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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.

ISAIAH CYRUS FLORES et al.,

Defendants and Appellants.

E057930

(Super.Ct.No. RIF1105254)

OPINION

APPEAL from the Superior Court of Riverside County. Elisabeth Sichel, Judge.

Affirmed as modified.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant Isaiah Cyrus Flores.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant Roland Angel Martinez.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant Joshua Lee Flores.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Tami F. Hennick and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

## I

### INTRODUCTION

Defendants Isaiah Flores, Joshua Flores,<sup>1</sup> and Roland Martinez (defendants) appeal from judgment entered following jury convictions for crimes committed during an armed home invasion robbery, during which Isaiah and Joshua attempted to steal a large stash of marijuana from Bruce Allen, Jr. (Junior) and Bruce Allen, Sr. (Senior). Roland Martinez provided defendants with transportation to and from the crime scene. The botched robbery ended in a shooting melee, with the Flores brothers, among others, sustaining gunshot wounds and fleeing empty handed.

Defendants were tried together before two juries. One jury heard the charges against the Flores brothers and the other jury heard the case against Roland. Isaiah was convicted of attempted voluntary manslaughter of Junior (Pen. Code, §§ 664, 192<sup>2</sup>; count 2), a lesser included offense of attempted premeditated murder; assault with a deadly weapon upon Kevin Yip (§ 245, subd. (b); count 6); first degree burglary (§ 459; count 7); and felon in possession of a handgun (§ 29800, subd. (a)(1); count 9). The jury also

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<sup>1</sup> Isaiah Flores and Joshua Flores are brothers.

<sup>2</sup> Unless otherwise noted, all statutory references are to the Penal Code.

found true the gun enhancements associated with counts 2, 6, and 7 (§ 12022.5, subd.

(a).) The trial court sentenced Isaiah to an aggregate prison term of 24 years, 8 months.

Joshua was convicted of attempted voluntary manslaughter of Senior and Junior (§§ 664, 192; counts 1 and 2), a lesser included offense of attempted premeditated murder; first degree burglary (§ 459; count 7); and felon in possession of a handgun (§ 29800, subd. (a)(1); count 8). The jury also found true the gun enhancements associated with counts 1, 2, and 7 (§ 12022.5, subd. (a)). The trial court sentenced Joshua to an aggregate prison term of 21 years, 4 months.

Roland was convicted of attempted murder of Senior and Junior (§§ 664, 187, subd. (a); counts 1 and 2); attempted home invasion robbery in concert, of Senior and Junior (§§ 664, 211, 213; counts 3 and 4); misdemeanor simple assault, a lesser included offense of assault with a firearm upon Travis Bandfield (§ 240; count 5); assault with a deadly weapon upon Kevin Yip (§ 245, subd. (b); count 6); and first degree burglary (§ 459; count 7). The trial court sentenced Roland to an aggregate state prison term of 24 years, 4 months, plus 180 days in county jail.<sup>3</sup>

Joshua and Isaiah contend the trial court imposed upper term sentences based on improper dual use of facts in violation of section 1170, subdivision (b). Roland argues the trial court improperly imposed multiple sentences in violation of section 654. We

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<sup>3</sup> The reporter's transcript indicates the trial court incorrectly calculated Roland's prison aggregate prison term as totaling 24 years, 8 months to life, whereas the actual aggregate prison term totals 24 years, 4 months to life. The abstract of judgment and sentencing minute order reflect the correct aggregate prison term of 24 years, 4 months.

conclude the trial court did not err in sentencing defendants, with the exception Roland's sentences on counts 3 and 4 must be stayed under section 654. The judgment is affirmed in all other regards.

## II

### FACTS

During the evening of September 28, 2011, Junior was at home with his girlfriend, Christine Schafer; his father, Senior; and his cousin, Kevin Yip. Junior and Senior sold marijuana. There was about 13 pounds of marijuana, worth up to about \$40,000, in the Allen home. Around 9:00 p.m. Travis Bandfield, a friend of the Allens, arrived in a black Volkswagen Jetta at the Allen home intending to purchase marijuana.

Meanwhile, Roland, who was unarmed, drove Joshua and Isaiah to the Allen home in a black Lexus. The Flores brothers were both armed with handguns and wore hoodies, gloves, and bandanas. They also sold marijuana. Joshua was known as the "weed man." Upon arriving at the Allen home in Riverside, defendants drove past the home and parked down the street. Roland remained in the car, crouched down in the driver's seat, while Joshua and Isaiah walked to the Allen home.

Meanwhile, while Junior was in the kitchen with Bandfield conducting businesses, Senior heard the dogs start barking. As he stepped outside the front door and lit a cigarette on the front porch, unaware of the Flores brothers' presence, one of the Flores brothers struck Senior in the head. Senior felt dazed. Senior fought the Flores brothers as he struggled to get back inside. Junior saw one of the Flores brothers strike Senior above his left eye with a gun and knock Senior to his knees just inside the front door.

Junior ran from the kitchen to his bedroom and retrieved two handguns. Joshua grabbed Senior from behind, pushed him to the floor, pressed a gun to his back, and ordered Senior to call for Junior to come out of his bedroom. Instead, Senior yelled, ““They’ve got guns.”” Joshua shot Senior in the lower back. Isaiah ordered Yip to get on the ground and pressed a gun to his back.

Junior emerged from his bedroom, yelled, ““You want to disrespect me in my house,”” and fired at the Flores brothers. The Flores brothers and Junior fired at each other, resulting in both Flores brothers sustaining gunshot wounds. The shootout ended when Isaiah dragged Joshua from the house. Roland drove up to the front of the house, helped the Flores brothers into the car, and drove to the hospital. The Flores brothers survived their gunshot wounds but Joshua is now paralyzed and confined to a wheelchair.

Junior and his girlfriend, Christine, backed out of the driveway and drove away in a red car. Junior drove to Lake Elsinore and threw two guns into the lake.

Bandfield, along with Bearman, Jordan, and Fortner, drove away in Bandfield’s Jetta. The police stopped the Jetta and found a gun (Eagle Uzi 9-mm) on the car floor. Bandfield claimed he had never seen the gun before. There was also blood on the front passenger seat and side of the doors. Bandfield believed someone else had gotten in his car while it was unoccupied.

Police Officer Corey Camp, who was dispatched to the Allen home, found Senior lying in the driveway and a black backpack containing “zip-tie” restraints on the path leading to the front door. Camp found a handgun (Davis Industries .38-caliber semiautomatic) and loaded handgun magazine (9 mm) lying in the street 10 to 15 feet

from Senior. The magazine did not match the handgun. Blood samples taken from the pistol and on the front porch and walkway matched Joshua's DNA profile. The blood found in Bandfield's Jetta and on the Uzi pistol found in his car also matched Joshua's DNA profile.

Joshua testified that he and Isaiah went to the Allen home to purchase marijuana. While Joshua was in the Allens' kitchen counting the money for the purchase, Senior accused Joshua of giving him a counterfeit hundred dollar bill. The two men grabbed for the money, fought, and punched each other. Joshua was shot in the arm and returned fire down the hallway. Senior was lying in the hallway near the front door. Joshua was shot again in the finger and back, causing him to fall to the ground as he was running out the front door.

Isaiah dragged Joshua to the street. The Flores brothers tried to get into the Jetta for cover but Joshua was too heavy for Isaiah to lift into the car. A red car backed out of the Allens' driveway and ran over Joshua's thigh and hip. The car also hit Isaiah. Roland pulled up and helped Isaiah get Joshua into the car.

### III

#### UPPER TERM FOR GUN USE ENHANCEMENT

Joshua contends the trial court abused its discretion by imposing the upper term for the personal gun use enhancement (§ 12022.5, subd. (a)), applied to his conviction for burglary (count 7). Joshua objected in writing and during the sentencing hearing. Joshua argued in his sentencing memorandum that the trial court should impose the midterm on the count 7 gun use enhancement because the most significant aggravating factor was use

of a gun, which should not be used to aggravate the gun use enhancement. Joshua’s attorney raised this same argument during the sentencing hearing.

The trial court imposed the upper term of six years for Joshua’s burglary conviction (count 7) and the upper term of 10 years for the enhancement. The court stated it based the upper term on the enhancement on (1) the seriousness of the crime—great violence, great bodily injury (GBI), cruelty, viciousness, and callousness; (2) Joshua’s leadership role in committing the crime; and (3) use of planning, sophistication, professionalism. (Cal. Rules of Court, rule 4.421(a)(1), (4), (8).)<sup>4</sup>

A single factor may be relevant to more than one sentencing choice. (*People v. Scott* (1994) 9 Cal.4th 331, 350 (*Scott*)). For instance, only a single aggravating factor is required to impose an upper term or a consecutive sentence, so long as that fact is reasonably related to each count for which it is used. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*); *People v. Robinson* (1992) 11 Cal.App.4th 609, 616, disapproved on another ground in *Scott*, at p. 353, fn. 16; *People v. Price* (1984) 151 Cal.App.3d 803, 812.) On the other hand, “such dual or overlapping use is prohibited to some extent.” (*Scott*, at p. 350; *People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196-1198 (*Moberly*)). A court cannot use a single fact both to impose the upper term and to impose an enhancement (§ 1170, subd. (b); *Scott*, at p. 350; rule 4.420(c)), or to impose the upper term and a consecutive sentence (*Osband*, at p. 728). Similarly, a fact that constitutes an element of the offense may not be used to aggravate or enhance a sentence.

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<sup>4</sup> Undesignated rule references are to the California Rules of Court.

(*Scott*, at p. 350; rule 4.420(d).) A court can, however, use the same fact or facts to aggravate both the base term for an offense and the sentence on an enhancement.

(*Moberly*, at p. 1198 [“We . . . conclude that the dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is not prohibited”].)

The trial court’s sentencing decision is reviewed for an abuse of discretion.

(*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) “The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary.

[Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Joshua argues the trial court improperly relied on factors not relevant or reasonably related to the personal use of a gun in connection with the burglary (count 7). He asserts that, although Joshua used great violence and GBI during commission of attempted manslaughter, there was no use of great violence or GBI during use of a gun in commission of the burglary. Joshua also argues that relying on the factors of use of great violence and GBI when imposing the gun use enhancement constituted an impermissible dual use of the same factor for more than one sentencing choice. The trial court relied on the use of great violence and GBI in imposing consecutive sentences and the gun use enhancements for counts 1 and 2. Joshua further argues the remaining factors relied on in imposing the gun use enhancements (leadership and use of planning, sophistication,

professionalism in committing the crime) were not reasonably related to the gun use enhancement.

Joshua forfeited these objections by not raising them at the sentencing hearing, even though he had an opportunity to do so after the trial court informed the parties of how it intended to rule. (*Scott, supra*, 9 Cal.4th at pp. 353, 356; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1041-1042.) Nevertheless, we conclude on the merits the trial court did not abuse its discretion in imposing the upper term on the gun use enhancement on count 7. There was substantial evidence Joshua used great force and violence in committing burglary, separate and apart from committing attempted manslaughter. Joshua and Isaiah used their guns to force their way into the Allen residence. The Flores brothers ran up to Senior and accosted him as he stepped outside the front door to light a cigarette on the front porch, unaware of the Flores brothers' presence. One of the Flores brothers struck Senior in the head with a gun, causing Senior to fall to the ground. Senior tried to prevent the Flores brothers from entering the Allen home by grappling with them in the front door entrance. Senior was struck on the head again with a gun, causing a gash to his forehead, requiring stitches. Joshua grabbed Senior from behind, pushed him to the floor, pressed a gun to his back, and ordered Senior to call for Junior to come out of his bedroom. Instead, Senior yelled, "They've got guns." This evidence of great violence, GBI, cruelty, viciousness, and callousness was sufficient to support an upper term for the gun enhancement on the burglary conviction.

Even if it was inappropriate to rely on the factor of great violence and GBI, based on dual use limitations, the trial court also relied on evidence the Flores brothers

committed the burglary and gun use enhancement with planning, sophistication, and professionalism. The Flores brothers were aware the Allens were in possession of a large amount of marijuana. The Flores brothers planned to force their way into the Allen home, using their guns, and rob the Allens of their marijuana stash. There was evidence the Flores brothers wore hoodies, bandanas, and gloves, and carried guns. Joshua instructed Roland to park down the street from the Allen house. In executing their plan, the Flores brothers ambushed Senior on the front porch, using their guns, and forced their way into the Allen home. Reliance on planning, sophistication, and professionalism was a sufficient basis for imposing the upper term on the gun use enhancement.

Thus, even if the trial court erred in relying on great violence, GBI, cruelty, viciousness, and callousness (rule 4.421(a)(1)) to impose an upper term on the gun use enhancement, the trial court properly relied on other proper factors to support the upper term on the enhancement. This is apparent from the trial court's comment that: "[T]his crime strikes the Court as the most senseless, stupid, misguided conduct it's been the Court's displeasure to view. [¶] Mr. Isaiah and Mr. Joshua Flores both chose to engage in a career—life of crime as a career, spending their days getting high, playing video games, and assaulting and robbing fellow drug dealers; and as such, they represent a high level of danger to the community. [¶] They showed cold, calculated, sophisticated criminal planning and, therefore, the Court feels the upper term is the most appropriate." The trial court appropriately considered a full range of aggravating circumstances when imposing the upper term on Joshua's burglary conviction and related gun enhancement. (*People v. Hall* (1995) 8 Cal.4th 950, 962.)

## IV

### UPPER TERM FOR COUNT 6

The trial court imposed the upper term of nine years for Isaiah's conviction for assault with a deadly weapon (count 6) and the upper term of 10 years for the related personal gun use enhancement (§ 12022.5, subd. (a)).

The trial court explained that it intended to impose upper terms on count 6 and the related gun use enhancement based on evidence Isaiah engaged in a life of crime, assaulting and robbing fellow drug dealers, and therefore represented a danger to the community. In addition, the court stated the evidence showed "cold, calculated, sophisticated criminal planning." The court further concluded that during the commission of the crime, Isaiah possessed contraband, consisting of illegally possessed guns and a large quantity of cash from illegal drug sales. The court added that the Flores brothers' conduct reflected they were mere "parasites on society, sitting around all day doing nothing except selling something illegal, living off of illegal proceeds, and shooting at each other and that's dangerous." "This was really bad conduct by people who were career criminals. And the fact that it's, oh, just drugs does not weigh with this court. . . . [¶] . . . [¶] By their own admission they sat around, got up every morning and smoked a bowl a day, went out with their friends, and sold drugs." The court noted Isaiah's conduct was dangerous; it "was a drug buy gone wrong."

The trial court stated it was sentencing Isaiah to the upper term on count 6 "because the Court believes this is professional criminal behavior of the worst possible sort in pursuit of illegal gain and shows a readiness to do evil. With respect to the

12022.5 allegation [gun use enhancement], the Court selects the upper term of ten years for [the] same reasons . . .”

Isaiah contends the trial court improperly relied on gun use as a factor in imposing the upper term on count 6 (assault with a deadly weapon) and on the related gun use enhancement. Isaiah argues that a fact of an enhancement cannot be used to impose an upper term on a base charge without striking the enhancement. Using the gun enhancement as a dual source violates the prohibition against dual use under *Scott, supra*, 9 Cal.4th 331, and section 1170, subdivision (b). (See rule 4.420(c) and *Moberly, supra*, 176 Cal.App.4th at p. 1197.) Section 1170, subdivision (b) states in relevant part: “[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law.” Based on the dual use rule, Isaiah’s attorney objected during the sentencing hearing to the court relying on the gun use enhancement as an aggravating factor in imposing an upper term on count 6.

The trial court here did not use the same fact or facts to impose an upper term on count 6 and to impose the related enhancement. The fact underlying the enhancement, personal use of a firearm, was not used by the trial court as a circumstance in aggravation to select the upper term on count 6. While use of a gun was mentioned, the trial court clearly stated that imposition of the upper term on both count 6 and the gun use enhancement was based on other factors, which included “professional criminal behavior of the worst possible sort in pursuit of illegal gain,” demonstrating “a readiness to do evil.” The court concluded that the Flores brothers’ conduct showed “cold, calculated, sophisticated criminal planning.”

Use of planning, sophistication, professionalism is a proper basis for imposing an aggravated term (rule 4.421(a)(8)), and only a single aggravating factor is required to impose an upper term, so long as that fact is reasonably related to each count for which it is used. (*Osband, supra*, 13 Cal.4th at pp. 728-729; *People v. Robinson, supra*, 11 Cal.App.4th at p. 616.) Furthermore, a court can use the same fact or facts to aggravate both the base term for an offense and the sentence on an enhancement. (*Moberly, supra*, 176 Cal.App.4th at p. 1198.)

Here, the trial court properly relied on planning, sophistication, and professionalism, as well as other factors the court described as “criminal behavior of the worst possible sort in pursuit of illegal gain [which] shows a readiness to do evil.” (Rule 4.421(a)(8) & (c).) The trial court therefore did not abuse its discretion in imposing upper terms on count 6 and the related gun use enhancement. (*People v. Sandoval, supra*, 41 Cal.4th at p. 847.)

Isaiah’s reliance on *People v. Roberson* (1978) 81 Cal.App.3d 890 (*Roberson*) for the proposition the trial court improperly imposed the upper term on count 6, is misplaced. In *Roberson*, the trial court imposed an aggravated sentence on the defendant’s armed robbery conviction, based on a finding of planning. The planning finding was based on evidence the defendant used a ski mask and a gun during commission of the robbery. The trial court also relied on the use of a gun in imposing a gun use enhancement. (*Id.* at p. 893.) The *Roberson* court concluded the trial court improperly relied on the defendant’s possession of a gun to impose the upper term on robbery and therefore could not also be used to impose the gun possession enhancement.

(*Ibid.*) The *Roberson* court explained: “this fact had been used to aggravate the crime and could not be used a second time. Although advance planning of the crime as evidenced by the ski mask and his pattern of violent conduct would of themselves be sufficient to find aggravation, the court is not bound to do so. If the armed allegation is determinative for the court in finding aggravation then it must decide whether this fact is to be used to aggravate or to enhance, one or the other, but not both as was done here. The case must be remanded for resentencing.” (*Ibid.*)

Isaiah argues that the court in *Roberson* found that “The threat of violence and possession of the weapon as an indication of planning could only be based on [the defendant’s] use of the weapon in committing this very crime.” (*Roberson, supra*, 81 Cal.App.3d at p. 893.) The *Roberson* court concluded that since the factors of violence and planning were based on gun use, those factors could not be relied upon in imposing an upper term on the robbery. Isaiah maintains that, likewise, in the instant case, the trial court’s stated reasons for imposing upper terms on count 6 and the related gun use enhancement were based on factors that were founded on gun use. Isaiah argues that the court stated it was relying on Isaiah’s “professional criminal behavior” and “readiness to do evil,” and these factors could only be based on Isaiah’s use of a gun in committing count 6.

The instant case is distinguishable from *Roberson, supra*, 81 Cal.App.3d 890, in that the trial court in the instant case did not state that it was relying on gun use as a basis for imposing the upper term on count 6 or as a basis for finding the factors relied on imposing the upper term (planning, professional criminal behavior, and readiness to do

evil). In addition, unlike in *Roberson*, the factors relied on were not solely based on Isaiah's gun use. For instance, the factors of planning and professional criminal behavior are supported by evidence defendants parked down the street from the Allen house, with Roland remaining in the car for surveillance and to provide a quick escape; defendants communicated by text message during surveillance of the Allen home; the Flores brothers wore hoodies, gloves, and bandanas; the Flores brothers ambushed Senior; and the Flores brothers brought zip-tie restraints, which could be used to restrain their victims.

Isaiah argues it could be inferred the court improperly relied on use of a gun, but the court did not state it was doing so and to conclude otherwise would be speculative, if not contradictory to the trial court's acknowledgement that it could not rely on the gun use enhancement as a dual source for imposing an upper term on count 6. We presume the court knows and follows the law. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) This presumption, combined with the court's clear statement that it was relying on appropriate aggravating factors, other than gun use, suffices to show the court properly imposed the upper term on count 6.

## V

### CONSECUTIVE SENTENCES AND UPPER TERM BASED ON SAME FACTS

Isaiah contends the trial court improperly imposed consecutive sentences on counts 2, 7, and 9, and the upper term on count 6, based on the same facts, in violation of rule 4.425(b). We disagree.

During sentencing, the trial court designated count 6 (assault with a deadly weapon) as the principal count and imposed the upper term based on the court finding the

crime “is professional criminal behavior of the worst possible sort in pursuit of illegal gain and shows a readiness to do evil.” The court imposed the upper term on the related gun use enhancement based on the same reasons. The court stated it imposed the midterm on count 2 (voluntary manslaughter), and midterm on the related gun use enhancement, “for an aggregate term of two years, four months with respect to Count 2 for the same reasons previously stated.” The court further stated it imposed the midterms on counts 7 (burglary) and 9 (felon in possession of a handgun), and midterm on the gun use enhancement related to count 7. Sentences on counts 7 and 9 were also imposed consecutively to count 6, with no stated reason for imposing consecutive sentencing. The court noted that section 654 did not apply because Isaiah’s objective in committing the burglary differed from his objective in committing the other offenses.

Rule 4.425(b) provides: “Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term.” In other words, “[T]he court cannot rely on the same fact to impose both the upper term and a consecutive sentence. [Citations.] However, one relevant and sustainable fact may explain a series of consecutive sentences. [Citations.]” (*Scott, supra*, 9 Cal.4th at p. 350, fn. 12; *Moberly, supra*, 176 Cal.App.4th at pp. 1197-1198.)

Citing *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 822 (*Ratcliffe*), Isaiah argues that, because the trial court did not state reasons for imposing consecutive sentencing but stated reasons for imposing an upper term on count 6, it is reasonable to infer that the trial court improperly relied on the same facts for imposing both

consecutive sentencing and the upper term on count 6. In *Ratcliffe*, the trial court imposed an upper term on rape and consecutive sentences for the defendant's kidnapping and oral copulation convictions. The court stated the upper term was based on the crime involving great violence, great bodily harm and threat of great bodily harm; the defendant committed other acts disclosing a high degree of cruelty, viciousness, and callousness; the defendant was armed and used a weapon; and the victim was particularly vulnerable. (*Id.* at p. 822.)

The trial court in *Ratcliffe* indicated its reasons for imposing consecutive sentences on the other crimes were the same as those relied on in imposing the upper term on rape. (*Ratcliffe, supra*, 124 Cal.App.3d at p. 822.) The defendant argued on appeal that the trial court erred in relying on the same facts to impose the aggravated term on rape and the consecutive sentences on kidnapping and oral copulation. (*Id.* at p. 821.) The *Ratcliffe* court agreed, concluding, "A review of the court's statement of reasons for imposing the aggravated term and for imposing the consecutive sentences, leads to only one reasonable interpretation—that the court improperly relied upon the same facts for imposing the aggravated term and for imposing consecutive sentences." (*Ibid.*) The *Ratcliffe* court therefore held that, "[s]ince it is clear that the trial court made dual use of the same factors in imposing the aggravated term and imposing consecutive sentences, appellant is entitled to a new sentencing hearing." (*Id.* at p. 822.)

The People argue that, by not raising the objection during sentencing, Isaiah forfeited his objection on appeal. We agree. Isaiah did not object to the trial court imposing consecutive sentencing without specifying its reasons for doing so, and did not

object to the trial court relying on the same reasons relied on in imposing consecutive sentences and the upper term on count 6. Had Isaiah raised these objections in the trial court, the court could have clarified its reasons for imposing consecutive sentencing and addressed whether the court was improperly relying on the same factors for imposing the upper term and consecutive sentences. Despite the opportunity to raise the dual source objection during sentencing, Isaiah failed to raise the objection in the trial court and therefore forfeited it on appeal. (*Scott, supra*, 9 Cal.4th at pp. 331, 353, 356; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1372.) Isaiah could have raised his sentencing objections after the trial court announced the tentative sentence, as well as after the court stated Isaiah's sentence. After stating Isaiah's sentence, the trial court asked if there was "[a]nything further with respect to sentencing on Mr. Isaiah Flores?" Defense counsel stated he had nothing to add, other than that he would file an appeal on Isaiah's behalf.

Furthermore, since the trial court stated it relied on at least two reasons for imposing the upper term, it is reasonably probable the trial court would have imposed consecutive sentencing based on different reasons than those relied on to impose the upper term on count 6. Therefore there was no prejudice. "Improper dual use of the same fact for imposition of both an upper term and a consecutive term or other enhancement does not necessitate resentencing if "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error."

[Citation.] Only a single aggravating factor is required to impose the upper term [citation], and the same is true of the choice to impose a consecutive sentence [citation]. In this case, the court could have selected disparate facts from among those it recited to

justify the imposition of both a consecutive sentence and the upper term, and on this record we discern no reasonable probability that it would not have done so. Resentencing is not required.” (*Osband, supra*, 13 Cal.4th at pp. 728-729.)

## VI

### CONSECUTIVE SENTENCES IMPOSED AGAINST ROLAND

Roland contends the trial court erred in imposing consecutive sentences against him because his sole intent was to aid the Flores brothers in the commission of the burglary and robberies. His liability for the attempted murders and assaults was based on the natural and probable consequences doctrine.

During Roland’s sentencing hearing, the trial court stated its tentative sentence. The court stated it intended to designate the sentence on count 6 (assault with a deadly weapon upon Kevin Yip) the principal term, with the subordinate sentences on the remaining counts imposed consecutively because there was more than one victim. Defense counsel requested the court to run concurrently the subordinate determinate sentences, except for the gun use enhancements on counts 1 through 7 (§ 12022, subdivision (a)(1)). The trial court acknowledged Roland had lesser involvement in the crimes than the Flores brothers but nevertheless rejected the suggestion to impose concurrent sentencing, and imposed consecutive sentences on counts 3 and 4 (attempted home invasion robbery against Senior and Junior), and count 7 (burglary, in which Roland, a principal, knew another principal was armed with a gun and personally used the gun in committing the burglary), because there was more than one victim.

Roland argues that under section 654 and *People v. Bradley* (2003) 111 Cal.App.4th 765, 770 (*Bradley*), the court could not sentence Roland to multiple consecutive sentences for crimes the Flores brothers committed because Roland's liability was as an aider and abettor of the burglary and robberies. Roland asserts that he could only be punished once for his involvement in the crimes because he had only a single intent and objective in aiding and abetting the home invasion burglary and robberies, and his liability for the other crimes upon which he received consecutive sentences was based on the natural consequences doctrine. The court in *Bradley* held that a defendant convicted under the natural and probable consequences doctrine could not be punished for crimes the defendant had no knowledge of committing and no separate objective and intent to commit.

This case is, in part, distinguishable from *Bradley* in that the instant case involves multiple victims of violent crimes. But *Bradley* is also on point to the extent Roland committed more than one crime against the same victim. In *Bradley*, the defendant had the single intent and objective of aiding and abetting robbery of a single victim. The defendant approached the inebriated victim in a casino and enticed him to leave the casino and drive with her to a party. On the way, the defendant persuaded the victim to stop the car, whereupon the defendant left in another car and the defendant's accomplices robbed the victim. (*Bradley, supra*, 111 Cal.App.4th at p. 767.) During the robbery, one of the accomplices shot the victim. The defendant was tried and convicted of both the robbery and attempted murder. The issue addressed in *Bradley* was: "May a court impose consecutive sentences on an aider and abettor for two offenses arising out of a

single criminal transaction where the aider and abettor only intended one of those offenses and her liability for the second depends upon it being a ‘natural and probable’ consequence of the first?” (*Id.* at p. 768, fn. omitted.) The *Bradley* court held the trial could not impose consecutive sentences under such circumstances. (*Id.* at pp. 768, 772.)

The *Bradley* court reversed the defendant’s consecutive sentence for attempted murder under section 654, on the grounds the defendant did not have a separate intent or objective to commit the attempted murder offense and her liability for the shooting rested solely on the natural and probable consequences doctrine. (*Bradley, supra*, 111 Cal.App.4th at pp. 768, 772.) The *Bradley* court explained: “In order to authorize consecutive sentencing for both the robbery and attempted murder offenses, [section] 654 tells us [the defendant] must have had a dual rather than single objective. This defendant . . . must personally have had the objective of committing both the robbery and the attempted murder. . . . Instead the jurors predicated [the defendant’s] guilt of the attempted murder count solely on the theory the prosecution tendered, [an aiding and abetting] theory only requiring [the defendant] to entertain a single objective—to rob that victim. [¶] In our view, the trial court cannot countermand the jury and make the contrary finding [the defendant] in fact *personally* had both objectives. . . . [W]ithout a finding [the defendant] at some point entertained as an independent objective the goal of attempting to murder [her robbery victim], [section] 654 denies the trial court discretion to impose consecutive sentences on [the defendant] for the robbery and attempted murder convictions.” (*Id.* at p. 770.)

Because Roland's liability for attempted murder and the assault crimes is based on the natural and probable consequences doctrine, we agree consecutive sentencing would normally be improper under section 654 because Roland harbored only one objective and intent, to aid and abet the Flores brothers in committing the burglary and robberies. Nevertheless, as the People assert, the multiple victim exception to section 654 applies to most of the counts because the offenses involved acts of violence against multiple victims. Under *People v. Oates* (2004) 32 Cal.4th 1048, 1063, "the limitations of section 654 do not apply to crimes of violence against multiple victims." This is because "[a] defendant who commits an act of violence . . . by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." (*Id.* at p. 1063; see also *People v. Deloza* (1998) 18 Cal.4th 585, 592; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1023 [defendant properly punished for two counts of making a terrorist threat because his threatening messages were heard by two individuals].)

As an aider and abettor of the robberies, burglary, attempted murders, and assault crimes, Roland could be punished for each violent crime involving a separate victim, even though he only intended to aid and abet the burglary and robberies. The multiple victim exception thus applies to count 6 (assault with a deadly weapon against Yip) and count 7 (burglary committed with a firearm). The burglary in the instant case qualifies as a violent crime under the section 654 multiple victims exception because it was committed with a gun and the jury found Roland participated as a principal in the commission of the crime, knowing that another principal was armed with a handgun. In addition, the burglary was committed in conjunction with an act of violence qualifying as

an enhancement and resulted in great bodily injury. (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1091; *People v. Miller* (1977) 18 Cal.3d 873, 886; *People v. Centers* (1999) 73 Cal.App.4th 84, 99 (*Centers*)). In addition, the burglary involved a victim that was not a victim of any of the other offenses. Christine Schafer was a residence at the Allen home and present at the time of the burglary. (*Centers*, at pp. 101-102.)

The multiple victim exception also applies to counts 1 and 2, but not counts 3 and 4. The multiple victim exception does not apply to all four counts (1 through 4) because count 1 (attempted murder) and count 3 (robbery) both involve the same victim, Senior; and count 2 (attempted murder) and count 4 (robbery) also both involve the same victim, Junior. Therefore, consecutive sentencing on all four counts was improper under the multiple victim exception. Under the exception, the trial court may impose consecutive sentencing only on one crime involving Senior as a victim and one crime involving Junior as a victim; presumably on the attempted murder crimes (counts 1 and 2), which subjected Roland to greater sentences than the robberies. The other sentences involving Senior and Junior as victims (counts 3 and 4) should be stayed under section 654 and *Bradley*, along with the related gun use enhancements. This is because *Bradley* prohibits multiple punishment of an aider and abettor for robbery and attempted murder when the aider and abettor's liability for the attempted murder rests solely on the natural and probable consequences doctrine, as in the instant case. The trial court therefore erred in failing to stay Roland's robbery sentences on counts 3 and 4, and related gun use enhancements.

The People argue that, even though the multiple victim exception did not apply as to the crimes against Senior and Junior, consecutive sentencing on the robbery and attempted murder counts was proper because there was substantial evidence that the crimes arose from separate, independent criminal objectives. As to Senior, the Flores brothers shot him gratuitously, after having already subdued him for purposes of robbing him by striking him twice on the head, causing Senior to fall to the ground. As to Junior, Joshua fired at Junior after the attempted robbery was aborted and the Flores brothers were fleeing.

The People argue *Bradley* therefore is inapplicable because there was evidence defendants had separate, dual objectives when they committed the robbery and attempted murder crimes. But, as in *Bradley*, in the instant case, there is no evidence Roland shared the Flores brothers' separate, independent objective and intent to shoot Senior and Junior. There is also no evidence Roland intended to aid and abet the attempted murder offenses. Since the victims (Senior and Junior) of the attempted murder offenses (counts 1 and 2) and robberies (counts 3 and 4) are the same, the multiple victim exception to section 654 does not apply to all four crimes. The sentences imposed on counts 3 and 4 for robbery of Senior and Junior therefore must be stayed under section 654 and *Bradley, supra*, 111 Cal.App.4th at page 770.

## VII

### DISPOSITION

The judgment as to Roland is ordered modified as to his sentences on counts 3 and 4, and related enhancements, as follows: Roland's sentences on counts 3 and 4, and

related enhancements, are ordered stayed under section 654, thereby reducing Roland's aggregate sentence from 24 years, 4 months to life; to 21 years, 8 months to life. The superior court is ordered to issue a modified abstract of judgment as to Roland, and to forward a certified copy to the Department of Corrections and Rehabilitation.

Defendants' judgments are affirmed in all other regards.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.