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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. ESAU BRAVO VASQUEZ et al. Defendants and Appellants.	E053452 (Super.Ct.No. SWF020973) OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine, Judge. Affirmed in part as modified; reversed in part.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Esau Bravo Vasquez.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant Ismael Bravo Vasquez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric Swenson, Garrett

Beaumont, and Charles C. Ragland, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants Esau Bravo Vasquez (Esau) and Ismael Bravo Vasquez (Ismael) appeal from their convictions of attempted premeditated murder (Pen. Code,[1] §§ 664, 187, subd. (a), counts 1 and 2); kidnapping to commit robbery (§ 209, subd. (b)(1), count 3); second degree robbery (§ 211, count 4); assault with a firearm (§ 245, subd. (a)(2), counts 5 and 6); and criminal threats (§ 422, count 7) and from true findings on associated enhancements.

Esau argues: (1) his convictions on counts 1, 2, 5, and 6 must be reversed because the trial court's exclusion of evidence denied him his right to present a defense; (2) the trial court erred in failing to instruct the jury on attempted voluntary manslaughter based on heat of passion and imperfect self-defense; (3) the trial court erred in failing to instruct the jury on defense of another; and (4) the sentencing minute order and abstract of judgment should be corrected to reflect only a single fine under section 1202.5.

Ismael contends: (1) his due process right to present a complete defense was violated when the trial court precluded cross-examination on an issue critical to the defense; (2) the evidence was insufficient to support his conviction of attempted premeditated murder of Vicente Avalos; (3) section 654 precludes punishment for both the attempted murder of Avalos and the kidnapping of Avalos to commit robbery because

[1] All further statutory references are to the Penal Code unless otherwise specified.

the offenses involved the same victim and were part of a continuous course of conduct with a single criminal objective; (4) punishment for making criminal threats must be stayed under section 654 because the threats were part of a continuous course of conduct with a single criminal objective; and (5) his potential life sentence constitutes cruel and unusual punishment.[2] Ismael also joins Esau's arguments to the extent they accrue to his benefit.

The People concede, and we agree, that the minute order of Esau's sentencing hearing and the abstract of judgment should be corrected. We further conclude that defendants' sentences for criminal threats must be stayed under section 654. We find no other errors.

II. FACTS AND PROCEDURAL BACKGROUND

In April 2007, Juan Aguiar was the foreman at avocado groves owned by McMillan Company, including a grove at Los Gatos and Carancho Road near Temecula. Aguiar paid the workers in cash every Saturday. On the afternoon of April 7, he was going to pay the 24 workers at the Los Gatos grove approximately $340 each in cash.

Esau had formerly worked at one of the groves. A few days before April 7, 2007, Esau's girlfriend, Laura Ayon, heard Esau, his brother Ismael, and a friend Gabriel Plantillaz, discussing a plan to rob the payroll and the vendors who came to the ranch on payday to sell food and clothing to the workers. Defendants had previously gone up to

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[2] In his reply brief, Ismael conceded that an additional contention, that section 654 precludes multiple punishments for the weapons use and great bodily injury enhancements, lacks merit in light of a recently decided California Supreme Court case, *People v. Ahmed* (2011) 53 Cal.4th 156.

the groves to obtain a handgun and a rifle. They had obtained the handgun from their cousin Martin.

On April 7, 2007, Vicente Avalos, a worker at one of the groves, left the workers' tent encampment at about 7:00 a.m. and started to walk toward work on a path through the trees. All the other workers had already left the encampment. Esau, armed with a .45-caliber handgun, and Ismael, armed with a .22-caliber rifle, encountered Avalos on the path. Defendants were both wearing masks, but Avalos, who had worked with Esau and had known him for a year and a half, recognized his voice.

Defendants told Avalos not to yell or run or they would kill him, and they took him "down below a rock" about 100 meters away. Esau put the handgun to Avalos's head, and he and Ismael beat Avalos with their weapons, stabbed him in the back with a knife, kicked him, and broke his tooth. Defendants took Avalos's wallet and demanded money from him.[3] They tied him up with a wire and a cable and kept him near the rock until about 2:00 p.m.

At about 2:00 p.m., defendants received a telephone call, after which they took Avalos to the location where Aguiar would be paying the workers. Before they left, they told him they wanted to get Aguiar's money, and they would kill Avalos if they did not get it.

Esau held onto the back of Avalos's shirt and kept his gun to Avalos's head. When they arrived at the Los Gatos grove, Aguiar was already paying other workers.

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[3] Avalos's testimony was inconsistent as to whether defendants had taken $15 from his wallet or whether the wallet had contained no money.

Ismael moved off to the right and hid behind a tree. As they were approaching, they told Avalos to call out to Aguiar and tell him to leave the money or Avalos would be killed. Avalos shouted to Aguiar but did not think Aguiar heard him, because Aguiar did not respond.

A worker named Gregorio shouted that someone was coming to rob them, and all the workers started running away. Aguiar heard gunshots coming from both sides, and he saw Esau with a gun holding Avalos. To his right, Aguiar saw a second man holding a gun. When Esau fired his gun, he released Avalos, pushed him away, and removed his mask. Avalos testified that he started to walk toward a vendor who was in the area, and as he was walking, Ismael shot him in the chest. However, Avalos had told a detective in April 2007 that he was not sure who had shot him. After the shooting, Avalos was taken to the hospital and a tube was placed in his chest. He experienced pain for two or three months and was able to work only a little. His medical record indicated he had sustained a "shotgun wound to the right chest posteriorly," and "[t]wo small 3 millimeter foreign bodies [were] seen superimposed in the right thorax." Avalos testified that other workers had told him the types of weapons defendants were carrying and that he had been shot with a .22-caliber rifle. Avalos admitted at trial that he was an undocumented worker in April 2007 and was afraid of being deported when he spoke to law enforcement.

Cristobal Ponce Gonzales testified that he had worked for McMillan Company for 20 or 22 years doing irrigation, cutting, maintenance of the groves, and picking fruit. He was paid about $360 per week. He had worked for a short time with Esau, whom he knew as "Saul," and he had also met Ismael. In the afternoon of April 7, 2007, he was

unloading gas cans from a truck at the Los Gatos grove when he felt a bullet strike him. He and all the other workers started running. Before he was shot, he did not see anyone with a gun, but afterward he saw Esau with a .45 and a second man with a .22. Esau came from the bushes about 15 meters away, and the man with the long gun was on the side about 30 meters away. Gonzales could not see all of Esau's face because Esau was holding Avalos. He heard the .45 fire twice, and he heard the .22 fire seven or eight times in close succession. He did not see any of the other workers with guns that day, nor did he see a shotgun there. He did not see the .22 hit anyone. Esau, the man with the .45, was the one who shot him. The second man's hood was pulled off by a tree branch, and Gonzales recognized him as Ismael. Gonzales's ribs were broken by the shot, and blood spurted out when he breathed. He could not move his arm the day he was shot, and he missed two weeks of work.

After the shootings, Ayon and Plantillaz picked up defendants beside a dirt road, where they had been hiding in the bushes. Plantillez told Ayon that defendants had called him to ask for a ride and that Ismael had been hurt. Defendants told Ayon the other workers had guns and fired at them first. Defendants gave Ayon $15 that they had taken from their hostage. Ayon testified that Ismael had suffered two or three injuries "[l]ike little holes with blood" or "little cuts with a little bit of blood in them" on his back and the back of his head. She felt a little bump like a shotgun pellet in one of the wounds. Defendants told Ayon their cousin Martin had fired the shot that injured Ismael.

A deputy sheriff interviewed 15 workers at the ranch after the shooting. They each said they ran when they heard shots, and they had not seen the shooters. No one

said how many guns had been used, the type of guns, the number of shots fired, or where the shooters had been. Aguiar told a detective that the workers and victims had discussed the events before the police arrived. However, at trial, Aguiar testified that he did not discuss what had happened with the other workers before the police arrived.

The firearms used in the crimes were never found.

Detective Fred Collazo testified he knew from his training and experience, including as a marksmanship instructor in the United States Marine Corps, that bullets can fragment upon entering a body. He testified that if a shooter intends to hit the body of another, the center of the body is the best place to aim.

The jury found defendants guilty of attempted premeditated murder (§§ 664, 187, subd. (a), counts 1 and 2); kidnapping to commit robbery (§ 209, subd. (b)(1), count 3); second degree robbery (§ 211, count 4); assault with a firearm (§ 245, subd. (a)(2), counts 5 and 6); and criminal threats (§ 422, count 7). The jury found true as to Esau enhancement allegations under sections 12022.7, subdivision (a) (as to counts 1 through 6); 12022.53, subdivision (c) (as to counts 1 through 4); 12022.53, subdivision (d) (as to count 2); and 12022.5, subdivision (a) (as to counts 5 through 7). The jury found true as to Ismael enhancement allegations under sections 12022.7, subdivision (a) (as to counts 3 through 5); 12022.53, subdivision (b) (as to count 4); and 12022.5, subdivision (a) (as to count 5). The jury found not true as to Ismael enhancement allegations under sections 12022.53, subdivision (c) (as to count 4) and 12022.7, subdivision (a) (as to count 6).

The trial court sentenced Ismael to a determinate term of 42 years, comprising a two-year middle term for count 7; a consecutive four-year term for the personal use of a

firearm as to count 7; a consecutive 13-year term for the personal discharge of a firearm as to each of counts 1 and 3; and a consecutive 10-year term for personal use of a firearm as to count 2. The trial court also sentenced him to a consecutive indeterminate term of seven years to life for each of counts 1 through 3. The trial court stayed his remaining sentences under section 654.

The trial court sentenced Esau to a determinate term of 52 years, comprising a two-year middle term for count 7; a consecutive four-year term for the personal use of a firearm as to count 7; a consecutive 20-year term for the personal discharge of a firearm as to each of counts 1 and 3; and a consecutive three-year term for infliction of great bodily injury as to each of counts 1 and 3. The trial court also sentenced him to a consecutive indeterminate term of seven years to life for each of counts 1 through 3, and a consecutive 25-years-to-life term for personally discharging a firearm causing great bodily injury. The trial court stayed his remaining sentences under section 654.

III. DISCUSSION

A. Jury Instructions

Esau contends the trial court erred in failing to instruct the jury on attempted voluntary manslaughter based on heat of passion and imperfect self-defense and on defense of another.

1. Additional Background

The trial court stated that the parties had "had extensive discussions about perfect and imperfect self-defense." The court held that an instruction on actual self-defense was appropriate, because Ismael had suffered apparent shotgun pellet wounds, the medical

records indicated Avalos had been injured by a shotgun, and an expended shotgun cartridge was found at the scene. However, the court stated it would not instruct the jury on imperfect self-defense or heat of passion, and Esau's counsel agreed she was not asking for an instruction on voluntary manslaughter as a lesser included offense. During closing argument, counsel for Esau argued that Esau had fired his weapon only after someone had fired a shot at Ismael. She further argued that Esau was not guilty if he reasonably believed use of force was necessary, and the jury had to determine whether his beliefs were unreasonable.

2. Invited Error

The People contend that Esau's trial counsel invited any instructional error by agreeing with the trial court that the evidence did not support an instruction on attempted voluntary manslaughter. We nonetheless will address the issue on the merits, because resolution of the issue is also relevant to defendants' claims of error in excluding evidence and restricting cross-examination, as discussed below.

3. General Principles on Duty to Instruct

The trial court must instruct the jury on the principles of law closely and openly connected to the evidence before the court and that are necessary for the jury's understanding of the case. (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial court must instruct on voluntary manslaughter in the heat of passion or defense of another when the evidence is "'substantial enough to merit consideration'" by the jury. (*People*

v. Breverman (1998) 19 Cal.4th 142, 153-163.) Evidence is substantial when it is "'evidence that a reasonable jury could find persuasive.'" (*Id.* at p. 162.)

4. Attempted Voluntary Manslaughter

Manslaughter is "the unlawful killing of a human being without malice." (§ 192.)

(a) Heat of passion

A homicide is voluntary manslaughter rather than murder when committed in a "sudden quarrel or heat of passion." (§ 192, subd. (a).) In *People v. Enraca* (2012) 53 Cal.4th 735, the defendant argued the trial court had erred in failing to instruct on voluntary manslaughter under a heat of passion theory; the defendant claimed the victims appeared to have been reaching for guns. The court stated that even under the defendant's scenario, one victim had "responded to being pulled up by the hair by an armed assailant, and [the second victim] acted in resistance to [the first victim] being killed." The court held, "Predictable and reasonable conduct by a victim resisting felonious assault is not sufficient provocation to merit an instruction on voluntary manslaughter. [Citations.]" (*Id.* at p. 760.)

Here, the evidence showed that defendants arrived at the grove wearing masks and camouflage clothing. Esau was holding a handgun to their hostage, Avalos, and Ismael was armed with a rifle. Esau ordered Avalos to yell to Aguiar to turn over the payroll money or they would kill Avalos. One of the workers shouted that someone was coming to rob them. Under this scenario, even if another person had fired before either of defendants did, such shooting would have been legally justified to defend against the attempted robbery in progress. Under those circumstances, any resistance by the

attempted robbery victims did not merit an instruction on voluntary manslaughter. (*People v. Enraca*, *supra*, 53 Cal.4th at p. 760.)

(b) Imperfect self-defense

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because (he/she) acted in (imperfect self-defense [or] imperfect defense of another)." (CALCRIM No. 571.) "It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault *or the commission of a felony*), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.]" (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1; second italics added.) The court further held that "a fortiori, . . . the imperfect self-defense doctrine cannot be invoked in such circumstances." (*Ibid.*) As a matter of law, defendants were not entitled to an instruction on imperfect self-defense.[4]

(c) Defense of another

Although we found no published cases addressing the specific issue, and the parties have cited none, the same principles set forth in *In re Christian S.*, *supra*, 7 Cal.4th 768, precluding a defendant from invoking self-defense when he is in the act of

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[4] As the trial court aptly pointed out at the sentencing hearing, "the idea that . . . somehow they should be permitted to march to that location after terrorizing one individual and keeping him for a long period of time, marching him to that location, armed with firearms, and expect that they should not have to be responding to likely lethal force is, to this Court, like the idea of shooting one's parents and then asking for mercy because one is an orphan."

committing a felony, apply to defense of a confederate in the same crime. As a matter of law, defendants were not entitled to an instruction on defense of another.

B. Evidentiary Ruling

Esau contends his convictions on counts 1, 2, 5, and 6 must be reversed because the trial court's exclusion of evidence denied him his right to present a defense. In a closely related argument, Ismael contends his due process right to present a complete defense was violated when the trial court precluded cross-examination on an issue critical to the defense.

1. Additional Background

In the Evidence Code section 402 hearing, Ayon testified that Esau told her they had gotten the .45-caliber gun from their cousin Martin. She said she had told defendants not to go up into the groves because the grove workers had guns. When asked how she knew that, she responded, "Because, uh, I know—not—not exactly, but because they brought the guns from over there, so you expect more things than that from over there, you know. I just can't—can't imagine if they found those guns over there, they might have more than that." She confirmed that she was assuming that because the .45 and the .22 came from the groves, there were more guns there.

Ayon had previously told Detective Collazo that defendants had gone to the groves a few weeks earlier and had stolen marijuana seeds. Defense counsel argued that Ayon believed the workers were growing and selling marijuana at the orchard and that the workers all had guns.

After the hearing, the trial court ruled: "The Court is—based upon her [Ayon's] testimony, would preclude her being asked about any other questions about any other firearms up in the groves or anyone else possessing any firearms up in the groves because she has absolutely no firsthand knowledge of that. She's making an assumption, and certainly counsel is free to—to make whatever argument is logically referenced by the information she can give, but she will not be permitted to testify about the fact that there were other guns up there and that other people would shoot them with those guns."

Defense counsel argued that the evidence was relevant to the credibility of the workers, who had a motive to lie to the police because they were undocumented, "they all have guns," and "there's marijuana being grown there." The trial court ruled the defense could ask the workers if they were documented but could not examine Ayon about her statements that the workers had firearms and were growing marijuana at the grove. The trial court also stated it would allow the parties to ask witnesses how many people they had seen with guns and how many guns they had seen.

The court stated, "Whether or not the person who [Gonzales] identified as Ismael Vasquez was carrying a rifle or a shotgun will be up to the jury to decide. In other words, the jury will have to decide if Mr. Gonzales and Mr. Avalos are correct in what they're describing as the long gun being a rifle, a .22, or if it was, instead, a shotgun."

2. Standard of Review

We review the trial court's decision to admit or exclude evidence under the deferential abuse of discretion standard. (*People Vieira* (2005) 35 Cal.4th 264, 292.) Similarly, the trial court has a "'wide latitude' of discretion to restrict cross-examination

and may impose reasonable limits on the introduction of such evidence. [Citation.] Thus, 'unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*People v. Smith* (2007) 40 Cal.4th 483, 513.)

3. Analysis

Defendants contend they were denied their right to present a defense. In general, "'the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Blacksher* (2011) 52 Cal.4th 769, 821.) Here, the purported defense was that defendants "discharged their weapons because the workers fired at them first." However, even if true, that is no defense at all to the charges of attempted murder and assault with a deadly weapon as alleged in counts 1, 2, 5, and 6, as we discussed above in connection with Esau's claim of instructional error.

Defendants' valid purpose in seeking to introduce evidence of marijuana-growing operations at the ranch was merely to challenge witnesses' credibility when they denied seeing anyone but defendants with weapons at the ranch. Defendants argue that our own Supreme Court has recognized that large scale marijuana growers use firearms to protect their crops. (*People v. Mayoff* (1986) 42 Cal.3d 1302, 1308-1309, fn. 2.) However, even if the court's statements in that case remain true nearly 30 years later, we nonetheless agree the trial court did not err in excluding evidence of marijuana growing. First, the only ranch employees who testified were Aguiar, Avalos, and Gonzales. Nothing in Ayon's statements to the police suggests that any of those individuals knew of or were

involved in marijuana growing. Next, Ayon did testify that Ismael had suffered wounds that appeared to be from a shotgun. She testified that defendants told her their cousin Martin had fired the shot that injured Ismael. An expended shotgun shell casing was recovered at the scene. Apparent shotgun pellets were removed from Avalos's back. Thus, ample evidence was presented from which the jury could have concluded that another person at the scene had fired a weapon at defendants. In addition, Avalos's credibility was impeached by his testimony confirming that he was an undocumented worker, and both defense counsel vigorously argued about the inconsistencies in the witnesses' testimony.

In sum, the trial court's refusal to permit evidence or cross-examination on the issue of whether other workers had guns or had been growing marijuana in the groves was merely the exclusion of evidence "on a minor or subsidiary point," and as such, "d[id] not interfere with th[e] constitutional right" to present a defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) We find no abuse of discretion in the trial court's rulings excluding the evidence and limiting cross-examination.

C. Correction of Minute Order and Abstract of Judgment

Esau contends the sentencing minute order and abstract of judgment should be corrected to reflect only a single fine under section 1202.5. The People concede error, and we agree. At the sentencing hearing, the trial court imposed a single $10 fine under section 1202.5, but the minute order and abstract of judgment reflect that the fine was imposed for each of the seven counts, for a total of $70. Under the terms of the statute,

the fine was proper only as to the robbery count. (§ 1202.5, subd. (a).) We will order the minute order and abstract of judgment to be amended accordingly.

D. Sufficiency of Evidence

Ismael contends the evidence was insufficient to support his conviction of attempted premeditated murder of Vicente Avalos.

The crime of attempted murder requires a specific intent to kill and a direct but ineffective step toward killing another person. (*People v. Ramos* (2011) 193 Cal.App.4th 43, 47.) Evidence of intent is rarely direct, and intent must usually be inferred the defendant's acts and the circumstances of the crime. (*Id.* at p. 48.)

1. Standard of Review

When a defendant challenges the sufficiency of the evidence to support his conviction, this court reviews the record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) "'If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] "A reviewing court neither reweighs evidence nor reevaluates a witness's credibility." [Citation.]' [Citation.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1153.)

2. Analysis

Ismael contends his conviction of attempted murder was based primarily on Avalos's testimony, and because Avalos's testimony was inconsistent on several points, he was not a credible witness. For example, Avalos did not know Ismael and never saw his face the day of the shooting. He did not provide a description of the shooter. None of the workers who testified actually witnessed the shooting; they all said they heard gunshots and ran. Gonzalez testified that Ismael fired a .22-caliber rifle seven or eight times, but "he didn't hit anyone." Aguiar testified he did not see Ismael's face that day because Ismael was too far away and was wearing a mask. Ayon testified that Ismael received wounds near his waist and the back of the head that appeared to be from shotgun pellets. In addition, Avalos was young, uneducated and possibly illiterate, and emotional at trial; he was an undocumented worker from Mexico, and he testified through a Spanish interpreter. Finally, evidence indicated Avalos had been struck by shotgun pellets, and other evidence indicated Ismael was armed with a rifle.

Ismael's argument is based on his assessment of Avalos's credibility, and Ismael sets forth the evidence in the light most favorable to his argument, not in the light most favorable to the judgment. Other evidence established that defendants armed themselves in advance and loaded their weapons. They repeatedly threatened to kill Avalos if their plan did not succeed. Moreover, the shots that wounded Gonzales and Avalos hit both victims in their center mass, and Detective Collazo testified that center body mass is the area where people aim toward when they intend to hit another person. Under the standards that govern our review (*People v. Johnson, supra*, 26 Cal.3d at p. 576; *People*

v. Livingston, *supra*, 53 Cal.4th at p. 1153) we conclude ample evidence supported Ismael's conviction of the attempted murder of Avalos.

E. Section 654

Ismael contends section 654 precludes punishment for both the attempted murder of Avalos and the kidnapping of Avalos to commit robbery, because the offenses involved the same victim and were part of a continuous course of conduct with a single criminal objective. He also contends his punishment for criminal threats must be stayed under section 654 because the threats were part of a continuous course of conduct with a single criminal objective.

1. General Principles

While a defendant may be convicted of multiple crimes when different provisions of law apply to his act or omission, section 654 prohibits multiple punishment when "the convictions arise out of an indivisible transaction and have a single intent and objective." (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713 [Fourth Dist., Div. Two].) Whether a defendant had a single criminal intent and objective is a question of fact, and we affirm the trial court's factual finding, whether express or implied, if it is supported by substantial evidence. (See *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

2. Attempted Murder and Kidnapping

In imposing separate punishments for the attempted murder and kidnapping counts, the trial court impliedly found that defendants had separate criminal intents and objectives in committing those crimes. The evidence showed that defendants seized Avalos at around 7:00 a.m., robbed him, beat him, tied him up, and held him in

concealment until about 2:00 p.m. when they took him to the area where the payroll was to be distributed.

In *People v. Surdi* (1995) 35 Cal.App.4th 685, the defendant argued that section 654 precluded his consecutive sentences for kidnapping and mayhem because his sole purpose in kidnapping the victim was to beat the victim. (*Surdi*, *supra*, at p. 688.) The court rejected that argument, reasoning that the crimes did not arise from a single volitional act, but occurred over "considerable periods of time during which reflection was possible," and each act of violence evidenced a separate intent to do violence. (*Id.* at p. 689.)

In *People v. Cleveland* (2001) 87 Cal.App.4th 263, the court upheld separate sentences for the defendant's attempted murder and robbery convictions. Although the defendant argued both crimes had the single objective of robbing the victim of a Walkman, the court held that "the amount of force used in taking the Walkman was far more than necessary to achieve one objective." (*Id.* at pp. 271-272.) In *People v. Nguyen* (1988) 204 Cal.App.3d 181, the court reasoned that "at some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime. [¶] . . . [¶] . . . [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." (*Id.* at p. 191.)

While none of those cases is precisely on point, their reasoning is instructive. Here, as in *Surdi*, the crimes took place over a considerable period of time during which

defendants had the opportunity to reflect. Defendants started firing their weapons after someone at the ranch yelled out that they were being robbed. As in *Cleveland* and *Nguyen*, the amount of force used in committing the second crime was far beyond that needed to accomplish the first objective. We conclude the trial court did not err in imposing separate punishments for attempted murder and kidnapping.

3. Criminal Threats

The record shows that defendants threatened Avalos three times. When defendants first encountered Avalos, they told him not to run or they would kill him. Second, while they were still keeping Avalos at the rock, they told him if they did not get money from Aguiar, they were going to kill him. Third, while they were walking to the area where the workers would be paid, Esau told Avalos to yell out to Aguiar and ask him to leave the money, and if they did not get the money, they would kill Avalos.

In imposing separate punishment for the criminal threats count, the trial court found that defendants had the independent purpose of convincing Avalos not to report to law enforcement what had happened to him. However, Avalos's testimony established only that the threats were part and parcel of their plan to rob the payroll—all of the threats were directed towards controlling Avalos's behavior *during* the kidnapping and robbery, and none were related to deterring him from making future reports to law enforcement. We therefore conclude no substantial evidence supports the trial court's finding that defendants made the criminal threats to convince Avalos not to report their

crimes to law enforcement. Defendants' sentences for count 7 and the associated enhancements must be stayed under section 654.[5]

F. Cruel and Unusual Punishment

Ismael contends his potential life sentence constitutes cruel and unusual punishment.[6] He was 16 years old when he committed the crimes and 20 years old when he was sentenced. He argues that his sentence of a determinate term of 42 years to be followed by three consecutive terms of seven years to life was a de facto sentence of life without parole. As discussed above, we will order his two-year sentence for count 7, and the corresponding four-year enhancement for personal use of a firearm, stayed under section 654, reducing his determinate term to 36 years to be followed by an indeterminate term of 21 years to life.

1. Federal Law

The Eighth and Fourteenth Amendments to the United States Constitution prohibit cruel and unusual punishment, and the United States Supreme Court has held that a criminal sentence is cruel and unusual if it is grossly disproportionate to the crime for

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[5] Although Esau did not join Ismael's argument, we will order Esau's sentence for count 7 stayed under section 654 because we correct section 654 error on our own motion. (*People v. Perez* (1979) 23 Cal.3d 545, 550, fn. 3.)

[6] After briefing was completed in this case, the California Supreme Court issued its opinion in *People v. Caballero* (2012) 55 Cal.4th 262, 268 (*Caballero*), holding that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." As we discuss below, *Caballero* is inapposite because, after the modification of defendant's sentence we order pursuant to section 654, he will be eligible for parole within his life expectancy.

which the defendant was convicted. (*Graham v. Florida* (2010) __ U.S. __ [130 S.Ct. 2011, 2021-2022, 176 L.Ed.2d 825, 835-837] (*Graham*).) In that case, the court held that life without parole (LWOP) sentences for juvenile defendants who commit nonhomicide offenses were categorically prohibited under the Eighth Amendment. (*Graham*, *supra*, __ U.S. __, 130 S.Ct. at pp. 2022-2023.) The court explained that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers" (*Id*. at p. 2027), and juveniles are, by reason of their immaturity, less culpable when compared to adults (*id.* at p. 2026). The court concluded, "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Id.* at p. 2034.)

Even more recently, in *Miller v. Alabama* (2012) __U.S. __ [132 S.Ct. 2455, 183 L.Ed.2d 407] (*Miller*), the court held that *mandatory* sentences of life without parole for those under the age of 18 when they commit their crimes are unconstitutional. (*Miller*, *supra*, __ U.S. __, 132 S.Ct. at p. 2460.) However, the court did not categorically prohibit sentences of life without parole for juvenile offenders. Instead, the court held that such sentences must be based on individualized consideration under which the trial court has the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juvenile offenders. (*Id.* at p. 2475.)

Ismael has not persuaded us that his sentence was impermissible under the holdings of *Graham* and *Miller*. This case is unlike *Miller* in that Ismael's sentence was not mandatory: the trial court had discretion to impose consecutive or concurrent terms.

(See *People v. Galvez* (2011) 195 Cal.App.4th 1253, 1264.) Moreover, the trial court had the opportunity to consider mitigating circumstances. (See *Miller*, *supra*, 132 S.Ct. at p . 2475.) At sentencing, Ismael's counsel argued factors in mitigation, as follows: "[W]e'd ask the Court to consider the chronological age of [Ismael], the fact that he had no prior court appearances, no prior criminal record previous to this incident. There was evidence of self-defense as presented during the trial. We'd ask the Court to consider that as well. [¶] And the subordinate role that [Ismael] played in this matter, and it was alluded to in the probation report, that he was essentially the . . . tag along. He was not the . . . main initiator of this. He was there. He was following . . . an older brother, older friends. He was the young guy along for the rest of it and was sort of led to this, if you will, so we would ask the Court to consider those factors in mitigation as well." The court responded that it understood the arguments about Ismael's age and the dynamic between Ismael and his older brother, "[b]ut it . . . could not be lost on anyone listening to the testimony of Mr. Avalos to understand the terror that he experienced that day and the impact upon him to this day about what occurred. Likewise, the impact upon Cristobal Gonzales, who was 64 years old at the time." The court pointed out that defendants had "gone there previously and been thwarted in their efforts, and in fact, had victimized an individual in the past, about two or three weeks before this event." The court stated that the fact defendants had known and worked with the people at the grove, "and then [went] back with gun in hand to point it at them, ma[d]e it very clear that [they were] willing to kill these individuals in order to take their hard-earned wages is cowardly and, quite frankly, just—just heinous."

This case is unlike *Graham*, in that Ismael was not sentenced to LWOP, nor has he persuaded us that his sentence was the functional equivalent of LWOP. In *People v. Mendez* (2010) 188 Cal.App.4th 47, on which Ismael relies, the court held that a 16-year-old's sentence of 84 years to life was indistinguishable from an LWOP sentence and therefore excessive because the defendant would not be eligible for parole during his life expectancy. (*Id.* at p. 63.) Ismael was born on June 17, 1990. He was sentenced on April 15, 2011, at the age of 20 years 10 months, and he was awarded custody and conduct credit totaling 1687 days (approximately four years seven months). At the oral argument, defendant's counsel represented to this court that she had been informed by the Department of Corrections and Rehabilitation that defendant would be eligible for a parole hearing in March 2064, at the approximate age of 74. Because we order his sentence reduced by seven years under section 654, he would therefore be eligible for a parole hearing at the approximate age of 68. Defendant has not shown that his parole eligibility date is beyond his normal life expectancy. He has made no showing that his life expectancy is less than that. Because Ismael has not shown that he has no realistic opportunity of obtaining a parole hearing and release during his life expectancy, he has failed to establish that his sentence was excessive as a matter of law under *Graham* or under the federal Constitution.

2. State Law

The state Constitution likewise bans cruel and unusual punishment. (Cal. Const., art. 1, § 17.) A punishment may violate the California Constitution if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and

offends fundamental notions of human dignity.' [Citation.]" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 199.) The defendant bears the burden of establishing that his sentence was unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.) The court considers three factors in determining whether a defendant's punishment violates the state constitution. (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 487-488.) First, the court examines the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch*, *supra*, at p. 425.) Second, the court compares the challenged punishment with punishments for more serious crimes in the same jurisdiction. (*Id.* at pp. 426-427.) Third, the court compares the challenged punishment with punishments for the same offense in other jurisdictions. (*Id.* at pp. 427-429.)

In examining the nature of the offense, we observe that Ismael committed not just one offense, but seven, all of which were extremely serious, and during which defendant was armed with a firearm and serious injury was inflicted on two victims. (See, e.g., *People v. Famalaro* (2011) 52 Cal.4th 1, 21 [noting that kidnapping is a serious offense]; § 1192.7, subd. (c)(8), (9), (19), (20), (23), (38) [defining as serious felonies "(8) any felony in which the defendant personally inflicts great bodily injury on any person . . . ; (9) attempted murder; . . . (19) robbery . . . ; (20) kidnapping; . . . (23) any felony in which the defendant personally used a dangerous or deadly weapon; [and] . . . (38) criminal threats . . . ."].)

In examining the offender, we observe that Ismael was young and had no prior criminal history, gang involvement, or drug addiction. Nonetheless, the nature of his

offenses indicates that he presents a serious degree of danger to society. (*In re Lynch*, *supra*, 8 Cal.3d at p. 425.) The robbery was planned well in advance, and, as the trial court pointed out, the brutality of defendants' treatment of Avalos indicates great callousness.

Ismael has made no showing that his sentence was more harsh than that imposed for more serious crimes in this jurisdiction or more harsh than that imposed for similar crimes in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 426-429.) We conclude his sentence, although harsh, passes muster under the state constitution.

IV. DISPOSITION

The minute order for Esau's sentencing hearing and his abstract of judgment shall be corrected to reflect only a single fine under section 1202.5 and the abstract of judgment amended accordingly. Both defendants' sentences for criminal threats in count 7 and the associated enhancements are stayed under section 654 and their abstracts of judgment are to be amended accordingly. The amended abstracts of judgment shall be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.