Filed 4/24/02

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JIMMIE LEE OATES, Defendant and Appellant.	E029354 (Super.Ct.No. FWV 018708) OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid A. Uhler, Judge. Affirmed as modified.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lora Fox Martin and Steven T. Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jimmie Lee Oates and two companions drove into hostile gang territory and fired two shots at a group of six rival gang members. Gustavo Barrera was shot in the leg, resulting in its amputation.

Defendant appeals judgment entered following his conviction by jury of five counts of attempted premeditated murder (counts 1, and 3 through 6);[1] mayhem (count 2);[2] and possession of a firearm by a felon (count 8).[3] The jury also found true the enhancement allegations that a principal personally used and discharged a firearm, which caused great bodily injury,[4] and that the offenses were committed to benefit a criminal street gang.[5] Defendant admitted the truth of the allegation that he had previously suffered a prior strike.[6]

The jury deadlocked on, and the court dismissed, the enhancement allegations that defendant personally inflicted great bodily injury[7] and discharged a firearm from a motor

---

[1] Penal Code section 187, subdivision (a). Unless otherwise noted, all statutory references are to the Penal Code.

[2] Section 205.

[3] Section 12021, subdivision (a)(1). Count 7 (evasion of an officer) is charged solely against a codefendant.

[4] Section 12022.53, subdivisions (b), (c), and (d).

[5] Section 186.22, subdivision (b)(4).

[6] Sections 667, subdivision (b) – (i), and 1170.12.

[7] Section 12022.7, subdivision (a).

vehicle, causing great bodily injury.[8]

The court sentenced defendant to an aggregate indeterminate prison term of 85 years to life plus a determinate term of 20 years, consisting of consecutive prison terms of 30 years to life on count 1 for attempted murder of Barrera; 30 years to life on count 5 for attempted murder of Manuel Castrejon; 25 years to life for a count 1 enhancement under section 12022.53, subdivision (d); and 20 years for a count 5 enhancement under section 12022.53, subdivision (c).

1. Factual and Procedural Background

During the afternoon of September 11, 1999, members of the North Side Ontario gang (NSO), including Gustavo Barrera, Victor Mendoza, and Walter Ramirez, entered East Side Ontario gang (ESO) territory. The NSO and ESO are rival gangs. Defendant is a member of ESO. Mendoza got into a fistfight with an individual associated with the ESO.

After the fight, the NSO members went to Antoinette Acuna's home to visit her son, NSO member, Manuel Castrejon. Acuna's home was in NSO territory, on Calaveras Street. At around 10:00 p.m., Mendoza, Barrera, Castrejon, Ramirez, and Jose Gonzalez socialized outside on Calaveras Street. A white car and a dark green car drove down Calaveras Street and momentarily stopped in front of the group of NSO members. An occupant in the green car, on the passenger side, fired at the NSO group. The first bullet hit Barrera in the leg. The NSO members fled for cover as a second bullet passed by

[8] Section 12022.55.

Barrera's head. The two cars then sped off.

Around 10:00 p.m. that night, California Highway Patrol Officer Wilkening observed a dark green car speeding on the I-10 freeway in Ontario. With his emergency lights activated, Wilkening chased the car. When the car slowed down, upon exiting the freeway, he observed the three occupants. Wilkening saw defendant in the front passenger seat. The car eventually stopped and Wilkening saw the occupants flee from the car. Wilkening chased after and apprehended defendant. Defendant acknowledged he was a passenger in the car. The other two occupants were also apprehended and identified as ESO gang members.

Early the next morning, after searching the route taken by the green car, an officer found a .44-caliber handgun laying on the shoulder of the freeway. Two cartridges had been fired and four live rounds remained in the gun cylinder. One of defendant's fingerprints was found on the gun.

Detective Giallo testified that Castrejon told him two days after the shooting and during a photographic lineup that defendant fired the shots from the front passenger seat. But Castrejon also initially told Giallo the shots came from the right rear passenger door.

Acuna testified that shortly before the shooting, she we nt outside and saw her son and friends congregated two house down from hers. A light colored car and a dark colored car turned onto Calaveras Street, and slowed down as they passed her son's group. An individual opened the front passenger door of the dark colored car and shot two or three times at the group. The first shot may have ricocheted off the ground before hitting Barrera's leg. When the police interviewed Acuna, out of fear of retaliation, she

initially said she could not identify the shooter but then told the police defendant was the shooter and identified him during an in-field lineup conducted the night of the shooting. She also identified defendant at trial as the shooter.

2. Aggravated Mayhem

Defendant contends there was insufficient evidence to support his aggravated mayhem conviction under section 205. He claims that evidence that he used a powerful firearm and modified bullets was insufficient. Defendant argues there was merely evidence of an indiscriminate attack or a general intent to kill rather than any evidence establishing defendant harbored a specific intent to maim Barrera.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citations.]"[9] In applying the same standard to a conviction based primarily on circumstantial evidence, we uphold the jury's verdict if reasonably justified by the circumstances, even if a contrary finding might also reasonably be reconciled with the circumstances.

Aggravated mayhem is a specific intent crime that requires proof that the

---

[9] *People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Hill* (1998) 17 Cal.4th 800, 848-849.

defendant intended to cause the victim permanent disability or disfigurement.[10] "[S]pecific intent may be inferred from the circumstances attending an act, the manner in which it is done, and the means used, among other factors."[11] The evidence is insufficient to prove specific intent where it shows no more than an "indiscriminate attack" upon the victim.[12] But evidence of a directed and controlled attack may provide substantial evidence of an intent to disable or disfigure permanently.[13]

In *People v. Ferrell*, the court concluded the defendant shot the victims in a deliberate and controlled manner sufficient to support an aggravated mayhem conviction. The defendant went to the victim's house and pointed a gun at the victim and her parents. When the victim's father moved toward the defendant, she shot him in the knee. The defendant then shot the victim in the neck from about two feet away. The court noted, "[i]t takes no special expertise to know that a shot in the neck from close range, if not fatal, is highly likely to disable permanently."[14] Therefore, based on the calm and deliberate manner of the defendant's shooting, the court held there was substantial

---

[10] *People v. Ferrell* (1990) 218 Cal.App.3d 828, 833; section 205.

[11] *People v. Lee* (1990) 220 Cal.App.3d 320, 325.

[12] *People v. Lee, supra,* 220 Cal.App.3d at page 325; *People v. Ferrell, supra,* 218 Cal.App.3d at page 835.

[13] *People v. Lee, supra,* 220 Cal.App.3d at page 326; *People v. Ferrell, supra,* 218 Cal.App.3d at page 836.

[14] *People v. Ferrell, supra,* 218 Cal.App.3d at page 835.

evidence to support the aggravated mayhem conviction.

While in the instant case, the shooting occurred at a greater distance than in *Ferrell*, there was nevertheless sufficient evidence that defendant shot Barrera in a deliberate, directed, and controlled manner. The car defendant was riding in stopped in front of Barrera and his companions. Defendant opened the car door, aimed at Barrera, and fired two shots with a high powered gun containing modified bullets. The first shot hit Barrera's leg. Defendant fired a second shot at Barrera's head but missed. Defendant then sped away in the green car.

A reasonable inference could be made that defendant was aiming at Barrera, with the intent to permanently disable, if not kill him, and this was not a random, indiscriminate attack. While defendant may not have known Barrera's identity when shooting at him, due to poor lighting and distance factors, there was sufficient evidence he intended to shoot and maim or kill an NSO member, and targeted Barrera for that purpose.

Substantial evidence supported defendant's conviction for aggravated mayhem.

3. Attempted Murder

Defendant contends there was insufficient evidence supporting defendant's convictions for five counts of attempted murder. Defendant was convicted of attempting to murder Barrera and his four companions, Mendoza, Ramirez, Castrejon, and Gonzalez. Defendant argues that he fired two shots at Barrera and therefore he cannot be found guilty of attempting to murder all five individuals, particularly since Barrera's companions were standing a substantial distance from Barrera. Defendant claims there

was thus insufficient evidence to support his convictions for more than two counts of attempted murder and, therefore, this court must reverse three of the five attempted murder convictions.

Murder is defined in section 187, subdivision (a) as "the unlawful killing of a human being . . . with malice aforethought." In order to prove attempted murder, there must be sufficient evidence of intent to commit the murder "plus a direct but ineffectual act toward its commission."[15] Implied malice is insufficient to support an attempted murder conviction. "[T]he evidence must demonstrate a deliberate intention unlawfully to kill a fellow human being."[16]

Evidence of such intent, while rarely direct evidence, may include circumstantial evidence "derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .' [Citation.] 'The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind.' [Citation.]"[17]

---

[15] *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.

[16] *People v. Chinchilla, supra,* 52 Cal.App.4th at page 690; section 188.

[17] *People v. Chinchilla, supra,* 52 Cal.App.4th at page 690.

[footnote continued on next page]

In *People v. Chinchilla*,[18] the court upheld attempted murder convictions as to two different victims on the following grounds: "Where a defendant fires at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both."[19]

Defendant argues *Chinchilla* is distinguishable because in *Chinchilla* the two officers were crouched one in front of the other and therefore the single shot endangered both officers, but in the instant case, Barrera and his companions were not next to each other. They were standing several feet apart.

Ramirez testified they were each standing approximately two feet apart and were all within a three yard radius. Gonzalez testified he was around 15 to 25 feet from Barrera, but then also testified he was double arms distance, or five feet, from Barrera. Mendoza said he was standing three feet from Barrera and, also, he was right next to Barrera, and the others were standing five to seven feet apart.

Defendant argues the two shots could not have killed all five individuals and therefore there was insufficient evidence that he attempted to kill all five individuals. We disagree. "[W]here the design of the accused is clearly shown, slight acts done in furtherance of the crime will constitute an attempt [citation]; it is not necessary that the

---

[footnote continued from previous page]

[18] *People v. Chinchilla, supra,* 52 Cal.App.4th 683.

[19] *People v. Chinchilla, supra,* 52 Cal.App.4th at page 691.

[footnote continued on next page]

overt act be the last possible step prior to the commission of the crime."[20]

Here there was sufficient evidence that defendant committed acts in furtherance of attempting to kill Barrera and his companions. There was evidence that defendant rode with ESO companions to Castrejon's mother's home in NSO gang territory; brought a loaded handgun; opened the car door as the car stopped in front of a group of ESO gang members; and fired at the group. In addition, there was evidence NSO and ESO gang members had been fighting earlier that day; NSO and ESO were rival gangs; Barrera and his companions were all NSO gang members and defendant and his companions were ESO members; the shooting committed by defendant was in retaliation for the earlier fight that day; and the gun used in the incident was a powerful .44-caliber, single action magnum handgun. The bullets were hollow-point bullets, which mushroom upon impact, thereby causing a more severe wound. One of the rounds had an altered bullet, with an X shape sawed partially through its nose, to cause the bullet to break up into fragments upon impact, causing a larger, more severe wound. Also, defendant's fingerprints were found on the gun and on the passenger side of the car.

Defendant does not dispute that there was sufficient evidence of attempted murder of Barrera and Mendoza, who was standing next to Barrera. Defendant claims there was insufficient evidence as to the other three individuals who may have been farther away from Barrera. But there was testimony by Ramirez that Barrera and his companions were

---

[footnote continued from previous page]

[20] *People v. Morales* (1992) 5 Cal.App.4th 917, 926.

all within two feet of each other. This testimony would place them close enough to Barrera to support a conviction of attempted murder as to each of them.

Furthermore, there were four unused bullets in the gun. A reasonable inference could be made that the remaining ammunition was not fired at Barrera's companions because they fled and took cover. Certainly the motivation existed for defendant to kill them, as rival gang members, had they remained accessible. The firing of only two shots is not dispositive. There was sufficient evidence defendant committed other acts in furtherance of attempting to murder Barrera and his companions.

4. Personal Gun Use Enhancement

Defendant contends that under section 12022.53, subdivision (e)(2) the trial court erred in imposing the criminal street gang enhancement under section 186.22, subdivision (b)(4) because there was insufficient evidence that defendant personally used a firearm. He claims there was inadequate evidence that he personally fired the gun. Defendant argues this is reflected by the jury's inability to reach verdicts on the two personal gun use enhancements, one alleging defendant personally discharged a firearm causing great bodily injury and the other alleging he personally discharged a firearm from a vehicle.

The People agree this court should dismiss defendant's section 186.22 enhancements, but not because of an insufficiency of evidence. Rather, the People argue the section 186.22 enhancement fails because the jury did not return any finding that defendant personally fired the revolver. The court dismissed the two enhancements that required a personal use finding after the jury deadlocked on them. This precluded this court from remanding the case for a determination as to whether defendant personally

discharged the gun. Therefore the section 186.22 enhancement must be dismissed. Defendant agrees.

Since there was no finding by the jury that defendant personally fired the gun, the section 186.22, subdivision (b)(4) enhancements shall be stricken as to each count.

5. Juror Misconduct

Defendant claims juror No. 45 committed juror misconduct by driving by Calaveras Street where the crime occurred, and the trial court erred in failing to conduct an inquiry sufficient to determine if such conduct constituted prejudicial misconduct.

"We begin with the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors. [Citations.] '"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."'"[21]

In passing upon a claim of jury misconduct: "It is the trial court's function to resolve conflicts in the evidence, to assess the credibility of the declarants, and to evaluate the prejudicial effect of the alleged misconduct. [Citations.] . . . Consistent with the principle that a trial judge has wide discretion in ruling on a motion for new trial, an appellate court should accord great deference to a trial judge's evaluation of the prejudicial effect of jury misconduct. [Citation.]"[22] The California Supreme Court stated

---

[21] *In re Hitchings* (1993) 6 Cal.4th 97, 110.

[22] *Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 954-955.

in *People v. Nesler*[23]: "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination."

Juror No. 45 informed the court staff that she had inadvertently passed by the area where the shooting incident had occurred. Upon being informed of this, the court questioned juror No. 45 regarding the matter. Juror No. 45 told the court, "I just happened to see the street, and it kinda hit me, and . . . it just kinda put things into perspective because of all this, you know? It's jumbled in your brain because you don't really know where this is, but I wanted to let him know or somebody know that, yes, I did see the street. I didn't go on the street or anything. . . . I'd have to go by that street to get on the freeway anyway if I were to maybe go to San Bernardino or L.A. I pass that street. But it was the first time I ever noticed it, and it just kinda hit me."

The court asked juror No. 45 if she remained on the street to investigate, and she said no. "I was in traffic and I was just going -- 'cause K-Mart's just down around the corner from it and, like I said, I just kinda observed it as I was passing by."

The court asked the prosecutor and defense counsel if they had any further questions and they said no. The court then excused juror No. 45 and asked counsel if they wished to be heard further on the matter. Both counsel declined. Both counsel also informed the court they did not wish the court to excuse juror No. 45.

---

[23] *People v. Nesler* (1997) 16 Cal.4th 561, 582.

[footnote continued on next page]

Under these circumstances, defendant waived any objection to juror No. 45 remaining on the jury panel by not requesting the court to excuse her from the jury or requesting a mistrial.[24]

Defendant alternatively argues that, if the issue was waived, his attorney rendered ineffective assistance. This contention fails as well.

In order to prevail on an ineffective assistance of counsel claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission.[25] "'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.]' [Citation.]"[26]

Here, the record sheds no light on why counsel acted or failed to act in the manner challenged. The court did not request defense counsel to explain why he did not object to juror No. 45 nor did counsel volunteer an explanation.

In addition, there is a satisfactory explanation for counsel's decision not to request a mistrial or juror No. 45's removal from the jury. Juror No. 45's conduct was

---

[footnote continued from previous page]

[24] *People v. Lucas* (1995) 12 Cal.4th 415, 487.

[25] *People v. Majors* (1998) 18 Cal.4th 385, 403.

[26] *People v. Fairbank* (1997) 16 Cal.4th 1223, 1243.

[footnote continued on next page]

inadvertent, and she passed by the street where the crime occurred, not the actual location of the crime. She did not remain there for any length of time and did not conduct any investigative acts. Juror No. 45 indicated that the only impact from seeing the street was that she realized the incident had occurred there and this "put things into perspective." There was no indication that juror No. 45 was biased one way or the other due to viewing the street or that further inquiry was necessary.

Defense counsel thus reasonably could have concluded it would have been fruitless to question the juror further regarding the matter or request the juror excused since it was unlikely that doing so would result in the court finding the juror's conduct prejudicial. Defense counsel's failure to request a mistrial likewise did not constitute ineffectual assistance of counsel. Trial counsel is under no obligation to make fruitless, time-consuming, nonproductive arguments, objections or motions that are of little or no merit.[27]

[footnote continued from previous page]

[27] *People v. Hart* (1999) 20 Cal.4th 546, 620.

6. Section 12022.53 Enhancements

Defendant asserts, and the People agree, that under section 12022.53, subdivision (f) the trial court improperly imposed more than one enhancement under section 12022.53 for counts 1 through 6.

Section 12022.53, subdivision (f) provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment."

Under section 12022.53, subdivision (f), this court must thus strike all section 12022.53 enhancements imposed against defendant in excess of one per crime and only the greatest enhancement under section 12022.53 shall be imposed.

In the People's respondent's brief, the People argue for the first time that, as to count 5, the trial court erred in imposing a 20-year enhancement under subdivision (c) of section 12022.53 for discharge of a firearm, rather than the greater 25-year-to-life enhancement under subdivision (d) for discharge of a firearm, causing great bodily injury (GBI). Defendant disagrees. He claims that, although normally the court must impose the greater enhancement, here, the trial court properly stayed the subdivision (d) enhancement pursuant to section 654 because Barrera's injury was the subject of both the count 5 and count 1 subdivision (d) enhancements. We agree defendant cannot be punished twice for the same enhancement but the subdivision (d) enhancement imposed on count 5 must be stricken, not stayed.

During sentencing on count 5 (attempted murder of Castrejon), the court stated:

"For Count 5, based on the fact that this was an act of violence against a separate individual -- as a matter of fact, it appears that this individual -- the initial motive was to attempt to murder the victim [Castrejon] based on a prior contact between the defendant's gang and this individual, I'm going to use my discretion and impose a consecutive sentence for Count 5 to be consecutive to Count 1. [¶] . . . [¶] For the enhancement of 12022.53(c) for principal discharge of a firearm, which was found true, I'm going to impose 20 years in the state prison, consecutive. [¶] For the enhancement of 12022.53(d), which was found true, I'm imposing a 25-year to life sentence, but staying it pursuant to 654 of the Penal Code."

Section 654, subdivision (a) provides that "An act or omission which 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." The statute does not prevent multiple convictions for the same conduct, only multiple punishment.[28]

While the People did not object to the court staying the section (d) enhancement under section 654, as to count 5, the objection is not waivable under *People v. Scott*.[29] The court in *Scott* states: "It is well settled, for example, that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654."

---

[28] *People v. Pearson* (1986) 42 Cal.3d 351, 359-361.

[29] *People v. Scott* (1994) 9 Cal.4th 331, 354, footnote 17.

[footnote continued on next page]

We thus address the issue of whether the trial court erred in staying the subdivision (d) enhancement under section 654 because the court imposed the same enhancement on count 1. In *People v. Moringlane*,[30] we concluded that, "section 654 proscribes multiple punishment for the same act unless the act constituted a crime against several persons. [Citations.] And we are persuaded that section 654 as interpreted prohibits the imposition of multiple enhancements for the single act of inflicting great bodily injury upon one person."[31]

In *Moringlane*, the defendant and codefendant were in a car chasing and firing at a car containing Javier Silva and Michael Rico. Several shots missed the car and hit Danny McDowell and his son, William McDowell, who were traveling in another vehicle. Danny was killed and William was seriously injured. The jury convicted the defendant of assaulting three victims, William McDowell, Javier Silva, and Michael Rico. The trial court imposed three identical GBI enhancements for inflicting GBI on William McDowell. The *Moringlane* court held that only one GBI enhancement could be imposed because the enhancements were based on a single act of GBI against a single victim, William McDowell.[32] The *Moringlane* court therefore struck the GBI enhancements as to the assault counts involving Silva and Rico, and left the enhancement

---

[footnote continued from previous page]

[30] *People v. Moringlane* (1982) 127 Cal.App.3d 811.

[31] *People v. Moringlane, supra,* 127 Cal.App.3d at page 817.

[32] *People v. Moringlane, supra,* 127 Cal.App.3d at page 817.

[footnote continued on next page]

as to the count for assault against William McDowell.

Although *Moringlane* is on point factually, it is not dispositive here because *Moringlane* was decided in 1982, before enactment of section 12022.53 in 1997, and thus the court did not address the issue of whether a section 12022.53 enhancement is exempt from section 654.

The court in a more recent 2001 case, *People v. Reeves*,[33] likewise concluded section 654 applied to enhancements but the *Reeves* decision is also not dispositive. It involved a section 12022.7 GBI enhancement and section 12022.7 does not contain the following language contained in section 12022.53, which the People argue exempts section 12022.53 enhancements from section 654: "Notwithstanding any other provision of law, any person who is convicted of a felony . . . , and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, . . . to any person . . . , shall be punished . . . , which shall be imposed in addition and consecutive to the punishment prescribed for that felony."[34]

The court in *People v. Hutchins*,[35] addressed the issue of whether section 654 applies to section 12022.53 enhancements and concluded section 654 does not apply because section 12022.53 contains language exempting section 12022.53 enhancements

---

[footnote continued from previous page]

[33] *People v. Reeves* (2001) 91 Cal.App.4th 14.

[34] Section 12022.53 (d).

[35] *People v. Hutchins* (2001) 90 Cal.App.4th 1308.

[footnote continued on next page]

from section 654. Section 12022.53 states that "punishment" for a section 12022.53 enhancement shall apply "Notwithstanding any other provision of law."[36]

In *Hutchins* the defendant was convicted of second degree murder and shooting at a person from a vehicle. The court imposed on the defendant's second degree murder conviction a section 12022.53, subdivision (d) enhancement. The defendant argued the trial court violated section 654 by imposing an additional statutory term of 25 years to life for the section 12022.53, subdivision (d) enhancement. The *Hutchins* court disagreed.[37]

In reaching its holding, the *Hutchins* court explained: "The plain language of the statute at issue in this case, section 12022.53, mandates imposition of the additional enhancement sentence. Thus, the statute clearly and unambiguously states that '*[n]otwithstanding any other provision of law,* any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, *shall be punished* by a term of imprisonment of 25 years to life in the state prison, *which shall be imposed in addition and consecutive to the punishment prescribed for that felony*.' (§ 12022.53, subd. (d), italics added.) [Fn.

[footnote continued from previous page]

[36] Section 12022.53, subdivisions (b), (c), (d), (g) and (h).

[37] *People v. Hutchins, supra,* 90 Cal.App.4th at page 1315.

[footnote continued on next page]

omitted.] Elsewhere the same statute specifically provides that '*[n]otwithstanding any other provision of law,*' a trial court '*shall not*' suspend execution or imposition of sentence for any person found to come within the provisions of this enhancement statute, or strike any allegation or finding that brings a person within the provisions of this section. (§ 12022.53, subds. (g), (h), italics added.) [Fn. omitted.]"[38]

Not only does the language in section 12022.53 indicate section 654 shall not apply when *imposing* a section 12022.53 enhancement, it further clearly states that the court must *punish* the defendant for the enhancement, as opposed to staying or suspending punishment under section 654.

The *Hutchins* court explained that, "Clearly, in enacting this provision the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes, including homicide, was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties. . . . Section 654 is not implicated by the imposition of a sentencing enhancement on a particular manner of committing murder- with the use of a firearm-- adjudged by society through its legislative representatives as particularly egregious and dangerous. What the Legislature has done by enacting section 12022.53 is not to punish the same single criminal act more than once or in more than one way. Instead, in

---

[footnote continued from previous page]

[38] *People v. Hutchins, supra,* 90 Cal.App.4th at page 1313.

[footnote continued on next page]

determining that a criminal offender may receive additional punishment for any single crime committed with a firearm, the Legislature has chosen to enhance or expand the punishment imposed on a single underlying crime, where committed by use of a firearm, in order to deter a particular form of violence judged especially threatening to the social fabric."[39] In *People v. Arndt*,[40] the court noted that "the Legislature may provide for increased *punishment* for an offense that has more serious consequences by, for instance, . . . adding enhancements . . . .' [Citations]."

As aptly noted in *Hutchins*, "Under appellant's interpretation of section 12022.53, where a victim dies from bullets fired in the commission of a felony, the person who pulls the trigger can never have the sentence enhanced pursuant to that statute. 'This result would undermine the intent of the legislation, which was to punish such acts harshly.' [Citation.]" [41]

Hutchins, however, is not dispositive of the issue here, in which the identical enhancement is applied to more than one underlying crime and the defendant is punished twice for the same enhancement. Furthermore, there is no case law directly addressing this issue. In determining whether section 654 applies when the same enhancement is applied to more than one underlying crime, we begin our analysis with familiar rules of

---

[footnote continued from previous page]

[39] *People v. Hutchins, supra,* 90 Cal.App.4th at pages 1313-1314.

[40] *People v. Arndt* (1999) 76 Cal.App.4th 387, 396.

[41] *People v. Hutchins, supra,* 90 Cal.App.4th at page 1314.

[footnote continued on next page]

statutory construction. "'Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law.' [Citation.] In determining legislative intent, we first look to the statutory language itself. (*Ibid*.) 'The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]' [Citation.] Thus, 'every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect.' [Citations.]. . . . 'Where as here two codes are to be construed, they "must be regarded as blending into each other and forming a single statute." [Citation.] Accordingly, they "must be read together and so construed as to give effect, when possible, to all the provisions thereof." [Citation.]' [Citations.]"[42]

In construing section 12022.53, we begin with the premise that "section 654, like any other statute, is presumed to govern every case to which it applies by its terms--unless some other statute creates an express exception."[43] Our Supreme Court in *People v. Norrell*[44] noted that "[The Legislature] has enacted sentencing provisions that are not

---

[footnote continued from previous page]

[42] *Mejia v. Reed* (3/29/02) 2002 WL 475112, 6.

[43] *People v. Siko* (1988) 45 Cal.3d 820, 824.

[44] *People v. Norrell* (1996) 13 Cal.4th 1, 6.

subject to the requirements of Penal Code section 654."[45]

While we are convinced that the language in section 12022.53 exempts it from section 654 when the principal crime and section 12022.53 enhancement are based on the same course of conduct, we are not so convinced as to identical enhancements imposed on different underlying crimes since there is no language expressly authorizing multiple punishment for identical section 12022.53, subdivision (d) enhancements. We must thus conclude the Legislature did not intend to create an exception to section 654 when applying the identical GBI enhancement under section 12022.53, subdivision (d) to separate underlying crimes. Since section 654 applies under such circumstances, under *Moringlane*, section 654 prohibits imposition of the section 12022.53, subdivision (d) enhancement on both counts 1 and 5.

Although section 654 applies here, where the same section 12022.53 enhancement is applied to both counts 1 and 5, under section 12022.53, subdivision (f), the trial court should have stricken the section 12022.53, subdivision (d) enhancement, rather than staying it, since the court also imposed a section 12022.53, subdivision (c) enhancement on the same count.

We further note the abstract of judgment is in error in not showing that the court imposed a consecutive 25-years-to-life enhancement under section 12022.53, subdivision (d), as to count 1, the principal count. The abstract must be corrected to reflect the subdivision (d) enhancement. The other enhancements under section 12022.53 for count

---

[45] *People v. Norrell*, *supra*, 13 Cal.4th at page 6, footnote 2.

1 must be stricken, i.e., enhancements (b) and (c) of section 12022.53.

All of the enhancements imposed under section 12022.53 as to counts 2, 3, 4, and 6 were stayed under either section 654 or subdivision (f) of section 12022.53 and thus should be stricken, with the exception of the section 12022.53, subdivision (d) enhancements, which shall be stayed under section 654.

As to count 5, as discussed above, the court imposed the subdivision (c) enhancement. The subdivision (d) and (b) enhancements were stayed under subdivision (f) of sections 12022.53 and 654, respectively, and therefore must be stricken.

7. Disposition

The judgment is modified by striking the section 186.22, subdivision (b)(4) criminal street gang enhancements imposed as to each of counts 1 through 6.

We further note the abstract of judgment is in error in not showing that the court imposed a consecutive 25-year-to-life enhancement under section 12022.53, subdivision (d), as to count 1, the principal count. The abstract of judgment shall reflect the subdivision (d) enhancement imposed by the trial court on count 1. The judgment is further modified such that the other enhancements under section 12022.53 for count 1 are stricken, i.e., enhancements (b) and (c) of section 12022.53.

The trial court stayed the enhancements (b), (c), and (d) imposed under section 12022.53 as to counts 2, 3, 4, and 6, under either section 654 or subdivision (f) of section 12022.53. The trial court shall strike enhancements (b) and (c) under section 12022.53, subdivision (f), and the section (d) enhancements shall remain stayed as to counts 2, 3, 4, and 6 as they are the greatest imposed enhancements under section 12022.53, subdivision

(f) on counts 2, 3, 4, and 6.

As to count 5, the subdivision (b) and (d) enhancements are stricken, with the section 12022.53, subdivision (c) enhancement imposed for a 20-year prison term consecutive to the prison term for the underlying conviction on count 5.

As modified the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment that reflects defendant's modified sentence and to forward copies of that amended abstract to the appropriate agencies.

CERTIFIED FOR PUBLICATION

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Ward
J.