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

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL MARQUIS MAXEY,

Defendant and Appellant.

F068057

(Super. Ct. No. F12908745)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

John L. Staley, 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, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Cornell, Acting P.J., Franson, J. and Peña, J.

## **INTRODUCTION**

Following jury trial, defendant Darrell Marquis Maxey was convicted of corporal injury on a spouse with a prior conviction, and assault with means of force likely to cause great bodily injury. The jury found true the great bodily injury enhancements alleged as to each count. In a bifurcated proceeding, the court found true prior strike and prison term enhancements. Defendant was sentenced to a total of 19 years 8 months in prison.

On appeal, defendant argues he should only have been punished once for great bodily injury because the multiple bodily injury enhancements arose from a single assaultive episode against a single victim, and Penal Code<sup>1</sup> section 12022.7 imposes a single enhancement for such an assault. Alternatively, he maintains the enhancement on count 3 must be stayed pursuant to section 654. We affirm.

## **THE RELEVANT FACTS AND PROCEDURE**

Gennifer Phillips married defendant after a brief courtship. On the evening of August 24, 2012, the couple went to defendant's brother's apartment. "Tee" and "Dee"—as defendant's brother and his girlfriend were commonly referred to—were planning to celebrate their daughter's birthday the following day. Phillips was helping Dee fill candy bags in anticipation of the party.

Later, Phillips and defendant began to argue in a bedroom. Defendant was angry because Phillips mentioned her son would be seeing his biological father, with whom defendant did not get along. Phillips then told defendant she wanted to leave because she did not want to "disrespect the house," but defendant went "crazy." Defendant grabbed Phillips's arms then pushed her onto her back. He shoved her so hard her head snapped up; she felt pain in her neck. Phillips tried to get her purse, but defendant told her she was not going anywhere. He grabbed her again and shook her "like a rag doll."

Defendant began hitting Phillips. In response, Phillips told defendant she wanted a divorce. Defendant shook her shoulders, causing her feet to leave the floor. He threw

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<sup>1</sup>Unless otherwise indicated, all further statutory references are to the Penal Code.

her on the bed and fell on top of her; she was facedown and defendant was on her back. Phillips was able to push him off and get back to her feet, but during the encounter her leg was broken. She had heard a “pop” in her left ankle and her foot was “dangling.” The pain was great. Phillips told defendant he had broken her leg, but he replied, “Your leg’s not broke, bitch.”

Eventually, Phillips was able to leave the room because Tee and Dee came in and held back defendant, although he was trying to grab her by the hair. Defendant broke free of his brother’s grasp and grabbed Phillips from behind by her hair and purse near the apartment’s front door. He whipped her around to face him and they struggled over her purse because it had the car keys in it. Phillips then let go of her purse and defendant fell back towards the wall. She told him, “Forget it, you can have it. I don’t care. I’ll walk home.” Phillips left the apartment, hopping on her injured ankle but trying to run. She did not make it far. Just outside the door, defendant caught her and pulled her down to the ground by her hair. Defendant lifted her up by her bra and shoulder; it hurt. Then he punched her in the left eye with a closed fist. He struck her three to four times in the face. She could taste blood and the pain was great.

Phillips managed to make it to her car. Defendant was behind her yelling and cussing: “Fucking bitch, I’ll fucking kill you. You’re fucking stupid.... Fucking ock.” She got to the passenger side door; the driver’s side door was broken and would not open. She had neither the keys to her car, nor her purse, but she intended to break a window to get inside. Before Phillips was able to do so, however, defendant pushed her onto the car, then whipped her around to face him. He was yelling and cursing that she was not going anywhere. Then he took the keys from her purse and threw them into the parking lot, saying, “Go fetch, fucking bitch.” When Phillips retrieved the keys, defendant wanted her to open the driver’s side door so that he could sit in the car with her. She refused. She had been trying to get in the passenger side and had the door open. Defendant ran around to that side of the car. From behind, defendant pushed Phillips toward the driver’s seat. Her head struck the driver’s side door. Phillips righted herself in the

driver's seat; defendant was sitting in the passenger seat. Defendant started punching Phillips in the stomach with his closed fists. She fought back, hitting him in the eye and mouth. Defendant grabbed her chin and bit her. Then he got on top of her, with his knees on her hips. Her hands were trapped under him and she was unable to move. Defendant put his hands around her neck, thumbs crossing over her windpipe, and squeezed. She could not speak or breathe. Her vision began to darken and tunnel, and she saw blue and white lights at the edge of her field of vision. The pain was a 10 on a scale of 1 to 10. She did not lose consciousness but thought she was going to die. Defendant let go and returned to the passenger seat.

Defendant resumed yelling at Phillips. He turned in the seat and began choking her again. It felt like her neck was being crushed. She thought she was going to die. Phillips does not remember what happened next because she blacked out from the second choking incident. She recalled waking up as defendant pulled her from the passenger side of the car by her hair. When Phillips got to her feet, defendant punched her in the left eye with a closed fist, telling her she was not going to leave him and threatening to kill her. Phillips was able to return to Tee and Dee's apartment. Initially, defendant was locked outside, but he banged on the door and jumped into the backyard yelling to be let in. Ultimately, defendant's brother let him in through the front door. Defendant tried to apologize to Phillips, who was sitting on the couch. His brother wanted them both to leave the apartment. Defendant told Phillips he would leave her alone if she took him to her home so he could get his stuff.<sup>2</sup> She agreed, hoping her brother would be at her home so her brother could hold defendant down while she called police. She was afraid for her life.

Defendant opened the car door for Phillips with her keys. As her car exited the apartment complex, Phillips was stopped by arriving police. She was asked if she was

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<sup>2</sup>Despite being married, Phillips and defendant had never lived together. He kept his belongings at her home because he was otherwise homeless.

aware of any disturbance, and Phillips told the officer that a “couple Mexicans” were fighting in the complex. She did so because she was afraid defendant would hurt her; he had a six- to seven-inch screwdriver in his lap. She did not think she could ask the officer for help at that time. After the officer drove away, defendant thanked Phillips. She continued toward her home, running red light signals enroute. On the way, defendant warned Phillips not to call the police, telling her he would kill her. She believed him.

Phillips went inside the home she shared with other family members and grabbed defendant’s belongings from her room. Defendant followed her inside. Her brother was not home. Phillips drove defendant back to his brother’s apartment because he promised her he would leave her alone so she could go to the hospital. She agreed.

At the apartment complex, Phillips pulled in and parked facing the exit. Defendant got out of the car, and when Phillips felt the weight of his two duffle bags being lifted from the car’s trunk, she began to drive away. Before she could get away however, defendant broke the driver’s side window with his hands. She took off.

Phillips drove to her mother’s house; her mother called an ambulance. Before being transported to the hospital, Phillips gave a brief statement to a responding officer. She later spoke with a detective.

Although surgery was not required on her foot, Phillips wore a hard splint for six weeks and a walking boot for about 10 weeks. She used crutches for the first 12 weeks. Valium was administered in the hospital, and she was prescribed Vicodin for four months thereafter. Phillips still felt pain at the time of trial and would wear a small brace when needed.<sup>3</sup> Walking caused pain, and she could no longer run and play with her children.<sup>4</sup> Phillips suffered other injuries as well, including a black eye, and numerous bruises and scratches to her face, neck, shoulders, arms, and knee.

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<sup>3</sup>At the time of her testimony, Phillips was waiting to see a podiatrist concerning further treatment of her injuries.

<sup>4</sup>Phillips has two children. She and defendant have no children in common.

In a first amended information filed July 30, 2013, defendant was charged as follows: count 1—corporal injury to a spouse with a prior similar conviction (§ 273.5, subd. (e)(1)); count 2—criminal threats (§ 422); and count 3—assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)). As to counts 1 and 3, it was further alleged defendant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)); as to count 1 it was also alleged defendant had suffered a prior similar conviction in 2008; and as to count 3, it was further alleged defendant had prior serious felony convictions in 2002 and 2008 within the meaning of sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d). Defendant pled not guilty and denied all allegations.

At trial, Fresno Police Officers Sergio Gonzalez and Edward Louchren, and Detective Bryan Craft testified concerning their respective interviews of Phillips shortly after the incident and weeks later.<sup>5</sup>

Following the five-day jury trial, defendant was found guilty of corporal injury to a spouse with a previous similar conviction (count 1) and assault by means likely to produce great bodily injury (count 3); the great bodily injury enhancements as to each count were found true by the jury. Defendant was found not guilty of criminal threats.

In a separate court trial, defendant's prior convictions for corporal injury to a spouse and robbery were found true, as was the prior prison term allegation.

On September 3, 2013, defendant was sentenced to a total of 19 years 8 months in state prison. This appeal followed.

## **DISCUSSION**

Defendant contends the “trial court erred by finding true multiple great bodily injury enhancements and imposing separate sentences for those enhancements. The true finding to the great bodily injury enhancement under count three should have been

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<sup>5</sup>The defense did not present any witnesses.

stricken or stayed as a matter of statutory interpretation of section 12022.7 or pursuant to section 654.”

### ***The Great Bodily Injury Findings & Sentencing Proceedings***

The jury found the section 12022.7, subdivision (e) allegations to be true as to counts 1 and 3.

After hearing from Phillips, as well as Phillips’s mother and son, the court entertained argument concerning the sentence to be imposed:

“[PROSECUTOR]: ...With relation to counts 1 and 3, Your Honor, there is a possible argument for 654 application of this particular case, and I do not believe that it should apply, specifically, due to the fact that while this could be argued as a continuous course of conduct, it would be the People’s position that these are two discreet [*sic*] events. While they may have happened close in time, and on the same night, I think the fact that great bodily injury was inflicted at two separate occasions means that this court has the ability to run these charges consecutively and not as 654 charges. Specifically, the incident that took place in the bedroom, and injuries resulting in her broken ankle, the point that she then left the bedroom and was trying to leave the scene, the defendant had the ability to stop this particular incident at that point. Instead, he made the choice to continue on with the assault and attack against her, specifically resulting in the loss of consciousness she experienced once she was in the vehicle at this particular point. Because of those particular findings by the jury of two separate counts of great bodily injury in this case, it would be the People’s argument that the court should not treat these incidents as 654. [¶] ... [¶]

“THE COURT: Thank you. [Defense counsel]?”

“[DEFENSE COUNSEL]: I would just say I think these are all 654, it’s out of the same course of conduct, but going back to what the court was saying, I think the court was correct in looking through [defendant]’s record that he does have a history of having issues with women, but there are mitigating factors....”

After hearing from defendant, the court ruled, in relevant part, as follows:

“[THE COURT:] With respect to whether or not 654 applies to counts 1 and 3, or whether concurrent or consecutive sentencing would be appropriate as to count 3, the facts in this case reflect that there was an attack on the victim in the house, and that’s when [defendant] broke her ankle or her leg. The victim in this case was able to reach a temporary point of safety, and with the defendant’s family members trying to hold him

back. [Defendant] at that point clearly had an opportunity to reflect on his behavior and to stop at that point. Instead, [he] chased the victim out of the house into the car and strangled her to the point of unconsciousness while in the car. It is very clear that these are two separate and distinct acts of violence against the victim in this case. The defendant clearly had an opportunity to reflect and to stop the attack on the victim. Instead, he chose to pursue her and to continue the attack. Therefore, consecutive sentencing is clearly appropriate, in that this involved two separate acts of violence separated by time and place, in which the defendant clearly had an opportunity to reflect on his behavior, so this was not a continuous course of conduct, in that it was broken when the victim was able to get out of the house, and then the defendant continued to pursue her and then choked her to unconsciousness while in the car.”

### *Analysis*

Section 12022.7 provides, in pertinent part:

“(e) Any person who personally inflicts great bodily injury under circumstances involving domestic violence in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years. As used in this subdivision ‘domestic violence’ has the meaning provided in subdivision (b) of Section 13700.

“(f) As used in this section, ‘great bodily injury’ means a significant or substantial physical injury.

“(g) This section shall not apply to murder or manslaughter or a violation of Section 451 or 452. Subdivisions (a), (b), (c), and (d) shall not apply if infliction of great bodily injury is an element of the offense.”

Section 654, subdivision (a) states, in part:

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

This provision prohibits multiple punishments for: (1) a single act, (2) a single omission, or (3) a single indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.)

Assuming section 12022.7 allows for the imposition of a single enhancement per “assaultive episode” as defendant contends, the trial court did not err. Defendant

assaulted Phillips on more than one occasion and in more than one location: once inside defendant's brother's apartment, and again in her vehicle parked outside. Hence, there were two "assaultive episodes," to borrow defendant's words. With regard to the fact not much time had passed between the two episodes, as the trial court pointed out, the acts were separated by sufficient time within which defendant had an opportunity to reflect upon his behavior. (See *People v. Petronella* (2013) 218 Cal.App.4th 945, 964.) Instead of doing so, or perhaps in spite of doing so, defendant elected to perpetrate a second assault on Phillips inside her car. We also note subdivision (h) of section 12022.7 provides that the "court shall impose the additional terms of imprisonment under either subdivision (a), (b), (c), or (d), but may not impose more than one of those terms for the *same offense*." (Italics added.) From the plain language of the statute then, there is no limit upon the imposition of an enhancement under this section to a situation such as the one before us where multiple offenses are involved. Subdivision (e)—the specific enhancement with which we are concerned—is missing from the aforementioned list. (See *People v. Coronado* (1995) 12 Cal.4th 145, 151.)

Both parties cite *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*) in their discussion of this issue. "In *Ahmed*, the court addressed whether and how section 654 applies to the imposition of *multiple enhancements* for a *single crime*." (*People v. Calderon* (2013) 214 Cal.App.4th 656, 662.) Here, as the People recognize, we are dealing with multiple enhancements for multiple, separate crimes (i.e., corporal injury to a spouse and assault by means likely to produce great bodily injury). The analysis is different when considering two enhancements attached to different underlying crimes.

"[S]eparate enhancements—even under the same statute—may be imposed for each conviction arising out of a separate criminal act. [Citations.]" (*People v. Wooten* (2013) 214 Cal.App.4th 121, 130–131 (*Wooten*)). "So long as the conduct giving rise to the convictions of separate substantive offenses ... arises from separate ... acts, neither section 654 nor *Ahmed, supra*, 53 Cal.4th 156 requires the staying of the [punishment on

the] attached enhancements.” (*Wooten, supra*, at p. 131.)<sup>6</sup> “When the criminal acts forming the basis for convictions of multiple substantive offenses are divisible—i.e., reflecting separate intents, objectives, or events—then section 654 has been held inapplicable.” (*Wooten*, at p. 130.)

That court distinguished the authorities relied upon by defendant *Wooten*, including two cases relied upon by defendant here:

“*Reeves, Moringlane, Culton, and Alvarez* stand for the proposition that only one enhancement for great bodily injury may be imposed on a defendant if he or she committed a single assault against a single victim. Here, defendant challenges the imposition of two enhancements for great bodily injury arising out of his crimes against M.S. Consequently, the propriety of the separate enhancements imposed on defendant depends on whether the attacks against M.S. constitute a single, indivisible assault or separate criminal acts.” (*Wooten, supra*, 214 Cal.App.4th at p. 132.)<sup>7</sup>

In *Wooten*, the court found two separate attacks on victim M.S. The attacks occurred over a period of about 15 minutes and began with an assault in the bathroom, followed by another attack in the bedroom after M.S. pushed her attacker away and sought escape. (*Wooten, supra*, 214 Cal.App.4th at pp. 125-126, 132-133.) Like the *Wooten* court, we are not persuaded by defendant’s characterization of his attack of Phillips as a single assault or the result of a continuous course of conduct.

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<sup>6</sup>Defendant argues *Wooten* should not be followed because “its conclusion that separate attacks occurred was not supported by the evidence and made little sense.” We do not agree with defendant’s interpretation. We find *Wooten* to be well supported and well reasoned.

<sup>7</sup>In *People v. Reeves* (2001) 91 Cal.App.4th 14, the defendant was convicted of burglary and assault arising from a single attack of victim Debra E. Each conviction was enhanced with a bodily injury enhancement. The *Reeves* court found section 654 prevented imposition of punishment on both enhancements. The court cited the holding of *People v. Moringlane* (1982) 127 Cal.App.3d 811: “[S]ection 654 ... prohibits the imposition of multiple enhancements for the single act of inflicting great bodily injury upon one person.” [Citations.]” (*Reeves, supra*, 91 Cal.App.4th at pp. 56–57, italics added.) But this is not a case of a single physical act resulting in multiple enhancements. Rather, it is a case of multiple physical acts or events giving rise to multiple enhancements. Section 654 does not prohibit punishment for each enhancement in this circumstance.

Here, despite defendant's argument to the contrary, the corporal injury to a spouse and assault by means likely to produce great bodily injury arose from separate criminal acts or events. The corporal injury to a spouse conviction arose from defendant's physical act of breaking Phillips's ankle or leg in the bedroom of his brother's apartment following a verbal dispute concerning a future visit between Phillips's son and his biological father. Whereas the assault by means likely to produce great bodily injury arose from defendant's subsequent physical act of strangling or choking Phillips inside her vehicle to the point she lost consciousness. Because these are separate acts or events, the *Wooten* test is satisfied. (*Wooten, supra*, 214 Cal.App.4th at pp. 130–131.) Section 654 does not require punishment on either enhancement be stayed. (*Ibid.*)

“[I]f section 654 does not bar punishment for two crimes, then it cannot bar punishment for the same enhancements attached to those separate substantive offenses. This is true even if the same *type* of sentence enhancement is applied to the underlying offenses.” (*People v. Wooten, supra*, 214 Cal.App.4th at p. 130.) Although great bodily injury was inflicted upon one victim, as we have discussed, two separate injuries were inflicted as a result of two separate and distinct acts. On this record, we find no error in the imposition of the great bodily injury enhancements.

Finally, defendant contends count 3 should be stayed pursuant to section 654 and the federal due process clause. We do not agree.

Defendant argues *People v. Correa* (2012) 54 Cal.4th 331 and *People v. Jones* (2012) 54 Cal.4th 350 support his position. In *Jones*, police searched the car the defendant was driving and found a loaded .38-caliber revolver that was not registered to him. The defendant told the officers that he bought the gun three days earlier for protection. He was convicted of possessing a firearm by a felon, carrying a readily accessible concealed and unregistered firearm, and carrying an unregistered firearm in public. He was separately sentenced for each offense. (*Jones, supra*, at p. 352.) *Jones* held that “a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654.” (*Id.* at p. 357.) It further concluded that

“[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law.” (*Id.* at p. 358.) The holding in *Jones* does not require the sentence imposed for count 3 be stayed because, as we explained above, more than a single physical act occurred. The holding in *Correa* does not help defendant here: “[T]he purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability. [Citations.]... ‘... A person who commits separate, factually distinct, crimes, even with only one ultimate intent and objective, is more culpable than the person who commits only one crime in pursuit of the same intent and objective.’ [Citation.]” (*People v. Correa, supra*, 54 Cal.4th at p. 341.) Here, because defendant committed more than one separate and factually distinct crime against Phillips, he is more culpable than an individual who committed a single crime, with the same intent and objective. As a result, the trial court did not err by refusing to stay imposition of the sentence in count 3, and no due process violation occurred.

#### **DISPOSITION**

The judgment is affirmed.