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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDREA K. BACHMAN,

Defendant and Appellant.

A130399

(Solano County
Super. Ct. No. VCR206150)

This appeal by Alexandra K. Bachman challenges two aspects of her sentence to four years in prison, less credits, after a jury found her not guilty of attempted murder and mayhem, but guilty of battery with serious bodily injury (Pen. Code, § 243, subd. (d)),¹ and assault with a deadly weapon—a car (§ 245, subd. (a)(1)).

We modify and affirm the judgment.

BACKGROUND

All charges arose from an incident in a parking lot outside a Popeye’s Chicken in Vallejo (Popeye’s) shortly after midnight on January 19, 2010. Bachman had been driving longtime friend Anna Webber and recent acquaintance Taylor Roberson around that evening in a large four-door Buick, stopping at people’s homes, drinking and buying liquor. They started near Sebastopol, went to Santa Rosa, and wound up at the Vallejo location, by which time Bachman and Roberson were both drunk. Bachman first dropped the other two off at a that location and left, Webber expecting that her grandfather would

¹ All undesignated further section references are to the Penal Code.

pick them up there to take them home, but Roberson grew irate at the idea of having been left there. Webber tried to calm her and got her soup at a store across from Popeye's, Parkway Liquors, hoping it would sober up the increasingly loud and enraged Roberson, but without effect. They walked back to wait outside Popeye's, and Roberson vowed that if Bachman came back, she was going to fight her.

Bachman did return, perhaps 15 or 20 minutes after dropping them off. Seeing the car, Roberson immediately pulled off her earrings, threw down her purse, and challenged Bachman to fight. She screamed, and pounded and kicked at the car as Bachman stayed inside. Details of what ensued varied a bit between four testifying witnesses, but Bachman backed up the car, drove away, and in the process knocked Roberson over, hit her again as she drove forward, drove over one or both legs, and dragged her under the car for 766 feet before Roberson became dislodged and rolled out as the car pulled onto the highway, not stopping. Roberson suffered no broken bones but was badly mutilated on the head and torso, requiring weeks of hospitalization, multiple skin grafts, and surgery to reattach her left ear.

Mohamad Said saw the incident from outside the liquor store and had just seen Webber and Roberson leave the store with the soup. His account of the Buick's movement was that it backed up 10 to 15 feet to make a U-turn, in that manner resulted in Roberson being in front of car when it drove forward and hit and dragged her. Said heard Roberson screaming and himself screamed out for the driver to stop as the car passed within a few feet of him. He ran after the car, screaming out all the while, called 911, and got to Roberson as she lay on the ground in the street. He never saw Roberson pound or yell at the driver's side of the car, only the passenger side.

Roberson's version was also that she started on the passenger side, was first struck by the front of the car as she stood at one corner, and was struck the second time, within seconds, as she was rising to her feet. She recalled screaming while being dragged.

Webber, too, saw Roberson kick and scream at the passenger side of the car. Alone among the witnesses, she said the car window stayed open on the passenger side and that Roberson hung onto the door there as the car first moved back (rolling over

Roberson's purse), then lost her grip. Roberson resumed kicking again at the car before being hit by the front driver's side. Webber recalled yelling for help and heard Roberson yell under the car as well.

Bachman admitted being too drunk to be driving. She said she rolled down a passenger window meaning to hail the others to get in, but then rolled all windows up out of fear once Roberson began yelling, pounding on and kicking the car, and goading her to fight. Trying to get away, Bachman said, she backed up, not realizing that Roberson had fallen, and drove forward out of the lot, not hearing anyone call out or realizing she ran over and was dragging Roberson. She recalled Roberson hitting and screaming at the driver's side window as well.

Bachman's defenses were that she was too drunk to form an intent to kill, did not know she was harming Roberson, and acted in self-defense (ordinary or imperfect).

The jury returned verdicts of not guilty of count 1 attempted murder or a lesser offense of attempted voluntary manslaughter, not guilty of count 2 mayhem but guilty of a lesser offense of battery with serious bodily injury (SBI) (§ 243, subd. (d)), and guilty of count 3 assault with a deadly weapon (car) (§ 245, subd. (a)(1)). The court, realizing only then that jurors had not been given a form on which to decide a great bodily injury (GBI) enhancement for count 3 (§ 12022.7), sent the jury back out. The jury took only minutes to find the GBI enhancement not true, despite having found guilt of battery with SBI.

DISCUSSION

One-for-One Credits

The court awarded presentence credits of 265 days, consisting of 177 actual and 88 conduct/work days. Bachman acceded to that calculation below but argues now that she was entitled to 88 days more under the scheme of section 4019 as modified to allow one-for-one credits. She may raise this claim on appeal despite lack of objection below (*People v. Cooper* (2002) 27 Cal.4th 38, 41, fn. 3), and the need to first seek correction in the trial court (§ 1237.1) does not apply since her appeal is not based solely on the miscalculation claim (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420).

This sentencing was on October 21, 2010, for crimes committed in January 2010. The current version of section 4019 expressly applies only to crimes committed after recent amendments (§ 4019, subds. (g) [added by Stats. 2010, ch. 426, § 2, eff. Sept. 28, 2010] & (h) [added by Stats. 2011, ch. 15, § 482, operative Oct. 1, 2011]), so this sentencing is governed by the preceding version (hereafter former section 4019) (Stats. 2009, 3d Ex. Sess., ch. 28, § 50, No. 10 West’s Cal. Legis. Service, pp. 5270-5271, eff. Jan. 25, 2010).

Subdivision (f) of former section 4019 summarized the overall scheme this way: “It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c).” The 88 days awarded below to Bachman comported with the exception language, and the referenced paragraphs dealt, respectively, with credits for assigned work and good conduct. Each provided in part for the lesser credits for a prisoner “committed for a serious felony, as defined in Section 1192.7” (Former section 4019, subds. (b)(2) & (c)(2).)

The sentencing court did not articulate why it denied one-for-one credits, and Bachman argues that she was entitled to them because she was not committed for a serious felony as defined in section 1192.7. Focusing on subdivision (c)(8) of section 1192.7, which defines in part as a serious felony “[a]ny felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice,” she stresses that the jury, when sent back to deliberate on the GBI enhancement for count 2, returned a not-true finding and that the count 3 conviction was only for the use of a deadly weapon (car) with force “likely” to produce GBI (§ 245, subd. (a)(1)). Acknowledging that the not-true finding was odd given that the jury had just found her guilty on that count of battery with SBI, Bachman suggests that it was due to “leniency” or a “compromise verdict.” She urges that the not-true finding means she was not committed for a serious felony. Anticipating counterargument that SBI, in

count 2 itself, is the essential equivalent, Bachman argues that to imply a finding of GBI, a serious-felony enhancement, would violate her statutory right to have a jury try serious-felony allegations (§ 969f) and her due process right under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), to have a jury decide any fact that increased the penalty for her offenses.

We do not reach most of those points, for we agree with the People that the count 3 conviction for assault with a deadly weapon (car) constituted a serious felony. Section 1192.7, subdivision (c)(31), lists “assault with a deadly weapon . . . in violation of Section 245” as a serious felony. This was not always so. *People v. Rodriguez* (1998) 17 Cal.4th 253, 261, found to the contrary at a time when section 1192.7 covered such assaults only under provisions that required, as they still do, *personal infliction* of GBI or *personal use* of a firearm or deadly weapon. (§ 1192.7, subd. (c)(8), (23).) But as explained in *People v. Luna* (2003) 113 Cal.App.4th 395, 398 (*Luna*), in upholding proof of a serious-felony prior: “[After] *Rodriguez* was decided, the voters adopted Proposition 21 in the March 7, 2000, Primary Election. [] Among the effects of Proposition 21 was the adoption of Penal Code section 1192.7, subdivision (c)(31), which deletes for serious felony purposes the personal use requirement for assault with a deadly weapon[:] ‘As used in this section, “serious felony” means any of the following: [¶] . . . (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245’ [Citation.] . . . There is no requirement that the accused *personally* use the deadly weapon as in Penal Code section 1192.7, subdivision (c)(8) and (23).” There is also no requirement in the added subdivision for personal infliction of GBI.

Bachman tries to distinguish *Luna* as involving a serious-felony *prior*, noting that enhancement priors are excepted from *Apprendi*’s rule of jury determination (*Apprendi*, *supra*, 530 U.S. at p. 490), but we are not persuaded that the distinction matters in this case. Bachman notes that numerous Court of Appeal decisions currently pending before our Supreme Court pose the question of former section 4019’s retroactive application (not an issue here) and, in some, whether there is a pleading-and-proof requirement for

the reduced-credit consequences of serious-felony commitments. The latter question also poses an underlying question whether a reduction of credits for serious-felony offenders constitutes an enhancement with the meaning of *Apprendi*, or just a sentencing fact that can be found without a jury by a sentencing judge. (See discussion in *Harris v. United States* (2002) 536 U.S. 545, 549-569.) But even if our Supreme Court should ultimately reach the enhancement/sentencing fact question and resolve it in Bachman's favor, it would not compel a different result in this case because this jury *did* determine that she committed assault with a deadly weapon.

Bachman correctly observes that the court here "did not tell the jury about a subdivision [(c)](31) enhancement," but her implicit argument that she was entitled to have the jury so apprised is flawed. She stresses the jury's odd finding of guilt on the count 2 offense for battery with SBI yet rejection of a GBI enhancement, offering that this was a "compromise verdict," but it is unclear where this leads us. Inconsistent jury verdicts, as between an offense and an enhancement, are allowed to stand (*People v. Santamaria* (1994) 8 Cal.4th 903, 911), but if Bachman means to say she was entitled to have the jury know that a guilty verdict on count 2 would *also* result in an "enhancement" so that jurors might, despite its view of the evidence, nullify the charges, then the claim is untenable. A California defendant has no right to instructions telling the jury that it may nullify the law. (*People v. Baca* (1996) 48 Cal.App.4th 1703, 1707-1708; *People v. Fernandez* (1994) 26 Cal.App.4th 710, 714-715; see also *U.S. v. Johnson* (6th Cir. 1995) 62 F.3d 849, 850-851.)

Bachman urges us to reject *Luna* as partially rendering other subdivisions of section 1197.2 surplusage. She cites subdivisions (c)(11) (assault with a deadly weapon or instrument on a peace officer), (c)(13) (assault with a deadly weapon by an inmate), (c)(23) (any felony with personal use of a dangerous or deadly weapon), and (c)(32) (assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of §§ 245.2, 245.3, or 245.5). To avoid surplusage, she suggests that we construe subdivision (c)(31) as if it contained these italicized words: "[A]ssault with a deadly weapon *such as* firearm, machinegun, assault weapon, or

semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245.” By construing subdivision (c)(31) as general and illustrative, she proposes, the canon of *ejusdem generis* would give independent effect to all of the provisions, including the earlier, more specific definitions. (See generally *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159-1161 & fns. 7 & 8; *Sullivan v. Fox* (1987) 189 Cal.App.3d 673, 680.)

We adhere to *Luna*. It follows the plain meaning of subdivision (c)(31), leaving no need for resort to *ejusdem generis* or any other canon of statutory construction. “When statutory language is clear, judicial construction is neither necessary nor proper. [Citation.]” (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179.) Nor is there any ambiguity that would permit construction by other means. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190.) Subdivision (c)(31) may overlap with other definitions, but overlap is not new to section 1192.7. (Compare, e.g., subd. (c)(10) [assault with intent to commit rape or robbery] with subd. (c)(29) [assault with intent to commit mayhem, rape, sodomy or oral copulation, in violation of section 220]), and is perhaps less surprising when a statute is amended, as here, by voter proposition rather than by presumptively more deliberative and researched action by the Legislature. Finally, it is also nightmarish to think that section 1192.7, with so many enhancement and other important consequences flowing from its list of “serious felony” offenses, would include a vague provision for offenses “such as” other ones mentioned.

No error is demonstrated in the court’s award of presentence credits.

Concurrent Terms

The court chose a four-year aggravated term for the count 3 assault with a deadly weapon (§ 245, subd. (a)(1)), a two-year “mid-term” term for the count 2 battery with serious bodily injury (§ 243, subd. (d)),² and ordered that the terms run concurrently. Bachman claims error in the concurrent terms, arguing that the count 2 term must be

² The court may have misunderstood that the available felony terms for battery with serious bodily injury are two, three, and four years (§ 243, subd. (d)), making three years, not two, the “mid-term,” but the People raise no claim of error in this regard.

stayed because the offenses comprised an indivisible course of conduct. We agree there was error.

“Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.] 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. [Citation.] Section 654 does not allow any multiple punishment, including . . . concurrent . . . sentences. [Citation.]” (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) Failure by Bachman to raise this issue below does not forfeit the claim on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

“It is the defendant’s intent and objective, not the temporal proximity of h[er] offenses, which determine whether the transaction is indivisible. [Citations.] . . . [I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] ¶ If, on the other hand, defendant harbored ‘multiple criminal objectives,’ which were independent of and not merely incidental to each other, [s]he may be punished for each statutory violation committed in pursuit of each objective, ‘even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.’ [Citation.]” (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Remarks by the court at the start of the sentencing hearing, before testimony or arguments, indicate that the court assumed that section 654 would apply. The court’s ultimate imposition of punishment for both offense would ordinarily *imply* a factual finding that there was more than one objective behind the offenses (*People v. Osband* (1996) 13 Cal.4th 622, 730-731), a finding that we would be bound to uphold if it was supported by substantial evidence (*id.* at p. 730; *People v. Watts* (1999) 76 Cal.App.4th 1250, 1265).

The problem with implying a dual-objective finding here is that the record betrays a misunderstanding by the court and prosecutor that running the terms concurrently would

satisfy section 654. The full remarks, with the prosecutor's responses, read: "THE COURT: Whatever punishment is out there on the 243(d), that would be moot, because it would be 654'd by the conviction of a 245(a)(1). In other words, [Bachman] could not be sentenced on both. She could be convicted of both, but she could not be punished for both. [¶] MR. GANZ: Consecutively. [¶] THE COURT: Consecutively. [¶] MR. GANZ. Correct." Nothing in the ensuing argument spoke to the section 654 issue, or to whether the terms should run concurrently. Also weighing against implying a dual-objective finding, the sentencing judge, the Honorable Allan P. Carter, was not the same judge who had presided at trial. He was therefore not well positioned to assess dual objectives from the trial evidence.

The record reflects that Judge Carter found that section 654 *did* bar multiple punishment³ but assumed that the solution was to run the terms concurrently rather than consecutively. That assumption was erroneous, and the count 2 term must be stayed. (*People v. Deloza, supra*, 18 Cal.4th at pp. 591-592.)

³ While not challenged, the implicit finding of a single objective is supported by substantial evidence. Backing the car and then going forward out of the lot could reasonably be viewed as done to get away from the situation, without time to reflect.

DISPOSITION

The judgment is modified to reflect that the two-year term imposed for battery with SBI (§ 243, subd. (d)) is stayed pursuant to section 654. As modified, the judgment is affirmed. The trial court shall direct that an amended abstract of judgment (§ 1213.5) be prepared and forwarded to the appropriate custodial authority.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.