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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JIHAD MALCOLM OSBY,

Defendant and Appellant.

A140903

(Solano County  
Super. Ct. No. FCR296848)

Jihad Malcolm Osby (appellant) appeals from a judgment entered after he pleaded no contest to one count of home invasion robbery (Pen. Code, <sup>1</sup> § 211; count 1) and two counts of criminal threats (§ 422; counts 4 & 5), with personal use of a firearm (§ 12022.5, subd. (a)(1)) as to all three counts and infliction of great bodily injury (§ 12022.7, subd. (a)) as to count 1. He contends the trial court: (1) erred in imposing the upper term for the gun use enhancement; (2) erred in refusing to stay the sentence on counts 4 and 5 pursuant to section 654; and (3) erred in ordering him to pay a \$10,000 restitution fine without considering his ability to pay. We reject the contentions and affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On April 18, 2013, an information was filed charging appellant with home invasion robbery (§ 211; count 1), first degree burglary (§ 459; count 2), two counts of assault with a firearm (§ 245, subd. (a)(2); counts 3 & 6), and two counts of criminal

<sup>1</sup>All further statutory references are to the Penal Code unless otherwise stated.

threats (§ 422; counts 4 & 5). The information alleged as to counts 1, 3, 4, 5 and 6 that appellant personally used a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)), and alleged as to counts 1 and 3 that he personally inflicted great bodily injury (§ 12022.7, subd. (a)).

The information was based on an incident that occurred at approximately 12:45 a.m. or 1:00 a.m. on October 12, 2012. That night, Donald and Giselle G. were home with their two children and Giselle's mother, who was visiting. Donald was sleeping and Giselle was preparing to go to bed when the doorbell rang. Giselle went to the front of the house, looked out a window, and saw a stranger standing outside signaling to another person. Giselle returned to her bedroom, entered the closet so that she would be safe and no one would hear her, and called the police from her cell phone. She told a police dispatcher what was going on. Donald woke up as Giselle made the call, and although Giselle said to him, "No. Wait. Stop," he left the bedroom to investigate because he "thought there [were] kids out there TPing the house or something like that." As Donald walked to the front door, appellant entered the house through an unlocked sliding glass side door. Donald called out, "Hey, what are you doing here?" Appellant responded by leveling a sawed-off rifle at Donald. Keeping the gun trained on Donald, appellant quickly walked over and pressed the barrel to Donald's head. Appellant grabbed Donald by the shirt collar and said he was going to rob Donald and then kill him. Appellant then hit Donald on the left cheek with the butt of the rifle.

Realizing what was going on, Giselle put the cell phone down in the closet without disconnecting the call with the police dispatcher. She walked out of the bedroom into a hallway, where she saw appellant strike Donald in the face with a rifle. She heard someone say, " 'We here for real. We are here to kill you. We are going to kill you tonight. Where's the money?' " Appellant forced Donald back toward the bedroom, and Donald heard Giselle crying behind him. Appellant told Donald to get down on the floor, but Donald refused out of concern for Giselle. Appellant struck Donald in the face again with the rifle, knocking him to the floor. Giselle got down on floor on all fours. Appellant pointed the gun to her head and said he was there to kill her. Appellant walked

back and forth between Donald and Giselle, straddling Giselle with his legs each time he walked by her. A second assailant came over and held Donald down. The second man held a knife or screwdriver to Donald's eye, then to his throat, and threatened to kill Donald if he moved.

Donald called out several times that appellant should leave Giselle alone and talk to him instead. Each time he did so, appellant walked over and hit Donald in the face with the rifle. The two men repeated their intention to rob Donald and Giselle, demanding, "Where's the money? Where's the money? Where's the money? Where's the money?" "The whole entire time," appellant "kept telling [Donald and Giselle that] he was going to kill [them]." Appellant took out a bullet and rubbed it on Donald's face, which by then was "all smashed in." While rubbing the bullet on Donald's face, appellant said it was the bullet he was going to use to kill Donald. Appellant walked into the bedroom and began opening the drawers. After discovering the cell phone in the closet, appellant came out of the bedroom and said to the other man, "They already called the police," and "We got to get out of here." Appellant punched Donald once or twice and demanded his wallet. Donald said he thought it was in his jeans; appellant and the other man grabbed the jeans, hit Donald again, and fled with Giselle's cell phone.

The police arrived shortly thereafter and Donald was rushed to the emergency room. His eye socket, cheek bones, temple, jaw, nose, and sinus cavity were shattered as a result of the blows and required surgery. Two titanium plates were inserted to stabilize the bones.

Pursuant to a plea agreement on November 4, 2013, appellant pleaded no contest to counts 1, 4, and 5, and admitted the great bodily injury allegation in count 1 and the personal firearm use allegations under section 12022.5, subdivision (a)(1), in exchange for dismissal of the remaining counts and enhancements with a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) and a maximum sentence of 23 years in prison. On December 19, 2013, the court sentenced appellant to an aggregate term of 18 years 4 months in state prison, consisting of the mid term of four years for the robbery, eight months (one third of the mid term) for each of the two criminal threat

counts, three years for the infliction of great bodily injury, and the upper term of 10 years for the firearm enhancement.

## DISCUSSION

### *1. Gun Use Enhancement*

#### *A. Dual Use*

Appellant contends the trial court violated the prohibition against dual use of facts when it imposed the upper term for the gun use enhancement. Specifically, he asserts the court improperly relied on one fact—great bodily injury—twice, to impose the upper term for the gun use enhancement *and* to impose a separate three-year-term for the enhancement of personal infliction of great bodily injury. We reject the contention.

A party who does not object to a trial court’s “failure to properly make or articulate its discretionary sentencing choices” forfeits the right to raise the claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) “Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.” (*Ibid.*) Appellant asserts there was no forfeiture because defense counsel submitted a pre-hearing memorandum in which she argued for the lower term, and because counsel “vigorously argued for the low or mid-term” at sentencing. Counsel, however, did not object on dual use grounds at any time. (*People v. Partida* (2005) 37 Cal.4th 428, 433–435 [appellate review precluded unless party states precise basis of objection]; *People v. Gonzalez* (2003) 31 Cal.4th 745, 755 [dual use violations forfeited by failure to object in trial court].) Thus, he has forfeited this claim.

Even assuming there was no forfeiture, we would conclude the contention fails on the merits. Under section 1170, subdivision (b), trial courts have the discretion to select among the lower, middle, and upper terms. The court “may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” (*Ibid.*) However, a single factor in aggravation is sufficient to justify the

imposition of the upper term for an enhancement. (*People v. Brown* (2002) 83 Cal.App.4th 1037, 1043.)

Here, in imposing the upper term for the gun use enhancement, the trial court stated, “So for the use of the firearm—and I want to point out, this firearm was . . . used . . . not only as a threat, it wasn’t just a matter of pointing the firearm like many robberies are carried out, firearms are either brandished or actually pointed and the victim surrenders his goods because he’s afraid he’s about to be shot, that’s not what we’re dealing here with. We’re dealing with a use of the firearm that resulted in [Donald], you know, believing at one point that he was going to lose his eye, that his face was completely caved in, that his jaw was shattered. He’s had all these surgeries.” The court also noted at sentencing that appellant “went back and forth from [Donald] and [Giselle] back and forth making these demands, making these threats. The idea that after having beaten [Donald] to the extent he was beaten for [appellant] to show him a bullet and tell him this is the bullet you’re going to die from tonight, I think, you know, this is the stuff that horror movies are made of.”

The above statement shows that in imposing the upper term, the trial court relied on the fact that appellant’s use of the firearm was much more egregious than just brandishing or pointing a firearm at the victim. The record supported that finding, as there was evidence that appellant used the rifle in a brutal manner by not only displaying it and pointing it at Donald, but also taunting and threatening him and Giselle with it, and violently smashing it into the side of Donald’s face, thereby seriously injuring him. Although, in discussing the aggravated nature of the gun use, the court also referred to the damaging result of the beatings, i.e., the severe injuries that resulted, its focus was on *how the gun was used*—an aggravating factor that justified the selection of the upper term. (*People v. Douglas* (1995) 36 Cal.App.4th 1681, 1691–1692 [“The manner in which [the defendant] used the gun clearly involved the threat of great bodily harm, which . . . is a factor legally sufficient to justify imposition of the upper term”]; *People v. Alvarez* (1992) 9 Cal.App.4th 121, 127–128 [while section 12022.5 focuses on the *conduct* of the defendant and punishes for the use of a firearm, the great bodily injury

enhancement focuses on the *result* to the victim and punishes for the injury that is inflicted].) Moreover, there was evidence that appellant used the rifle *repeatedly*, going “back and forth from [Donald] and [Giselle]” and hitting Donald in the face with the rifle each time Donald told appellant to leave Giselle alone. Appellant’s repeated and violent use of the rifle were aggravating factors that supported imposition of the upper term.

### ***B. Mitigating Factors***

In arguing that any error regarding dual use was not harmless, appellant contends the trial court “failed to . . . acknowledge” and “dismissed many other valid mitigating factors.” Appellant points to his learning disabilities, mental impairments, drug addiction, remorse, lack of prior adult offense or serious juvenile offenses, and difficult upbringing. We reject the contention.

Here, the trial court stated it had read all materials including letters in support, as well as the report by a defense expert who addressed all mitigating factors. The court also allowed the expert and appellant’s brother to speak at sentencing. The court explained in great detail why it rejected appellant’s position regarding mitigation, stating, among other things, that appellant’s apology “[rang] somewhat hollow to the Court,” that his upbringing, while difficult, was not one that merited mitigation, and that appellant had had several encounters with the juvenile justice system involving weapons and violence, and that the juvenile court had “bent over backwards . . . to give him breaks, keep him out of custody, return him home,” but that appellant had failed to take advantage of those opportunities. The court also acknowledged that appellant’s deficits, as well as his youth, may have contributed to his making bad judgments, but emphasized that the harm appellant inflicted was “horrendous,” and that he was in a leadership position throughout, making the decisions and inflicting the beatings. The court cited as mitigating factors appellant’s youth and the fact that he had never been to prison, but did not find these factors particularly compelling. “[T]he court is presumed to have considered all relevant criteria enumerated in the rules unless the record affirmatively demonstrates otherwise.” (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836; Cal. Rules of Court, rule

4.409.) There is nothing in this record indicating the court failed to consider mitigating factors.

## ***2. 654 Challenge to Sentencing on Counts 4 and 5***

Appellant contends the trial court erred in refusing to stay the sentence on counts 4 and 5 pursuant to section 654. Assuming, without deciding, that this issue is properly before this court,<sup>2</sup> we conclude there was no error.

Section 654 provides: “(a) An act or omission that 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.” If all of the crimes are merely incidental to, or are the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525.) “If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct.” (*Ibid.*)

In reviewing a claim that the court erred in failing to stay a sentence pursuant to section 654, the defendant’s intent and objective presents a question of fact. The trial court’s determination will be reviewed under the deferential substantial evidence standard, i.e., the court’s finding—express or implied—will be sustained if there is substantial evidence to support it, whether or not the evidence would also support a contrary finding. (*Neal v. State of California* (1960) 55 Cal.2d 11, 17, overruled on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 334.)

In finding that multiple punishments were appropriate, the trial court stated, “I don’t think when you come over and show someone a bullet after you’ve beaten their face in and say this is the bullet I’m going to kill you with that that’s the same as the beating initially or the force used in the robbery. That’s a terrorist threat.” The court also

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<sup>2</sup>The Attorney General argues the issue is forfeited because appellant failed to obtain a certificate of probable cause and because he waived his right to appeal as part of his plea bargain.

emphasized that appellant paced back and forth between the victims, taunting them and threatening them, seemingly “g[etting] some kind of thrill or high out of what he was doing.” “I can’t think of anything more cowardly than threatening a woman, a man his size[,] twice as big as [Donald], he’s three times as big as Giselle . . . .” “[Donald] has . . . told us today he offered him over and over and over and over take everything. If he was just there to take property . . . I can’t conceive of why he wouldn’t have just done that. But he never—he never makes any attempt to take anything except the phone that they’ve determined, you know, was being used to contact the police.”

“[S]ection 654 cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense.” (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.) Appellant’s additional threats were far beyond necessary to achieve his original objective of stealing property. Substantial evidence supports the trial court’s finding that appellant had multiple criminal objectives, and that multiple punishments were therefore appropriate.

### ***3. \$10,000 Restitution Fine***

Appellant contends the trial court erred in ordering him to pay a \$10,000 restitution fine without considering his ability to pay. We reject the contention.

“In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record.” (§ 1202.4, subd. (b).) Where the defendant is convicted of a felony committed in 2012, the fine shall be set, at the discretion of the trial court, between \$240 and \$10,000, commensurate with the seriousness of the offense. (§ 1202.4, subd. (b)(1).) A defendant’s inability to pay the fine is not a compelling and extraordinary reason not to impose the fine, but is just one of several factors for the court to consider in setting the amount of a fine above the minimum of \$240. (§ 1202.4, subs. (c) & (d).) There is a rebuttable presumption that a defendant has the ability to pay. (§ 1202.4, subd. (d); *People v. Romero* (1996) 43 Cal.App.4th 440, 448–449.) “A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the

amount of the fine shall not be required. A separate hearing for the fine shall not be required.” (§ 1202.4, subd. (d).)

Here, when the trial court ordered appellant to pay a restitution fine of \$10,000, defense counsel stated, “I would like to first object to any issuance of the \$10,000 restitution fine without a showing of ability to pay similarly.” The court overruled the objection, noting, “Well, the case law is quite clear on ability to pay doesn’t control this, and that’s going to be the order. Now whether it gets paid or not, I guess will, in part, depend on his ability, but I’m still going to make these orders.” Because appellant did not have a right to a separate hearing, (§ 1202.4, subd. (d)), and because he failed to present any evidence indicating he would be able to overcome the presumption of an ability to pay, the court did not err in imposing a fine commensurate with the seriousness of the offense and denying the request for a hearing.

Moreover, even if the trial court erred in not considering appellant’s ability to pay, we conclude that any error was harmless. Appellant complains that he injured his leg in 2010. The probation report noted, however, that the leg pain can be managed with Tylenol or Motrin, which shows the injury is not disabling. He also points out that he has cognitive difficulties, has not completed high school, and suffers from Attention Deficit Hyperactivity Disorder. According to the probation report, however, appellant worked for his father’s carpet and window cleaning service washing windows, cleaning carpets, and waxing and stripping floors. He hoped to take over the business, or enroll in culinary school one day. He had also been receiving Supplemental Security Income of \$956 per month since he was 12 years old. He had the capacity to work while in prison, and would be under 40 years old upon his subsequent release. Further, the sporadic nature of his employment was not a result of any physical or other limitations, but rather, was due to the fact that appellant and his father had trouble “getting along.” Given appellant’s work history and his history of receiving of SSI benefits, there is ample evidence in the record that appellant has the ability to pay the restitution fine over time.

#### **DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Siggins, J.