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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY CHU,

Defendant and Appellant.

F064187

(Fresno Super. Ct. No. F11905427)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jon Kapetan, Judge.

Charles M. Bonneau, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Detjen, J.

PROCEDURAL AND FACTUAL HISTORY

On September 20, 2011, the Fresno County District Attorney filed a felony complaint charging defendant Tony Chu with attempted murder (Pen. Code,¹ §§ 187, subd. (a), 664) with personal use of a knife (§ 12022, subd. (b)(1)) (Count 1), and mayhem (§ 203) by behavior that “split the ear of ... a human being” (Count 2). On September 18, 2011, defendant pled not guilty to both counts and denied the enhancement allegation. On September 28, 2011, defendant pled not guilty by reason of insanity, and the trial court suspended criminal proceedings and appointed two psychologists to evaluate him. In his report, one of the psychologists, Robert Taylor, included a summary of the incident as reported to a Fresno police officer: the victim told Officer Ressler that the defendant approached the victim’s work station, produced a butcher knife, and placed it to the victim’s throat. The victim ran outside. Defendant chased him. Defendant “then ... bit the ear of the victim, causing the injury”

On December 19, 2011, the trial court received, considered, “incorporate[d] into the file and [made] part of the record,” the reports of both psychologists. The trial court found defendant not guilty by reason of insanity. Defendant then withdrew his not guilty plea, pled guilty to count one with the enhancement, and pled guilty to count two.

Counsel for both parties stipulated that the factual basis for the plea was as it was listed on the plea form: “THE POLICE REPORT SAYS THAT ON 9-18-11, IN THIS COUNTY, I USED A KNIFE AND BITING TO SPLIT MY COUSIN’S EAR AND TRY TO KILL HIM.” When discussing defendant’s maximum period of commitment, the trial court stated it may be 11 years 4 months. Defendant’s counsel took the position

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

that the maximum period of commitment would depend on whether section 654 applied; the trial court acknowledged section 654 might apply.

On January 5, 2012, the trial court followed the recommendation of the Community Program Director of the Central California Conditional Release Program (CONREP) and committed defendant to Atascadero State Hospital (ASH). The following then occurred:

“MR. GUNDERSON [prosecutor]: Your Honor, we do have to set the maximum term.

“THE COURT: We need time credits as well as maximum period of confinement on this. [¶] ... [¶]

“MR. LAMBE [defense counsel]: Yes. Three matters, Your Honor. I’ve provided attorney fee form to the Court. I assume the Court will find that he is [sic] not have the ability to pay.

“THE COURT: That’s correct.

“MR. LAMBE: Secondly, I come up with 110 days of actual time credits.

“THE COURT: Okay.

“MR. LAMBE: Thirdly, I have the maximum time in custody as ten years applying PC 654 to Count Two.

“THE COURT: People?

“MR. GUNDERSON: I’m not so sure it is [sic] 654 issue. I’m not sure that biting an ear off necessarily has anything to do with attempted murder.

“MR. LAMBE: A single criminal objective, single transaction, single attack.

“THE COURT: The maximum would be, if it were not 654?

“MR. GUNDERSON: 11,4.

“THE COURT: All right. I’ll find 11 years 4 months is the maximum period of commitment. And the time credits are 110 days you said?

“MR. LAMBE: Yes.

“THE COURT: 110 days. Anything further?

“MR. LAMBE: We observely [*sic*] we object to the finding of the maximum time.

“THE COURT: All right. I understand.

“MR. LAMBE: Thank you, Your Honor.

“THE COURT: Objection is noted for the record.”

DISCUSSION

The commitment of 11 years 4 months consisted of nine years for attempted murder (count 1), one year for personal use of a knife (special allegation), and one year, four months, for mayhem (count 2). Defendant asserts the trial court was limited in its “654 determination” to the factual basis that was stated for the guilty plea, the factual basis established the two substantive offenses were committed with a single intent and objective, and the trial court therefore erred when, in its determination of his maximum term, it ran the two terms consecutively. He cites to *People v. Bui* (2011) 192 Cal.App.4th 1002 as support for his position.

Respondent points to three sources of information as justifying the trial court’s choice to run the terms consecutively: the factual basis for the plea, the fact the knife use was alleged and admitted as to the attempted murder count only (and not the mayhem count), and the incident description listed in Dr. Taylor’s evaluation. Respondent argues that consideration of all three sources of information leads to the reasonable inference “that the attempted murder and the mayhem were separate acts – i.e., that [defendant] used a knife to attempt to murder his cousin, and separately bit his cousin in the ear, with the intent to disfigure him, which provided the basis for the mayhem charge.”

Section 1026.5, subdivision (a)(1) requires that, “[i]n the case of any person committed to a state hospital . . . , the court shall state in the commitment order the maximum term of commitment ‘[M]aximum term of commitment’ shall mean the longest term of imprisonment which could have been imposed for the offense . . . , including the upper term of the base offense and any additional terms for enhancements and consecutive sentences which could have been imposed less any applicable credits” Section 654, subdivision (a), is applicable to the calculation of the maximum term of commitment. (*People v. Hernandez* (2005) 134 Cal.App.4th 1232, 1238.) That section applies to “[a]n act or omission that is punishable in different ways by different provisions of the law” and prohibits punishment for two crimes arising from a single, indivisible course of conduct. (§ 654, subd. (a), *People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

“The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Additionally, where a defendant has similar but consecutive objectives, multiple punishments are permitted. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212.) “The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. Its findings on this question must be upheld on appeal if there is any substantial evidence to support them. [Citations.] We must ‘view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.)

Contrary to defendant's position, a section 654 determination is not necessarily limited by the agreed factual basis for the plea; that is not the purpose of the factual basis. A factual basis is required before a trial court accepts a guilty or no contest plea pursuant to a plea agreement. (*People v. French* (2008) 43 Cal. 4th 36, 50.)² “The purpose of the requirement is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged. [Citation.] Inquiry into the factual basis for the plea ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead.’ [Citation.]” (*Ibid.*)

When making a section 654 determination, on the other hand, a trial court looks beyond the limits of the factual basis. A section 654 analysis, in the “vast majority of cases,” is made by the trial court “on the basis of the evidence received during trial.” (*People v. Ross* (1988) 201 Cal.App.3d 1232, 1240.) In *People v. Ross*, a post plea section 654 evidentiary hearing was held on the issue of whether the crimes were separate and distinct. In finding no error in the holding of such a hearing, the court of appeal stated, “The right to enter a plea of guilty or to waive trial by jury cannot be deemed to include the right to deprive the court of facts that must be known in order to make a correct sentencing decision; nor can a plea bargain limit that inherent judicial prerogative.” (*Id.* at p. 1241.)

When a defendant enters a not guilty by reason of insanity plea, the question of whether he was sane or insane at the time of the offense is determined by trial. (§1026subd. (a).) In this case, during the court trial, Dr. Taylor's evaluation was “incorporate[d] into the file and [made] part of the record.” In other words, it was

² Conversely, when there is no plea agreement, for example when a defendant enters an unconditional plea, the trial court has “no duty to inquire into the factual basis.” (*People v. French, supra*, 43 Cal.4th at p. 50.)

received into evidence. As such, its contents were available to the trial court for use in a section 654 analysis.

The evidence before the trial court was that defendant approached the victim and put a butcher knife to the victim's throat. When the victim fled, defendant chased him. Defendant then bit the victim in the ear, with the intent to disfigure him. Defendant's plea admitted personal use of a knife in the commission of the attempted murder, but not in the commission of mayhem.

In *People v. Bui, supra*, 192 Cal.App.4th 1002, the case upon which defendant relies, the court held the defendant could not be sentenced to consecutive terms for attempted murder and mayhem when the two crimes addressed the same act of shooting the victim. Bui fired at least three rounds into the victim's body. (*Id.* at p. 1006.) The trial court characterized the two counts as describing "basically[] the same occasion and same set of operative facts." (*Id.* at p. 1013.) The court of appeal agreed. (*Id.* at p. 1015.)

This case, however, is factually different. It does not involve one attack on the victim for which defendant was convicted of different provisions of the law. Viewing the evidence in "a light most favorable to the respondent" (*People v. Hutchins, supra*, 90 Cal.App.4th at p. 1312), it is reasonable to infer defendant used a knife with the intent to kill the victim and, after the victim fled, chased and caught up to him, biting his ear with the intent to disfigure him. Implicit in the trial court's sentencing decision was a determination that defendant harbored separate intents and objectives with respect to attempted murder and mayhem. The trial court did not err in imposing a maximum commitment of 11 years 4 months.

DISPOSITION

The judgment is affirmed.