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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DENNIS KEEPER, Defendant and Appellant.	D055965 (Super. Ct. No. SCD217683)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed as modified with directions.

Koryn & Koryn and Daniel G. Koryn for Defendant and Appellant.

Edmund G. Brown Jr., and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr. and Stephanie H. Chow Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exceptions of parts I, III, IV and V.

A jury convicted Michael Dennis Keeper of attempted willful, deliberate, premeditated murder (Pen. Code,[1] §§ 664, 187, subd. (a), 189; count 1), assault with a firearm (§ 245, subd. (a)(2); counts 2 & 4), making a criminal threat (§ 422; count 3), and evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a); count 5). As to count 1, the jury found true an allegation Keeper personally discharged a firearm causing great bodily injury (firearm discharge enhancement). (§ 12022.53, subd. (d).) As to counts 2 through 4, the jury found true allegations Keeper personally used a firearm (firearm use enhancement). (§ 12022.5, subd. (a).) As to count 2, the jury also found true an allegation Keeper personally inflicted great bodily injury causing permanent paralysis. (§§ 12022.7, subd. (b), 12022.9.)

The trial court sentenced Keeper to a term of life in prison with the possibility of parole for count 1, plus 25 years to life for the related firearm discharge enhancement. The trial court additionally sentenced Keeper to a prison term of three years for the assault with a firearm conviction in count 4 plus four years for the related firearm use enhancement, and concurrent prison terms for counts 3 and 5 and for the firearm use enhancement related to count 3. The court stayed the execution of sentence for count 2.

Keeper appeals, contending the trial court committed instructional error by: (1) refusing to give an instruction on attempted voluntary manslaughter; (2) refusing to give an instruction on the consideration of testimony by a person with a mental disability; and (3) failing to limit the flight instruction to counts 1 through 4. In addition, Keeper

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1 Further statutory references are also to the Penal Code unless otherwise stated.

contends the court erred by imposing a concurrent sentence for count 3 rather than staying it under section 654. He also contends his sentence of 25 years to life for the firearm discharge enhancement constitutes cruel and unusual punishment, and that there are errors in the abstract of judgment requiring correction.

The People concede the trial court should have stayed the sentence for count 3 and there are errors in the abstract of judgment requiring correction. We agree and as modified, we affirm the judgment in all other respects.

BACKGROUND

Prosecution Evidence

Jennifer L.'s Version of Events

Keeper and Jennifer L. (Jennifer) once dated and have a teenage son, B. Jennifer later married Matthew L. (Matthew) and they have two young children.

Keeper had visitation rights with B. every Wednesday, plus every other weekend. In recent years, Keeper was often unable to pick up B. for visits because he lacked a job or car; however, Jennifer dropped B. off whenever Keeper had time to see him. They did not have many disagreements regarding visitation until B. became a teenager and no longer wanted to spend as much time with Keeper, which frustrated Keeper.

In December 2008, Jennifer and Matthew attended a holiday party. A neighbor babysat Jennifer and Matthew's two young children. B. planned to stay the night at a friend's house. B. called Jennifer during the party because Keeper had called him and told him he would be picking him up for a fishing trip. B. asked Jennifer to tell Keeper he did not want to go because he had a soccer tournament.

Keeper also called Jennifer during the party and told her he wanted to pick up B. and take him on a fishing trip that weekend. Jennifer did not know about the fishing trip before that day. Jennifer explained to Keeper that B. had a soccer tournament that weekend and did not want to go on the trip. Not dissuaded, Keeper told Jennifer to get B. ready because he was going to pick him up and he hung up on her.

B. called Jennifer again. He told her Keeper called him, said he did not care about the soccer tournament, and directed him to get ready because he was coming to get him. Keeper also called Jennifer again and screamed at her. He directed her once more to get B. ready because he had the fishing trip planned and he was going to pick up B. This time, Jennifer hung up on him.

B. called Jennifer a third time. He was crying and concerned about the way Keeper was acting toward him. Jennifer shared B.'s concern. She told B. to go to his friend's house right away. She also called the babysitter and told the babysitter not to answer the door and to call the police if Keeper came by. Matthew was not involved in any of the phone calls.

On the way home from the party, Jennifer received a text message from the babysitter stating, "Your ex is here. He knocked on the door and I told him no one was home." A few minutes later, when Jennifer and Matthew turned onto their street, Jennifer saw Keeper's van parked in front of their house. Keeper and his friend, Steve Callihan, were talking nearby.

Jennifer and Matthew parked behind Keeper's van and stayed in their car. Keeper noticed Jennifer and walked up to the car. When Jennifer got out, Keeper asked her

where B. was. Jennifer told Keeper that B. was staying at a friend's house and had a soccer tournament the next morning. Keeper told Jennifer to call B. and tell him to come home because they were going on a fishing trip. Jennifer called B. to appease Keeper. B. told Jennifer he was not coming home. Jennifer relayed B.'s response to Keeper. As she did so, B. could hear Keeper swearing in the background. B. told Jennifer to hang up and call the police. B. also called the police.

Around this time, Matthew got out of the car and asked Jennifer if she was okay. Keeper told Matthew the matter was none of Matthew's business. Matthew said, "Look, man. Calm down. B. doesn't want to go with you." As this exchange occurred, Jennifer dialed 911. Keeper swore at Matthew and told him again the matter was none of his business. Matthew replied, "Yes, it is. I take care of him. I pay his bills. I feed him."

At this point, Callihan stepped between Keeper and Matthew and told Keeper to calm down. Keeper pushed Callihan away, then pulled a gun, and pushed it against Matthew's chest. Keeper kept telling Matthew to mind his own business. Matthew put his hands up in the air and started walking backwards, saying as he did, "Man, do you really want to do this? Is it really worth it?" Keeper kept swearing at Matthew and shoving the gun at him. Keeper fired two shots at Matthew and Matthew fell to the ground. Keeper then walked over to him and fired more shots at him. Jennifer ran to Matthew. Keeper pointed the gun at her and asked, "Do you want to die, too?"

Upon hearing approaching sirens, Keeper lowered the gun and ran to his van. He called out to Callihan to "come on," but Callihan put up his hands and said, "No way, man." Keeper then drove away.

Callihan's Version of Events

Callihan's perception of events varied from Jennifer's in some key respects. Callihan testified Keeper's wife had asked him to go with Keeper to make sure Keeper did not get into any trouble. On the way to Jennifer and Matthew's house, Keeper angrily told Callihan that he was picking up his son and Matthew "better not get in my face." Callihan tried to calm Keeper down. He did not know Keeper had a gun with him.

Keeper pulled out the gun after Callihan had stepped between Keeper and Matthew. Keeper pointed the gun at Matthew's head and then at Matthew's chest. Matthew told Jennifer to call 911. Matthew asked Keeper, "What are you going to do? Shoot me?" Matthew then said, "Go ahead and shoot me. Shoot me." Matthew kept saying this over and over.

Matthew started backing up while continuing to dare Keeper to shoot him. Keeper put the gun down, then Matthew pushed him and Keeper put the gun back up. Callihan kept telling Keeper, "It's not worth it." Keeper put the gun down again, but Matthew grabbed the hand holding the gun and pulled it to his chest. A few seconds later, a shot fired and went into Matthew's leg. Then, a second shot fired and went into Matthew's chest. Matthew fell to the ground. A few seconds later, Keeper shot Matthew in the face. Jennifer ran over to Matthew. Keeper never said anything to her and never pointed the gun at her.

Afterwards, Keeper told Callihan to get in the van with him, but Callihan declined and Keeper drove off without him. Callihan never told the police about Matthew pushing

Keeper, about Matthew pulling Keeper's gun hand to his chest, or about the sequence of shots.

Police Pursuit

Two police officers spotted Keeper's van as he was leaving the area. Although the officers activated the emergency lights and sirens on their patrol car, Keeper did not stop. They and other police vehicles, as well as a police helicopter, pursued Keeper. During the pursuit, Keeper ran multiple red lights, changed lanes multiple times, drove at unsafe speeds, and nearly caused a collision. The pursuit ended approximately 10 to 12 miles from where it began, when Keeper stopped the van on a freeway onramp after the van's transmission became disabled.

Officers found a .357 magnum on the front floorboard of the van. The gun contained five expended rounds and one live round. The officers also found multiple rounds of live ammunition in an open case in the backseat of the van.

Matthew's Injuries

Matthew sustained multiple gunshot wounds to his head, neck, chest, back, abdomen, and knee. The bullet fragments caused bleeding in his brain and fractures in three parts of his spine. His injuries resulted in permanent neurological loss, severe spinal cord damage, and quadriplegia.

Defense Evidence

Keeper's Version of Events

After Keeper and Jennifer broke up, they set up a visitation schedule for B. The two never argued over visitations. In addition, Keeper got along with Matthew and never had any problems with him.

Approximately eight months before the shooting, Keeper left his job as a certified nurse assistant caring for the elderly. He left the job because he had to "clean up dead people all the time" and "it started to get to me, watching people die when I knew them." He went on disability leave and did not work again.

Keeper suffered from depression for several years. Shortly before the shooting, he was diagnosed with posttraumatic stress, his wife was diagnosed with fibromyalgia, and one of his other children was diagnosed with autism. He was feeling "really depressed." Although he had been taking antidepressant, antianxiety, and other medications, he stopped taking the medications a week prior to the shooting because he wanted to feel normal.

Keeper told B. about the fishing trip about two weeks before the shooting. He thought he also told Jennifer about it. Throughout the day of the shooting, Keeper felt very depressed. He yelled at Jennifer and B. on the telephone because he was frustrated and believed Jennifer and Matthew were telling B. not to go on the fishing trip with him.

Prior to going over to Jennifer's house, Keeper picked up Callihan to make sure nothing would happen. While driving to Jennifer's house, Keeper told Callihan that Matthew "better not get in his face." Although Jennifer had already told Keeper that B. would not be going on the fishing trip, Keeper thought she would change her mind if he went to her house.

About a month earlier, Keeper found a case while cleaning out a garage. Thinking it contained tools, he put the case in his van. Earlier on the day of the shooting, Keeper opened the case for the first time and discovered it contained a gun. Keeper kept the gun in the van because he did not want it inside his house around his other children.

When Keeper arrived at Jennifer and Matthew's house, he put the gun in his pants pocket because he did not want B. to be near it. Keeper did not intend to use the gun.

After the babysitter told Keeper that B. was not there, Keeper returned to his car intending to wait a few minutes before going home. When he noticed Jennifer, he approached her and she told him B. did not want to go with him. He insisted on seeing B. and yelled at Jennifer.

Matthew got out of the car and told Keeper that B. was not going with him. Keeper told Matthew the matter did not concern him and Matthew yelled back that B. was not going anywhere because Matthew "pa[id] for his stuff, clothes and everything." Matthew threatened and pushed Keeper.

Keeper reached into his pocket for his cell phone to call 911 for help in enforcing the visitation; however, his cell phone was not in his pocket. Instead, he pulled out the gun. When Matthew saw the gun, he said, "Are you gonna shoot me? Are you gonna shoot me?" Keeper put the gun down, but Matthew grabbed Keeper's hand and pulled it up so the gun was pointed at Matthew's chest. Matthew let go and Keeper put his hand back down. Keeper turned toward Matthew and Matthew tried to grab the gun from Keeper. When Keeper tried to pull away, he accidentally fired the gun twice. Keeper never intended to kill Matthew and did not aim the gun at Matthew's chest or face.

After Keeper fired the first two shots, he "blanked out." He did not remember firing three more shots and did not remember threatening Jennifer. His next memory was of driving on the freeway. He realized Callihan was no longer in the van. He saw police lights in his rearview mirror, so he stopped driving. On cross-examination, Keeper acknowledged that he did not remember many of the things that happened, and that his version of events might not be accurate.

Keeper's Mental and Neurological Impairments

Dr. Mark Lewkowicz, a clinical psychologist, evaluated Keeper and diagnosed him with Bipolar Disorder. In addition, Dr. Lewkowicz concluded Keeper has an I.Q. of 77 and a neurological impairment consistent with a language learning disability. Dr. Lewkowicz explained that Keeper has difficulty organizing information, sequencing ideas, and using language for complex reasoning and planning. Dr. Lewkowicz further explained that, when someone with depression stops taking depression medication, the person will gradually become more depressed and less resilient, and develop a sense of hopelessness in life.

Keeper's Character Evidence

Callihan's ex-wife, Keeper's former work supervisor, and Keeper's martial arts instructor testified Keeper was a peaceful, honest person.

DISCUSSION

I

During the jury instruction conference, defense counsel requested the trial court give the jury the instruction for attempted voluntary manslaughter as a lesser included

offense of the attempted murder charge. Defense counsel argued the instruction was warranted based on Callihan's testimony that Matthew took Keeper's gun, pointed it at himself, and dared Keeper to shoot. The court declined to give the instruction finding there was insufficient evidence to support it. Keeper contends the trial court's failure to give the instruction necessitates reversal of his attempted murder conviction. We conclude there is no merit to this contention.

"Even without a request, a trial court must instruct on general principles of law that are closely connected to the facts before the court and that are necessary for the jury's understanding of the case. [Citation.] It must instruct sua sponte on a lesser included offense where there is evidence that, if believed by the trier of fact, would absolve the defendant of the greater offense, but not of the lesser. [Citation.] This obligation extends to all theories of a lesser included offense that find substantial support in the evidence. [Citation.] However, the court need not instruct on a lesser offense when there is no evidence the offense was less than that charged." (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 833; accord, *People v. Avila* (2009) 46 Cal.4th 680, 704-705.) On appeal, we independently review whether the trial court properly declined to instruct on a lesser included offense. (*People v. Avila*, at p. 705; *People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

"Attempted murder is the attempt to commit an unlawful killing of a human being, or a fetus, with malice aforethought." (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) Attempted murder is reduced to attempted voluntary manslaughter if the attempt to kill is "committed upon a sudden quarrel or heat of passion or under an honest but

unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury." (*Ibid.*)

To support the giving of an attempted voluntary manslaughter instruction under a heat of passion theory, there must be evidence substantial enough for the jury to consider that the defendant acted under the heat of passion. In addition, there must be evidence the victim provoked the defendant's heat of passion, or the defendant reasonably believed the victim provoked it. There must also be evidence the provocation was sufficient to cause an ordinary person of average disposition to act rashly or without due deliberation or reflection. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583-584; *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709; *People v. Williams*, *supra*, 199 Cal.App.3d at p. 475.)

In this case, the version of events most favorable to Keeper was that Matthew approached Keeper while Keeper was arguing with Jennifer and pushed Keeper. Matthew then told Keeper that B. was not going with Keeper because Keeper did not financially support B. When Keeper mistakenly pulled out the gun instead of his cell phone, Matthew repeatedly dared Keeper to shoot him and twice pulled Keeper's gun hand up so Keeper could do so. While Matthew's conduct, if it occurred, was unwise, it was not sufficiently provocative to cause an ordinary, reasonable person to act rashly or without due deliberation or reflection. (See, e.g., *People v. Manriquez*, *supra*, 37 Cal.4th at pp. 585-586 [victim's name-calling, taunts, and dares to defendant to use a weapon if he had one were plainly insufficient to cause an average person to lose reason and judgment].) Absent evidence of sufficient provocation, the trial court was not required to instruct the jury on attempted voluntary manslaughter under a heat of passion theory.

Similarly, to support the giving of an attempted voluntary manslaughter instruction under an imperfect self-defense theory, there must be evidence substantial enough for the jury to consider that the defendant actually believed he needed to act in self-defense against an imminent threat to life or of great bodily injury. (*People v. Manriquez, supra*, 37 Cal.4th at pp. 581-582.) Here, there is no evidence Keeper actually believed he needed to act in self-defense. Instead, he testified the first shots were accidental and the remaining shots occurred after he "blanked out." Accordingly, the trial court was also not required to instruct the jury on attempted voluntary manslaughter under a self-defense theory.

Even if the trial court had erred in failing to give attempted voluntary manslaughter instructions, the error is harmless. By finding Keeper guilty of premeditated attempted murder, the jury implicitly rejected Keeper's version of events. Accordingly, there is no doubt the jury would have returned the same verdict had the jury received attempted voluntary manslaughter instructions. (*People v. Manriquez*, *supra*, 37 Cal.4th at pp. 582-583, 586.)

II

During the jury instruction conference, defense counsel requested that the trial court give the CALCRIM No. 331 instruction.[2] The trial court declined to give the instruction, finding it did not apply to the facts of the case. Keeper contends the failure to give the instruction requires reversal of his conviction because the instruction was necessary for the jury to properly evaluate his credibility. We conclude there is no merit to this contention.

In a criminal case in which a person with developmental disability, or a cognitive, mental, or communication impairment, testifies as a witness, the trial court must, upon request, instruct the jury to consider all of the factors surrounding the person's testimony, including the person's level of cognitive development, when the jury evaluates the person's testimony. (§ 1127g.) In addition, the trial court must instruct the jury that, even though the person's disability or impairment may cause the person to perform differently as a witness, the difference does not mean the person is a more or less credible witness. (*Ibid.*) The trial court must also instruct the jury not to discount or distrust the person's testimony solely because of the person's disability or impairment. (*Ibid.*) A trial

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2 CALCRIM No. 331 states: "In evaluating the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment), consider all of the factors surrounding that person's testimony, including his or her level of cognitive development. [¶] Even though a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental[,]/ [or] communication) impairment)[,] may perform differently as a witness because of his or her level of cognitive development, that does not mean he or she is any more or less credible than another witness. [¶] You should not discount or distrust the testimony of a person with a (developmental disability[,]/ [or] [a] (cognitive[,]/ [or] mental [,]/ [or] communication) impairment)[,] solely because he or she has such a (disability/ [or] impairment)."

court fulfills this obligation in appropriate cases by giving the CALCRIM No. 331 instruction, which tracks the language of section 1127g.

Section 1127g does not define "developmental disability" or "cognitive, mental, or communication impairment." When the meaning of a statute is unclear, " 'we look to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy.' " (*People v. Ramirez* (2009) 45 Cal.4th 980, 987.)

The Legislature enacted section 1127g in 2004 as part of an Assembly Bill that made " 'numerous changes to the Penal Code, Evidence Code, and the Welfare and Institutions Code to protect dependent persons and the elderly in court.' " (Sen. Rules. Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 20 (2003-2004 Reg. Sess.) as amended Aug. 18, 2004, p. 7.) The bill's author particularly sought " 'to protect the rights of crime victims who are dependent on others for their care because of a developmental disability, traumatic brain injury, or degenerative brain disease' " by ensuring " 'dependent people who are called upon to testify in a court of law are given the rights afforded to minors in the same situation.' " (*Ibid.*)

The Legislative Counsel described the Legislature's intent more broadly as "ensur[ing] that people who cannot live independently are treated fairly by the criminal justice system." (Legis. Counsel's Dig., Assem. Bill No. 20 (2003-2004 Reg. Sess.) chaptered Sept. 28, 2004, p. 3.) Section 1 of the bill reflects this intent and states the purpose of the legislation is to protect "the rights of developmentally disabled persons

and other dependent persons who are witnesses in criminal cases . . . ." (Assem. Bill No. 20 (2003-2004 Reg. Sess.) § 1 (italics added); see Stats. 2004, ch. 823, § 1; Historical and Statutory Notes, 29B West's Ann. Evid. Code (2011 supp.) foll. § 177, p. 11.) "Dependent persons" in this context are persons whose disability or impairment substantially restricts their ability to carry out normal activities or to protect their rights. (Evid. Code, § 177.)[3]

It is apparent from the legislative history and the definition of "dependent persons" that the Legislature intended section 1127g to apply to persons whose developmental disability, or cognitive, mental, or communication impairment, causes them to be dependent on others for care. While Keeper presented evidence his mental disorder and neurological impairment affected some aspects of his life, he did not present any evidence his disorder and impairment caused him to be a dependent person. To the contrary, the evidence shows that, despite his disorder and impairment, Keeper generally engaged in normal daily activities without assistance. Therefore, we conclude the trial court did not err in declining Keeper's request for the CALCRIM No. 331 instruction.

III

At the prosecutor's request, the trial court gave the jury the CALCRIM No. 372 instruction. This instruction, which is based on section 1127c,[4] informed the jury that if

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3 Evidence Code section 177 was enacted at the same time and as part of the same Assembly Bill as Penal Code section 1127g. (Assem. Bill No. 20 (2003-2004 Reg. Sess.) § 2; Stats. 2004, ch. 823, §§ 2, 15.)

4 Section 1127c requires the trial court to give a flight instruction in any criminal trial where the prosecution relies on evidence of the defendant's flight as proof of guilt.

the defendant fled immediately after the crime, the flight might show the defendant was aware of his guilt. (CALCRIM No. 372.) The instruction further informed the jury that, if it concluded the defendant fled, it could decide the meaning and importance of the flight; however, the flight could not prove guilt by itself. (*Ibid.*)

Although defense counsel did not object to or request a modification of the instruction, Keeper contends on appeal that the trial court prejudicially erred in giving the instruction without modifying it to clarify it did not apply to the evading an officer charge. More particularly, Keeper contends the jury could not properly consider flight as evidence of consciousness of guilt for the evading an officer charge because flight is an element of that charge. Because the trial court failed to limit the flight instruction to the other charges, Keeper contends the jury could have improperly inferred his guilt of the evading an officer charge upon less than proof beyond a reasonable doubt. We need not decide whether the trial court erred as Keeper claims, because even if the trial court had erred, the error does not require reversal.

The evading an officer charge required the prosecution to prove police officers pursued Keeper, Keeper fled or tried to the elude the officers, Keeper intended to evade the officers, and, during the pursuit, Keeper drove with willful or wanton disregard for the safety of persons or property. (Veh. Code, § 2800.1, subd. (a); CALCRIM No. 2181.)

Section 1127c further requires the instruction to be substantially as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

Keeper defended against the charge by presenting evidence he lacked the intent to evade because he was in an unconscious or "blacked out" state. He never disputed he fled from officers, nor could he have reasonably done so. The uncontroverted evidence shows he drove off in his van as soon as he could hear emergency sirens approaching. A short time later, two police officers spotted his vehicle and signaled him to pull over. Instead of doing so, he continued driving for 10 to 12 miles as multiple police vehicles and a police helicopter followed him. Therefore, any error in failing to limit the flight instruction to the other charges was harmless under both federal and state constitutional standards. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV

Keeper contends the 25 years to life sentence the trial court imposed for the firearm discharge enhancement under section 12022.53, subdivision (d), constitutes cruel and unusual punishment under both the state and federal Constitutions. We conclude there is no merit to this contention.

A

Keeper contends the sentence, on its face, constitutes cruel and unusual punishment under the state Constitution because it is mandatory and, therefore, the trial court must impose it without regard to individual culpability, mitigating circumstances, or gradations in punishment. This argument was rejected more than a decade ago in *People v. Martinez* (1999) 76 Cal.App.4th 489 (*Martinez*), a decision with which we agree. As the *Martinez* court explained, "[s]ection 12022.53 as a whole represents a

careful gradation by the Legislature of the consequences of gun use in the commission of serious crimes. The section is limited, in the first place, to convictions of certain very serious felonies. The statute then sets forth three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies: 10 years if the defendant merely used a firearm, 20 years if the defendant personally and intentionally discharged it, and 25 years to life if the defendant's intentional discharge of the firearm proximately caused great bodily injury." (*Id.* at p. 495, fn. omitted.) Subsequent appellate courts have also concluded a mandatory sentence under section 12022.53 does not, on its face, constitute cruel and unusual punishment. (See, e.g., *People v. Taylor* (2001) 93 Cal.App.4th 318, 324; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214-1215.)

Keeper contends *Martinez* is distinguishable because, in *Martinez*, the firearm enhancement applied to a base offense for which the trial court had a range of sentencing options. Thus, even though the trial court had to impose a sentence of 25 years to life for the firearm discharge enhancement, the trial court still had some means of recognizing gradations in culpability. (*Martinez, supra,* 76 Cal.App.4th at p. 495.) Conversely, in this case, the trial court could only impose a sentence of life with the possibility of parole for Keeper's attempted murder conviction and, therefore, had no means of recognizing gradations in Keeper's culpability.

We find this distinction unpersuasive for two reasons. First, the mandatory sentence of life with the possibility of parole for Keeper's attempted murder conviction is dictated by the fact Keeper committed the offense with premeditation and deliberation.

Consequently, like the base offense sentence discussed in *Martinez*, the sentence for Keeper's attempted murder conviction recognizes gradations in culpability. Second, the *Martinez* court's decision did not turn on the existence of sentencing discretion for the base offense. Rather, the existence of such discretion is simply one of many factors the court found supported its conclusion section 12022.53 sufficiently recognized gradations in culpability. (*Martinez, supra*, 76 Cal.App.4th at p. 495.) More compelling on this point in our view are the limited types of base offenses to which section 12022.53 applies and its provision of different sentences for different types of firearm use. Accordingly, we conclude Keeper's sentence for the firearm discharge enhancement does not, on its face, constitute cruel and unusual punishment under the state Constitution.

B

Keeper also contends the sentence, as applied to him, constitutes cruel and unusual punishment under the state Constitution because it is grossly disproportionate to his offense and to his individual culpability. " ' "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ' " 'shocks the conscience and offends fundamental notions of human

dignity' " ' [citation], the court must invalidate the sentence as unconstitutional." ' " (*People v. Wallace* (2008) 44 Cal.4th 1032, 1099.)

Here, the nature of Keeper's firearm use was unquestionably serious. The evidence shows he drove to Jennifer and Matthew's house intent on picking up his teenage son despite his son's unwillingness to go with him because of another commitment. On the way there, Keeper told Callihan that Matthew had better not get in his way. Keeper also brought along a gun, which he put in his pocket upon arriving at Jennifer and Matthew's house.

After Jennifer and Matthew arrived home, Keeper quickly confronted Jennifer and demanded she produce their son for the fishing trip. When Matthew tried to aid Jennifer, Keeper pulled the gun and pointed it at Matthew's chest. He fired two shots, causing Matthew to collapse. He fired additional shots at Matthew as Matthew lay on the ground. Matthew is now severely disabled and dependent on others for his care.

While not denying the seriousness of his firearm use, Keeper minimizes his culpability by portraying the shooting as a reflexive act induced by his mental disorder and neurological impairment. The jury, however, specifically rejected this portrayal of the incident. In considering whether a punishment is cruel or unusual, we must view the facts in the light most favorable to the judgment. (*People v. Em* (2009) 171 Cal.App.4th 964, 971; *Martinez, supra*, 76 Cal.App.4th at p. 496.)

Although Keeper does not have a significant history of crime or violence apart from this incident, this factor is not determinative. (*Martinez, supra,* 76 Cal.App.4th at p. 497.) In addition, his fatherhood and other positive qualities do not outweigh the

seriousness and circumstances of his firearm use. Consequently, we cannot conclude his sentence for the firearm discharge enhancement " ' " 'shocks the conscience and offends fundamental notions of human dignity.' " ' " (*People v. Wallace*, *supra*, 44 Cal.4th at p. 1099.)

C

Keeper lastly contends the sentence constitutes cruel and unusual punishment under the federal Constitution for the same reasons it does so under the state Constitution. In determining whether a prison term constitutes cruel and unusual punishment under the federal Constitution, "[a] court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." (*Graham v. Florida* (2010) __ U.S. __, 130 S.Ct. 2011, 2022.)

In this case, we need not engage in a comparative analysis. For the reasons explained in the preceding section, a comparison of the gravity of Keeper's firearm use with the severity of his sentence does not lead to an inference of gross disproportionality. (See also, e.g., *Lockyer v. Andrade* (2003) 538 U.S. 63, 66-68, 77 [two consecutive terms of 25 years to life under California's three strikes law for stealing approximately $85 worth of videotapes from one store and about $70 worth from another is not grossly

disproportionate]; *Ewing v. California* (2003) 538 U.S. 11, 18-20, 28-31 [sentence of 25 years to life under California's three strikes law for stealing three golf clubs worth $1,200 is not grossly disproportionate].) Accordingly, we conclude the sentence does not constitute cruel and unusual punishment under the federal Constitution.

V

Keeper contends, the People concede, and we agree his conviction in count 3 for making a criminal threat against Jennifer and his conviction in count 4 for assaulting her with a deadly weapon were part of an indivisible course of conduct. Therefore, the trial court should have stayed execution of sentence for count 3. (§ 654; *People v. Alford* (2010) 180 Cal.App.4th 1463, 1469, 1472.)

In addition, Keeper contends and the People concede the abstract of judgment does not accurately reflect the sentence the trial court orally imposed. Specifically, the trial court stayed execution of sentence for count 2; however, the abstract of judgment states in two places the sentence for count 2 is to be served concurrently with the indeterminate sentence in count 1. The trial court also ordered the sentence for count 4 to be served consecutively with the sentence for count 1; however, the abstract of judgment states in two places the sentence for count 4 is to be served concurrently with the sentence for count 1. We order the abstract of judgment corrected to reflect the sentence the trial court orally imposed. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [an appellate court may order the correction of an abstract of judgment that does not accurately reflect the oral judgment of the trial court].)

DISPOSITION

The judgment is modified to stay execution of sentence for count 3 pursuant to section 654. The superior court is directed to amend the abstract of judgment to reflect this modification. The superior court is further directed to amend the abstract of judgment to delete the two references to the sentences for counts 2 through 5 running concurrently with the sentence for count 1, and to indicate instead that the sentence for count 4 runs consecutively to the sentence for count 1, and the sentence for count 5 runs concurrently with the sentence for count 1. The trial court is directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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O'ROURKE, J.