

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKY TOMMY ARAGON,

Defendant and Appellant.

E038944

(Super.Ct.No. FBA007632)

OPINION

APPEAL from the Superior Court of San Bernardino County. John B. Gibson,
Judge. Affirmed in part and reversed in part with directions.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves,
Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General,
Gil Gonzalez, Supervising Deputy Attorney General, Andrew Mestman and Robert
Foster, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Ricky Tommy Aragon (hereafter defendant) guilty as charged of attempted second degree robbery (Pen. Code, § 664/211) (count 1), assault with a firearm (Pen. Code, § 245, subd. (a)(2)) (count 2), and participating in a criminal street gang (Pen. Code, § 186.22, subd. (a)) (count 3). The jury further found true the allegation, in connection with each count, that in the commission of the alleged offense a principal was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)).¹

The district attorney prosecuted defendant on the theory that he had aided and abetted Alexander Gamez, the actual perpetrator, in the commission of the noted crimes, all of which occurred during a single incident on December 22, 2003, and involved a single victim, Craig Sullivan. At the conclusion of their joint trial, the jury was unable to reach verdicts with respect to Gamez on any of the three charges but found defendant guilty as charged on all three counts.

In this appeal, defendant challenges the sufficiency of the evidence to support his conviction on count 3, the criminal street gang charge, and to support the jury's true finding on the related section 12022, subdivision (a)(1) enhancement. In a supplemental brief, defendant asks that we take judicial notice of the subsequent retrial of Alexander Gamez in which the prosecutor dismissed the charges midtrial when the victim, Craig Sullivan, stated that Gamez definitely was not the person who had assaulted and attempted to rob him. Because defendant was prosecuted as an aider and abettor of Gamez, and the charges against Gamez were dismissed, defendant contends that we must

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

reverse the judgment and dismiss the criminal street gang charge. Defendant also contends that the jury should have been instructed on the need for unanimity because Gamez fired four shots at Sullivan, each of which defendant contends constituted a separate act of assault with a firearm but the prosecutor charged only one crime based on those acts. Moreover, defendant contends that the trial court should have stayed execution of the sentence imposed on defendant's attempted robbery conviction because that crime and the crime of assault with a firearm were based on the same criminal act within the meaning of section 654. As his final claim, defendant contends that the trial court violated his Sixth Amendment right to have a jury determine all factual issues because in imposing the upper term sentence on count 2 and the consecutive sentences on counts 1 and 3 the trial court relied on facts other than those the jury found true at trial.

We agree with defendant's claim under section 654 and in light of *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) ___ U.S. ___ [127 S.Ct. 856] must also agree with defendant's challenge to the trial court's imposition of the upper term sentence. Therefore, we will vacate defendant's sentence and remand the matter to the trial court for further proceedings and with directions that in resentencing defendant, the trial court must stay execution of the sentence imposed on count 1. The judgment is otherwise affirmed.

FACTS

The parties fully recount the evidence presented at trial in their respective briefs. For our purpose it is sufficient to recount only those details pertinent to the issues defendant raises in this appeal. That evidence includes the testimony of Craig Sullivan,

the victim, who testified in pertinent part that on December 22, 2003, around 9:30 p.m., he and his friends, Robert and Linda Linville, went to an apartment complex to find their friend Christopher Schwartz (also referred to at trial as CC) in order to buy marijuana. Sullivan was knocking on the door of an apartment where he believed CC lived when defendant walked up. Defendant told Sullivan that the occupant of the apartment was not home. Then defendant asked if Sullivan was looking for marijuana. After Sullivan said he was, defendant walked upstairs and returned with another man who asked Sullivan how much marijuana he wanted to buy. Sullivan said that he had to check with his friends and he and the two men walked back to the car.

Linda Linville was in the back seat of the car waiting for her husband Robert and defendant to return. Robert had also apparently gone in search of CC. Sullivan sat down in the front passenger seat, with the door open and his legs and feet extended outside the car. After Sullivan sat down, the second man said that he would get marijuana for him if Sullivan would give him some money. When Sullivan said that his friend had the money, the man hit Sullivan in the knee with a gun and said, "Look, mother fucker where is the money?" When Sullivan repeated that he did not have any money, the man said, "If you don't give me your money, I'm going to blow your fucking head off." The man shot Sullivan in the leg after Sullivan stated yet again that he did not have any money.

Sullivan immediately grabbed the man's hands, and jumped out of the car. The man tried to shoot Sullivan in the face while Sullivan held his hands. The two struggled and eventually fell to the ground. Sullivan repeatedly banged the man's hands on the ground to get him to let go of the gun. During the struggle, the gun went off three times

but none of the bullets hit Sullivan. When Sullivan lost his hold, the man scrambled to his feet, and started kicking Sullivan while at the same time demanding money. Sullivan, who was lying on his back with his hands over his head, asked the man not to shoot him all the while repeating that he did not have any money. The man shot Sullivan three more times in the legs, each gunshot preceded by a demand for money and Sullivan's insistence that he did not have any money. After shooting Sullivan, the man ran off.

While Sullivan and the man with the gun struggled, defendant stood by the car next to the door where Linda Linville was seated. When the man with the gun ran off, defendant ran off too. After the two men left, Sullivan got up and ran from the area. He looked for help but was unable to find any and eventually walked to a hospital where he received treatment for gunshot wounds, one in the back of each thigh, and a graze or tangential wound in his left leg.

Sullivan described defendant, both to the investigating police officer, Detective Griego, and at trial, as a heavyset man with a large tattoo on the side of his head that said "G-Thing" or "G-Thang." Sullivan could not identify the second man and described him as a young Hispanic male.

Linda Linville identified Gamez in a live lineup as the person who shot Craig Sullivan after demanding money from him. She identified defendant from a photo lineup as the person who kicked Sullivan and who also stood next to the car during that assault and indicated by wagging his finger back and forth that Linda should not try to get out of the car.

Alejandro Rodriguez testified in pertinent part that on the night in question he was visiting his sister at the apartment complex where the shooting occurred. Rodriguez denied remembering anything about the shooting, other than hearing the shots fired, and also could not recall talking with a police detective about the incident a few days after it occurred. Detective Griego testified in pertinent part that he interviewed Alejandro Rodriguez, whose sister lives in an apartment that overlooks the area where the shooting occurred. Rodriguez told the detective that he had looked out the window of his sister's apartment and saw "Alex Gamez" shooting someone who was on the ground. Rodriguez knew Gamez and recognized him because he and Gamez used to work together. Rodriguez told Detective Griego that he also saw defendant walk over and kick the victim, after which defendant and Gamez ran off. Detective Griego testified, in pertinent part, that in the early morning hours after the shooting, he contacted Gamez in an apartment at the complex where the shooting had occurred. Gamez, whom Detective Griego also knew by his gang moniker, Little Grande, told the detective that he had been in the apartment all night.

Additional evidence will be discussed below as pertinent to the issues defendant raises on appeal.

DISCUSSION

We first address defendant's contention that the evidence is insufficient to support either the jury's verdict finding him guilty on count 3 of participating in a criminal street gang, or the jury's true finding on the related gun use enhancement.

1.

SUFFICIENCY OF THE EVIDENCE

Defendant's challenge to the sufficiency of the evidence stems from the jury's inability to reach verdicts on the charges against Gamez. Because Gamez was the actual perpetrator of the crimes and defendant's liability was predicated entirely on aiding and abetting Gamez, defendant contends that the jury's inability to reach a verdict on the charges against Gamez requires reversal of defendant's conviction on the criminal street gang charge because, in order to find defendant guilty of actively participating in a criminal street gang, the jury had to find among other things that defendant aided and abetted another member of the criminal street gang in committing a crime.² (See § 186.22, subd. (a); *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435-536; CALJIC No. 6.50 (Fall 2006 ed.)) Because the jury did not find Gamez guilty of any crime and there was no evidence to show that some other gang member committed those offenses, defendant contends the evidence is insufficient to support the jury's implied finding that defendant aided and abetted a gang member in committing a crime.

The issue defendant presents does not concern sufficiency of the evidence. The evidence presented at trial, and recounted above, is sufficient to show that Gamez committed each of the charged crimes, notwithstanding the jury's inability to reach a

² Defendant does not challenge the sufficiency of the evidence to prove the other elements of the criminal street gang charge and thus concedes the evidence established the existence of a criminal street gang, called Los Gents, of which Gamez and defendant were members.

verdict on the charges, and that defendant aided and abetted Gamez in the commission of the those crimes. The issue defendant raises is whether the jury’s inability to reach verdicts on the charges against Gamez affects the validity of the verdicts the jury rendered against defendant. The answer is no, for reasons we now explain.

In deciding whether the different results the jury reached in this case affect the validity of defendant’s conviction for participating in a criminal street gang, we are guided by principles that apply when juries reach inconsistent verdicts. “It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.]” (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) For example, a jury may convict the alleged aider and abettor even though in an earlier proceeding a different jury acquitted the actual perpetrator. (*Standefer v. United States* (1980) 447 U.S. 10.) In affirming the aider and abettor’s conviction, and rejecting his collateral estoppel claim, the *Standefer* court “noted that a jury has the power, if not the legal right, to acquit no matter what the evidence, and the prosecution may never challenge such an acquittal. This circumstance ‘in criminal cases permits juries to acquit out of compassion or compromise or because of “their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.’” [Citation.]’ [Citation.] ‘In denying preclusive effect to [the actual perpetrator’s] acquittal, we do not deviate from the sound teaching that “justice must satisfy the appearance of justice.” [Citation.] This case does no more than manifest the simple, if discomfoting, reality that “different juries may reach different results under any criminal statute. This is one of the consequences we accept under our jury system.” [Citation.] While symmetry of results may be intellectually satisfying, it is not required.

[Citation.]” (*People v. Palmer* (2001) 24 Cal.4th 856, 862-863, quoting *Standefer v. United States, supra*, 447 U.S. at pp. 22, 25-26, quoting *Dunn v. United States* (1932) 284 U.S. 390, 393.)

Defendant does not challenge his conviction on count 1 or count 2, both of which also depend on defendant aiding and abetting Gamez in the commission of those crimes, and thereby defendant impliedly recognizes the principle that a jury may reach inconsistent verdicts with respect to codefendants who are prosecuted as actual perpetrator and aider abettor. In challenging his conviction on count 3 defendant argues that because the jury was unable to reach verdicts on the charges against Gamez and there was no evidence to show that another gang member committed those crimes, defendant could not have aided and abetted a gang member in committing a crime and therefore defendant cannot be found guilty of participation in a criminal street gang. In other words, defendant would have us conclude from the jury’s inability to reach verdicts on the charges against Gamez that the evidence was insufficient to support those charges. We cannot draw that conclusion. If, as defendant contends, the jury had found that the evidence was insufficient then they would have acquitted Gamez and thereby reached a verdict. A jury’s inability to reach a verdict implies only that the jurors could not all agree on some essential element of the charge. Neither the source of disagreement nor the correctness of the disagreement can be implied from the jurors’ inability to unanimously agree.

In the context of coconspirators, a context analogous to that of aider and abettor and actual perpetrator, inconsistent verdicts are permitted in a joint trial. (See *People v.*

Palmer, supra, 24 Cal.4th at pp. 860-865.) The same conclusion should apply when the defendant is charged with participating in a criminal street gang and is prosecuted on the theory that the defendant aided and abetted a crime committed by another gang member. The United States Supreme Court has explained: “[A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury’s determination that evidence on another count was insufficient.’ [Citation.]” (*People v. Lewis, supra*, 25 Cal.4th at p. 656, quoting *United States v. Powell* (1984) 469 U.S. 57, 67.)

The evidence recounted above is sufficient to support defendant’s conviction for aiding and abetting Gamez, a gang member, in committing assault with a firearm and attempted robbery. Therefore, the evidence supports defendant’s conviction of participation in a criminal street gang as alleged in count 3. Briefly recounted, that evidence includes the testimony of Linda Linville who identified Gamez both in a lineup and in court during trial, as the person who assaulted Craig Sullivan with a firearm, shot him, and attempted to rob him. When interviewed by Detective Griego, Alejandro Rodriguez also identified Gamez as the assailant although he refused to repeat that identification in court, and instead steadfastly insisted that he could not recall anything that had occurred, including whether he had even actually talked to Detective Griego.

The evidence also shows that defendant introduced Gamez to Sullivan, and that defendant stood by and watched while Gamez repeatedly shot Sullivan in an attempt to rob him. Moreover, the evidence shows that defendant participated in the assault by kicking Sullivan after Sullivan struggled with Gamez over the gun.

For the reasons discussed above we must also reject defendant's assertion, raised in a supplemental brief, that the district attorney's subsequent dismissal of the charges against Gamez requires us to reverse defendant's conviction on count 3. According to defendant, the prosecutor dismissed the charges because Gamez did not commit the charged crimes. To support that claim defendant asks that we take judicial notice of the transcript of the hearing on October 25, 2005, in the subsequent retrial of Gamez at which the prosecutor dismissed the charges. We grant that judicial notice request but conclude that the transcript does not support defendant's claim that the prosecutor dismissed the charges because Gamez did not commit the crimes. The transcript, which defendant quotes in his supplemental brief, shows only that the prosecutor believed he could not prove the charges against Gamez beyond a reasonable doubt and for that reason dismissed them.³

Finally, and for the reasons previously discussed, we must also reject defendant's challenge to the sufficiency of the evidence to support the jury's true finding on the section 12022, subdivision (a)(1) sentence enhancement alleged in connection with count

³ Any other inference or conclusion defendant would have us draw is not apparent from the facts in the record and therefore cannot be raised in this appeal. Defendant must pursue any further claim in a petition for writ of habeas corpus.

3. Defendant challenges the enhancement on the same ground he relied on to challenge the substantive offense to which the enhancement is attached – the evidence is insufficient to show that a principal in the crime of participating in a criminal street gang was armed with a firearm because the jury did not find Gamez guilty of any crime. Defendant purports to distinguish the enhancement from the crime to which it is attached, and argues based on that purported distinction that even if the evidence is sufficient to support the crime, it is insufficient to support the firearm enhancement. The distinction defendant attempts to draw is not apparent to us. In our view, the jury’s true finding on the firearm enhancement is supported by the same evidence recounted above that supports the jury’s guilty verdict on the underlying crime.

Accordingly, for the reasons explained above we reject defendant’s assertion that the evidence was insufficient to support the jury’s verdict finding him guilty of participation in a criminal street gang as alleged in count 3 and finding true the section 12022, subdivision (a)(1) firearm enhancement alleged in connection with that charge.

2.

UNANIMITY

Defendant contends that because Sullivan was shot more than once⁴ the evidence supports more than one charge of assault with a firearm which in turn required either that the prosecution elect the act it intended to rely on to support the charge or the trial court

⁴ According to defendant, Sullivan was shot four times. In our view of the evidence, Gamez hit Sullivan once with the gun, and then shot him three times.

instruct the jury on the need for unanimity. Neither of those things occurred, and according to defendant the oversight resulted in structural error. We do not agree that a unanimity instruction was required.

“[W]hen the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The controlling case is *People v. Oppenheimer* (1909) 156 Cal. 733, in which the defendant, who was in prison for life, assaulted a fellow prisoner, first by hitting him in the head with a weight and then assaulting him with a knife. (*Id.* at p. 737.) In rejecting the defendant’s assertion that the evidence showed two separate acts of assault, the Supreme Court held the prosecutor was not required to elect between an assault with the weight and an assault with the knife: “We think it is manifest that there was but a single assault shown by this evidence, even though two weapons were used. The mere fact that two weapons are used does not necessarily show two assaults. If one unlawfully assails another with his two hands, first striking at him with one hand and immediately thereafter with the other, no one would say that there were two offenses. The offense would be the one unlawful attempt, coupled with a present ability, to commit a violent injury upon the other’s person, and each effort made in what constituted only the same attempt to accomplish this result would constitute only a single element of that attempt.” (*People v. Oppenheimer, supra*, 156 Cal. at p. 740.)

Defendant’s contrary claim notwithstanding, the evidence in this case shows only one discrete criminal act of assault with a firearm, even though Gamez fired several shots

at Sullivan. Accordingly, we conclude the prosecutor was not required to elect the specific act of assault and the trial court was not required to instruct the jury on the need to unanimously agree on the specific act that constituted that crime.

3.

CONSECUTIVE SENTENCES

Defendant contends that the trial court erred when it imposed consecutive sentences on defendant's conviction for assault with a firearm and his conviction for attempted robbery. Defendant contends that both crimes resulted from the same criminal act, or occurred during an indivisible criminal transaction, and therefore the trial court should have stayed execution of the lesser sentence in accordance with section 654. The Attorney General concedes this claim of error, a concession we view as appropriate. Defendant also contends that the trial court violated section 654 by imposing the firearm enhancement on count 3, defendant's conviction for participating in a criminal street gang, because the enhancement is based on the same conduct as the underlying offense. We do not share defendant's view on this latter claim of error.

Section 654 prohibits multiple punishments for a single criminal act, or indivisible course of criminal conduct, that violates more than one criminal law. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 18.) When the defendant commits more than one physical act during a criminal enterprise the question is whether the course of criminal conduct is divisible and "therefore gives rise to more than one act within the meaning of section 654." (*Neal v. State of California*, *supra*, at p. 19.) Resolution of that question, in turn, "depends on the intent and objective

of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Ibid.*)

The trial court here imposed consecutive sentences on counts 1 and 2 after finding that the attempted robbery was complete, and that the last shot Gamez fired had nothing to do with that crime. According to the trial court, “That [attempted robbery] was over with. It [the last shot] was just done out of malice, and, therefore, it was not part and parcel of the one crime. Completely independent thereof.”

As defendant points out, and the Attorney General concedes, there was no evidence to show that defendant shared the intent and purpose of the actual perpetrator to assault Sullivan with a firearm after the attempted robbery was completed. Therefore, assuming the trial court’s view of the evidence is accurate, and the last shot Gamez fired was entirely gratuitous and unrelated to the attempted robbery, that evidence would support consecutive sentences only as to Gamez, the actual perpetrator. (See *People v. Bradley* (2003) 111 Cal.App.4th 765, 769-770 [aider and abetter may be convicted of both crimes but may only be sentenced on both if evidence shows aider and abetter harbored separate intent and objective].) Accordingly, we will stay execution of the eight-month sentence the trial court imposed on count 1, defendant’s attempted robbery conviction, that being the shorter of the two sentences.

Defendant also contends that we must stay execution of the sentence on the firearm enhancement imposed on count 3, defendant’s conviction for violating section 186.22, subdivision (a), by actively participating in a criminal street gang. According to defendant, the firearm use enhancement is based on the same acts that constitute the

substantive crimes and therefore execution of the sentence imposed on the enhancement must be stayed under section 654.⁵

In *People v. Coronado* (1995) 12 Cal.4th 145, 156, our California Supreme Court held that section 654 does not apply to status-based enhancements.⁶ However, there is a split of authority whether section 654 applies to act-based enhancements, such as the act at issue here of using a firearm. The question is currently before the California Supreme Court in the case of *People v. Palacios*, review granted, May 11, 2005, S132144.

The sentence enhancement at issue here, which increases the defendant's sentence on the underlying crime by a year in state prison when a firearm is used to commit the underlying crime, does not result in dual punishment for the same criminal conduct. Rather such enhancements increase the punishment that is imposed for the underlying crime. Simply put, defendant is not being punished more than once for the same criminal act, he is being punished more harshly for that criminal act because a principal was armed with a firearm during the commission of that crime. (§ 12022, subd. (a).) Moreover, it occurs to us, as it has to other courts, that if section 654 applies to enhancements based

⁵ The Supreme Court granted review in *People v. Manila* (2006) 139 Cal.App.4th 589, review granted September 20, 2006, S144885, which defendant cites to support his claim that section 654 applies to section 12022 firearm use enhancements.

⁶ One month before the Supreme Court decided *People v. Coronado, supra*, we held, in *People v. Douglas* (1995) 39 Cal.App.4th 1385, that section 654 applies to enhancements and therefore precluded imposition of more than one enhancement under section 667.8, subdivision (a), which adds a nine-year prison term when a kidnapping is committed for the purpose of committing specified sexual offenses. (*People v. Douglas, supra*, at pp. 1392-1393.)

on use of a firearm in the commission of the underlying offense, then “section 12022, subdivisions (a) and (b), and section 12022.5, subdivisions (a) and (b) would be superfluous.” (*People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519.) For these reasons, we conclude that section 654 does not preclude execution of the section 12022, subdivision (a) firearm use enhancement the trial court imposed on count 3.⁷

4.

SIXTH AMENDMENT VIOLATION

As his final claim, defendant argues that the trial court violated his constitutional right to a jury trial under *Blakely v. Washington* (2004) 542 U.S. 296, by imposing upper term and consecutive sentences based on facts that the jury did not expressly or impliedly determine. The Supreme Court recently resolved the issue with respect to upper term sentences when it held in *Cunningham v. California, supra*, that any fact used to increase punishment for a crime, other than the fact of a prior conviction, must be found by a jury and therefore California’s determinate sentencing scheme violates the Sixth Amendment. Because the trial court in this case imposed the upper term sentence based on facts other than a prior conviction and the facts were not the result of a jury finding, we must strike

⁷ We note that this case does not involve the imposition of more than one firearm use enhancement because the trial court stayed execution of the enhancement imposed on count 2, after it relied on Gamez’s use of the firearm to impose the upper term sentence on that count, and we have stayed execution of the sentence imposed on count 1. As a result, only one firearm use enhancement is being imposed and executed and that is the enhancement found true in connection with count 3.

the upper term sentence the trial court imposed on count 2 and remand this matter to the trial court for further proceedings consistent with *Cunningham v. California*.

The Supreme Court did not address consecutive sentences in *Cunningham v. California*. Therefore, the controlling authority on that issue is *People v. Black* (2005) 35 Cal.4th 1238, 1261-1264, in which our state Supreme Court held that a defendant is not entitled to have a jury decide the facts a trial court relies on to impose consecutive sentences. Accordingly, we reject that aspect of defendant's claim.

DISPOSITION

Defendant's sentence is vacated and that matter is remanded to the trial court for further proceedings consistent with *Cunningham v. California, supra*. In resentencing defendant the trial court is directed to stay the sentence imposed on count 1 in accordance with section 654. The judgment otherwise is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Richli
J.