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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANH-TUAN DAO PHAM, Defendant and Appellant.	C063758 (Super. Ct. No. 07F02800)

APPEAL from a judgment of the Superior Court of Sacramento County, Timothy M. Frawley, Judge. Affirmed as modified.

Kathleen M. Scheidel, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., and Kamala Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes, Deputy Attorney General, Janis Shank McLean and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Appellant.

Convicted of second degree murder, two counts of attempted murder, and discharging a firearm at an inhabited dwelling, and

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts II, III, IV, V, VI, VII, VIII, and IX of the Discussion.

sentenced to 79 years to life in prison, defendant Anh-Tuan Dao Pham appeals, contending: (1) there was insufficient evidence to support his convictions for murder and attempted murder; (2) the trial court erred in instructing the jury on murder, attempted murder, and consciousness of guilt; (3) the trial court erroneously and prejudicially limited his case; (4) his trial attorney was ineffective; (5) the trial court erred in allowing the jury to formulate questions for the witnesses; (6) sentence enhancements were imposed in violation of his rights under the Sixth Amendment; (7) a firearm use enhancement was wrongfully imposed on the conviction of discharging a firearm at an inhabited dwelling; and (8) his de facto sentence of life without parole amounts to cruel or unusual punishment, primarily because he was 16 years old at the time of the crimes.

In the published part of our opinion, we reject defendant's argument that there was insufficient evidence to support his convictions for attempted murder. Defendant implicitly admits there was sufficient evidence that he was the person who fired a gun a number of times into a group of people, and he *expressly* admits that "the evidence adduced [at trial] showed that [he] had the specific intent to kill two African-American males" when he fired the gun. Defendant's complaint about his convictions is that the evidence showed the two African-American males he intended to kill "were not present in the group" when he committed the shooting, wounding two different people instead. According to defendant, under these facts he was wrongfully convicted of attempted murder based on the doctrine of

transferred intent because "[i]f [he] intended to kill two specific people and in doing so wound[ed] two unintended targets, he is not guilty of the attempted murders of the two unintended targets."

For their part, the People contend defendant's attempted murder convictions were not wrongly based on transferred intent, but correctly based on concurrent intent, also known as the "kill zone" theory of attempted murder, which our Supreme Court explained in *People v. Bland* (2002) 28 Cal.4th 313. According to the People, "it was enough that [defendant] had a generalized intent to kill people standing in the group," and "[t]he fact that [he] may have been mistaken in his belief that the African-American males were part of the group does not change the analysis."

We conclude that neither side has it right. As we will explain, defendant's convictions were not based on the jury's improper application of transferred intent to the crime of attempted murder, as defendant contends. At the same time, however, this was not a case in which defendant created a "kill zone," and thus the jury could not have convicted him of the attempted murder charges based on concurrent intent, as the People argue. Instead, defendant's attempted murder convictions are supported by substantial evidence that he specifically tried to murder two people by shooting into a group of people where he thought they were, although it turned out he was mistaken. Under well-established California law, the fact that his targets were not present at the scene of the shooting does not excuse

him from criminal liability for attempted murder because factual impossibility is not a defense to a charge of attempt. Accordingly, we will affirm the attempted murder convictions.

In the unpublished part of our opinion, we agree with defendant (and the People) that a firearm use enhancement could not be imposed on his conviction for discharging a firearm at an inhabited dwelling, because firearm use was an element of that crime, and we will modify defendant's sentence to strike that enhancement. Otherwise we find no merit in defendant's challenges to his convictions and his sentence, and we will therefore affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 11:30 p.m. on February 22, 2007, an African-American teenager named Dominique Hickman was walking home from a friend's house in South Sacramento when he was struck in the back by a bullet that had first ricocheted off a hard surface. The bullet wound killed him; his body was found there the next morning.

Seven .45-caliber shell casings were found at the scene. A defect in a sound wall that appeared to have been made by a bullet was also found nearby.

A little over an hour later, it was discovered that someone had just crashed a stolen car into the garage of a house on Caymus Drive, about four miles away from where Hickman was shot. About 10 to 15 minutes later, as a group of people were gathered in the front yard of the Caymus Drive residence, a white car drove past and the passenger -- a young, Asian male -- fired a

gun at the crowd numerous times. Two people were injured in the shooting. Six .45-caliber shell casings were found at the scene.

Just before the shooting, the white car had driven past the residence followed by a van that one of the residents and a friend of his recognized from an incident a week earlier. In that incident, someone threw a rock at the van.

In a statement to sheriff's deputies a week after the shootings, defendant admitted he was the shooter in the Caymus Drive incident. He said that when he was with his 14-year-old friend, Thomas Tran, and another friend, he got into an altercation with two black teenagers, and one of them threw a rock and dented his mother's van. He committed the Caymus Drive shooting because he was mad about the dent. Defendant also admitted to the deputies that he told Tran, "I shot at the people [who] threw the rock at the car."

Defendant denied any knowledge of the Hickman shooting, ballistics testing revealed, however, that the cartridge casings found at the scenes of both shootings were fired from the same gun. Tests also showed gunshot residue on the passenger side of the stolen car that crashed into the Caymus Drive residence.

Defendant was charged with the murder of Hickman, two counts of attempted murder for shooting the two bullets that caused injuries in the Caymus Drive shooting, and one count of discharging a firearm at an inhabited dwelling, along with various firearm enhancement allegations.

At trial in the fall of 2009, defendant testified that on February 22, 2007, he was at his house with his 19-year-old friend, Hung Nguyen, and several others, when Hung's brother, Davis Nguyen, who was 22 or 23 years old, called and asked defendant and Hung to steal a car for him.[1] According to defendant, they went out and stole a Honda Accord and left it where Davis could pick it up, then went back to defendant's house. Later, Davis came over and said he had just shot at someone. Davis left the gun with defendant, then asked defendant and Hung to take him home and to get rid of the stolen car. After dropping Davis off, they retrieved the stolen car, then came up with the idea of driving it into the house where they thought the problem had started with the two African-American teenagers the week before. Defendant claimed he drove the stolen car into the garage. He also claimed that later, on the way to get something to eat, they drove back past the Caymus Drive residence to see what was going on, then shortly thereafter Hung said he wanted to go back and scare the people there. Defendant claimed he drove their friend's white car on the way back, and Hung was in the passenger seat. As he drove slowly past the residence, Hung shot several times. Defendant claimed he originally admitted to being the shooter because he was scared Davis might do something to him or his family if he "told on" Hung.

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[1] To avoid confusion, we will refer to the Nguyen brothers by their first names.

The jury did not believe defendant's story and convicted him of all four charges, fixing the murder at second degree. The trial court sentenced defendant to an aggregate term of 79 years to life in prison, made up of the following consecutive sentences: 15 years to life for the murder, with 25 years to life for the personal firearm use enhancement on that charge; seven years for the first attempted murder conviction, with 20 years to life for the firearm enhancement on that charge; two years and four months for the second attempted murder, with six years and eight months for the firearm enhancement on that charge; and one year and eight months for the shooting at an inhabited dwelling charge, with one year and four months for the firearm enhancement on that charge.

DISCUSSION

I

Sufficiency Of The Evidence Of Attempted Murder

In its ultimate form, the information charged defendant with the attempted murders of two male African-American members of a group of persons gathered outside the Caymus Drive residence. The jury found defendant guilty of those charges.

On appeal, defendant contends there was insufficient evidence to support the attempted murder convictions because "the evidence adduced showed that [he] had the specific intent to kill two African-American males who were not present in the group" on Caymus Drive. Specifically, defendant contends the evidence showed that his intent was "to kill the two African-American males with whom [he] had an altercation the week

prior," but neither of them was present in front of the Caymus Drive house when the drive-by shooting occurred. In his view, because "there was no evidence adduced at trial that [he] intended to kill anyone [who was] in the group of people standing outside the house on Caymus Drive," "the prosecution clearly advocated [his] guilt under a theory of transferred intent that was disallowed as to attempted murder in" *People v. Bland*, *supra*, 28 Cal.4th at page 313.

In *Bland*, the Supreme Court explained that while, in the context of the crime of murder, intent to kill is deemed transferred or "extended" "to every person actually killed" when the defendant tries to kill a particular person but ends up killing others as well, this concept of "transferred intent" does not apply to the inchoate crime of attempted murder. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 326-327.) According to the Supreme Court, "Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder--due to transferred intent--if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id.* at p. 327.)

In defendant's view, because the evidence showed he was trying to kill two people who were not present at the scene of

the shooting, the jury could not have found he intended to kill anyone who actually *was* present, and therefore the evidence was insufficient to support the charges of attempted murder. In other words, defendant's argument is that he could not be convicted of attempted murder because, while he harbored the intent to kill, the two people he intended to kill were not in the group at which he shot, even though he "mistakenly believed" they were, and his intent to kill them could not be "transferred" to the two people he ended up wounding.

The People argue that defendant's attempted murder convictions were "based on the legally correct doctrine of concurrent intent," not "the legally impermissible doctrine of transferred intent." Describing what also has been called the "kill zone" theory (see *People v. Bland*, *supra*, 28 Cal.4th at pp. 329-330), the People contend that "[c]oncurrent intent applies when a defendant intends to kill a particular target, and uses a mode of attack that, by its nature and scope, shows a concurrent intent to kill persons in the vicinity of the intended target." According to the People, "the fact that [defendant] may have been mistaken in his belief that the African-American males [he intended to shoot] were part of the group [he shot at] does not change the analysis." In the People's view, the evidence that defendant "repeatedly fired a .45caliber gun into the midst of a group" was sufficient to support his two attempted murder convictions. Indeed, the People contend they "could have charged [defendant] with several

additional counts of attempted murder, up to at least the number of shots fired into the group."

We begin our analysis by rejecting the People's reliance on concurrent intent. As even the People admit in their brief, the concept of concurrent intent "applies when a defendant intends to kill a particular target, and uses a mode of attack that, by its nature and scope, shows a concurrent intent to kill persons in the vicinity of the intended target." Here, the evidence -- consisting primarily of defendant's own admissions to sheriff's deputies -- showed that defendant's "intended target[s]" were the two African-American teenagers he held responsible for damaging his mother's van. But the fact that defendant fired a gun at a group of people he thought included those teenagers, by itself, does not demonstrate that he had "a generalized intent to kill people standing in the group," as the People argue. Just because a defendant fires a gun repeatedly at a group of people does not necessarily mean the defendant can be convicted of as many counts of attempted murder as the number of bullets he fired. The question -- which is a factual one for the jury to decide -- is whether, based on the particular evidence in the case, it can be inferred that defendant had the concurrent intent to kill not only his intended target but others in the target's vicinity. (See, e.g., *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564 [in case involving shooting at two houses, "[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a

specific intent to kill every living being within the residences they shot up"].)

Here, we need not resort to the "kill zone" theory to uphold defendant's two convictions for attempted murder, and thus we need not determine whether there was sufficient evidence for the jury to find, based on the nature of the shooting, that defendant intended to kill more people than just the two African-American teenagers he believed had damaged his mother's van. Instead, as we will explain, it was enough that he intended to kill those two persons, and it did not matter that they were not at the scene of the shooting.

As we have previously suggested, defendant finds the absence of his intended targets to be *the* critical factor in the analysis of whether his attempted murder convictions are supported by substantial evidence. Specifically, he believes the absence of his intended targets is what makes the convictions unsupportable, because, as the Supreme Court explained in *Bland*, his intent to kill them cannot be "transferred" to the two people he actually ended up shooting.

What both defendant and the People have missed, however, is a basic concept of criminal law that supports defendant's convictions for attempted murder without resort to either the discredited theory of transferred intent or the overused theory of concurrent intent/"kill zone." That concept is that an attempt to commit a crime is a crime even if it would have been impossible for the defendant to complete the commission of the offense. As one court explained more than 50 years ago:

"Mere intention to commit a crime does not of itself amount to an 'attempt' as that word is employed in the criminal law. Some act done toward the ultimate accomplishment of the intended crime is necessary. [Citation.] But if a person formulates the intent and then proceeds to do something more which in the usual course of natural events will result in the commission of a crime, the attempt to commit that crime is complete. *And even though the intended crime could not have been completed, due to some extrinsic fact unknown to the person who intended it, still he is guilty of attempt*.

"'If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are in fact unsuitable, or because of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim, or by a third person.'" (*People v. Siu* (1954) 126 Cal.App.2d 41, 44, italics added; see also *People v. Grant* (1951) 105 Cal.App.2d 347, 356-357 [for guilt of attempt to commit a crime, "[i]t is not necessary that there be a 'present ability' to complete the crime, nor is it necessary that the crime be factually possible"].) "Our courts have repeatedly ruled that persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee: 'factual impossibility is not a defense to a charge of attempt.'" (*People v. Reed* (1996) 53 Cal.App.4th 389, 396.)

Here, as even defendant himself admits, the evidence supported the conclusion that defendant attempted to kill two African-Americans males he believed were in the group gathered outside the house on Caymus Drive. Unbeknownst to him, the two individuals he intended to kill were not there. Under the foregoing authorities, however, defendant cannot escape liability for his attempt to kill them just because, contrary to his belief, it turned out his intended victims were not where he thought they were. His crimes were complete when, with the intent to kill the two teenagers, he fired shots into a group in which he thought they were. Under these circumstances, the evidence was sufficient to support defendant's two convictions for attempted murder.[2]

II

Jury Instructions On Attempted Murder

Defendant challenges the jury instructions on attempted murder on two grounds. Neither has merit.

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[2] As we have noted, the information in its ultimate form charged defendant with the attempted murders of two male African-American members of a group of persons gathered outside the Caymus Drive residence. While the evidence showed defendant tried to kill two African-American males he *thought* were in that group, there was no evidence they actually *were* in that group. Thus, there was a deviation between the proof at trial and the language used in the amended information. Because defendant does not raise any issue regarding that deviation, and instead rests his challenge on the alleged improper application of the doctrine of transferred intent (which we have rejected), we have no occasion to address the effect, if any, of that deviation.

Defendant first argues that the jury was instructed on "a legally inadequate theory" of attempted murder. This argument, however, is essentially just a repackaging of his sufficiency of the evidence argument, contending his convictions were based on the theory of transferred intent discredited in *Bland*. Having rejected that argument, we also reject his related challenge to the jury instructions on attempted murder.

Defendant next argues that "the jury instruction failed to provide the jury with an adequate definition of the intent necessary for attempted murder" because "[t]he jury was never instructed that . . . [he] could only be convicted of attempted murder if in fact the two people he wounded were people he intended to kill when he shot into the group of people on Caymus Drive." We find no error. It did not matter, for purposes of defendant's liability for attempted murder, whether the two people he wounded were the people he intended to kill. Indeed, as we have shown, it did not matter whether the two people he intended to kill were present at the scene. All that mattered was that defendant *thought* the two African-American males he wanted to kill were there, and he took a direct, but ineffectual step toward killing them by shooting at the crowd that he thought included them. On these facts, there was no error in the jury instructions on attempted murder the trial court gave.

III

Sufficiency Of The Evidence Of Second Degree Murder

Defendant does not dispute there was sufficient evidence to convict him of murdering Dominique Hickman; he contends only

that "[t]here was no evidence . . . that the murder was anything other than murder in the first degree." According to him, "[a]ll the facts relied upon by the prosecution showed only that the perpetrator intentionally shot pedestrian Hickman from a motor vehicle," which would have been first degree murder, but by finding him guilty of only second degree murder the jury necessarily rejected this view of the evidence. In defendant's view, however, "there was no substantial evidence to support the theory of second degree murder -- i.e., that [he] shot Hickman with the intent to kill or with a conscious disregard of a high probability of danger to human life, but without committing the shooting from a motor vehicle."

Defendant's argument is without merit. To convict defendant of first degree murder based on shooting a firearm from a motor vehicle, the jury had to find that he intentionally shot from inside a motor vehicle at a person outside the vehicle *with the intent to kill that person*. Thus, the jury could have rejected this theory of murder simply by finding that defendant *did not intend to kill* Hickman. If the jury found that defendant shot at Hickman from inside the vehicle without the intent to kill him, but with a conscious disregard of a high probability of danger to human life, then the jury could have found him guilty of second degree murder based on implied malice. As the People point out, there was sufficient evidence to support such a finding because "[t]he evidence showed that [defendant] fired seven times from the vehicle without directly striking the victim, including the fatal bullet which struck the

victim in the back after it ricocheted off a wall." On these facts, the jury could have reasonably found defendant did not intend to kill Hickman, and instead just wanted to terrorize him by shooting at him, but killed him nonetheless, which amounted to second degree murder based on implied malice.[3]

IV

Limitation Of Defense Evidence

Defendant contends the trial court prejudicially limited the presentation of evidence in his defense, depriving him of various constitutional rights. We disagree.

A

Evidence About Who The Shooter Was

As we have noted, in a statement to sheriff's deputies a week after the shootings, defendant admitted he was the shooter in the Caymus Drive incident. At trial, however, defendant testified that he was only the driver; that his friend Hung was the shooter; and that he thought Hung was only going to shoot to scare. Defendant claimed he lied to the deputies because he was afraid of what Davis might do if defendant "told on" Hung. Under direct examination, without objection, defendant testified

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[3] In a related argument, defendant asserts the trial court erred in instructing the jury on second degree murder because the instructions allowed the jury to convict him of second degree murder when there was insufficient evidence of that crime. In rejecting defendant's sufficiency of the evidence argument, we necessarily reject this related instructional error argument as well.

that he "eventually decided to tell the truth," and the first person he told was his attorney.

On cross-examination, after examining defendant at length about his pretrial statements, the prosecutor asked defendant, without objection, "It is only now that you are denying being the actual shooter on Caymus. Right?" and defendant responded, "Yes, sir." A short time thereafter, the prosecutor asked defendant, "About two-and-a-half years after admitting to two sets of detectives that you were the shooter on Caymus, now you have changed your story. Right?" Defendant responded, "I told my attorney the truth right in front -- from the beginning." The prosecutor replied, "Okay. You realize there is no way for me to test that right? Because of the attorney/client privilege?" At that point, defense counsel interjected, asking for "a sidebar on this." The trial court denied the request, and defendant responded, "Yeah." Defense counsel then stated, "I need to make an objection, and I need to do it out of the presence of the jury." The trial court said, "Overruled. Next question."

The trial court subsequently allowed the prosecutor to ask whether defendant had told anyone other than his two attorneys that he was not the shooter in the Caymus Drive incident. Defendant said he told "[a] lot of people when [he] was at Juvenile Hall," but when asked if "[a]nybody [was] going -- c[ould] come in and corroborate that [he] ha[d] been telling that story for two-and-a-half years," defendant said, "I don't

know." Defense counsel again said he had an objection to make, but the court overruled it.

Later, outside the presence of the jury, defense counsel objected that "[t]he prosecution [had] asked a series of questions along the line of [defendant] didn't tell anybody for all these years that Davis Nguyen was probably the shooter in this case." He argued that was not true, and "[t]o leave the jury with the impression that all of a sudden [defendant] is just blurting this out three years later is wrong." Defense counsel asked to have the jury "instructed . . . that . . . the prosecution knew from [him] that that was what [defendant] had told [him] way back when," because "to leave [the jury] with [the contrary] impression is just mean, unjust, and wrong and it is unethical; and it is a violation of his right to a fair trial and equal protection and due process."

At this point, we need to pause to explain the divergence between the prosecutor's questions to defendant, and defense counsel's arguments that purportedly addressed the prejudicial effect of those questions. To the extent the prosecutor's questions to defendant, set forth above, insinuated anything, they insinuated that defendant had recently fabricated the story that he was not the shooter in the Caymus Drive incident, but Hung was. Defense counsel's objection to those questions, however -- as is apparent from the passage set forth above and as will be further apparent from what follows hereafter -- referred to defendant's trial testimony that it appeared *Davis* was responsible for the *Hickman* shooting. Apparently, from what

we can glean from defense counsel's representations in his argument to the trial court, defendant had early on implicated Davis as the shooter in the Hickman shooting, and defense counsel discussed this with the prosecution at the time and asked about having Davis investigated as "the real culprit" in that shooting, but the prosecution declined to do so. From his arguments, it appears defense counsel erroneously believed that in cross-examining defendant the prosecutor had wrongly insinuated that defendant had only recently made up the story that Davis shot Hickman, when the prosecutor did no such thing.[4] Instead, at most (as we have observed), the prosecutor's questions insinuated that defendant had only recently made up the story that Hung was the shooter in the Caymus Drive incident. As will be seen, defense counsel's confusion of the two shootings with relation to this point leaves defendant's arguments on appeal without merit.

In response to defense counsel's request for an instruction, the trial court concluded the prosecutor's questions did not result "in any unfairness." Defense counsel asked for permission to ask defendant about what had happened three years earlier, when defendant told his attorney about Davis being the shooter of Hickman and his attorney came back to him and told him the prosecution was not interested and did not

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[4] It must be noted that neither the trial court nor either side, either at trial or in this court, recognized or pointed out defense counsel's confusion on this point.

want to talk to Davis. The court said it would not permit that question because it "would be hearsay" and "irrelevant." Upon defense counsel's further complaints, the trial court observed that defendant had already testified that "he told you at the outset of the case," and that testimony was "unrebutted."

At the end of defendant's case, defense counsel returned to this issue again when he asked the court to allow him to call his cocounsel, or a former prosecutor in the case, as a witness to elicit testimony that would rebut the "very strong inference earlier made by the prosecution while [defendant] was on the witness stand that he [had] just recently ma[de] up this story about Davis being the shooter in the murder case." Specifically, defense counsel proposed to offer evidence that he and his cocounsel had approached the former prosecutor in the case back in 2007 with defendant's information that Davis was the one who shot Hickman, and that they had later raised the issue again with the former prosecutor but were told the prosecution was not going to pursue it. The trial court accepted the offer of proof but concluded the evidence was either irrelevant or would be excluded under Evidence Code section 352 because it lacked probative value and would involve undue consumption of time and confusion of the issues.

On appeal, defendant asserts two claims of error with regard to the foregoing rulings. First, he contends the trial court erroneously prohibited defendant himself from testifying that he had always told his attorneys he did not shoot Hickman because such testimony would have been offered for the

nonhearsay purpose of establishing that he told his attorneys that fact, not to establish the truth of the statement itself. Second, he contends the trial court erroneously precluded one of his defense attorneys from testifying that he told them early on he did not shoot Hickman because that evidence "became relevant when the prosecution raised questions about [defendant]'s veracity on this point during cross[-]examination." He also contends the evidence was relevant "in that it would have corroborated [his] testimony that it was Davis, and not [defendant], who killed Hickman." He also contends the trial court erred in precluding admission of this evidence under Evidence Code section 352.

We find no merit in defendant's arguments. As we have previously suggested, the proposed testimony, either from defendant himself or from cocounsel, that defendant told his attorney early on that Davis shot Hickman was not relevant to rebut any insinuation from the prosecutor's cross-examination of defendant, because if that cross-examination insinuated anything, it insinuated something about defendant's testimony about *the Caymus Drive shooting*, not his testimony suggesting Davis was the one who shot Hickman. Defendant points to *nothing* in the prosecutor's cross-examination insinuating that defendant had only recently made up the story that Davis shot Hickman. Accordingly, *none* of the additional testimony defense counsel wanted to elicit was relevant.

To the extent defendant attempts to advance the admissibility of the proposed evidence irrespective of the

prosecutor's cross-examination about the Caymus Drive shooting -- by arguing that the evidence was relevant simply because "it would have corroborated [his] testimony that it was Davis, and not [defendant], who killed Hickman" -- that argument is without merit also. Under Evidence Code section 791, evidence of a witness's prior consistent statement is limited as follows:

"Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen."

To the extent defendant sought to offer evidence that he told his attorneys early on that Davis shot Hickman -- which was also what was suggested by defendant's testimony at trial -- such evidence was inadmissible to support defendant's credibility under either prong of Evidence Code 791. Under the first prong, the prosecution did not offer any evidence of a statement by defendant that he shot Hickman, let alone such a statement that was made *after* defendant told his attorneys that

Davis was responsible for that shooting. Accordingly, defendant had no basis for offering his prior consistent statement into evidence under subdivision (a) of Evidence Code section 791.

Under the second prong of the statute, the prosecution made no express or implied charge that defendant's trial testimony *about Davis being the shooter of Hickman* was recently fabricated. As we have explained, if there was any such charge, it related to defendant's testimony about *the Caymus Drive shooting* only. And even if it could be said there was an express or implied charge that defendant's trial testimony about Davis shooting Hickman was influenced by an improper motive, it *cannot* be said that defendant's prior consistent statement to his attorneys on that point was made before the improper motive arose. Defendant had a motive to lie about who shot Hickman from the moment he committed that shooting. Thus, his alleged statement to his attorneys some time later that he did not do it was not admissible under subdivision (b) of Evidence Code section 791 to support the credibility of his trial testimony on that point.

For the foregoing reasons, the trial court did not err in precluding the additional testimony of defendant or his attorney that defendant sought to introduce.

B

Limitation Of Further Redirect Examination

On redirect examination, defendant testified he never shot the gun that was used in both shootings. On recross-examination, the prosecution asked defendant if he remembered

one of the detectives asking him about shooting that gun. Defendant did not remember. The prosecution then elicited evidence that the detective had asked defendant if he had "ever shot" a gun before the Caymus Drive shooting, and the transcript of the interview showed "[n]o audible response." When the prosecutor asked, "Why didn't you tell the police then that you had never shot a gun before?" defendant responded, "I could of [*sic*] been mumbling or I could of [*sic*] shook my head."

When, shortly thereafter, the prosecutor said he had no further questions, defense counsel immediately began to ask, "Is it fair to say . . . ," but the trial court interrupted and precluded counsel from any further examination of defendant, saying, "You are the party [who] called the witness. The rules are direct and redirect, cross and recross."

Out of the presence of the jury, defense counsel objected that the trial court "limit[ed] [his] redirect examination" because "[w]hen the prosecutor brings up some issue that hasn't been brought up before that nobody talked about, and I can't get up and asked my client to explain his answer," "that is completely unjust" and "unfair and it denies my client a right to a fair trial." The court stated that counsel's "recourse, if [he] felt the prosecutor was asking a question that was beyond the scope of the previous examination, was to object."

On appeal, defendant contends the court's refusal to allow his attorney to engage in further redirect examination was "arbitrary" because the court had earlier allowed the prosecutor to engage in further redirect examination of a witness.

Defendant suggests that the trial court's arbitrary enforcement of a "rule" against further redirect examination violated his constitutional right to testify.

The problem with defendant's argument is that without an offer of proof in the trial court about what testimony he would have offered on further redirect examination, if the trial court had allowed it, we cannot determine: (1) whether the trial court erred, or denied defendant his constitutional rights, in precluding the further examination; or (2) whether any such error or denial was prejudicial. Just because the trial court precluded defendant from offering further testimony is not a basis for reversal when we do not know what the gist of that further testimony would have been.

Furthermore, we fail to see how *any* further testimony on the subject of the prosecutor's recross-examination of defendant could have been of assistance to defendant. By his questions, the prosecutor tried to suggest that defendant failed to answer the investigator's questions about whether defendant had shot a gun before the Caymus Drive incident. Defendant, however, was able to emphasize that the transcript of the interview did not show that he *failed* to answer those questions, but only that there was no audible response. Moreover, while the prosecutor's recross-examination related to whether defendant had ever shot *any* gun before the Caymus Drive incident, defendant's trial testimony had been only that he had not shot *the gun that was used in that incident*. Under these circumstances, the recross-examination of defendant can hardly be seen as damaging, such

that further redirect examination would have been necessary to repair defendant's case.

For the foregoing reasons, we find no prejudicial error in the trial court's limitation of further redirect examination of defendant.

V

Ineffective Assistance Of Counsel

A

Objection To Statements Of Tran

On March 1, 2007, while in custody on unrelated charges, Thomas Tran spoke with sheriff's detectives about the incidents surrounding the Caymus Drive shooting. Tran claimed he did not know about the shooting, was not there, and was not the shooter. Eventually, however, he said he was in the car but would not tell the deputies who did the shooting. Then, all of a sudden, Tran said, "just write it down. I did it then. . . . I'm just gonna do the time for it." But immediately thereafter Tran said, "I know for sure that I didn't do nothin. You can check on everything on me. I didn't do nothin. But just say whatever, cuz I'm -- I'm tired of this shit." He then resumed saying he did it. As the deputies questioned him about the details, however, Tran claimed he did not know them. He then claimed he was alone when he committed the shooting and he did not tell anyone about it.

On March 12, 2007, sheriff's detectives conducted another interview with Tran while he was at juvenile hall. In this interview, Tran once again claimed he was not present at the

Caymus Drive shooting, but he then changed his story and admitted being there after the detectives told him they were not investigating that shooting but were investigating another one that happened that same night (i.e., the Hicks shooting). Tran told the detectives he saw someone holding a gun but he never touched it. At no point during this interview did Tran claim he was the shooter in the Caymus Drive incident.

Before trial, the prosecutor moved to exclude any evidence of Tran's March 1 statement, when he claimed he was the shooter in the Caymus Drive incident, on the ground that Tran's statement was not admissible as a statement against penal interest because it was unreliable. Defense counsel sought to admit a six-page portion of the interview in which Tran claimed he was the shooter. The prosecutor argued that if the court was going to allow Tran's admission to being the shooter into evidence, then the court should admit the entirety of both of Tran's interviews "under the rule of completeness and under the rule that once a statement is admitted as a declaration against penal interest, you are allowed to impeach it with other statements not made under penalty of perjury or under sworn testimony." Defense counsel initially objected to admission of anything other than the portion of the March 1 interview in which Tran asserted he was the shooter, but later agreed that both interviews could be admitted in their entirety.

The recordings of both interviews were played for the jury in their entirety.

On appeal, defendant contends his trial attorney was ineffective when counsel withdrew his objection to the admission of the March 12 interview with Tran. According to defendant, "[t]he rule of completeness [as codified in Evidence Code section 356] would not have required the admission of" the March 12 interview because that interview was "totally separate" from the March 1 interview and the March 1 interview "was independently comprehensible on the issue of the veracity of the content of that statement." He also contends Tran's March 12 statement was inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177].

"Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.)

The rule stated in Evidence Code section 356 is "but a codification of a generally prevailing rule" and is "subject only to the qualification that the additional matter be relevant to the portion previously introduced [citation] or, as phrased in the statute, 'necessary to make it understood.' This does not presuppose or have any necessary relationship to ambiguity in the primary admission; the rule is broader than that, as broad as principles of fair play may demand." (*Rosenberg v.*

Wittenborn (1960) 178 Cal.App.2d 846, 852 [addressing the predecessor statute of Evidence Code section 356].)

Here, the March 12 interview with Tran became admissible once the March 1 interview was admitted into evidence because the March 12 interview -- in which Tran contradicted his statements in the March 1 interview that he was the shooter in the Caymus Drive incident -- was relevant to the veracity of Tran's statements in the March 1 interview. Principles of fair play clearly demanded that if the jurors were going to hear Tran's statements that he was the shooter, they must also hear all of his other statements in which he claimed otherwise. And because the March 12 interview was admissible under Evidence Code section 356, it was not ineffective assistance of counsel for defendant's attorney to withdraw his objection to the admission of the March 12 interview. (See *People v. Jones* (1998) 17 Cal.4th 279, 309 ["It was not deficient for counsel to fail to register a meritless objection"].)

As for defendant's argument based on *Crawford* -- in which "the United States Supreme Court held that the confrontation clause of the federal Constitution bars the admission of out-of-court 'testimonial' statements except when the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant" (*People v. Parrish* (2007) 152 Cal.App.4th 263, 271) -- we likewise find no ineffective assistance. In *Parrish*, the appellate court concluded that "statements otherwise admissible under [Evidence Code] section 356 are generally not made inadmissible by *Crawford*. This is because

. . . [Evidence Code] section 356 is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on confrontation clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood. [Evidence Code] [s]ection 356 is founded not on reliability but on fairness so that one party may not use 'selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed.' [Citations.] As *Crawford* forbids only the admissibility of evidence under statutes purporting to substitute another method for confrontation clause test of reliability, evidence admissible under [Evidence Code] section 356 does not offend *Crawford*." (*Parrish*, at pp. 272-273.)

Defendant asserts that "the continued validity of the holding in *Parrish* is doubtful at best" because the *Parrish* court reasoned by analogy to the rule of forfeiture by wrongdoing, and the United States Supreme Court has repudiated that rule. We disagree, however, that the demise of the rule of forfeiture by wrongdoing has any effect on the continued validity of *Parrish*, which simply applies the common-sense rule that a defendant cannot selectively invoke *Crawford* to present the jury with a misleading impression of a witness's out-of-court statements on a particular topic. If a defendant affirmatively seeks to admit into evidence an out-of-court

statement that would be objectionable under *Crawford*, he or she cannot simultaneously object based on *Crawford* to another related out-of-court statement by the same witness on the same subject, so as to leave the jury with a misleading impression of what the witness has said on the subject.

In any event, regardless of whether *Parrish* has continuing validity, the fact is that *Parrish* has not been overruled and the trial court was bound by it. (*See Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, defendant's trial counsel could have reasonably concluded that an objection to the March 12 interview based on *Crawford*, when he was seeking to admit the March 1 interview despite the availability of a comparable *Crawford* objection, would have been futile. Accordingly, trial counsel was not ineffective for failing to maintain his objection to admission of the March 12 interview under *Crawford*.

B

Limitation On Argument

In discussing with counsel the admissibility of Tran's statements to detectives that he was the shooter in the Caymus Drive incident, the trial court expressed concerns under Evidence Code section 352 about playing the entire March 1 and 12 interviews for the jury, which "together comprise almost two hours," when the inculpatory statements defendant wanted the jury to hear "comprise[] . . . a couple of minutes." Stating that "[c]onfusion of issues is a consideration," the court asked defense counsel how he "anticipate[d] arguing the statement if

it is admitted?" Defense counsel expressed uncertainty about how and whether he would argue Tran's statements to the jury.

The prosecutor complained that he was going to be prejudiced by admission of Tran's inculpatory statements, not because the jury might believe them, but because defense counsel would use Tran's confession to the shooting "either implicitly or explicitly to show . . . Davis Nguyen is a scary guy," which is why "[o]ther people are confessing [to the shooting], too." The trial court stated that defense counsel had said he was "not going to argue that," and the court said, "I am going to take him at his word." The court then ruled that Tran's statements were admissible.

On appeal, defendant contends his trial counsel was ineffective in agreeing "not [to] use the false confession of Tran to corroborate [defendant]'s defense that he too falsely confessed rather than face retaliation from Davis Nguyen." The flaw in this argument is that the record does not show defense counsel agreed to any such thing. While the trial court twice noted that defense counsel had said he was "not going to argue that," all defense counsel had said (on the record, at least) was that he might not argue the statement or he might "argue that somebody else has confessed to this crime." At no point did defense counsel agree that he would not argue that Tran, too, confessed to the Caymus Drive shooting out of fear of Davis.

To the extent defendant contends his trial counsel was ineffective for not arguing this theory to the jury, we reject

this argument, too. Defendant contends that if his attorney had argued that Tran's confession was based on a fear of Davis, the jury would have been more inclined to believe defendant's testimony that he confessed to the shooting out of a similar fear. But there was no *evidence* that Tran claimed responsibility for the shooting because he was afraid to pin it on Hung due to fear of Hung's brother, Davis. While defendant specifically testified at trial that he lied about being the shooter because he was afraid of what Davis might do if he "told on" Hung, there was no evidence of any similar statement from Tran. Absent such evidence, it was not unreasonable for defense counsel to decide not to press the argument that Tran, too, feared Davis.

C

Objection To Argument Regarding Defendant's Testimony

Harkening back to the prosecutor's cross-examination of defendant, discussed above, defendant contends his trial attorney was ineffective because he "did not specifically object on the ground of prosecutorial misconduct to the questioning . . . which implied that [defendant] had recently fabricated his account of the crimes."

We are not persuaded. Defendant's claim of misconduct is based on the rule that "[i]t is improper for a prosecutor to ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist." (*People v. Warren* (1988) 45 Cal.3d 471, 480.) However, defendant points to no such questions here. Defendant contends

the prosecutor's questioning of him "implied that [he] recently fabricated his account of the crimes," but he does not tell us which questions he thinks gave rise to this implication.

On our own, we find no question that we conclude defense counsel should have objected to as misconduct under the foregoing rule. When the prosecutor asked defendant if he had "now" "changed [his] story" "that [he was] the shooter on Caymus" "[a]bout two-and-a-half years after admitting to two sets of detectives that you were," defendant responded, "I told my attorney the truth right in front -- from the beginning." Even if the prosecutor's question could be understood as implying, as a fact, that defendant had only recently "changed [his] story," defendant promptly defeated that implication, and an assertion of misconduct by defense counsel only would have prevented defendant from doing so. Accordingly, the lack of such an objection did not amount to ineffective assistance.

As for the prosecutor's question as to whether defendant "realize[d] there [wa]s no way for [the prosecutor] to test that" defendant had told his attorney "from the beginning" that he was not the shooter, that question did not fall within the rule on which defendant relies, as it did not imply any fact harmful to defendant. The same is true of the prosecutor's question as to whether "[a]nybody [was] going -- c[ould] come in and corroborate that [defendant] ha[d] been telling that story for two-and-a-half years."

In summary, we find no basis for concluding that defendant's trial counsel was ineffective in failing to assert

prosecutorial misconduct in response to the prosecutor's cross-examination of defendant.

VI

Consciousness Of Guilt Instruction

Without objection, the trial court instructed the jury on consciousness of guilt with a combination of CALCRIM Nos. 362 and 371.[5] On appeal, defendant contends the instruction was "misleading, unsupported by the evidence, and constituted [an] improper pinpoint instruction[]," and thereby "deprived [him] of due process, equal protection and a fair jury trial." More specifically, defendant contends the consciousness of guilt instruction (1) was "unnecessary" because it merely "repeat[ed] th[e] general principle [that the jury can draw inferences from circumstantial evidence] in the guise of permissive inferences of consciousness of guilt"; (2) was "impermissibly argumentative" because it "'improperly implied certain conclusions from specified evidence'"; and (3) "improperly allowed [his] jury to make a permissive inference" that "lacked a rational basis."

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[5] Specifically, the court instructed as follows: "If the defendant made a false or misleading statement relating to the charged crimes, knowing the statement was false or intending to mislead and/or that the defendant tried to hide evidence, that conduct may show he was aware of his guilt of the crimes; and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement or tried to hide evidence, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement or tried to hide evidence cannot prove guilt by itself."

With respect to the comparable CALJIC instructions on consciousness of guilt -- Nos. 2.03 (willfully false or misleading statements) and 2.06 (attempt to suppress evidence) -- our Supreme Court has "repeatedly rejected [similar] claims that these instructions are partisan and argumentative, permit the jury to irrationally infer guilt, or undermine the reasonable doubt requirement." (*People v. Lynch* (2010) 50 Cal.4th 693, 761.) And this court has observed that while "there are minor differences between" the CALJIC and CALCRIM instructions, "none is sufficient to undermine our Supreme Court's approval of the language of these instructions." (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.)

Defendant points to one difference between the version of CALCRIM No. 362 used here and its predecessor, CALJIC No. 2.03, not specifically discussed in *McGowan*. Whereas CALJIC No. 2.03 was expressly limited to statements made "before this trial," the version of CALCRIM No. 362 used here contained no such limitation.[6] With respect to this difference, defendant cites *People v. Beyah* (2009) 170 Cal.App.4th 1241 for the proposition that the unmodified CALCRIM instruction "erroneously permitted the jury to infer 'consciousness of guilt' from false statements based solely on [his] trial testimony."

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[6] The limiting phrase "before this trial" was added to CALCRIM No. 362 by revision in August 2009. For some reason, however, the revised version of the instruction was not used here, even though the instructions were given in October 2009.

The decision in *Beyah* does not support defendant's claim of error in the instruction. While the *Beyah* court "doubt[ed] that the CALCRIM committee intended CALCRIM No. 362 to be used . . . to permit an inference of consciousness of guilt based on knowingly false or intentionally misleading statements in a defendant's trial testimony," the court nonetheless concluded that "California law makes clear that a defendant's false trial testimony may, in proper circumstances, be considered as evidence of consciousness of guilt." (*People v. Beyah*, *supra*, 170 Cal.App.4th at pp. 1248-1249.) And with regard to defendant's argument that the unrevised version of CALCRIM No. 362 used here "unfairly singled out [his] testimony as subject to heightened scrutiny compared to other witnesses," the *Beyah* court observed that the defendant's testimony is singled out "only because the principle involved is uniquely applicable to the defendant. That is not, however, a legitimate ground for concluding that the instruction unconstitutionally burdened defendant's choice to testify or resulted in any improper inference of guilt based on the jury's evaluation of his testimony." (*Beyah*, at p. 1250, fn. omitted.)

For all of the foregoing reasons, we find no error in the consciousness of guilt instruction given here.

VII

Juror Questions

The trial court instructed the jury at the outset of the trial that upon the conclusion of the parties' examination of each witness, the jurors would be permitted to submit written

questions for the court to ask the witness. Outside the presence of the jury, defense counsel objected "to the jurors asking questions" on the grounds "it is a denial of due process and a fair trial to allow jurors to become advocates" and that "allowing jurors to ask questions . . . tips all the other jurors off as to how they are thinking before they actually go into the jury room to deliberate." The trial court overruled the objection.

On appeal, defendant contends he was "denied his rights to due process, equal protection and a fair trial by impartial jurors when the trial court allowed jurors to question witnesses." Of course, he later acknowledges that no juror actually questioned a witness, but the jurors were allowed "to pass the court written questions [for the court] to ask ea[c]h witness after examination by counsel was completed."

Defendant notes that this practice has been upheld in the federal courts and in the California courts. He contends, however, that "[n]o California case has examined the constitutional implications of the practice." He then points out that although the courts have noted risks in the practice of allowing the jury to submit questions to the court, "[m]ost state and federal circuit courts that have ruled on this issue have upheld the practice as a matter of judicial discretion." Despite this observation, defendant suggests the practice is constitutionally impermissible because: (1) "it may cause *premature deliberation* among the jury"; (2) even "allowing jurors to think of questions to ask is 'fraught with dangers'";

and (3) "the practice . . . eviscerates the adversarial system in favor of an inquisitorial system."

Our Supreme Court has concluded that the practice employed here does not result in premature deliberation, but instead may be of "'real benefit'" "'[i]n a proper case.'" (*People v. Anderson* (1990) 52 Cal.3d 453, 481.) Indeed, the court has stated that "the judge has discretion to ask questions submitted by jurors" "[f]or the same reason" that the judge "'may examine witnesses to elicit or clarify testimony'" -- because "'"it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence."'" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305.)

It true that in neither *Anderson* nor *Cummings* was the Supreme Court confronted with the argument defendant advances here -- that the practice of allowing jurors to submit questions to the trial court violates a defendant's constitutional right to a fair trial. Nonetheless, we believe the Supreme Court's positive observations about the practice in those cases illustrates why the practice does not violate the defendant's right to a fair trial, but instead helps secure that right. Allowing jurors to submit questions they believe are material but have not been answered, subject to the court's review to determine if the questions are proper, assists in the ascertainment of the truth, which is the entire purpose of a trial. *Barring* the jurors from having their questions answered, which is what defendant's objection would have accomplished,

would have the opposite effect. As our Supreme Court has observed, "The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

Indeed, although defendant contends the questions the jurors asked of him "evidence[d] that one or more of them had taken on the role of the prosecution," we perceive no such thing. The questions the jurors (and the court) asked of defendant evidence to us merely an intent to determine the truth of defendant's story at trial, which directly conflicted with his pretrial statements. Nothing in those questions suggests the jurors who formulated the questions had abandoned impartiality or were deliberating prematurely.

In summary, we find no constitutional infirmity in the trial court allowing the jurors to submit questions for the court to ask.

VIII

Sentence Enhancements

A

Sixth Amendment

Defendant contends he "was denied the right to have jury resolution of all necessary elements of the sentence

enhancements attendant to counts one through four because the instructions failed to define adequately 'personally' in terms of the discharge and use allegations." Specifically, defendant contends the instructions as a whole allowed the jury to use the "aiding and abetting" instructions to "impute the actual shooter's gun use to [him]" for purposes of the gun use enhancement allegations. We disagree.

Pursuant to CALCRIM No. 400, the trial court instructed the jury that "[a] person may be guilty of a crime in two ways: One, he may have directly committed the crime. I will call that person the *perpetrator*. Two, he may have aided and abetted a perpetrator, who directly committed the crime." The court then instructed the jury, pursuant to CALCRIM No. 401, on the elements the prosecution had to prove in order "[t]o prove that the defendant is guilty of a crime based on aiding and abetting that crime."

After instructing the jury on the elements of murder, attempted murder, and shooting at an inhabited dwelling, the court then instructed the jury, "If you find the defendant guilty of any of the crimes charged in Counts 1 through 4, you must . . . then decide whether the People have proved additional allegations regarding personal use of a firearm." The court then separately instructed the jury on the firearm use allegation associated with the murder charge ("personally discharged a firearm"), the firearm use allegations associated with the attempted murder charges ("personally discharged a firearm"), and the firearm use allegations associated with the

attempted murder charges and the shooting at an inhabited dwelling charge ("personally used a firearm"). In each instance, the court instructed the jury to decide the firearm use allegations *if* the jury found defendant guilty of the crime (or any of the crimes) charged.

The People contend the foregoing instructions were "very clear that the aiding and abetting theory applie[d] to the *charged crimes*" only. Defendant responds that "the jury was never instructed that they should not apply the aiding and abetting instruction to the sentence enhancements." The People have the better argument. As set out above, the instructions told the jury that the concept of aiding and abetting was one way defendant could be found "guilty of a crime." The instructions later told the jurors that they were to decide the "personal use of a firearm" allegations only if they had first found defendant guilty of the crime or crimes with which those allegations were associated. Considering the instructions together, as the jurors were instructed to do, we are persuaded no reasonable juror would have interpreted them as allowing a finding on the firearm use allegations that defendant "personally" used or discharged a firearm based on the concept of "aiding and abetting," which the instructions specifically related only to whether defendant was "guilty of a crime." Accordingly, the jury instructions did not deprive defendant of his Sixth Amendment right to have the jury decide all of the necessary elements of the sentence enhancements.

B

Firearm Use Enhancement On Conviction Of

Shooting At An Inhabited House

In a supplemental opening brief, defendant contends the firearm use enhancement the jury found true in association with the charge of discharging a firearm at an inhabited dwelling must be stricken because by the terms of the enhancement statute (Pen. Code, § 12022.5, subd. (a)), the enhancement does not apply if "use of a firearm is an element of th[e] offense." The People concede the error. We accept the concession (see *People v. Kramer* (2002) 29 Cal.4th 720, 723, fn. 2 [firearm use enhancement in Pen. Code, § 12022.5, former subd. (a)(1), did not apply to the crime of discharging a firearm at an occupied vehicle]) and will therefore modify the judgment to strike the enhancement on count four.

IX

Cruel And Unusual Punishment

Defendant contends that his aggregate prison term of 79 years to life, "which far exceeds [his] natural life span, is akin to life without possibility of parole" and "[a]s such, his sentence, for crimes he committed as a juvenile, run[s] afoul of the prohibition against cruel and unusual punishment in the federal and state Constitutions."[7] We disagree.

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[7] For the purposes of this argument, we will assume that because of the 15 percent limitation on worktime credits for persons convicted of violent felonies (Pen. Code, § 2933.1), defendant's sentence of 79 years to life is functionally

As an initial matter, the People assert that "[d]efense counsel's failure to object that the sentence imposed was cruel and unusual forfeited this claim on appeal." Defendant contends "the forfeiture rule of *People v. Scott* (1994) 9 Cal.4th 331 . . . does not apply to unconstitutional sentences, as they are unauthorized." Our Supreme Court has held, however, that "[i]t is elementary that [a] defendant waive[s] [an argument based on his Eighth Amendment right to be free from cruel and unusual punishment] by failing to articulate an objection on federal constitutional grounds below." (*People v. Burgener* (2003) 29 Cal.4th 833, 886.) There is no reason why the same rule should not apply to a similar argument under the state Constitution. Nevertheless, because defendant also asserts that his trial attorney's failure to make this argument in the trial court amounted to ineffective assistance of counsel, we will nonetheless consider defendant's challenge to his sentence "through the lens of ineffective assistance of counsel." (*Id.* at p. 887.)

Both the United States and California Constitutions prohibit punishment that is disproportionate to the defendant's culpability. (*People v. Webb* (1993) 6 Cal.4th 494, 536.) Under the Eighth Amendment to the United States Constitution, "extreme sentences that are 'grossly disproportionate' to the crime" are forbidden. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 [115

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equivalent to a sentence of life without parole, since defendant will likely not be eligible for parole until past his life expectancy.

L.Ed.2d 836, 869].) Under article I, section 17 of the California Constitution, "cruel or unusual punishment" is forbidden, and punishment may be deemed "cruel or unusual" if it "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Defendant's argument that his sentence violates the foregoing constitutional provisions reduces to two basic points: First, relying primarily on *Roper v. Simmons* (2005) 543 U.S. 551 [161 L.Ed.2d 1] and *Graham v. Florida* (2010) 560 U.S. ___ [176 L.Ed.2d 825], he contends the Eighth Amendment's proportionality principle forbids sentencing *any* defendant who was a juvenile at the time of his crimes to prison for life without possibility of parole. Second, he contends the punishment imposed on him was unconstitutionally disproportionate under *Lynch* because of his "youth" and "other personal characteristics." We will address those arguments in turn.

A

Eighth Amendment

In *Roper*, the United States Supreme Court held that "the death penalty is disproportionate punishment for offenders under 18." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 575 [161 L.Ed.2d at p. 25].) In reaching this conclusion, the court noted "[t]hree general differences between juveniles under 18 and adults" that justify holding juveniles less culpable than adults for their crimes: (1) lack of maturity; (2) greater vulnerability to negative influences and outside pressures; and

(3) more transitory personality traits. (*Id.* at pp. 569-571 [161 L.Ed.2d at pp. 21-22].) Having recognized "the diminished culpability of juveniles," the court went on to conclude that neither of the "two distinct social purposes served by the death penalty" -- retribution and deterrence -- "provides adequate justification for imposing the death penalty on juvenile offenders." (*Id.* at pp. 571-572 [161 L.Ed.2d at p. 23].)

More recently, in *Graham*, the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." (*Graham v. Florida*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 850].)

Defendant recognizes that "the holding of *Graham* specifically applies only to juvenile offenders who are convicted of nonhomicides." Nevertheless, he contends that "*Graham* and *Roper* establish that a sentence that at the outset guarantees a juvenile offender will die in prison is cruel and unusual." We disagree. Nothing in either *Roper* or *Graham* compels the conclusion that a de facto sentence of life without parole cannot lawfully be imposed on a juvenile offender who, like defendant, committed a homicide and two attempted homicides with a firearm.

It is true that in *Graham*, the Supreme Court observed that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense," and "[w]ith respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been

recognized as legitimate--retribution, deterrence, incapacitation, and rehabilitation, [citation]--provides an adequate justification." (*Graham v. Florida*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 843].) The court's analysis in *Graham*, however, does not compel a similar conclusion with respect to the crimes and sentence at issue here. While "[a] sentence of life imprisonment without parole . . . forswears altogether the rehabilitative ideal" (*id.* at p. ___ [176 L.Ed.2d at p. 845]), it does not follow that life without parole cannot be deemed a proportional punishment based on the other three goals of penal sanctions.

With regard to retribution, the Supreme Court in *Graham* concluded that "retribution does not justify imposing the second most severe penalty" -- life without parole -- "on the less culpable juvenile nonhomicide offender" (*Graham v. Florida*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 844]), but that was only after observing that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" (*id.* at p. ___ [176 L.Ed.2d at p. 842]). Because a juvenile offender like defendant here, who both killed *and* had the intent to kill, does not have the "twice diminished moral culpability" that was the pivotal consideration in *Graham*, *Graham*'s conclusion with respect to the goal of retribution does not apply here.

The same can be said for the goal of deterrence. In *Graham*, the court observed that "in light of juvenile nonhomicide offenders' diminished moral responsibility, any

limited deterrent effect provided by life without parole is not enough to justify the sentence." (*Graham v. Florida*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 844].) Again, however, a juvenile offender like defendant here, who both killed and intended to kill, does not have the "twice diminished moral culpability" of a juvenile nonhomicide offender. Thus, *Graham* does not compel the conclusion that the goal of deterrence will not support the sentence at issue for the crimes at issue here. Furthermore, it should be pointed out that in rejecting deterrence as a justification for imposing the death penalty on juvenile offenders, the court in *Roper* observed that "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person." (*Roper v. Simmons*, *supra*, 543 U.S. at p. 572 [161 L.Ed.2d at p. 23].) Thus, the court implicitly suggested that life without parole would be an acceptable punishment for a juvenile homicide offender.

Finally, with respect to the goal of incapacitation, the *Graham* court concluded that while that particular goal "is inadequate to justify [life without parole] for juveniles who did not commit homicide," "incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts." (*Graham v. Florida*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 844].) The plain implication was that incapacitation might well justify life without parole for a

juvenile *homicide* offender. It may be that incapacitation alone would not justify such a penalty, but when that goal is considered together with retribution and deterrence (discussed above), we find no basis for concluding that either *Graham* or *Roper* precludes as disproportionate a de facto sentence of life without parole for a juvenile offender who both killed and intended to kill, and who used a firearm in doing so. Thus, we reject defendant's argument under the Eighth Amendment, and we conclude his trial counsel did not render ineffective assistance by failing to raise that argument.

B

Article I, Section 17

Under *In re Lynch*, a particular sentence may be deemed cruel or unusual under the California Constitution if it is disproportionate in view of "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch*, *supra*, 8 Cal.3d at p. 425.) This prong of *Lynch*[8] requires examining "'the facts of the crime in question'" under a "totality of the circumstances" test, along with "the defendant's individual culpability as shown by such factors as his age, prior criminality, personal

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[8] Defendant does not offer any argument under the second or third prongs of *Lynch* -- comparing his punishment with the penalty for more serious crimes in California and comparing his punishment with the penalty for the same offense in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425-427.)

characteristics, and state of mind." (*People v. Dillon* (1983) 34 Cal.3d 441, 479.)

Defendant argues that "[a] life-plus [sentence] for an immature 16 year old who had no violent criminal record, and who was susceptible to negative peer pressure from others, is not within the limits of civilized standards." But at least two factual foundations of defendant's argument -- that he was "immature" and "susceptible to negative peer pressure from others" -- are far from a given on this record.

Defendant admits that the trial court, at least implicitly, found that his "actions were not due to immaturity." In particular, the trial court observed that defendant "was a person who freely chose a lifestyle of violent crime" and "chose what he wanted to do that particular night." Defendant contends the court's finding was "unfounded . . . and . . . unaided by expert assistance" and "[t]here were no signs [defendant] was mature at the time of the crimes," but defendant must do more than make these bare assertions to carry his burden on appeal of demonstrating that the trial court's finding was not supported by substantial evidence. As we explained in *People v. Sanghera* (2006) 139 Cal.App.4th 1567, "To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient . . . .' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Id.* at p. 1573.) Defendant has not done that here.

As for defendant's supposed susceptibility to peer pressure, he points to no evidence demonstrating such susceptibility, nor any evidence tending to show he committed the shootings because of such a susceptibility. Absent such evidence, we are left with the assertion that defendant's sentence shocks the conscience because he was 16 years old at the time of his crimes and had no violent criminal record. We do not agree. While defendant's sentence is undoubtedly harsh, we cannot say -- based on the factors defendant argues -- that it so disproportionate to the crimes for which it was imposed that it offends fundamental notions of human dignity. Accordingly, we reject his argument under the California Constitution also.

DISPOSITION

The judgment is modified to strike the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)) on count four. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward of copy of the amended abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

RAYE, P. J.

HULL, J.