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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. JIMMIE LEE OATES, Defendant and Appellant.	E029354 (Super.Ct.No. FWV 018708) OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid A. Uhler, Judge. Affirmed in part; reversed in part with directions.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lora Fox Martin and Steven T. Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

After we affirmed the trial court's judgment in this case, but ordered various

sentencing modifications, the California Supreme Court granted review and reversed this court only as to imposition of the Penal Code section 12022.53, subdivision (d)[1] enhancement imposed on count 5. Specifically, the Supreme Court held that this court erred in holding that a section 12022.53, subdivision (d) enhancement, which requires great bodily injury, could be imposed only once under section 654 since only one person was injured. The Supreme Court remanded the case to this court for further proceedings consistent with its opinion, including remanding the case to the trial court for resentencing.

Since the Supreme Court affirmed our decision in all regards, other than as to the section 12022.53, subdivision (d) enhancement issue, we repeat in this opinion our views and holdings as stated in our previous opinion. As to the enhancement issue, we adopt the views and holding stated in the Supreme Court decision, and remand the case for resentencing.

2. Procedural Background

Defendant Jimmie Lee Oates and two companions drove into hostile gang territory and fired two shots at a group of five rival gang members. Gustavo Barrera was shot in the leg, resulting in its amputation.

Defendant appeals judgment entered following his jury conviction for five counts of attempted premeditated murder (counts 1, & 3 through 6) (§ 187, subd. (a)); mayhem

[1] Unless otherwise noted, all statutory references are to the Penal Code.

(count 2) (§ 205); and possession of a firearm by a felon (count 8) (§ 12021, subd. (a)(1)).[2] The jury also found true the enhancement allegations that a principal personally used and discharged a firearm, which caused great bodily injury (§ 12022.53, subds. (b), (c), & (d)), and that the offenses were committed to benefit a criminal street gang (§ 186.22, subd. (b)(4)). Defendant admitted the truth of the allegation that he had previously suffered a prior strike (§ 667, subds. (b) – (i), & 1170.12).

The jury deadlocked on, and the court dismissed, the enhancement allegations that defendant personally inflicted great bodily injury under section 12022.7, subdivision (a) and discharged a firearm from a motor vehicle, causing great bodily injury (§ 12022.55).

The court sentenced defendant to an aggregate indeterminate prison term of 85 years to life plus a determinate term of 20 years, consisting of consecutive prison terms of 30 years to life on count 1 for attempted murder of Barrera; 30 years to life on count 5 for attempted murder of Manuel Castrejon; 25 years to life for a count 1 enhancement under section 12022.53, subdivision (d); and 20 years for a count 5 enhancement under section 12022.53, subdivision (c).[3] The trial court imposed concurrent sentences as to the other attempted murder counts (counts 3, 4, & 6), and stayed sentencing as to counts 2 (mayhem) and 8 (felon gun possession).

We affirm the judgment as to defendant's convictions and reverse the judgment as

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[2] Count 7 (evasion of an officer) is charged solely against a codefendant.

[3] The abstract of judgment is in error in not showing that the court imposed a consecutive 25-years-to-life enhancement under section 12022.53, subdivision (d), as to

[footnote continued on next page]

to defendant's sentence. This case is remanded to the trial court for resentencing consistent with the views expressed in this opinion.

3. Factual Background

During the afternoon of September 11, 1999, members of the North Side Ontario gang (NSO), including Gustavo Barrera, Victor Mendoza, and Walter Ramirez, entered East Side Ontario gang (ESO) territory. The NSO and ESO are rival gangs. Defendant is a member of ESO. Mendoza got into a fistfight with an individual associated with the ESO.

After the fight, the NSO members went to Antoinette Acuna's home to visit her son, NSO member, Manuel Castrejon. Acuna's home was in NSO territory, on Calaveras Street. At around 10:00 p.m., Mendoza, Barrera, Castrejon, Ramirez, and Jose Gonzalez socialized outside on Calaveras Street. A white car and a dark green car drove down Calaveras Street and momentarily stopped in front of the group of NSO members. An occupant in the green car, on the passenger side, fired at the NSO group. The first bullet hit Barrera in the leg. The NSO members fled for cover as a second bullet passed by Barrera's head. The two cars then sped off.

Around 10:00 p.m. that night, California Highway Patrol Officer Wilkening observed a dark green car speeding on the I-10 freeway in Ontario. With his emergency lights activated, Wilkening chased the car. When the car slowed down, upon exiting the freeway, he observed the three occupants. Wilkening saw defendant in the front

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[footnote continued from previous page]
count 1, the principal count.

passenger seat. The car eventually stopped and Wilkening saw the occupants flee from the car. Wilkening chased after and apprehended defendant. Defendant acknowledged he was a passenger in the car. The other two occupants were also apprehended and identified as ESO gang members.

Early the next morning, after searching the route taken by the green car, an officer found a .44-caliber handgun lying on the shoulder of the freeway. Two cartridges had been fired and four live rounds remained in the gun cylinder. One of defendant's fingerprints was found on the gun.

Detective Giallo testified that Castrejon told him two days after the shooting and during a photographic lineup that defendant fired the shots from the front passenger seat. But Castrejon also initially told Giallo the shots came from the right rear passenger door.

Acuna testified that shortly before the shooting, she went outside and saw her son and friends congregated two houses down from hers. A light colored car and a dark colored car turned onto Calaveras Street, and slowed down as they passed her son's group. An individual opened the front passenger door of the dark colored car and shot two or three times at the group. The first shot may have ricocheted off the ground before hitting Barrera's leg. When the police interviewed Acuna, out of fear of retaliation, she initially said she could not identify the shooter but then told the police defendant was the shooter and identified him during an in-field lineup conducted the night of the shooting. She also identified defendant at trial as the shooter.

4. Aggravated Mayhem

Defendant contends there was insufficient evidence to support his aggravated mayhem conviction under section 205. He claims that evidence that he used a powerful firearm and modified bullets was insufficient. Defendant argues there was merely evidence of an indiscriminate attack or a general intent to kill rather than any evidence establishing defendant harbored a specific intent to maim Barrera.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; see also *People v. Hill* (1998) 17 Cal.4th 800, 848-849.) In applying the same standard to a conviction based primarily on circumstantial evidence, we uphold the jury's verdict if reasonably justified by the circumstances, even if a contrary finding might also reasonably be reconciled with the circumstances. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138; *People v. Bean* (1988) 46 Cal.3d 919, 932.)

Aggravated mayhem is a specific intent crime that requires proof the defendant intended to cause the victim permanent disability or disfigurement. (*People v. Bolin, supra,* 18 Cal.4th at p. 331; see also *People v. Hill, supra,* 17 Cal.4th at pp. 848-849.) "[S]pecific intent may be inferred from the circumstances attending an act, the manner in

which it is done, and the means used, among other factors." (*People v. Lee* (1990) 220 Cal.App.3d 320, 325.) The evidence is insufficient to prove specific intent where it shows no more than an "indiscriminate attack" upon the victim. (*People v. Lee, supra,* 220 Cal.App.3d at p. 325.) But evidence of a directed and controlled attack may provide substantial evidence of an intent to disable or disfigure permanently. (*People v. Lee, supra,* 220 Cal.App.3d at p. 326; *People v. Ferrell* (1990) 218 Cal.App.3d 828, 836.)

In *People v. Ferrell, supra,* 218 Cal.App.3d 828, the court concluded the defendant shot the victims in a deliberate and controlled manner sufficient to support an aggravated mayhem conviction. The defendant went to the victim's house and pointed a gun at the victim and her parents. When the victim's father moved toward the defendant, she shot him in the knee. The defendant then shot the victim in the neck from about two feet away. The court noted, "[i]t takes no special expertise to know that a shot in the neck from close range, if not fatal, is highly likely to disable permanently." (*People v. Ferrell, supra,* 218 Cal.App.3d at p. 835.) Based on the calm and deliberate manner of the defendant's shooting, the court held there was substantial evidence to support the aggravated mayhem conviction.

While in the instant case, the shooting occurred at a greater distance than in *Ferrell*, there was nevertheless sufficient evidence that defendant shot Barrera in a deliberate, directed, and controlled manner. The car defendant was riding in stopped in front of Barrera and his companions. Defendant opened the car door, aimed at Barrera, and fired two shots with a high powered gun containing modified bullets. The first shot

hit Barrera's leg. Defendant fired a second shot at Barrera's head but missed. Defendant then fled in the car.

A reasonable inference could be made that defendant was aiming at Barrera, with the intent to permanently disable, if not kill him, and this was not a random, indiscriminate attack. While defendant may not have known Barrera's identity when shooting at him, due to poor lighting and distance factors, there was sufficient evidence he intended to shoot and maim or kill an NSO member, and targeted Barrera for that purpose.

Substantial evidence supported defendant's conviction for aggravated mayhem.

5. Attempted Murder

Defendant contends there was insufficient evidence supporting defendant's convictions for five counts of attempted murder. Defendant was convicted of attempting to murder Barrera and his four companions, Mendoza, Ramirez, Castrejon, and Gonzalez. Defendant argues that he fired two shots at Barrera and therefore he cannot be found guilty of attempting to murder all five individuals, particularly since Barrera's companions were standing a substantial distance from Barrera. Defendant claims there was insufficient evidence to support his convictions for more than two counts of attempted murder and, therefore, this court must reverse three of the five attempted murder convictions.

Murder is defined in section 187, subdivision (a) as "the unlawful killing of a human being . . . with malice aforethought." In order to prove attempted murder, there

must be sufficient evidence of intent to commit the murder "plus a direct but ineffectual act toward its commission." (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Implied malice is insufficient to support an attempted murder conviction. "[T]he evidence must demonstrate a deliberate intention unlawfully to kill a fellow human being." (*Ibid*; § 188.)

Evidence of such intent, while rarely direct evidence, may include circumstantial evidence "derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .' [Citation.] 'The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind.' [Citation.]" (*People v. Chinchilla, supra,* 52 Cal.App.4th at p. 690.)

In *People v. Chinchilla, supra,* 52 Cal.App.4th 683, the court upheld attempted murder convictions as to two different victims on the following grounds: "Where a defendant fires at two officers, one of whom is crouched in front of the other, the defendant endangers the lives of both officers and a reasonable jury could infer from this that the defendant intended to kill both." (*People v. Chinchilla, supra,* 52 Cal.App.4th at p. 691.)

Defendant argues *Chinchilla* is distinguishable because in *Chinchilla* the two officers were crouched one in front of the other and therefore the single shot endangered both officers, but in the instant case, Barrera and his companions were not next to each other. They were standing several feet apart.

Ramirez testified they were each standing approximately two feet apart and were all within a three yard radius. Gonzalez testified he was around 15 to 25 feet from Barrera, but then also testified he was double arms distance, or five feet, from Barrera. Mendoza said he was standing three feet from Barrera and, also, he was right next to Barrera, and the others were standing five to seven feet apart.

Defendant argues the two shots could not have killed all five individuals and therefore there was insufficient evidence that he attempted to kill all five individuals. We disagree. "[W]here the design of the accused is clearly shown, slight acts done in furtherance of the crime will constitute an attempt [citation]; it is not necessary that the overt act be the last possible step prior to the commission of the crime." (*People v. Morales* (1992) 5 Cal.App.4th 917, 926.)

Here there was sufficient evidence that defendant committed acts in furtherance of attempting to kill Barrera and his companions. There was evidence that defendant rode with ESO companions to Castrejon's mother's home in NSO gang territory; brought a loaded handgun; opened the car door as the car stopped in front of a group of ESO gang members; and fired at the group. In addition, there was evidence NSO and ESO gang members had been fighting earlier that day; NSO and ESO were rival gangs; Barrera and

his companions were all NSO gang members and defendant and his companions were ESO members; the shooting committed by defendant was in retaliation for the earlier fight that day; and the gun used in the incident was a powerful .44-caliber, single action magnum handgun. The bullets were hollow-point bullets, which mushroom upon impact, thereby causing a more severe wound. One of the rounds had an altered bullet, with an X shape sawed partially through its nose, to cause the bullet to break up into fragments upon impact, causing a larger, more severe wound. Also, defendant's fingerprints were found on the gun and on the passenger side of the car.

Defendant does not dispute that there was sufficient evidence of attempted murder of Barrera and Mendoza, who was standing next to Barrera. Defendant claims there was insufficient evidence as to the other three individuals who may have been farther away from Barrera. But there was testimony by Ramirez that Barrera and his companions were all within two feet of each other. This testimony would place them close enough to Barrera to support a conviction of attempted murder as to each of them.

Furthermore, there were four unused bullets in the gun. A reasonable inference could be made that the remaining ammunition was not fired at Barrera's companions because they fled and took cover. Certainly the motivation existed for defendant to kill them, as rival gang members, had they remained accessible. The firing of only two shots is not dispositive. There was sufficient evidence defendant committed other acts in furtherance of attempting to murder Barrera and his companions.

6. Personal Gun Use Enhancement

Defendant contends that under section 12022.53, subdivision (e)(2) the trial court erred in imposing the criminal street gang enhancement under section 186.22, subdivision (b)(4) because there was insufficient evidence that defendant personally used a firearm. He claims there was inadequate evidence that he personally fired the gun. Defendant argues this is reflected by the jury's inability to reach verdicts on the two personal gun use enhancements, one alleging defendant personally discharged a firearm causing great bodily injury and the other alleging he personally discharged a firearm from a vehicle.

The People agree this court should dismiss defendant's section 186.22 enhancements, but not because of an insufficiency of evidence. Rather, the People argue the section 186.22 enhancement fails because the jury did not return any finding that defendant personally fired the revolver. The court dismissed the two enhancements that required a personal use finding after the jury deadlocked on them. This precluded this court from remanding the case for a determination as to whether defendant personally discharged the gun. Therefore the section 186.22 enhancement must be dismissed. Defendant agrees.

Since there was no finding by the jury that defendant personally fired the gun, the section 186.22, subdivision (b)(4) enhancements must be stricken as to each count.

7. Juror Misconduct

Defendant claims juror No. 45 committed juror misconduct by driving by

Calaveras Street where the crime occurred, and the trial court erred in failing to conduct an inquiry sufficient to determine if such conduct constituted prejudicial misconduct.

"We begin with the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors. [Citations.] '"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."'" (*In re Hitchings* (1993) 6 Cal.4th 97, 110.)

In passing upon a claim of jury misconduct: "It is the trial court's function to resolve conflicts in the evidence, to assess the credibility of the declarants, and to evaluate the prejudicial effect of the alleged misconduct. [Citations.] . . . Consistent with the principle that a trial judge has wide discretion in ruling on a motion for new trial, an appellate court should accord great deference to a trial judge's evaluation of the prejudicial effect of jury misconduct. [Citation.]" (*Andrews v. County of Orange* (1982) 130 Cal.App.3d 944, 954-955.) The California Supreme Court stated in *People v. Nesler* (1997) 16 Cal.4th 561, 582: "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination."

Juror No. 45 informed the court staff that she had inadvertently passed by the area where the shooting incident had occurred. Upon being informed of this, the court questioned juror No. 45 regarding the matter. Juror No. 45 told the court, "I just happened to see the street, and it kinda hit me, and . . . it just kinda put things into

perspective because of all this, you know? It's jumbled in your brain because you don't really know where this is, but I wanted to let him know or somebody know that, yes, I did see the street. I didn't go on the street or anything. . . . I'd have to go by that street to get on the freeway anyway if I were to maybe go to San Bernardino or L.A. I pass that street. But it was the first time I ever noticed it, and it just kinda hit me."

The court asked juror No. 45 if she remained on the street to investigate, and she said no. "I was in traffic and I was just going -- 'cause K-Mart's just down around the corner from it and, like I said, I just kinda observed it as I was passing by."

The court asked the prosecutor and defense counsel if they had any further questions and they said no. The court then excused juror No. 45 and asked counsel if they wished to be heard further on the matter. Both counsel declined. Both counsel also informed the court they did not wish the court to excuse juror No. 45.

Under these circumstances, defendant waived any objection to juror No. 45 remaining on the jury panel by not requesting the court to excuse her from the jury or requesting a mistrial. (*People v. Lucas* (1995) 12 Cal.4th 415, 487.)

Defendant alternatively argues that, if the issue was waived, his attorney rendered ineffective assistance. This contention fails as well.

In order to prevail on an ineffective assistance of counsel claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Lucas, supra,* 12 Cal.4th at p. 487.) "'Because of the difficulties inherent in making the evaluation, a court must indulge a strong

presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.]' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1243.)

Here, the record sheds no light on why counsel acted or failed to act in the manner challenged. The court did not request defense counsel to explain why he did not object to juror No. 45 nor did counsel volunteer an explanation.

In addition, there is a satisfactory explanation for counsel's decision not to request a mistrial or juror No. 45's removal from the jury. Juror No. 45's conduct was inadvertent, and she passed by the street where the crime occurred, not the actual location of the crime. She did not remain there for any length of time and did not conduct any investigative acts. Juror No. 45 indicated that the only impact from seeing the street was that she realized the incident had occurred there and this "put things into perspective." There was no indication that juror No. 45 was biased one way or the other due to viewing the street or that further inquiry was necessary.

Defense counsel thus reasonably could have concluded it would have been fruitless to question the juror further regarding the matter or request the juror excused since it was unlikely that doing so would result in the court finding the juror's conduct prejudicial. Defense counsel's failure to request a mistrial likewise did not constitute ineffectual assistance of counsel. Trial counsel is under no obligation to make fruitless, time-consuming, nonproductive arguments, objections or motions that are of little or no

merit. (*People v. Hart* (1999) 20 Cal.4th 546, 620.)

8. Section 12022.53 Enhancements

Defendant asserts, and the People agree, that under section 12022.53, subdivision (f) the trial court may not impose more than one section 12022.53 enhancement per count for counts 1 through 6.

Section 12022.53, subdivision (f) provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment." Under section 12022.53, subdivision (f), this court must thus strike all section 12022.53 enhancements imposed against defendant in excess of one per crime and only the greatest enhancement under section 12022.53 shall be imposed.

In the People's respondent's brief, the People argued for the first time that, as to count 5, the trial court erred in imposing a 20-year enhancement under subdivision (c) of section 12022.53 for discharge of a firearm, rather than the greater 25-year-to-life enhancement under subdivision (d) for discharge of a firearm, causing great bodily injury. Defendant disagrees. He claims that, although normally the court must impose the greater enhancement, here, the trial court properly stayed the subdivision (d) enhancement under section 654 because Barrera's injury was the subject of both the count 5 and count 1 subdivision (d) enhancements.

During sentencing on count 5 (attempted murder of Castrejon), the trial court

stated: "For Count 5, based on the fact that this was an act of violence against a separate individual -- as a matter of fact, it appears that this individual -- the initial motive was to attempt to murder the victim [Castrejon] based on a prior contact between the defendant's gang and this individual, I'm going to use my discretion and impose a consecutive sentence for Count 5 to be consecutive to Count 1. [¶] . . . [¶] For the enhancement of 12022.53(c) for principal discharge of a firearm, which was found true, I'm going to impose 20 years in the state prison, consecutive. [¶] For the enhancement of 12022.53(d), which was found true, I'm imposing a 25-year to life sentence, but staying it pursuant to 654 of the Penal Code."

Section 654, subdivision (a) provides that "An act or omission which 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." The statute does not prevent multiple convictions for the same conduct, only multiple punishment. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-361.)

While the People did not initially object to the court staying the section (d) enhancement under section 654, as to count 5, the objection is not waivable under *People v. Scott* (1994) 9 Cal.4th 331, 354, footnote 17. The court in *Scott* states: "It is well settled, for example, that the court acts in 'excess of its jurisdiction' and imposes an 'unauthorized' sentence when it erroneously stays or fails to stay execution of a sentence under section 654."

We thus address the issue of whether the trial court had the discretion to impose multiple section 12022.53, subdivision (d) enhancements. Section 12022.53, subdivision (d) provides additional punishment if the defendant "in the commission of" the listed felony, "personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice."

In our previous decision in this case, we concluded the subdivision (d) enhancement could not be imposed on count 5 because only one person was shot and section 654's prohibition against multiple punishment precluded imposing punishment under the subdivision (d) enhancement more than once. The enhancement was imposed as to count 1, concerning the injured victim, and therefore we concluded it should have been stricken, not stayed, as to count 5.

On review, our state Supreme Court held that imposing multiple section 12022.53, subdivision (d) enhancements is proper under the facts in the instant case, in which a defendant fires two shots at a group of five people but hits and injures only one. The court reasoned that when each offense is against a different victim, section 654 does not preclude imposing a subdivision (d) enhancement as to each offense. The Supreme Court remanded the matter to this court for further proceedings consistent with the Supreme Court's opinion.

Consistent with our high court's directive and in accordance with its opinion in this case, we hold as to count 5, as well as counts 1, 3, 4 and 6, the trial court was required to impose a section 12022.53, subdivision (d) enhancement, and not stay the

enhancement under section 654 and alternatively impose a subdivision (c) enhancement. We thus remand this case for resentencing to allow the trial court to exercise its discretion in imposing multiple subdivision (d) enhancements. Upon imposing the subdivision (d) enhancements, the trial court must strike, rather than stay all other section 12022.53 enhancements, such as the subdivisions (b) and (c) enhancements under section 12022.53, subdivision (f).

9. Disposition

The judgment is affirmed as to defendant's convictions and reversed as to defendant's sentence. This case is remanded to the trial court for resentencing consistent with the views expressed in this opinion and the California Supreme Court's decision in this case.

The trial court is instructed not to impose the section 186.22, subdivision (b)(4) criminal street gang enhancements as to counts 1 through 6. The court is directed to impose section 12022.53, subdivision (d) enhancements as to each of the attempted murder counts (counts 1, 3, 4, 5, & 6) and to the mayhem count (count 2), and strike any section 12022.53, subdivision (b) and (c) enhancements under section 12022.53, subdivision (f).

Gaut, J.

We concur:

McKinster, Acting P.J.

Ward, J.