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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE AGEO AMAYA, JR.,

Defendant and Appellant.

E052948

(Super.Ct.Nos. RIF141889 &
RIF116615)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Davis, Judge.

Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and William M. Wood and Bradley A. Weinreb, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Jose Ageo Amaya, Jr., was convicted of attempted willful, deliberate, premeditated murder (Pen. Code,¹ § 664, 187), with true findings on the deadly weapon use (§ 12022, subd. (b)(1)), infliction of great bodily injury (§ 12022.7, subd (a)), and that he committed the crime for the benefit of a gang (§ 186.22, subd. (b)); assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)) as a lesser included offense, with a true finding on the gang allegation (§ 186.22, subd. (b)); unlawful possession of a “shank” (a jail-manufactured knife) in prison (§ 4502, subd. (a)); unlawful manufacture of a shank in prison (§ 4502, subd. (b)); active participation in a gang (§ 186.22, subd. (a)); and resisting arrest (§ 148, subd. (a)). Defendant admitted and the court found true the allegations that he had suffered two prior convictions for which he served prison terms (§ 667.5, subd. (b)) and had suffered three prior strike convictions (§ 667, subds. (c) & (e)(2)(A) and § 1170.12, subd. (c)(2)(A)). The court sentenced defendant to an indeterminate term of life plus an indeterminate term of 58 years to life. He appeals, contending the evidence was insufficient to support his convictions for attempted willful, deliberate, and premeditated murder and unlawful manufacturing of a shank in prison, and the trial court erred in failing to instruct the jury on attempted involuntary manslaughter. He further challenges his sentence.

I. PROCEDURAL BACKGROUND AND FACTS

At approximately 4:35 p.m. on June 20, 2007, deputies at the Robert Presley Detention Center in Riverside (the Center) contacted inmates, including defendant, who

¹ All further statutory references are to the Penal Code unless otherwise indicated.

were designated trustees who distributed meal trays to other inmates. As defendant walked out of his cell, Deputy Kevin Ogden noticed he was unsteady on his feet and there was a possibility he had been drinking “pruno.”² Deputy Ogden told defendant to return to his cell, but defendant refused. Deputy Ogden and Deputy John Finch went to see if they could get defendant back in his cell. Deputy Finch told defendant that he would not be serving meals and he should step back into his cell. Defendant refused and said, “No, I got this. I’m all right.”

Deputy Finch looked inside defendant’s cell and saw defendant’s cellmate, Gilbert Saldivar, and a third inmate, Henry Duarte. The deputy instructed Duarte to step out of the cell and take care of the meal duties. Defendant stepped forward, put his hand up in front of Duarte to block him, and again said, “No, I got this.” Defendant continued to refuse the deputy’s instructions and put his right hand into his pocket. Deputy Finch ordered defendant to take his hand out of his pocket. As defendant complied, he twisted toward the deputy. The deputy, believing defendant was going to throw a punch, raised his hand and returned with a punch. Deputy Finch hit defendant in the chest and knocked him to the ground.

Deputy Finch moved back and then noticed that defendant was holding a shank. The deputy tried to pepper spray defendant, but it did not work. He also attempted to broadcast the incident over the radio, but the battery was knocked out of the radio in his attempt to get away from defendant. Deputy Finch told Deputy Ogden, “He’s got a

² Pruno is described as jail-made alcohol drink.

weapon,”” and told him to leave. Deputy Finch dropped his pepper spray to the ground and heard defendant say to the others, “Get him.”

The deputies retreated down the small stairway while defendant, Saldivar, and Duarte chased after them. They ran into the day room while defendant and the others continued their pursuit. As Deputy Finch was leaving the day room, he felt a burning sensation on his neck. When he touched the area, he noticed blood and realized that he had been slashed by defendant. Deputies Finch and Ogden continued running away and down a corridor until eventually they reached a dead end. By this time, defendant and the other inmates had chased them for about 100 feet.

Meanwhile, Deputy Reggie Alcantar, who had heard the radio call, arrived at the open door near the “sally port” of the facility and saw Deputies Finch and Ogden running by, with Saldivar directly behind them and defendant and Duarte about seven to eight yards farther back. Deputy Alcantar hid from view and saw Saldivar catch up to Deputy Ogden and attempt to hit him. Deputy Alcantar came out of hiding and hit Saldivar three times in the face with a “palm heel strike,” or closed fist.

At this point, the deputies were coming around the corner. Deputy Ogden took out his pepper spray and sprayed defendant and Saldivar in the face. Deputy Finch took the spray from Deputy Ogden and sprayed defendant again. This slowed defendant down but did not stop him from advancing. Deputy Finch hit defendant on the left side of his head. Defendant bent forward, and Deputy Finch kicked him in the head. Defendant fell to the ground, where Deputy Finch tried to pull defendant’s hands out and away from under his

body. Five or more deputies arrived and helped restrain defendant, Duarte and Saldivar, and forced defendant's hands behind his back.

Deputy Michael Vernal noticed a laceration on the left side of Deputy Finch's neck and that his eyes were glassed over and he appeared to be in shock. Deputy Vernal took Deputy Finch to the nurse's station. Later, Deputy Finch was transported to the hospital for treatment. During an investigation, deputies found a small prison-made shank on the floor adjacent to defendant's cell. Several other razor blades were located in defendant's cell, as was a cup full of pruno.

Senior Investigator Michael Riley of the Riverside County Sheriff's Department had extensive experience with gangs and was familiar with the Corona Varrio Locos (CVL) criminal street gang. Investigator Riley knew defendant had been previously convicted of attempted murder and carjacking, both with gang allegations. He opined that defendant was an active member of the CVL gang. Investigator Riley also believed that when defendant attacked Deputy Finch, he did so for the benefit of the CVL gang.

II. EVIDENCE OF ATTEMPTED MURDER

Defendant contends his rights under the due process clause of the Fourteenth Amendment (U.S. Const., 14th Amend., Cal. Const., art 1, § 15) were violated because there was insufficient evidence that the attempted murder was willful, deliberate, and premeditated. He claims the evidence showed that the way he attacked Deputy Finch and his subsequent actions indicated he was "intoxicated, pissed off . . . and . . . acted in an impulsive rash manner."

A. Standard of Review

Our standard of review is well settled. We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could have found beyond a reasonable doubt that the attempted murder was willful, deliberate, and premeditated. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223 [Fourth Dist., Div. Two].) In determining whether the record contains substantial evidence of premeditation and deliberation, we draw all reasonable inferences in support of the finding. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124 (*Perez*).

“‘Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) An attempted murder is “premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.]” (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*)). “Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection. [Citations.]” (*People v. Cook* (2006) 39 Cal.4th 566, 603.) ““Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly”” [Citation.]” (*Stitely, supra*, at p. 543.)

The court in *Perez* noted that in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), after surveying a number of cases involving the sufficiency of the evidence to support findings of premeditation and deliberation, the court identified three types or

categories of evidence pertinent to the determination of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. (*Perez, supra*, 2 Cal.4th at p. 1125.) The *Anderson* court observed that courts typically sustain premeditation and deliberation findings ““when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).”” (*Perez, supra*, at p. 1125.)

In other words, courts have generally found sufficient evidence of premeditation and deliberation when ““(1) there is evidence of planning, motive, and a method of killing that tends to establish a preconceived design; (2) extremely strong evidence of planning; or (3) evidence of motive in conjunction with either planning or a method of killing that indicates a preconceived design to kill.’ [Citation.]” (*People v. Tafoya* (2007) 42 Cal.4th 147, 172.) These categories of evidence are not the exclusive means of establishing premeditation and deliberation, however. (*Ibid.*)

Indeed, the goal of *Anderson* was not to establish bright-line rules but to aid reviewing courts in assessing the ultimate question of whether the evidence supports an inference that the killing was the result of “‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed.’ [Citation.]” (*Anderson, supra*, 70 Cal.2d at p. 27.) Thus, the three categories of evidence identified in *Anderson* “need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.]” (*Stitely, supra*, 35 Cal.4th at p. 543.) Other types or combinations of evidence may also support a premeditation finding. (*Perez, supra*, 2 Cal.4th at p. 1125; *Anderson, supra*, at pp. 26-

27.) When all three *Anderson* factors are present, however, a finding of premeditation and deliberation will generally be upheld. (*Stitely, supra*, at p. 543.)

B. Analysis

According to defendant, none of the *Anderson* factors were present. As for planning activity, defendant argues the evidence showed he “wanted to hurt Deputy Finch as he was ‘pissed off’ but the way [defendant] attacked [Deputy Finch] and [defendant’s] subsequent actions indicated he was drunk, pissed off, and acted in an impulsive, rash manner.” Regarding motive, defendant argues there was no evidence as to why he stabbed Deputy Finch. And finally, defendant characterizes his manner of stabbing the deputy “was more consistent with a random, spontaneous act than anything else.” Considering these factors, defendant contends the evidence in the record is insufficient to show that he “acted with premeditation and deliberation when he stabbed Finch.” We disagree.

Defense counsel argued this theory to the jury, but the jury rejected it and reasonably concluded, based on substantial evidence, that defendant’s attempted murder of Deputy Finch was premeditated and deliberate. As the prosecutor argued, after defendant was told he would not be allowed to work food duty, he prevented another inmate from leaving the cell to assume the duty. When defendant was told to “lock it up,” and “get in the cell,” he refused. He then put his hand in his pocket. When instructed to remove his hand from his pocket, defendant twisted around and threw a punch at Deputy Finch, which covered the fact that he had pulled a shank out of his pocket and slashed the deputy in the neck area. Though the jury could have reasonably

concluded that defendant's act of stabbing the deputy was a "drunk reaction at being ordered to return to his cell and stop feeding other inmates because he appeared intoxicated," the jury also could have reasonably concluded, and apparently did conclude, that the time between the deputies' initial instruction to "lock it up" and the moment defendant stabbed Deputy Finch gave defendant sufficient time to reflect on, consider, and weigh the consequences for and against murdering Deputy Finch. (Cf. *People v. Solomon* (2010) 49 Cal.4th 792, 829 [premeditation and deliberation do not occur "in the 'flick of an eye'"].)

Substantial evidence also showed that defendant had concealed the shank in his pocket and knew exactly how to grip it when pulling it out and aiming for Deputy Finch. Further, defendant knew exactly the area of the neck to aim for in order to kill Deputy Finch. This reasonably indicated that defendant was prepared to stab Deputy Finch when the deputy approached defendant, and that defendant had reflected on and considered stabbing the deputy even before he ordered defendant to return to his cell. Further, defendant's motive was simple. Defendant, a gang member, could not be disrespected while in custody.

Concomitantly, all three *Anderson* factors are present. As indicated, "evidence of motive in conjunction with either planning or a method of killing [or attempted killing] that indicates a preconceived design to kill" is generally sufficient to uphold a finding of premeditation and deliberation. (*People v. Tafoya, supra*, 42 Cal.4th at p. 172.) Here, evidence of motive, in conjunction with planning and the method and circumstances of the attack on Deputy Finch, all indicated a preconceived design to kill.

III. FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER

When discussing jury instructions, defense counsel indicated he would not be requesting an instruction on the lesser included offense of attempted voluntary manslaughter, because he would be arguing that defendant was guilty only of assault with force likely to produce great bodily injury. The trial court noted there was “some evidence to support” such instruction; however, it did not give the instruction pursuant to defense counsel’s request. On appeal, defendant contends the trial court erred in failing to instruct the jury on the lesser included offense of attempted voluntary manslaughter on the theory that he acted upon a sudden quarrel or from the heat of passion. The People urge this court to reject the contention on the grounds of invited error.

A. Standard of Review

“A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) On appeal, “we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense . . . should have been given. [Citation.]” (*Ibid.*)

B. Analysis

“Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion, or by an unreasonable but good faith belief in the necessity of self-defense. ‘Only these circumstances negate malice when a defendant intends to kill.’ [Citation.] Here, self-

defense, imperfect or otherwise, [was] not argued. To establish voluntary manslaughter under a heat of passion theory, both provocation and heat of passion must be found. [Citation.] ‘First, the provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the [victim]. [Citations.] Second, . . . the provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.’ [Citation.] [¶] When relying on heat of passion as a partial defense to the crime of attempted murder, both provocation and heat of passion must be demonstrated. [Citation.]” (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708-709 (*Gutierrez*); see also *People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

Generally, a trial court must instruct the jury on lesser included offenses sua sponte, “whenever evidence that the defendant is guilty of only the lesser offense is substantial enough to merit consideration by the jury. [Citation.]” (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414.) “‘The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to it being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense. [Citation.]’ [Citations.]” (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*)). This “prevents the ‘strategy, ignorance, or mistakes’ of *either* party from presenting the jury with an ‘unwarranted all-or-nothing choice,’ encourages ‘a verdict . . . no harsher *or more lenient* than the evidence merits’

[citation], and thus protects the jury’s ‘truth-ascertainment function’ [citation]. ‘These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice.’ [Citation.]” (*Id.* at p. 155.)

However, “a defendant may not invoke a trial court’s failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court’s failure to give the instruction.” (*People v. Barton* (1995) 12 Cal.4th 186, 198.) This doctrine, in the context of the duty to instruct as to lesser included offenses, will apply only when the record demonstrates a deliberate tactical purpose for objecting to or resisting an instruction or persuading a court not to give an instruction on a lesser included offense. (See *People v. Wilson* (2008) 43 Cal.4th 1, 16; *People v. Beames* (2007) 40 Cal.4th 907, 927; *People v. Hardy* (1992) 2 Cal.4th 86, 184.) Such a tactical decision might be made, for example, if the defendant believes that giving lesser included offenses are inconsistent with the defense that the defendant did not commit the crime at all. (See, e.g., *People v. Horning* (2004) 34 Cal.4th 871, 905.)

The doctrine of invited error will not bar an appeal when the decision regarding an instruction is based on defense counsel’s mistake or ignorance (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Wickersham* (1982) 32 Cal.3d 307, 330, overruled on another point in *People v. Barton, supra*, 12 Cal.4th at p. 200), or when the record is ambiguous as to whether trial counsel had considered and rejected the

challenged instruction (*People v. Valdez* (2004) 32 Cal.4th 73, 115-116; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1330).

Here, the record does indicate a deliberate tactical purpose for failing to request an instruction on involuntary manslaughter. During the discussion of jury instructions, the trial court specifically found that attempted voluntary manslaughter “is a viable charge.” The prosecutor was willing to go along with instructing the jury on this theory, because there was “a smidgen of evidence as to heat of passion”; however, he opined there was not sufficient evidence presented to support the theory and the defense was not relying on it. The prosecutor pointed out there was no evidence of a “heated verbal exchange between either Deputy Ogden and the defendant or Deputy Finch and the defendant. It was merely orders to obey, orders to get back in the cell, orders that the defendant didn’t follow.” In response, the trial court noted the fact that defendant was being taken off lunch detail and another inmate was being given the job.

The prosecutor continued to argue there was insufficient evidence to support an instruction on attempted voluntary manslaughter. Even defense counsel acknowledged that while he “could make an argument for a heat of passion very similar to what [the court] just said,” he did not think it was a strong one, and he believed he would be better off “just arguing the [section] 245 rather than arguing, ‘Hey, look, I told you it’s a [section] 245, but if you still think he intended to kill the guy, it’s still attempted voluntary manslaughter, and here’s why. And it’s a situation where [defendant] loses face or doesn’t want to be locked down, he, you know, in the heat of passion attacks Deputy Finch.’ I mean, I could make that argument. I don’t think it’s a particularly good

one.” Recognizing the arguments for and against instructing the jury with attempted voluntary manslaughter, the trial court stated it was not trying to force either party to change the way they wanted to present and argue the case. Thus, the court decided to “leave it up to the defense to choose to . . . have it,” and asked the parties to “think about it . . . while [the court does] these other things, and then you let [the court] know.”

After a short recess, the court inquired as to whether defense counsel wished to instruct the jury on the lesser included offense of attempted voluntary manslaughter. In response, counsel said, “I’m not going to ask for it for tactical reasons.”

Clearly, the above indicates that defendant made a tactical decision to forego instructing on involuntary manslaughter. Thus, he is now barred by the doctrine of invited error from raising the failure to instruct on this theory as an issue on appeal.

In any event, even if we were to consider the merits of the issue, we conclude the evidence was insufficient to support such instruction. There is nothing in the record “‘substantial enough to merit consideration’ by the jury of the lesser included offense of attempted voluntary manslaughter under a theory of sudden quarrel or heat of passion [Citation.]” (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) There is no evidence of a quarrel, sudden or otherwise, between defendant and Deputy Finch prior to the stabbing, and there is no evidence of any provocation. According to the evidence presented at trial, Deputy Finch believed that defendant was unable to perform his duty of handing out meals because he appeared to be intoxicated. When Deputy Finch told defendant to get back into his cell to allow another inmate to hand out meals, defendant replied that he “got this.” When the deputy approached defendant, defendant

put his hand in his pocket. When the deputy asked defendant to take his hand out of his pocket, defendant twisted around and threw a punch at the deputy, which covered the fact that he had pulled a shank out of his pocket and slashed the deputy in the neck area. There was no showing that defendant exhibited anger or any type of emotion. Rather, defendant was described as staggering, like he had been drinking. Nothing in these facts is supportive of a finding that the stabbing was the result of a sudden quarrel or heat of passion. Similarly, there is no evidence in the record suggesting any reasonable provocation. While the trial court suggested that defendant being told he could not serve the meals and hearing the deputy ask another inmate to do so may support instructing on voluntary manslaughter, we note the court declined to state that such facts constituted sufficient evidence to support instructing on the lesser included offense.

For the above reasons, there was no error in failing to instruct the jury on involuntary manslaughter.

IV. EVIDENCE OF UNLAWFULLY MANUFACTURING A SHANK OR AIDING AND ABETTING ANOTHER IN DOING SO

Defendant concedes there was sufficient evidence that he possessed the shank in this case; however, he contends the evidence fails to establish that he “knowingly manufactured or knowingly aided and abetted another in manufacturing the ‘shank.’”

Section 4502, subdivision (b), in relevant part, provides: “Every person who, while . . . confined in any penal institution, . . . manufactures or attempts to manufacture any instrument or weapon of the kind commonly known as a . . . dirk or dagger or sharp instrument . . . is guilty of a felony and shall be punished by imprisonment in the state

prison. . . .” In the case before this court, there were numerous razor blades (including a black comb with a razor attached to it) in the cell that defendant shared with Saldivar. When attacking Deputy Finch, defendant used a shank made out of razor blades. Thus, defendant was charged with both the possession of and manufacture of the shank. At trial, defense counsel argued, “[T]here were a lot of different blades [in defendant’s cell]. There’s [*sic*]four or five of them pulled out of the razors. I don’t recall seeing an actual shank in the cell that was made from those blades. Now, we don’t know where [defendant] got the one he used on Deputy Finch. I mean, we don’t know. He could have made it. Maybe not. [¶] If someone is manufacturing a shank in the cell, it could be one of the other people. He has a cellmate at least on that occasion there was a third guy there. So we don’t know who is making the shanks and who isn’t. [¶] Now, I think the People are going on an aiding and abetting theory in that even if [defendant] is not actually manufacturing the shank, the other guys are, and he’s on the same page with them. But even on aiding and abetting, there has to be something that [defendant] does to help. You’ve got to do something. You can’t just not aid in some way in order to be guilty of an aiding and abetting charge, and I don’t think that’s there. [¶] I think shanks, if they were going to be made, could have been made by any—either of those two other guys or even the one he had.”

On appeal, defendant argues, “There “was no evidence that [he] engaged in any affirmative act that even suggested that he had assisted another inmate in manufacturing the ‘shank’ he used on Deputy Finch or the other razor blade ‘shanks’ found around his cell while he was in jail.” In response, the People recognize the possibility that

defendant's cellmate may have been responsible for actually making the shank; however, they argue that it was the jury's duty to determine the facts and draw all reasonable inferences from them. Thus, the People contend the jury could have reasonably concluded that either defendant made the shank, or, given his possession, leadership role during the attack, and gang membership, he aided and abetted in making it, if not actually making it. To conclude otherwise would make it impossible to convict a defendant of manufacturing a weapon in prison under the circumstances where there are two or more inmates sharing a cell. We agree.

V. SECTION 654

After defendant was convicted of both manufacturing and possessing a shank (§ 4502, subds. (a) & (b)), the trial court imposed a three strikes, indeterminate term of 25 years to life for the possession count, and, without comment, a concurrent similar term for the manufacturing count. On appeal, defendant contends that section 654 precludes separate punishments because his sole intent was to possess the shank. We disagree.

A. Standard of Review

“Section 654 prohibits multiple punishment for a single act or an indivisible course of conduct. [Citations.] Whether a defendant's conduct constitutes a single act under section 654 depends on the defendant's intent in violating penal statutes. If the defendant harbors separate though simultaneous objectives in committing the statutory violations, multiple punishment is permissible. [Citation.]” (*People v. Williams* (2009) 170 Cal.App.4th 587, 645 [Fourth Dist., Div. Two].) Additionally, “[m]ultiple criminal

objectives may divide those acts occurring closely together in time. [Citations.]”

(*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565.)

“The trial court has broad latitude in determining whether section 654, subdivision (a) applies in a given case. [Citations.] In conducting the substantial evidence analysis we view the facts . . . “in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citation.]’ [Citations.]” (*People v. Garcia, supra*, 167 Cal.App.4th at p. 1564.) Here, there was substantial evidence upon which the trier of fact could conclude that defendant had multiple criminal objectives during the time period he committed the crimes.

B. Analysis

The facts before this court support a finding that section 654 does not preclude separate punishment for defendant’s custodial possession of a shank and custodial manufacture of a shank. During a search of defendant’s cell, deputies found numerous razor blades (including a black comb with a razor attached to it). When attacking Deputy Finch, defendant used a shank made out of razor blades. Given this evidence, the People argue that defendant’s intent to manufacture a shank was perfected upon his undertaking to create the shank. Afterwards, defendant could have possessed it, given it away, or used it to attack Deputy Finch. Here, after making the shank, defendant retained possession of it until he decided to use it on the deputy. Thus, “another separate and distinct transaction [was] undertaken with an addition intent which necessarily is

something more than the mere intent to [manufacture] the proscribed weapon.” (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1414.)

VI. APPLICATION OF “THREE STRIKES” LAW

The offenses that constituted the three strikes against defendant were attempted murder, carjacking and being an active gang member, for which he was convicted by jury on March 27, 2006.³ On June 20, 2007, while in custody awaiting sentencing on his convictions, defendant committed the current offenses. On July 31, 2009, defendant was sentenced on those prior convictions. He appealed, and on January 20, 2011, this court affirmed the judgment, as modified. Because defendant’s current offenses predated the his sentencing date on the three strikes against him, he contends that “it is unlawful to sentence a defendant under the Three Strikes law when the qualifying ‘strike priors’ are for offenses for which sentence was not imposed until after the commission of the current offenses.” We disagree.

The controlling statutes provide that “[t]he determination of whether a prior conviction is a prior felony conviction for purposes of [the three strikes law] shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor.” (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1); *People v. Queen* (2006) 141 Cal.App.4th 838, 842 (*Queen*) [“a conviction occurs on the date that guilt is adjudicated for purposes of determining whether a prior constitutes a strike”]; *People v. Williams*

³ On October 28, 2011, we granted defendant’s request to take judicial notice of case No. E049317.

(1996) 49 Cal.App.4th 1632, 1638.) While defendant refers to case law that includes discussions when the prior offense was a “wobbler,” such is not the case before this court. Defendant’s priors were felonies. As the court in *Queen* aptly stated, “defendant committed a new offense within moments of when his guilt was determined on his prior crimes. We do not believe the three strikes statute was intended to reward defendants for overeagerness in committing new offenses. To the contrary, both the letter and spirit of the three strikes law is maintained when a defendant who commits a new offense after his guilt has been determined on prior conduct is punished accordingly.” (*Queen, supra*, at p. 843.) Thus, defendant’s prior convictions were properly treated as strikes.

VII. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.