cal.App.4th 1566, 1571.) Whether a scar is a permanent disfigurement is a question for the trier of fact. (*People v. Park* (2003) 112 Cal.App.4th 61, 72.)

Martinez acknowledges that Newson suffered severe injuries to his head, including a fractured skull, three lacerations requiring 19 staples, and a two-centimeter indentation to his skull.[8] The focus of his challenge, however, is the scarring on the back of Newson's head. In essence, he contends that because the scars are covered by Newson's hair and are therefore not visible to the naked eye, they do not qualify as a disfiguring injury for purposes of mayhem.

Martinez cites *Goodman* v. *Superior Court* (1978) 84 Cal.App.3d 621, where the victim endured a five-inch scar running along the eyebrow to below the eye and onto the cheek.

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[8] The jury was shown photographs of Newson's injuries.

The reviewing court concluded that, "[w]hile not every visible scarring wound can be said to constitute the felony crime of mayhem, we decline to say as a matter of law that the trier of fact could not reasonably conclude . . . that mayhem was committed here." (*Id*. at p. 625.) According to Martinez, by using the term "visible," the *Goodman* court could only have meant that the disfiguring scar must be *visible to others*. Citing *People* v. *Santana*, *supra*, 56 Cal.4th 999, where our Supreme Court quoted with approval the aforesaid language from *Goodman,* Martinez maintains that "the clear presumption is that to constitute mayhem, a disfiguring wound must be *visible*." (Italics added.) We have no doubt that to qualify as a disfiguring scar, the scar must be visible. Indeed, a scar, defined as "a mark left (as in the skin) by the healing of injured tissue,"[9] is, by its very nature, visible. It follows that the *Goodman* court's use of the term "visible" was superfluous and does nothing to support Martinez's position

Notwithstanding Martinez's position that a disfigurement must be visible to others, he acknowledges that appellate courts have upheld mayhem convictions, despite the fact that the victim's scars were not readily visible to others, based upon the emotional injury caused to the victims. (*People* v. *Keenan* (1991) 227 Cal.App.3d 26, 29, 36 [cigarette burn marks on victim's breast]; *People* v. *Page* (1980) 104 Cal.App.3d 569, 577-578 [breasts and abdomen forcibly tattooed causing victim to endure permanent scarring].) Martinez contends that here, in contrast, there is no indication of emotional injury in that Newson himself said he was unable to see the scars, presumably unless he moved

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[9] Merriam Webster's Collegiate Dictionary (10th ed. 1995) p. 1042.

his hair away and looked in a mirror. This ignores, however, the fact that Newson was able to feel the scars and therefore knew that they were there.

Moreover, the law is settled that a disfiguring injury is permanent even if cosmetic repair is or may be medically feasible. (See, e.g., *People v. Hill*, *supra*, 23 Cal.App.4th at pp. 1574-1575.) In our view, the same rationale applies here. For purposes of mayhem, if a disfiguring injury can be altered by cosmetic surgery and still be deemed disfiguring, then a disfiguring scar which is visible only if something covering it is removed should still constitute a disfiguring scar.

Lastly, as previously indicated, Martinez's challenge focuses on the scarring at the back of Newson's head and ignores Newson's other injuries. After asserting during closing argument that Martinez is guilty of committing mayhem even though Newson's scars are covered by his hair and are not visible unless he moves his hair away, the prosecutor stated: "It's still a permanent disfigurement. You can have a scar that's covered by your hair . . . multiple scars. . . . So skull fractures. 19 staples. Bone fragments still in his head . . . [s]cars. Hair that doesn't grow over those areas. All of these or any one of those constitute mayhem." Indeed, the evidence showed that Martinez disfigured Newson by leaving permanent scarring, bald spots, and a skull indentation that altered the normal appearance of his head. Even though the scars may not be visible when covered by hair, they are still there, and it was for the jury to determine whether Newson's injuries qualified as disfiguring injuries. Viewing the evidence in the light most favorable to the judgment, and presuming every fact the jury could reasonably have deduced

from the evidence, we are unable to say that the jury could not reasonably have reached the decision that it did.

C. The Trial Court's Great Bodily Injury Enhancement on the Mayhem Conviction Must Be Stricken.

Martinez contends, the People concede, and we agree that the court erred by imposing a three-year great bodily injury enhancement under section 12022.7, subdivision (a), on the mayhem conviction and by failing to impose a one-year deadly weapon enhancement (§ 12022, sud. (b)(1)) on the same count. In these respects the sentence was unauthorized and must be corrected. (See *People* v. *Hill, supra,* 23 Cal.App.4th at p. 1575 [because great bodily injury is an element of mayhem, it is improper to use that factor to aggravate sentence for that offense].)

Following jury instructions and a discussion by counsel, the trial court struck the great bodily injury enhancement from the verdict forms. The jury returned a guilty verdict on the mayhem charge without making a finding on the great bodily injury enhancement, but it did find that Martinez had used a deadly weapon in committing mayhem. (§ 12022, subd. (b)(1).) Thus, because the trial court inadvertently imposed and stayed the great bodily injury enhancement after striking it from the verdict form and did not impose the deadly weapon enhancement, its 19-year sentence for mayhem consisting of the upper term of eight years doubled to 16 years for the prior strike plus three years for the great bodily injury enhancement, must be modified to instead reflect 16 years plus one year on the weapon enhancement which the jury did find, for a total of 17 years.

DISPOSITION

The sentence is corrected and modified such that the three-year enhancement imposed under section 12022.7, subdivision (a) on count 6 is stricken, and the one-year enhancement under section 12022, subdivision (b)(1), which was alleged in the operative information and found true by the jury, is added to count 6. The sentence on count 6, therefore, shall be reduced from 19 years to 17 years. There is no change in the trial court's determination that the sentence on that count is stayed pursuant to section 654. As corrected and modified, the judgment is affirmed.

The trial court is directed to prepare an amended abstract of judgment reflecting the modification of the judgment and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.