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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERIC JAMES LAWRENCE, Defendant and Appellant.	F055219 (Super. Ct. No. VCF186464C) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Paul Anthony Vortmann, Judge.

Victor Blumenkrantz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Brian Alvarez and Leslie W. Westmoreland, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Eric James Lawrence stands convicted, following a jury trial, of attempted unpremeditated murder, in the commission of which he personally used and

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts IA and II of the Discussion.

intentionally discharged a firearm (Pen. Code,[1] §§ 187, subd. (a), 664, 12022.53, subds. (b), (c) & (e)(1); count 1), shooting at an inhabited dwelling (§ 246; count 2), assault with a firearm, in the commission of which he personally used a firearm (§§ 245, subd. (a)(2), 12022.5, subds. (a) & (d); count 3), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count 4).[2] Following a bifurcated court trial, appellant was found to have served two prior prison terms. (§ 667.5, subd. (b).) Sentenced to a total unstayed term of 30 years in prison, he now appeals, raising various claims of instructional and sentencing error. For the reasons that follow, we will remand the matter for correction of sentencing errors, but otherwise affirm.

FACTS

As of July 1, 2007, Craig Isherwood was staying at Devon Fox's house in Tulare.[3] Fox owned a Jeep Grand Cherokee, which she let appellant use. The night before, Isherwood saw appellant at Fox's house. Appellant had a pistol-grip sawed-off shotgun. Appellant said he had just gotten out of "the pen" and that he was just waiting for somebody to "mess around" with him so that he could shoot the gun.

Early on the morning of July 1, Renee York was at her residence in Tulare when Arthur Machado and appellant arrived in a white Jeep.[4] York was outside, waiting for appellant, who asked what was the matter. York responded that she was upset with a comment Larry Robinson had made to her. Appellant asked what it was, and York

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

2 Appellant was jointly charged and tried with Arthur Machado. Machado's case is not before us on this appeal.

3 Isherwood was granted use immunity with respect to his testimony.

4 York was originally charged as an accessory in this case and was facing substantial prison time. She entered into a plea agreement under which a four-year term was suspended, and she was required to serve a year in the county jail and three years' felony probation. She believed that if she did not testify, her probation would be violated and she might go to prison.

explained that Robinson had asked about the "XIV" tattoo on appellant's head. Robinson had asked why, if appellant was White, he had something like that on his head, and had said it meant appellant was a punk. Appellant got angry very quickly and asked if York knew where Robinson lived. Appellant said he was going to go over there and show Robinson what a punk was.

Appellant had York accompany him and Machado to show them how to get to Robinson's residence. On the way, appellant told York that when they got there, she was to knock on the door and bring Robinson outside. Appellant said he was going to "get in an old fashioned ass whoopin." At no time was there any talk about killing anybody. During the approximately five-minute drive to Robinson's residence, York neither saw nor heard mention of a shotgun.

On the date in question, Doris Burleson resided at the Tulare Motel on South K Street. The motel, which was laid out in a horseshoe shape, had a total of 24 units. Units 12 through 15 ran across the bottom of the "U"; Viola Astorga lived in unit 14, while Robinson resided in unit 15. Unit 16, in which Burleson lived, was the first unit starting up one side of the horseshoe.

Burleson and Astorga were in unit 14 when, between 3:30 and 3:45 a.m., a very loud car pulled in the driveway. The loud vehicle, a white Jeep, parked in front of unit 13, almost between units 13 and 14. Burleson exchanged greetings with York as York walked past unit 14.

York knocked on the door of unit 15, and, when Robinson opened it, asked if he would come outside so they could talk. Robinson stepped out of the room. Appellant, who was by the Jeep, approached Robinson. Burleson heard him yelling something, and the two got into an argument.[5] Appellant threw a punch at Robinson. Although Burleson

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[5] According to York, Robinson met appellant in front of unit 14. She believed appellant said something like, "'you want to call me a punk?'"

was unable to tell whether it connected, York, who had jumped into the backseat of the Jeep and lain down because she was scared, heard what sounded like someone getting punched. While she did not see who struck whom, she sat up and saw that Robinson had gone to the ground, while appellant had lost his balance a little. Robinson stood up, and she heard him say something like, "'well, let me get what I have,'" and something about his baseball bat. He ran toward his door. Although York never saw a bat, Robinson never let go of the door handle, but half of his body went around the door as if he was going to grab whatever was behind it. Burleson saw Robinson run back inside his room, and heard appellant say something like, "'you're gonna be a punk, bitch.'"

Appellant turned around and Machado, who had also been by the Jeep, handed him a sawed-off shotgun. Burleson said, "'Oh, my God he has a sawed-off shotgun.'" Appellant and Machado looked at her, then appellant took a few steps, put the gun up by the door to Robinson's room, and pulled the trigger. He was about a foot from the door. York, who did not see how appellant came to have the gun, saw appellant point the gun in the direction Robinson had run, and she lay down again. She heard the gun being fired and saw a big light flash, so she started the Jeep so that when appellant got back in, he could just go. According to York, appellant was still standing by the end of the Jeep, so the gun was pretty far from the door.[6] Only a couple of seconds elapsed between when she saw the gun and when she heard the shot. Robinson never came back out.

Appellant and Machado ran back to the Jeep and left with York. Burleson called 911. Robinson subsequently came out of unit 12. He was holding a bunch of bandages to his side and said he had been shot.

Officers were dispatched to the Tulare Motel at 3:46 a.m. Robinson was hiding in a shed and ran from the uniformed officers, who had to use physical force to detain him.

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6 A defense investigator subsequently took measurements and determined that from the center of one unit's threshold to the center of another was 24 feet.

He had been shot in the back. Burleson saw a hole about the size of a softball in the door of unit 15. The insulation from the door was blown across the room and there were BB's all over the floor.

Appellant, York, and Machado drove to Devon Fox's house and went into the kitchen. According to Isherwood, appellant had the shotgun and said he had just shot somebody. He was sweating profusely, as if he had been running, and seemed very nervous. He said he had to change his shirt and get the gunpowder residue off his arms. As he was washing himself, he kept saying "'I shot the mother fucker. Yeah, I shot him.'" He almost seemed happy about it. Machado looked like he was going to be sick and kept repeating that he could not believe appellant shot "'that guy.'" According to York, appellant was "freaking out." He was yelling that he could not believe what just happened, because it was not supposed to go like that. He was trying to wash his arms. He was not saying anything that sounded like bragging.

Isherwood subsequently told police that Machado wiped down the Jeep to get rid of any fingerprints. According to York, however, Fox cleaned out the Jeep. Machado asked York if she could find him a ride out of there. She told him to calm down, that she was getting all three of them a ride. A van pulled up and the three got in and left. The shotgun was returned to its owner.

Early on the morning of July 1, sometime after she had heard a gunshot, Cynthia Marlow saw Machado at the Wilson Cottages, on South K Street, near the Tulare Motel. Appellant and Renee York had been within him in the car, but they left.[7] Machado was pacing back and forth "and kinda freaking out." Machado said there were a lot of cops at the Tulare Motel. Because Marlow had a friend who lived there, Machado told her to go down there and see what was going on. When Marlow did, she saw Doris Burleson. According to Burleson, Marlow said to her, "'This is what happens to people that point.'"

[7] York denied seeing Marlow that morning.

Marlow was arrested for threatening Burleson. When Marlow and York were in a holding cell near the one in which Machado and appellant were located, appellant apologized to York for getting her involved and said he should not have done it.

DISCUSSION

I

JURY INSTRUCTION ISSUES

A. Failure to Instruct on Lesser Included Offense*

"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.) Here, the trial court instructed the jury on attempted voluntary manslaughter based on a sudden quarrel or heat of passion. It also instructed on self-defense. It did not instruct, however, on attempted voluntary manslaughter as a lesser included offense based on unreasonable or so-called imperfect self-defense. Appellant claims this omission constituted reversible error. (*People v. Barton* (1995) 12 Cal.4th 186, 199-201.)

On appeal, we employ a de novo standard of review and independently determine whether instructions on imperfect self-defense were required. (*People v. Manriquez*

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* See footnote, *ante*, page 1.

(2005) 37 Cal.4th 547, 584.) In order to justify such instructions, evidence appellant was guilty only of the lesser offense must have been "'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could … conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman, supra,* 19 Cal.4th at p. 162; *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) In deciding whether such evidence existed, we do not evaluate the credibility of witnesses, as that is a task for the jury (*Breverman, supra*, at p. 162), and we resolve doubts as to the sufficiency of the evidence in favor of appellant (*Flannel, supra,* at p. 685, fn. 12). Although the testimony of a single witness can constitute substantial evidence requiring a sua sponte instruction (*People v. Lewis* (2001) 25 Cal.4th 610, 646), "[s]peculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense. [Citations.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 941.) If there is no substantial evidence, then we need not reach the question whether the concept of imperfect self-defense manslaughter applies.

"Self-defense is *perfect* or *imperfect*. For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.] A killing committed in perfect self-defense is neither murder nor manslaughter; it is justifiable homicide. [Citations.]" (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) In such a case, the actor is completely exonerated. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) "Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant actually, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of

no crime greater than voluntary manslaughter." (*In re Christian S.* (1994) 7 Cal.4th 768, 771, italics omitted.)[8] "In either case, 'the fear must be of imminent harm. "Fear of future harm – no matter how great the fear and no matter how great the likelihood of the harm – will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury."' [Citations.]" (*People v. Stitely, supra,* 35 Cal.4th at p. 551.) """'[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*.'""" (*People v. Manriquez, supra,* 37 Cal.4th at p. 581.)

"It is well established that the ordinary self-defense doctrine … may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack … is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances." (*In re Christian S., supra,* 7 Cal.4th at p. 773, fn. 1.) Here, although none of the trial witnesses testified to seeing who struck whom, Burleson saw appellant throw a punch at Robinson, while York heard what sounded like someone being struck. According to her, Robinson went to the ground, while appellant did not fall, but instead lost his balance and went backwards. The conclusion is almost inescapable that appellant was the initial attacker so that Robinson's response was legally justified, thus rendering imperfect self-defense unavailable to appellant. (See *People v. Seaton* (2001) 26 Cal.4th 598, 664; but see *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179-1180.)

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[8] Imperfect self-defense gives rise to voluntary manslaughter where the unlawful killing involves *either* an intent to kill *or* a conscious disregard for life. (*People v. Stitely* (2005) 35 Cal.4th 514, 551; *People v. Blakeley* (2000) 23 Cal.4th 82, 87-89.) *Attempted* voluntary manslaughter, in contrast, requires a specific intent to kill. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1549-1550.)

In any event, the record in the present case is devoid of evidence suggesting that when appellant shot Robinson, he harbored an actual belief in the need for self-defense against an imminent danger to life or great bodily injury. Even assuming jurors credited York's testimony that Robinson said something about getting a baseball bat, appellant either shot him from a substantial distance (according to York), or advanced on him before firing (according to Burleson). Whichever scenario was the more accurate one, the evidence was undisputed that appellant fired through the door to Robinson's room and shot Robinson in the back. Nothing suggested he shot out of fear or believed doing so was necessary to defend his life or avoid great bodily injury. (See, e.g., *People v. Hoyos* (2007) 41 Cal.4th 872, 913; *People v. Stitely*, *supra*, 35 Cal.4th at pp. 551-552; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.) Accordingly, there was no substantial evidence to support the giving of imperfect self-defense instructions.

We recognize that the court did instruct on true self-defense, albeit belatedly.[9] While it is true that self-defense and imperfect self-defense both require the mental state of a genuine belief in the need to defend (*People v. De Leon* (1992) 10 Cal.App.4th 815, 824), the fact instructions were given on self-defense does not automatically mean substantial evidence supported the giving of instructions on imperfect self-defense (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1270). In our view, it would not have

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9 The trial court gave the bulk of its instructions before the attorneys argued. During the course of his argument, defense counsel stated, "There is a possibility, and, again, we don't know because we have limited testimony as to what exactly happened, whether in fact [Robinson] was going to reach to get a weapon or not. [¶] There is the right to self-defense. You can't create the right to self-defense, but in fact that is a factor that can be used in the voluntary manslaughter, that if somebody is reaching for a weapon, then he could have shot the gun for defense." Although this was defense counsel's only arguable reference to self-defense, perfect or otherwise, there was an unreported bench conference at the conclusion of defense counsel's summation, and then the trial court instructed on self-defense immediately following the prosecutor's closing argument.

been error for the trial court to omit self-defense instructions altogether, as there was no substantial evidence appellant acted out of fear or a genuine belief in the need to defend himself. (*People v. Rodriguez, supra,* 53 Cal.App.4th at p. 1270; *People v. De Leon, supra,* 10 Cal.App.4th at p. 824.) We therefore find no error in the failure to give an instruction not supported by the evidence on what is asserted to be a lesser included offense.

B. CALCRIM Nos. 105 and 226

CALJIC No. 2.20 (believability of witness) tells jurors, in pertinent part: "You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness." CALJIC No. 2.21.2 (witness willfully false) provides: "A witness, who is willfully false in one material part of his or her testimony, *is to be distrusted* in others. *You may reject the whole testimony* of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (Italics added.)

The substance of these instructions is contained in CALCRIM Nos. 105 and 226, which were given in appellant's case.[10] In pertinent part, appellant's jury was told: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard.… You may believe all, part, or none of a witness'[s] testimony. Consider the testimony of each witness and decide how much of it you believe. [¶] … [¶] If you decide that a witness deliberately lied about something significant in this case, *you should consider not believing anything* the witness says; or, if you think the witness lied about some things, but told the truth

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10 CALCRIM No. 105 was given as part of the preinstructions. CALCRIM No. 226 was given prior to deliberations. Although the challenged language is the same in each, we quote the trial court's reading of CALCRIM No. 226.

about others, you may simply accept the part that you think is true and ignore the rest." (Italics added.)

Appellant contends that the "weakened" language of CALCRIM Nos. 105 and 226 fails adequately to convey to jurors that a witness who is willfully false in a material part of his or her testimony is to be distrusted in other parts, and that his or her whole testimony can be rejected. He argues that the CALJIC instructions obligate the jury to distrust – hence, disbelieve – a false witness and so put the burden on the witness to prove that some parts of his or her testimony are true, whereas the CALCRIM instructions merely give jurors the option of disbelieving, without telling them that the policy of the law is that the witness *should* be disbelieved unless parts of his or her testimony seem to be true. The result of giving his jury the CALCRIM instructions, appellant says, was prejudicial error.[11]

The California Supreme Court and numerous Courts of Appeal have long held that CALJIC No. 2.21.2 and its predecessor, former CALJIC No. 2.21, correctly state the law. (E.g., *People v. Beardslee* (1991) 53 Cal.3d 68, 94; *People v. Lang* (1989) 49 Cal.3d 991, 1023; *People v. Vang* (2009) 171 Cal.App.4th 1120, 1130; *People v. Foster* (1995) 34

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11 As an initial matter, we reject respondent's contention that any claim of error was forfeited by appellant's failure to object at trial or to request modification or clarification. "[A] defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant's 'substantial rights.' (§ 1259.) In this regard, '[t]he cases equate "substantial rights" with reversible error' under the test stated in *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Felix* (2008) 160 Cal.App.4th 849, 857; *People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim …." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) As for the general rule that "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language" (*People v. Andrews* (1989) 49 Cal.3d 200, 218), we read appellant's arguments as going beyond a claim CALCRIM Nos. 105 and 226 were merely incomplete, and instead asserting they were not "correct in law."

Cal.App.4th 766, 772.) The "distrust" language contained therein has as its source former Code of Civil Procedure section 2061, subdivision 3, which required jurors to be instructed "'[t]hat a witness false in one part of his testimony is to be distrusted in others.'" (*Florez v. Groom Development Co.* (1959) 53 Cal.2d 347, 356, fn. 1.) Former Code of Civil Procedure section 2061 was repealed in 1965, effective January 1, 1967. Although the "distrust" language was not carried over into a different code section, the cautionary instructions on evidence and witnesses that former Code of Civil Procedure section 2061 listed were derived from the common law and so the repeal was seen as having "no effect on the giving of the instructions contained in the section …." (Cal. Law Revision Com. com., 21A West's Ann. Code Civ. Proc. (2007 ed.) foll. § 2061, p. 608; see *People v. Hampton* (1999) 73 Cal.App.4th 710, 722.)

We do not understand this to mean, however, that the wording of the jury charge is immutable. This court has previously rejected the argument that CALJIC instructions "serve as the benchmark by which to adjudicate the correctness of CALCRIM instructions," observing that "CALCRIM instructions are now 'viewed as superior' to CALJIC instructions. [Citation.]" (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1188.) We have also been unpersuaded "that semantic differences between CALCRIM No. 226 and CALJIC No. 2.21.2 are even material, let alone prejudicial" (*People v. Warner* (2008) 166 Cal.App.4th 653, 659), ironically in a case in which the defendant argued that CALCRIM No. 226 encouraged jurors to reject his own entire testimony.

CALCRIM Nos. 105 and 226, like CALJIC No. 2.21.2, have the purpose of "'set[ting] out a commonsense principle for evaluating witness credibility.' [Citation.]" (*People v. Vang, supra,* 171 Cal.App.4th at p. 1130.) The instructions "allow[] the jury to disbelieve a witness who deliberately lies about something significant because experience has taught us that a deliberate liar cannot be trusted." (*Ibid.*) In our opinion, this is what the "distrust" language of CALJIC No. 2.21.2 is meant to convey, not that there is somehow a presumption, burden, or legal policy the witness (or party

propounding the witness's testimony) must overcome. If anything, CALCRIM Nos. 105 and 226 are phrased so as to be more beneficial to a defendant than the CALJIC instruction in situations where jurors might find a witness who gives testimony favorable to the defense to have deliberately lied about something.[12] Accordingly, we find no infirmity in the wording of CALCRIM Nos. 105 and 226, and conclude they were properly given in the present case.

In reaching this conclusion, we reject appellant's claims of constitutional error. First, appellant says that because CALJIC No. 2.21.2 had its origins in common law, the failure to give it or an instruction with equivalently strong language deprived him of a state-created procedural right and denied him due process of law under *Hicks v. Oklahoma* (1980) 447 U.S. 343. That case, which dealt with a defendant who was subjected to a mandatory prison sentence under a statute later declared unconstitutional, and who was denied the right to have his punishment fixed by the jury as required by state law (*id*. at pp. 344-346), is inapposite. The jurors in appellant's case were instructed concerning how to evaluate witness credibility. State law did not entitle appellant to have them instructed in any particular language.

Second, appellant says the giving of CALCRIM Nos. 105 and 226, instead of a CALJIC No. 2.21.2-type instruction, constituted a failure to instruct on the defense theory of the case, thus denying him a fair trial and due process. Appellant fails to explain why this is so, but cites *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734 in support. In that case, in which the defendant was charged with kidnapping for the purpose of robbery, the trial court precluded defense counsel from arguing to the jury that the prosecution failed to

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12 In the present case, appellant appears to assume the instructions could only have been found applicable to Craig Isherwood. It is possible, however, that jurors could also have found Renee York to have lied. Although called as a witness by the prosecution, some of York's testimony was favorable to appellant, especially with respect to issues of premeditation and heat of passion.

prove a robbery or an intent to rob; refused to instruct on simple kidnapping; and reduced the prosecution's burden to show specific intent to take property from the victim or her immediate presence by modifying the pattern instruction requiring "'specific intent to rob [the victim]'" to the expansive "'specific intent to rob [the victim] of money over which she had control.'" (*Id*. at pp. 739-740.) No such error occurred in the present case; defense counsel was free to argue that jurors should completely distrust and reject Isherwood's testimony in its entirety. (See *People v. Vang, supra*, 171 Cal.App.4th at p. 1131.)

Third, appellant says the giving of CALCRIM Nos. 105 and 226 lowered the prosecution's burden of proof and permitted a conviction that rested on insufficient evidence, thereby denying him due process. Again, appellant fails to explain how this is so, especially since, even under CALJIC No. 2.21.2, jurors are not required to reject the testimony of a witness who deliberately lied. The cases cited by him – *Jackson v. Virginia* (1979) 443 U.S. 307, which sets out the standard of review for a claim of insufficiency of the evidence to support a conviction (*id*. at p. 319) and *Carella v. California* (1984) 491 U.S. 263, which deals with jury instructions that lighten the prosecution's burden of proof by imposing mandatory conclusive presumptions concerning elements of the offense (*id*. at pp. 265-266) – do not apply.

C. CALCRIM No. 600

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Pursuant to CALCRIM No. 600, the trial court here told jurors that in order to prove a defendant was guilty of attempted murder, the People had to prove the defendant took direct but ineffective steps toward killing another person, and the defendant intended to kill that person. The court further instructed: "A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step

is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. *A direct step indicates a definite and unambiguous intent to kill*. It is a direct movement towards the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstances outside the plan had not interrupted an attempt." (Italics added.)

Appellant says the emphasized portion erroneously and prejudicially conflated the mental state and act requirements of the crime, and suggested to jurors that once they found appellant took a direct step toward the killing of another – e.g., fired the shotgun at Robinson – they had also found the requisite intent to kill. Appellant claims the mental state requirement was deemphasized, and the jury was discouraged from properly considering and weighing all of the conflicting evidence concerning intent to kill. He also claims the instruction encouraged jurors to apply an objective, rather than subjective, standard in determining appellant's state of mind, and lessened the prosecution's burden of proof.[13]

We conclude CALCRIM No. 600 correctly states the law. The challenged language is virtually identical in meaning to the analogous portion of CALJIC No. 8.66 (attempted murder), which states: "However, acts of a person who intends to kill another person will constitute an attempt *where those acts clearly indicate a certain, unambiguous intent to kill*." (Italics added.) That portion of CALJIC No. 8.66 was derived from the more general attempt instruction, CALJIC No. 6.00 (attempt – defined). (See *People v. Beck* (2005) 126 Cal.App.4th 518, 522.) The California Supreme Court has held that former CALJIC No. 6.00, which instructed in pertinent part that acts are

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13 Respondent claims, by way of footnote included in his discussion of CALCRIM Nos. 105 and 226, that appellant forfeited his claim of error with respect to CALCRIM No. 600 for the same reasons respondent asserted with respect to CALCRIM Nos. 105 and 226. We reject this argument for the reasons set out in footnote 11, *ante*.

sufficient when they "'clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design,'" correctly stated the law. (*People v. Dillon* (1983) 34 Cal.3d 441, 452-453.) We see no substantive difference between the language of CALCRIM No. 600 and the language approved in *Dillon*.

When the challenged portion of CALCRIM No. 600 is considered in context, it is clear there is no reasonable likelihood jurors understood it as appellant asserts. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The instruction as a whole makes it clear that in order to find an attempt, the jury must find two distinct elements: an act and an intent. These elements are related; usually, whether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.) Read in context, it is readily apparent the challenged language refers to the act that must be found, and is part of an explanation of how jurors are to determine whether the accused's conduct constituted the requisite direct step or merely insufficient planning or preparation.

II*

SENTENCING ISSUES

A. Imposition of Concurrent Term on Count 4

As previously described, appellant was convicted in count 4 of assault by means of force likely to cause great bodily injury. Analyzing the factual scenario as one in which the victim was struck on the head and then shot as he retreated, the probation officer

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* See footnote, *ante*, page 1.

recommended imposition of a concurrent term on this count.[14] Argument at sentencing centered around imposition of the aggravated term on count 1, and the trial court imposed the concurrent term on count 4 without discussion. Appellant now says section 654 required the court to stay sentence on count 4, because that count involved the same criminal act as the attempted murder for which appellant was sentenced in count 1.

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose behind this provision is to ensure that punishment will be commensurate with culpability (*People v. Trotter* (1992) 7 Cal.App.4th 363, 367), and it applies to imposition of concurrent as well as consecutive terms (*People v. Fuller* (1975) 53 Cal.App.3d 417, 420).

"In determining whether section 654 has been violated, two tests have been applied. One test examines whether the offense arises out of a single act. [Citations.] The other test applies where a course of conduct violates more than one statute and comprises an indivisible transaction. [Citations.]" (*People v. Gbadebo-Soda* (1989) 215 Cal.App.3d 1371, 1375.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "Where a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he may be punished for more than one crime even though the violations share common acts or are parts of an otherwise indivisible course of

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14 It appears the probation officer relied on police reports of the incident, according to which a witness related that one male subject struck the victim in the head, then, as the victim attempted to flee back into his apartment, the second male subject pulled out a sawed-off shotgun and fired at the door as the victim closed it.

conduct. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Whether a defendant harbored a separate intent and objective for each offense is a factual determination for the trial court, and its conclusion will be sustained on appeal if supported by any substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) On review of this issue, we consider the evidence in the light most favorable to the judgment. (*People v. Williamson* (1979) 90 Cal.App.3d 164, 172.)

In the present case, respondent argues that imposition of a concurrent term on count 4 was proper because that count could have been based on evidence appellant punched Robinson, and not on the shooting that formed the basis for count 1. Respondent acknowledges that the prosecutor did not argue count 4 based on the punch, but says the trial court's implicit determination at sentencing – that the crimes involved more than one objective – is supported by the evidence. Appellant responds that such an argument constitutes an improper change in the theory of the case on appeal. (See, e.g., *People v. Koontz* (2002) 27 Cal.4th 1041, 1075, fn. 4; *People v. Borland* (1996) 50 Cal.App.4th 124, 129.)

The theory on which respondent now relies was presented, albeit by the probation officer, at sentencing. Thus, we do not view this as a situation in which a party is attempting to rely on an entirely new, factually dependent theory for the first time on appeal. The problem is that, while an attack with fists can constitute an assault by means of force likely to produce great bodily injury (e.g., *People v. Kinman* (1955) 134 Cal.App.2d 419, 422) and the jury instructions did not preclude jurors from convicting appellant on that basis, the prosecutor never suggested such an option was available. Instead, he told jurors: "Then this is Count 4, assault with force likely to produce great bodily injury. It's just another way of saying that they came over there with a shotgun to cause harm for Larry Robinson. [¶] … [¶] … When the defendant acted, he had the present ability to apply force likely to produce great bodily injury to a person, and then

great bodily injury is defined here. [¶] Significant or substantial physical injury. Bringing a shotgun, that's just what happens, that's what it's designed to do, to cause substantial or significant physical injury."

"'What force is likely to produce great bodily injury is a question of fact to be determined *by the jury*. [Citation.]' [Citation.]" (*People v. Kinman, supra,* 134 Cal.App.2d at p. 422, italics added.) "'Whether a fist would be likely to produce such injury is to be determined by the force of the impact, the manner in which it was used and the circumstances under which the force was applied.' [Citation.]" (*Ibid.*) In the present case, we question whether the evidence was sufficient to sustain a finding that the punch – which apparently only knocked Robinson to the ground momentarily – was likely to produce great bodily injury. The jury was never given the option of making such a determination, but instead predicated a conviction solely on the theory that the prosecutor tendered, viz., that the attempted murder and other offenses either all arose from the same act or were committed pursuant to the single objective of going to the motel with a shotgun to cause harm to Larry Robinson. Under these circumstances, although whether a defendant harbored multiple intents and objectives is a factual one for the trial court, that court "cannot countermand the jury and make the contrary finding appellant in fact … had both objectives." (*People v. Bradley* (2003) 111 Cal.App.4th 765, 770.) Accordingly, the trial court was required to stay sentence on count 4.

B. <u>Imposition of Only One Prior Prison Term Enhancement</u>

The first amended information alleged that appellant had suffered two prior convictions for which he served prison terms within the meaning of section 667.5, subdivision (b), one in 2002 and the other in 2004. The trial court found both allegations true, but imposed sentence on only one.

The one-year enhancement provided for by section 667.5, subdivision (b) is mandatory unless stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Accordingly, the failure to impose or strike such an enhancement is a legally

unauthorized sentence that is subject to correction for the first time on appeal, even if the correction results in a harsher punishment.[15] (*In re Renfrow* (2008) 164 Cal.App.4th 1251, 1254; *People v. Flores* (2005) 129 Cal.App.4th 174, 187; see *In re Sheena K.* (2007) 40 Cal.4th 875, 887.) As it appears the second enhancement was simply overlooked by the court, probation officer, and counsel, we find it appropriate to remand the matter to the trial court so that it may exercise its discretion, in conformity with section 1385, to impose or strike the additional one-year term.

DISPOSITION

The matter is remanded with directions to the trial court to (1) stay the sentence on count 4, and (2) exercise its discretion to impose or strike the second enhancement found true under section 667.5, subdivision (b). In all other respects, the judgment is affirmed.

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Ardaiz, P.J.

WE CONCUR:

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Vartabedian, J.

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Cornell, J.

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[15] Pursuant to Government Code section 68081, we afforded the parties the opportunity to address this issue, which neither raised.