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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. SHON RAMONE YOKELY, Defendant and Appellant.	B213003 (Los Angeles County Super. Ct. No. TA013892)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed as modified.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Michael A. Katz, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception **DISCUSSION,** parts B through H.

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INTRODUCTION

Shon Ramone Yokely (defendant) was convicted of murder in 1992. A federal district court granted defendant a writ of habeas corpus based on its findings that defendant's constitutional rights had been violated because his attorney was not present at a live line-up at which two eyewitnesses identified defendant as the murderer, and because his attorneys had failed to object to admission of the lineup and in-court identifications by those witnesses at defendant's trial.[1] At defendant's retrial, the trial court independently determined that the testimony of those two witnesses had origins independent of the tainted lineup, and admitted their identification testimony. Defendant again was convicted of murder.

We hold that the findings of the federal district court did not preclude the trial court from determining independently the admissibility of the in-court identification testimony of the two witnesses, and that there is substantial evidence to support the trial court's conclusion that the identification testimony of both witnesses had an origin independent of the illegal live lineup. We reject defendant's other claims of trial error, and we correct certain errors made by the trial court in sentencing defendant. As modified, we affirm the judgment.

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[1] We grant defendant's request for judicial notice of the district court's findings, which findings were before the trial court. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

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BACKGROUND

A. Factual Background[2]

1. The Murder

Shortly after 7:00 p.m. on Sunday, July 7, 1991, Katie Jones[3] and her fourteen-month old daughter, Mitchshalae, arrived at their home in the Willowbrook area of Los Angeles. Katie and Mitchshalae lived at the house with Katie's mother. Katie's brothers John Paul and Albert were in the front yard.

Katie parked her car on the street in front of the house. She put Mitchshalae on the sidewalk and began to unload the trunk. Albert came out to help Katie; he lifted Mitchshalae over the fence separating the front yard from the street, and handed her to John Paul. John Paul set Mitchshalae down so she could walk into the house.

John Paul saw a blue Jeep Cherokee turn onto the street with loud music playing. The car approached slowly with the windows down. John Paul said he saw three African-American men in the car. The man sitting behind the driver was light skinned, had a dry jheri-curl hairstyle, and his ears "poked out" from his head. John Paul later identified that man as defendant, both from a photo lineup and in open court. Defendant put his arms and upper body through the window. He was holding a black firearm in both hands out in front of him. Defendant started shooting.

Albert was shot in the shoulder and fell to the sidewalk bleeding. As Katie went toward him, she was hit in the left leg above the knee. John Paul ran toward Mitchshalae,

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[2] On appeal, "we must view the evidence in the light most favorable to the verdict and presume the existence of each fact that a rational juror could have found proved by the evidence. [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 139-140, fn. 30, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

[3] We sometimes refer to the members of the Jones family by their first names for ease of reference.

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but he fell when a bullet struck him in the right leg and shattered his femur. He crawled toward Mitchshalae, who was lying on her back in the yard. Mitchshalae had been shot in the face. She was conscious, but John Paul could see her brains coming out of her mouth. He covered her with his body so that Katie could not see her. Before help arrived, Mitchshalae died.

The Jeep Cherokee sped away.

2. Testimony of Vernon Cox

In July 1991, Vernon Cox was 15 years old. Cox formerly was an associate of the Holmes Street Watts Crips street gang. Cox had a friend named Rance Hill who lived in an apartment near 125th Street and Western Avenue, approximately two miles from the Jones residence.

On July 7, Cox went to visit Hill. He found Hill leaving his apartment building in a blue Jeep Cherokee driven by Darrell Whitson. Whitson was a member of the 118th Street East Coast Crips street gang with the gang moniker Little D. The Crip gangs were rivals of Blood gangs. Cox joined Hill and Whitson in the Jeep.

The three young men drank cognac and beer and smoked marijuana at various locations before returning to Hill's apartment. Cox, who had not eaten, vomited; he felt better after doing so. Hill asked Cox and Whitson to leave the apartment for awhile so that he could be alone with a girl.

Cox and Whitson went back to the Cherokee. Whitson drove; Cox was in the passenger seat. Whitson drove east into territory controlled by the East Coast Crips. Whitson saw a friend of his and stopped the Cherokee. Cox identified Whitson's friend as defendant.

Whitson and defendant talked for a minute or two. Defendant asked Whitson what he was about to do. Whitson answered that they were going roll around to see if they could see some Bloods. Defendant said he wanted to come along. Defendant ran toward a house; when he came back, he appeared to be holding something in his waistband.

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Defendant got in the back of the Cherokee. Whitson drove generally southward, into territory controlled by the Athens Park Boys, a Blood street gang.

After a few minutes, the Cherokee turned left onto the street where the Joneses lived. Cox saw two men standing near the second house on the block. As they drove past the house, Cox heard three gunshots; he saw the men going down, and could not tell whether they were ducking or had been shot. Cox saw defendant leaning out of the driver's side rear window of the Cherokee, holding a black gun in both hands. They drove away, and dropped defendant off near where they had picked him up. Defendant said that he was going to put the rest of the bullets in his gun, but Whitson and Cox did not wait for him. They drove back to Hill's apartment building.

Two months later, the police came to Cox's home to interview him about the shooting. Cox cooperated. Cox identified Whitson as the driver of the Jeep from a photo lineup. He identified defendant as the shooter from another photo lineup, although he told police that he was "not 100 percent sure." Cox said that the picture of defendant looked most like the shooter. Cox explained that, at the time, he did not know defendant and did not know what might happen to him if he identified defendant, but he "tried his best to do what [he] thought was right." Cox testified that he had also identified defendant as the shooter at a court proceeding in 1992. Cox was granted immunity in exchange for his testimony.

3. Other Evidence

John Paul Jones gave the police a description of the shooter in the hospital the night of the shooting. The description generally matched defendant's appearance. Police found the blue Jeep Cherokee the next day. The vehicle was traced to Whitson, who, it appears, implicated defendant. Police asked defendant to come to the police station voluntarily for questioning. As a deputy sheriff transported defendant to the station, defendant told the deputy that he was a former member of the 118th Street East Coast Crips, known by the gang moniker Calbo. A gang expert testified that the 118th Street East Coast Crips were deadly rivals of the Athens Park Boys, a Blood gang.

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When interviewed by police, defendant stated that on the day of the murder, he had been at a motel on Western Avenue with a girl who was visiting the area from Arizona. Police checked the registration records of the motel and were unable to verify defendant's alibi. Defendant presented similar alibi testimony at trial. Defendant denied that he was a member of 118th Street East Coast Crips; he testified that he used to be associated with a different clique of the East Coast Crips based in Carson.

B. Procedural Background

1. Original Trial and Writ of Habeas Corpus

In November 1992, a jury convicted defendant of one count of first degree murder (Pen. Code, § 187, subd. (a)),[4] three counts of attempted murder (§§ 664/187, subd. (a)), and one count of conspiracy to commit murder (§ 182, subd. (a)(1)). Defendant was sentenced to four consecutive life terms. His convictions were affirmed on direct appeal.

In May 2007, the United States District Court for the Central District of California (the district court), in adopting the Report and Recommendation of United States Magistrate Judge, granted defendant's petition for a writ of habeas corpus. The district court concluded that defendant's Sixth Amendment right to counsel was violated because defendant's attorney was not present at a live lineup at which Vernon Cox, John Paul Jones and Albert Jones identified defendant as the shooter. The district court further concluded that defendant had been denied the effective assistance of counsel at his trial because his trial counsel failed to object to the admission of testimony regarding the live lineup identifications, which testimony was excludable per se, and to the in-court identifications of defendant by Vernon Cox and John Paul Jones. The district court found that defendant was prejudiced by trial counsel's failure to object to the in-court identification by Vernon Cox because, based on the record of defendant's trial, the

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[4] All further statutory references are to the Penal Code, unless otherwise indicated.

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prosecution probably could not have established by clear and convincing evidence that Cox's identification of defendant was not tainted by the unconstitutional live lineup. The district court found that had Cox's identification been excluded, there was a reasonable probability that defendant would not have been convicted. The district court also found that had defendant moved to suppress the in-court identification by John Paul Jones, the prosecution probably would have been able to establish by clear and convincing evidence that the identification was not tainted by the illegal lineup.

2. Retrial and Sentencing

In June 2007, a new information was filed charging defendant with the murder of Mitchshalae Jones (§ 187, subd. (a)) (count 1), the attempted murders of Katie, Albert and John Paul Jones (§§ 664/187, subd. (a)) (counts 2, 3 and 4), and conspiracy to commit murder (§ 182, subd. (a)(1)) (count 5). The information specially alleged that defendant inflicted great bodily injury (GBI) on each of his victims by discharging a firearm from a motor vehicle (§ 12022.55), that a principal in the charged crimes was armed with a handgun (§ 12022, subd. (a)(1)), that defendant personally used a handgun (§ 12022.5, subd. (a)), and that defendant personally inflicted GBI on each of his victims (§ 12022.7, subd. (a)).

Defendant made a pretrial motion to suppress in-court identifications by Vernon Cox or John Paul Jones unless the prosecution proved the identifications had an origin independent of the illegal live lineup. At the hearing on the motion, defense counsel argued that the trial court was bound by the district court's finding that the prosecution could not establish that the identification by Vernon Cox had an origin independent of the illegal lineup. The trial court rejected defendant's contention on the ground that there had been no evidentiary hearing on independent origin either at defendant's original trial or before the district court on habeas corpus; the issue decided by the district court was whether defendant had been prejudiced at his original trial by the violations of his Sixth Amendment rights. Accordingly, the trial court ordered an evidentiary hearing to permit the prosecution to attempt to establish an independent origin for the identifications by

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both Vernon Cox and John Paul Jones. After hearing testimony from Cox, John Paul and defendant at the hearing, the trial court denied defendant's motion and ruled that the prosecution had established by clear and convincing evidence that the identifications of defendant as the shooter by both Cox and John Paul had an origin independent of the illegal lineup.

After the jury was selected but prior to opening statements, defendant elected to represent himself at trial and was granted pro per status by the trial court. The jury convicted defendant as charged on all counts. The jury found true the firearm enhancement allegations as to counts 1 through 4, and found true the GBI special allegations with respect to Mitchshalae (count 1) and John Paul (count 4) only. The trial court sentenced defendant to four consecutive life terms on counts 1 through 4.[5] The trial court imposed a term of 25 years to life on count 5, and stayed execution of the sentence on that count pursuant to section 654. Defendant timely appealed.

DISCUSSION

A. In-Court Identification Testimony

1. Relevant General Principles

Under the Sixth Amendment to the United States Constitution, a defendant has a right to have counsel present at a live lineup held after criminal proceedings have commenced. (*United States v. Wade* (1967) 388 U.S. 218, 236-237; *Gilbert v. California* (1967) 388 U.S. 263, 272-273; see also *Moore v. Illinois* (1977) 434 U.S. 220; *Kirby v. Illinois* (1972) 406 U.S. 682, 689; *People v. Cook* (2007) 40 Cal.4th 1334, 1352-1353.) When a live lineup violates a defendant's Sixth Amendment rights, evidence of identifications made at the lineup is subject to a per se exclusionary rule. (*Gilbert v.*

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[5] The trial court also imposed firearm and GBI enhancements on counts 1 through 4 that are discussed in Discussion, Part H, *post*.

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California, supra, 388 U.S. at pp. 272-273; *United States v. Wade, supra,* 388 U.S. at pp. 236-237; see generally, 2 LaFave, et al., Criminal Procedure (3d ed. 2007) § 7.3(f), p. 926 (LaFave).) Nevertheless, a witness who participated in such an illegal lineup *may* identify the defendant at trial, provided the prosecution establishes by clear and convincing evidence that the in-court identification had an origin independent of the illegal lineup. (*United States v. Wade, supra,* 388 U.S. at p. 241; *People v. Ratliff* (1986) 41 Cal.3d 675, 689.)

2. Collateral Estoppel/Law of the Case

In assessing whether defendant was prejudiced by his counsel's ineffective assistance at his first trial, the district court examined the trial record "to determine whether the government would have been able to establish by clear and convincing evidence that the in-court identifications had a basis independent of the illegal lineup." After examining Cox's trial testimony, the district court concluded that the "record demonstrate[d] a *reasonable probability* that the prosecution *would have been unable* to establish by clear and convincing evidence that the in-court identification by Cox was independent of the illegal lineup." (Italics added.) The district court expressly acknowledged that "[b]ecause there was no motion to suppress filed, the prosecutor did not have the opportunity to establish the existence of an independent origin of the in-court identifications . . . ."

Defendant argues that, under the doctrines of collateral estoppel and law of the case, the trial court was bound by the district court's conclusion and was precluded from determining independently whether Cox's in-court identification of defendant had an independent origin. We disagree.

Under the doctrine of collateral estoppel, a party cannot relitigate an issue of ultimate fact that was determined by a valid and final judgment in a previous lawsuit between the same parties. (*Ashe v. Swenson* (1970) 397 U.S. 436, 443 (*Ashe*); *People v. Barragan* (2004) 32 Cal.4th 236, 252-253 (*Barragan*); *People v. Santamaria* (1994) 8 Cal.4th 903, 912 (*Santamaria*).) In criminal cases, this doctrine is an aspect of the Fifth

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Amendment's protection against double jeopardy. (*Ashe, supra,* 397 U.S. at p. 445; *Schiro v. Farley* (1994) 510 U.S. 222, 232; *Santamaria, supra,* 8 Cal.4th at p. 912.) Collateral estoppel applies only if five requirements are met: (1) the relevant issue must be identical to that decided in the prior proceeding; (2) the issue actually must have been litigated in the prior proceeding; (3) the issue necessarily must have been decided in the prior proceeding; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be identical to or in privity with the party to the prior proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077; *People v. Cooper* (2007) 149 Cal.App.4th 500, 518 (*Cooper*).) The burden is on the defendant to establish the factual predicate for the doctrine to apply. (*Schiro v. Farley, supra,* 510 U.S. at p. 233; *Cooper, supra,* 149 Cal.App.4th at p. 519.) We do not apply collateral estoppel "with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." (*Ashe, supra,* 397 U.S. at p. 444; accord, *Santamaria, supra,* 8 Cal.4th at p. 912.) The California Supreme Court and courts of appeal have expressed doubt that the doctrine of collateral estoppel applies in further proceedings in the same litigation, such as a defendant's retrial after his or her conviction is set aside for reasons other than the legal sufficiency of the evidence. The issue, however, has not been resolved definitively. (See *Barragan, supra,* 32 Cal.4th at p. 253; *Santamaria, supra,* 8 Cal.4th at pp. 913-914; *People v. Gordon* (2009) 177 Cal.App.4th 1550, 1557; *Cooper, supra,* 149 Cal.App.4th at p. 519.) We need not resolve the issue in this case because, as we will discuss, defendant's claim of collateral estoppel would fail even if the doctrine could apply.

Under the law-of-the-case doctrine, the determination by an appellate court of an issue of law is conclusive in subsequent proceedings in the same case. (*People v. Boyer* (2006) 38 Cal.4th 412, 441.) The doctrine applies only if the issue was actually presented to and determined by the appellate court. (*People v. Gray* (2005) 37 Cal.4th 168, 197.) The doctrine is one of procedure that prevents parties from seeking reconsideration of an issue already decided absent some significant change in circumstances. (*People v. Boyer, supra,* 38 Cal.4th at p. 441.) But the law-of-the-case doctrine does not limit the evidence

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that may be offered on the retrial of an issue of fact, and it controls the outcome of a retrial only if the evidence is substantially the same. (*Id.* at p. 442; *Barragan, supra,* 32 Cal.4th at p. 246-247.) Accordingly, the law-of-the-case doctrine does not preclude the presentation of new evidence on a suppression issue after a conviction has been reversed and the cause remanded for a new trial. (*People v. Boyer, supra,* 38 Cal.4th at p. 442; see also *Cooper, supra,* 149 Cal.App.4th at p. 526-527 [law-of-the-case doctrine did not apply to subsequent retrial of defendant after habeas relief granted and new evidence was presented on retrial].)

Defendant's arguments based the doctrines of collateral estoppel and law-of-the-case both fail for the same reason: the issue determined by the trial court in this case with respect to the admissibility of Cox's in-court identification was *not* the same issue previously determined by the district court. The issue resolved by the district court was whether defendant was prejudiced by his trial counsel's failure to move to suppress Cox's in-court identification—that is, whether it was reasonably probable, *based on the record of the first trial*, that defendant would have received a more favorable result had his trial counsel made a motion to suppress. The district court did not hold an evidentiary hearing, and it received no testimony from Cox. Instead, the district court examined Cox's *trial* testimony to determine whether there was "a *reasonable probability* that the prosecution *would have been unable* to establish by clear-and-convincing evidence that the in-court identification by Cox was independent of the illegal lineup." (Italics added.) In other words, the district court examined a trial transcript in an effort to ascertain what probably would have happened at a hypothetical suppression hearing, at which the evidence presented was identical to Cox's trial testimony. As the district court cautioned in its findings, the scope of its determination was limited: "Because there was no motion to suppress filed," the district court stated, "the prosecutor did not have the opportunity to establish the existence of an independent origin of the in-court identification[] made by . . . Cox."

In contrast, the trial court in this case was not tasked with determining what probably would have happened at a hypothetical suppression hearing. The issue before

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the trial court was the factual determination of whether, based on the evidence presented at a suppression hearing, there was clear and convincing evidence that Cox's identification of defendant as the shooter had an origin independent of the illegal live lineup. The trial court held an evidentiary hearing and received testimony from Cox regarding the basis for his identification.

Furthermore, although the transcripts of defendant's first trial are not part of the record on this appeal,[6] it appears the evidence at the suppression hearing differed in material respects from the trial testimony relied upon by the district court. For example, unlike the trial court in this case, the district court had no opportunity to observe Cox testify or to evaluate his credibility. Based on its review of the trial transcripts, the district court thought it significant that Cox had little time to observe the shooter because Whitson picked the shooter up close to the scene of the shooting; the shooter was wearing a hat; Cox was intoxicated at the time of the shooting; and Cox's pre-live lineup photo identification of defendant was equivocal based on Cox's statement that the photo looked "mostly like" defendant. Cox testified at the suppression hearing, however, that notwithstanding his intoxication, he was alert when Whitson stopped the Jeep to pick up defendant. Whitson spoke with defendant "for a little while" before defendant got in the car; Cox observed defendant during that time and was able to see his face. Cox then watched defendant run to the house to get something, and Cox saw defendant when he came back to the car. From the front passenger seat of the Jeep, Cox saw defendant pulling himself back in through the rear driver's side window after defendant fired the shots that killed Mitchshalae and wounded the Jones siblings. Cox identified both

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[6] Although both parties relied on the transcripts of defendant's 1992 trial in arguing the motion to suppress, the record clearly establishes that the transcripts were not provided to or considered by the trial court in denying the motion to suppress. The trial court based its decision on the suppression motion on the district court's written findings and Cox's live testimony taken at the suppression hearing, both of which are included in the record on appeal. Accordingly, the record before us is adequate to permit our review of the collateral estoppel issue.

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Whitson and defendant from photo lineups prior to the illegal live lineup. Cox testified that he had identified defendant as the shooter at the first trial, and that his identification was not based on the illegal live lineup—his identification was based on his observations of defendant in court and because defendant was "the person that was in the car." When examined by the trial court, Cox explained that he told police he was not certain about the photographic identification because he was scared—he had heard about what happened to people who testified against someone accused of a drive-by shooting, and he "didn't want to be that individual."

The issues before the district court and the trial court were thus different. Although both issues concerned the origin of Cox's in-court identification, the two determinations were based on different procedures and different evidence. Although the analogy is inexact, one might view the difference between the decisions of the district court on habeas corpus and the trial court after the suppression hearing as similar to the decisions made in a civil case, first on a motion for summary judgment and then after trial. Both decisions, for example, might involve a plaintiff's fraud claim, but the determination on summary judgment that a plaintiff submitted evidence sufficient to raise a triable issue of fact does not preclude the trier of fact from later determining independently after trial that the plaintiff failed to prove his case by a preponderance of the evidence. The doctrines of collateral estoppel and law-of-the-case did not bar the trial court from determining independently whether Cox's in-court identification had an independent origin.

3. Denial of Motion to Suppress

The trial court held an evidentiary hearing to determine whether to admit the in-court identification testimony of Vernon Cox and John Paul Jones, and found by clear and convincing evidence that both witnesses had a basis independent of the illegal lineup to identify defendant as the shooter. On appeal, defendant argues that the evidence adduced at the suppression hearing was insufficient to support the trial court's ruling.

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Whether the in-court identifications were admissible presents a mixed question of law and fact. (See *People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.) "Mixed questions of law and fact are those where the facts are established, the law is undisputed, and the issue is whether the law as applied to the established facts is violated. [Citation.] The constitutionality of an identification procedure presents a mixed question of law and fact. [Citation.]" (*Id.* at p. 608.) Accordingly, we review the trial court's findings of historical fact for substantial evidence. (*Ibid.*; see *People v. Ratliff, supra,* 41 Cal.3d at p. 689 & fn.2.) We review independently whether those factual findings established that admission of the in-court identifications satisfied the constitutional requirement that they had an origin independent of the illegal live lineup. (See *People v. Kennedy, supra,* 36 Cal.4th at p. 609.) When considering whether the identification has an independent source, the court should consider such factors as the witness's opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification by the witness prior to the lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the period of time between the alleged act and the lineup identification. (*United States v. Wade, supra,* 388 U.S. at p. 241; *People v. Cooks* (1983) 141 Cal.App.3d 224, 306; see also 2 LaFave, *supra,* § 7.3(f), pp. 926-927.)

a. Vernon Cox

The trial court stated that it had observed Cox testify, asked him questions, and found his testimony credible. The trial court was satisfied that Cox truthfully answered that his apparent equivocation in identifying defendant's photograph in the photo lineup was not because he was uncertain, but because he was frightened.

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(i) The witness's opportunity to observe the alleged criminal act.

There was substantial evidence that Cox had ample opportunity to observe defendant at the time of the shootings. As discussed, Cox testified that Whitson spoke with defendant "for a little while" before defendant got in the car. Cox observed defendant during that time and was able to see his face. Cox watched defendant run to the house to get something, and Cox saw defendant when he came back to the car. From the front passenger seat of the Jeep, Cox saw defendant pulling himself back in through the rear driver's side window after defendant fired the shots. Cox also observed defendant when he got out of the car after the shooting.

Defendant argues that, although Cox might have had time to observe defendant, his ability to do so was impaired because he was intoxicated. Cox testified, however, that he "felt better" after he vomited and eliminated some of the intoxicants out of his system. He had not had anything to drink or smoke for approximately 45 minutes before he left Rance Hill's apartment with Whitson. Cox further testified that, notwithstanding his intoxication, he was alert when Whitson stopped the Jeep to pick up defendant. Moreover, the circumstances in which Cox observed defendant were undoubtedly memorable: Cox testified that the day of the shooting would be "burned in [his] mind" for "the rest of [his] life," and that 17 years later he still would not "even get in a Jeep Cherokee."

(ii) Any discrepancy between any pre-lineup description and the defendant's actual description.

There was no evidence that Cox gave an inaccurate description of defendant. Defendant argues that there were some discrepancies between the testimony of Cox and John Paul Jones regarding defendant's appearance—specifically, whether defendant was wearing a baseball cap and whether defendant had on a track suit or jacket. But there was no difference in the testimony regarding defendant's basic appearance, including the light color of his skin and his distinctive hairstyle. Moreover, eyewitnesses to crimes

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frequently differ in their testimony as to details. Although such differences are a proper subject of argument to the trier of fact, they do not render a witness's identification constitutionally suspect. In this case, the trial court found Cox to be a credible witness.

(iii) Any identification by the witness prior to the lineup of another person.

There was no evidence that Cox identified any other person. To the contrary, Cox identified defendant consistently from his first contact with police. The record demonstrates that Cox identified defendant as the shooter from a photo lineup, at a live lineup, at the first trial, at the suppression hearing, and at the second trial.

(iv) The identification by picture of the defendant prior to the lineup.

Cox identified both Whitson and defendant from photo lineups prior to the illegal live lineup. Defendant argues that Cox's identification was "uncertain," because Cox said the photo looked "mostly like defendant" and was not "100 per cent sure." Cox, however, explained to the trial court that he told police he was not certain about the photographic identification because he was scared—he had heard about what happened to people who testified against someone accused of a drive-by shooting, and he "didn't want to be that individual." The trial court found that explanation to be credible.

Defendant also questions the validity of the photo array shown to Cox, but defendant did not move to suppress Cox's photo identification and did not object to its admission at trial. Insofar as the record reflects, there has been no finding by any court that the photo array was unduly suggestive.

(v) Failure to identify the defendant on a prior occasion.

There was no evidence that Cox failed to identify defendant as the shooter when given the opportunity to do so.

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(vi) Lapse of time between the alleged act and the lineup identification.

Defendant argues that Cox's identification at the photo lineup was unreliable because the photo lineup occurred two months after the shooting. The photo lineup preceded the illegal live lineup, however, so Cox's ability to identify defendant from the photo lineup after two months tends to support rather than undermine the conclusion that Cox's in-court identification was based on his observation of defendant on the day of the shooting. As noted, Cox testified at the suppression hearing that he identified defendant as the shooter because he recognized defendant as "the person that was in the car."

Defendant's reliance on *Tomlin v. Myers* (9th Cir. 1994) 30 F.3d 1235 is unpersuasive. In that case, a panel of the Ninth Circuit held that the prosecution had failed to establish an independent origin for a witness's identification of a suspect when the witness saw the suspect after the suspect "barged" into a truck in "a dark alley" and almost immediately fired his gun at close range; the suspect sat in a position that made it "difficult" for the witness to see the suspect "full-face"; and there were material discrepancies between the witness's initial description of the suspect and his actual appearance. (*Id.* at pp. 1241-1242.) The witness also had testified in habeas corpus proceedings that the detectives had "exchanged glances that led her to choose" the suspect's photograph from a photo lineup. (*Id.* at p. 1242.) In contrast, the shootings in this case occurred in daylight; there was substantial evidence that Cox had ample opportunity to see defendant's face; and there was no evidence that Cox misdescribed or misidentified defendant, or that he was coached or induced by police to identify him. We conclude that the prosecution established by clear and convincing evidence that Cox's identification had an origin independent of the illegal live lineup, and that the trial court properly denied defendant's motion to suppress.

b. John Paul Jones

The trial court found that John Paul Jones's testimony was both detailed and credible. Although his opportunity to view defendant at the time of the shooting was

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brief, the trial court believed John Paul's statement that his identification of defendant was based on what he observed on the day of the shooting.

The factors described above support the trial court's conclusion that John Paul's in-court identification had an origin independent of the illegal live lineup. John Paul testified that it was daylight when the shootings occurred, and he had no problems with his eyesight. He saw the Cherokee as it turned left onto Carlton Avenue and proceeded slowly toward the house. He saw that the Cherokee had three occupants—a driver, someone in the passenger seat, and a person in the back. John Paul testified that he got a "good look at the shooter" and that the shooter looked in his direction before he shot.

After the shooting, John Paul accurately described both Whitson and defendant to police. While still in the hospital, John Paul told police that "was sure that [he] could identify the shooter and the driver." John Paul identified both Whitson and defendant from photo lineups. He testified that the faces of both men were "burned in [his] memory forever." At the live lineup, John Paul not only identified defendant, but accurately informed police that defendant had cut his hair since the day of the shooting. John Paul testified that his in-court identification of defendant at the first trial was not because of the live lineup, but because defendant was the shooter. There was no evidence of any discrepancy between John Paul's description and defendant's actual appearance; that John Paul had identified any other person as the shooter; or that John Paul ever failed to identify defendant as the shooter when given the opportunity to do so.

Defendant argues that John Paul's identification is nevertheless tainted by the illegal lineup because John Paul estimated that he had only seven or eight seconds under difficult circumstances to observe defendant at the time of the shooting. That fact is not dispositive, however. The trial court found that John Paul's testimony regarding his observations on the day of the shooting were credible. Moreover, John Paul accurately described defendant shortly after the shooting, and identified him from a photo lineup prior to the live lineup. This is substantial evidence to support the conclusion that John Paul had a sufficient opportunity to observe defendant for purposes of making his in-

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court identification. The trial court did not err in admitting the in-court identification of John Paul.

B. Advisory Counsel

1. Additional Background

The post-habeas information charging defendant in this case was filed in June 2007. Through October 2007, defendant was represented by appointed counsel. Defendant requested and was granted a continuance to permit him to obtain private counsel. A privately retained attorney appeared for defendant on October 22, 2007; she was replaced by another privately retained attorney, William McKinney, on December 11, 2007.

On March 12, 2008, defendant informed the trial court that he wanted to represent himself, pursuant to *Faretta v. California* (1975) 422 U.S. 806, at the hearing to suppress the identification testimony of Cox and John Paul,[7] and that he wanted McKinney to act as cocounsel. Defendant explained, "The reason I want to do that is I've been dealing with a lot of these issues for 16 years. I know the case law and everything." Defendant stated that there were "going to be some admissibility issues . . . and I could better present them and assist my counsel because he has been sick. He has had a heart attack and other things. . . . I understand the appellate law on the issues that should be presented . . . as far as the in limine motion. The trial—I'm not going to say anything there. All I want to do is establish everything for the in limine motion."

The trial court denied defendant's request, stating that defendant could represent himself if he wished, but that McKinney could not act as cocounsel. The trial court stated that McKinney was free to remain in the courtroom, to observe the proceedings and to assist defendant in whatever capacity he and defendant agreed outside of the courtroom,

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[7] See Discussion, Part A.2.

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but McKinney would not be permitted to sit at counsel table and act as cocounsel. Defendant objected to the trial court's ruling. McKinney continued to represent defendant through jury selection and the pretrial hearing on defendant's motion to suppress the identification testimony.

On March 17, after jury selection and prior to opening statements, the trial court and counsel were discussing evidentiary issues. Defendant interrupted the discussion, stating, "Hey, I'm relieving counsel right now. I'm going to go pro per." After a brief recess, McKinney explained that defendant had decided, against the advice of counsel, to represent himself. Defendant disagreed with certain aspects of McKinney's trial strategy. McKinney said that defendant "ha[d] accused [him] of being in a conspiracy with the District Attorney's office [and others] to get [defendant] convicted . . . ." Defendant told the trial court that it seemed to him that McKinney was "trying to railroad [him] on some issues" because when they came to court "certain things [were] not being litigated or expressed." Defendant stated that he did not need additional time to prepare because he was "ready to go," and implied that McKinney's decision making was suspect because McKinney recently had been ill. McKinney stated that he would assist defendant in coordinating expert witnesses.

The trial court held a brief hearing on defendant's competence to represent himself. During the hearing, defendant stated that he wanted to "make sure we have enough time to go through all the evidence, objections. Other than that, I'm ready to go." The trial court stated that it would grant defendant pro per status and give defendant an opportunity prior to opening statements the next morning to discuss the evidentiary issues and discovery with the prosecutor; defendant then would have one last opportunity to reconsider his decision to represent himself. Defendant asked if the trial court could "give me pro per today and have him [McKinney] ordered back tomorrow for just a stand-by thing for the technical thing . . . ." The trial court denied defendant's request, but nevertheless ordered McKinney to be present the following morning to give an update on the defense witnesses. The following morning, defendant confirmed that he wished to represent himself.

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2. Discussion

Defendant argues that the trial court violated defendant's constitutional rights and abused its discretion "when it refused to allow Mr. McKinney to assist him at trial." We disagree.

"A criminal defendant . . . has two mutually exclusive rights with respect to legal representation at trial. 'He may choose to be represented by professional counsel, or he may knowingly and intelligently elect to assume his own representation.' [Citations.] These are federal constitutional rights that derive from the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment. [Citation.] [¶] Significantly, however, a . . . defendant who chooses professional representation, rather than self-representation, is not entitled to present his or her case personally or to act as cocounsel at trial. [Citations.] There are sound reasons for this rule. 'Undesirable tactical conflicts, trial delays, and confusion often arise when a defendant who has chosen professional representation shares legal functions with his attorney.' [Citation.] [¶] Accordingly, when a defendant exercises his or her constitutional right to representation by professional counsel, it is counsel who 'is in charge of the case' and the defendant 'surrenders all but a handful of "fundamental" personal rights to counsel's complete control of defense strategies and tactics.' [Citation.]" (*In re Barnett* (2003) 31 Cal.4th 466, 471-472, fn. omitted; see also *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) "Thus none of the 'hybrid' forms of representation, whether labeled 'cocounsel,' 'advisory counsel,' or 'standby counsel,' is in any sense constitutionally guaranteed." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1218.)

Although not constitutionally guaranteed, a trial court retains discretion to permit shared representation in appropriate circumstances. (*In re Barnett, supra,* 31 Cal.4th at p. 472.) Generally, "the powers and responsibilities which attend the representation of a criminally accused person should never be conferred jointly and equally on the accused and the attorney. Rather, in all cases of shared or divided representation, either the accused or the attorney must be in charge. . . . [T]he record should be clear that the accused is either self-represented or represented by counsel; the accused cannot be both

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at once. A defendant represented by counsel who wishes to participate in the presentation of the case, but without surrendering the benefits of professional representation, may do so only with counsel's concurrence and under counsel's supervision, and only by leave of the court upon a proper showing. [Citation.] Similarly, a self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over presentation of the defense case, may do so only with the court's permission and upon a proper showing." (*People v. Bloom, supra,* 48 Cal.3d at pp. 1218-1219.) "[I]t is the trial court's duty 'to safeguard and promote the orderly and expeditious conduct of its business and to guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.' [Citation.]" (*In re Barnett, supra,* 31 Cal.4th at p. 472.)

Contrary to defendant's contention on appeal, the record does not support the conclusion that defendant ever requested that McKinney be permitted to act as cocounsel at trial. Defendant's request to represent himself on March 12 was prior to the hearing on defendant's motion to suppress the identification testimony of Vernon Cox and John Paul Jones. It appears that defendant's request to represent himself on that date, and his request that McKinney be permitted to act as cocounsel, was limited to the hearing on the motion to suppress that testimony. Defendant stated, "I understand the appellate law on the issues that should be presented . . . *as far as the in limine motion. The trial—I'm not going to say anything there. All I want to do is establish everything for the in limine motion.*" (Italics added.) A fair reading of the record thus indicates that defendant's request to represent himself on March 12 was limited to the hearing on the motion to suppress. But a defendant who is represented by counsel has no right personally to present motions to the trial court, unless the motions concern self-representation or the substitution of appointed counsel. (*People v. Clark* (1992) 3 Cal.4th 41, 173; *People v. Mattson* (1959) 51 Cal.2d 777, 798 [stating general rule that "a defendant who is represented by an attorney of record will not be personally recognized by the court in the conduct of his case"], disapproved on another ground in *People v. Crandell* (1988) 46

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Cal.3d 833, 861-862, see also *In re Barnett, supra,* 31 Cal.4th at p. 472 & fn. 2.) The trial court did not err in refusing to permit plaintiff to act as cocounsel in presenting the motion to suppress.

On March 17, after the jury was empanelled but prior to opening statements, defendant exercised his right to represent himself at trial because he disagreed with McKinney's trial strategy. Defendant told the trial court that he was "ready to go." Defendant did not request that McKinney be permitted to act as cocounsel at trial. Rather, defendant requested only that the trial court order McKinney back the following morning "for just a stand-by thing for the technical thing . . . ." It appears that defendant was referring to a discussion of evidentiary and discovery issues that was to occur the following morning. Although the trial court denied defendant's request to order McKinney to act as stand-by counsel for the hearing, the trial court nevertheless ordered McKinney to be present, and defendant was given an opportunity prior to the hearing to change his mind with respect to representing himself. There is no basis in the record to conclude that the trial court abused its discretion in handling defendant's request as it did.

Moreover, even if we were to interpret defendant's statements as a request for McKinney to act as cocounsel at trial, we would find no reversible error. Contrary to defendant's assertion, the trial court did not prohibit McKinney from assisting defendant during the trial—rather, the trial court explained to defendant that, although McKinney could not sit at counsel table or participate in the proceedings, McKinney could remain in the courtroom, observe the trial and assist defendant in whatever manner defendant and McKinney agreed outside of the courtroom.

Furthermore, the trial court reasonably could conclude that permitting McKinney to act as cocounsel would not "promote justice and judicial efficiency . . . ." (*In re Barnett, supra,* 31 Cal.4th at p. 472.) Defendant chose to exercise his right of self-representation because he disagreed with McKinney's trial strategy so vehemently that he interrupted a discussion between counsel and the trial court to announce that he was "relieving counsel right now." According to McKinney, defendant accused him of conspiring with the prosecutor to "get [defendant] convicted," and defendant told the trial

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court that McKinney was trying to "railroad" him and that McKinney's decision making had been compromised by his health problems. Under these circumstances, the trial court reasonably could conclude that shared representation between defendant and McKinney was likely to result in conflict and would disrupt and delay the proceedings.

People v. Bigelow (1984) 37 Cal.3d 731 (*Bigelow*), upon which defendant relies, is inapposite. In that case, a capital defendant tried to replace his appointed counsel, but the trial court denied his request. The defendant then elected to represent himself and requested to have an attorney appointed "as an advisor." (*Id.* at p. 740.) The trial court denied the request, stating that such an arrangement was prohibited by California law. The trial court inquired and initially concluded that the defendant was not competent to waive counsel, but after a recess the trial court changed its mind. Voir dire of the jury commenced immediately. (*Id.* at pp. 740-741.) The defendant's representation of himself at trial was ineffectual; he was convicted and sentenced to death. (*Id.* at pp. 741-742.)

The Supreme Court concluded that the trial court erred by failing to exercise its discretion to appoint advisory counsel. (*Bigelow, supra,* 37 Cal.3d at p. 742.) The court observed that the trial court's error was all the more serious because to deny advisory counsel in the circumstances of the case would have been an abuse of discretion. It was a capital case, which "raise[d] complex additional legal and factual issues beyond those raised in an ordinary felony trial." (*Id.* at p. 743.) The case arose under the 1978 death penalty initiative, which was "rife with constructional and constitutional difficulties . . . ." (*Ibid.*) The defendant was charged with four special circumstances, two of which had never been judicially construed. (*Ibid.*) The defendant had a ninth grade education, and he was a foreign national unfamiliar with California law. (*Id.* at pp. 743-744.) The trial court had initially concluded that the defendant was not competent to waive counsel, and the Supreme Court observed that the trial court's "initial conclusion that [the defendant] was not competent to defend a capital case [was] unquestionably true." (*Id.* at p. 744.)

The circumstances in this case were materially different than those in *Bigelow, supra,* 37 Cal.3d 731. This was not a capital case. Defendant was well versed in the

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legal issues—indeed, he informed the trial court that he had written his successful habeas petition, that he "underst[oo]d the appellate law on the issues[,]" and that he was "ready to go." The trial court found that defendant was competent to represent himself and, as the trial court observed, defendant proved to be a capable and well-prepared advocate at trial. Accordingly, *Bigelow* is not dispositive. The trial court did not err in refusing to permit McKinney to act as cocounsel.

C. Mistrial Motions

1. Additional Background

Prior to trial, the trial court admonished the parties, Vernon Cox and John Paul Jones that they were not to mention defendant's first trial or the illegal live lineup. The trial court instructed them to refer to the first trial as a "hearing" or "proceeding." The prosecutor told the trial court that he had instructed the prosecution witnesses not to mention the live lineup.

a. *Vernon Cox*

During defendant's cross-examination of Vernon Cox, defendant asked Cox if he, Cox, had a weapon on the day of the crime. Cox testified that he did not. Defendant then asked if Cox had been asked that question before; Cox answered that he probably had. Defendant asked Cox what his testimony was; Cox answered that his testimony had been that he did not have a weapon. Defendant then asked, apparently attempting to impeach Cox, "Did somebody ever ask you—at the *prior trial* was the question asked on the day of the shooting did you have a gun?" (Italics added.) Cox answered, "Yeah, I remember reading that and I told them no, I didn't have no gun." Defendant then asked Cox, "So this transcript that says anything otherwise . . . would it be an error if it stated that they asked you if you had a gun and you said you didn't remember?" Cox responded, "I told them I didn't have no gun because I didn't have a gun." Defendant asked, "So I'm

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saying if the transcripts say that they asked you and . . . you said there is a possibility that you had one?" Cox again responded that he had testified that he did not have a gun.

Later in the cross-examination, defendant asked Cox, "Now, 15 years ago you supposed to seen somebody, quote, unquote, for a short period of time, right?" Cox answered, "Yeah." Defendant asked, "How 15 years later [after the crime] that you can come and look and see a person and the person don't look like the person that was on the picture or the age enhancement?" The trial court overruled the prosecutor's objection to the question and rephrased the question, stating, "The question was: How can you identify somebody 15 years later?" Cox answered, "Because you look the same. Only thing, you don't have no hair on your head. *When I identified you in the lineup,* your head was just like that." (Italics added.)

Defendant objected and requested a mistrial. The trial court overruled the objection and told defendant to ask the next question. Instead, defendant moved to strike the testimony. The trial court granted the motion to strike.

Outside the presence of the jury, defendant renewed his motion for a mistrial. The trial court denied the motion, explaining that it was unlikely the jury knew that Cox had referred to anything other than the photo lineup Cox had testified about. The trial court admonished Cox not to mention the lineup again, and admonished defendant not to refer to the prior trial again.

b. *John Paul Jones*

During the direct examination of John Paul Jones, the prosecutor asked John Paul if he had identified defendant at a "prior hearing." John Paul answered that he had. The prosecutor asked, "That was in 1992?" John Paul answered, "Whatever day *the trial* was. I don't know exactly what year." (Italics added.) Defendant did not object or move for a mistrial.

During cross-examination, defendant sought to impeach John Paul by demonstrating that John Paul had testified to "extra details" in his description of the shooter that he had not mentioned in 1991. Defendant asked John Paul, "*You understand*

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these proceedings are a result of an identification issue, right?" (Italics added.) The trial court sustained the prosecutor's objection to the question. Defendant asked John Paul if his memory should have been fresher at the time of the incident than it was 17 years later; John Paul agreed it should. Defendant asked, "How many times have you talked to the detectives in regards to this case over the years?" John Paul answered, "Over the years? [¶] . . . [¶] I just got a phone call last year, this year or last year. *I think you were going up for appeal or trying to get out* or whatever the situation is. I haven't talked to them at all." (Italics added.) The trial court asked defendant if he wanted the answer stricken; defendant answered, "No." Defendant then moved for a mistrial.

Outside the presence of the jury, defendant argued that John Paul's use of the word "appeal" had communicated to the jury that defendant previously had been convicted. The trial court cautioned defendant that he kept asking the same questions over and over, and that "one of the consequences of asking the same question over and over again is that witnesses say things differently." The trial court explained, "[D]o we really think that this jury doesn't know that there were prior proceedings 17 years ago and something happened in the meantime? They probably know something happened, but we are trying our darndest to not tell them what happened so the only way we can do that is to try to admonish witnesses not to mention certain things." John Paul had not been admonished not to use the word "appeal" because the issue had not come up and defendant had not requested such an admonition. The trial court stated, "If for a minute I thought that the prosecution was telling his witnesses to throw things out [during their testimony] as you allege, then I'd grant your mistrial. There is no evidence to believe that." The trial court denied defendant's motion for a mistrial.

2. Discussion

Whether to grant a mistrial is entrusted to the sound discretion of the trial court, and we review the trial court's rulings for an abuse of discretion. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) "'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a

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particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*Ibid.*) A witness's volunteered statement can provide the basis for a finding of incurable prejudice. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) Generally, we presume the jury followed a trial court admonition to disregard improper evidence, particularly when, as here, there is no evidence of bad faith. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) It is only in the exceptional case that an admonition will not cure the prejudicial effect of improper evidence. (*People v. Allen* (1978) 77 Cal.App.3d 924, 935 (*Allen*).)

With respect to Vernon Cox's reference to the live lineup, we conclude the trial court did not abuse its discretion in denying defendant's request for a mistrial. Although Cox violated the court's admonition by referring to the lineup, there is no indication in the record that defendant suffered incurable prejudice. To the contrary, it is unlikely the jury knew to what lineup Cox referred. The only lineup the jury was aware of involving Cox was the photo lineup. There was no evidence or discussion of the live lineup in the jury's presence.

Defendant argues that the jury would not have understood that Cox referred to the photo lineup because defendant had hair in his photograph in the photo array, and Cox stated at trial, "Only thing, you *don't have no hair on your head*. When I identified you in the lineup, your head was just like that." (Italics added.) That fact is not dispositive, however. It appears unlikely that the jury heard Cox's fleeting reference to an unspecified lineup, correlated Cox's statement with defendant's lack of hair at trial and the presence of hair in the photo array, and reached the conclusion that defendant posits—i.e., that there was some other, additional lineup at which Cox positively had identified defendant as the shooter. (See *People v. Bolden* (2002) 29 Cal.4th 515, 555 [trial court properly denied request for mistrial when it was "doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction"]; see also *People v. Valdez* (2004) 32 Cal.4th 73, 128; *People v. Ayala* (2000) 23 Cal.4th 225, 285.) In any event, the trial court struck

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Cox's testimony regarding both the lineup and defendant's lack of hair, and later instructed the jury, "If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose." As noted, we presume the jury followed the trial court's admonition. (*People v. Olivencia, supra,* 204 Cal.App.3d at p. 1404.)

The trial court properly denied defendant's request for a mistrial due to John Paul Jones's reference to an "appeal." Notwithstanding the trial court's best efforts, there can be little doubt the jury was aware that there had been a prior trial. The jury heard evidence, for example, that the crime occurred in July 1991, and that defendant was arrested for the crime only days later. Any reasonable juror would have deduced that there must be *some* reason that defendant was being tried for the crime nearly 17 years later, in March 2008. Indeed, it was defendant who first referred in the jury's presence to his prior trial, and it was defendant who asked John Paul in the jury's presence if he was aware that the present proceedings were the result of an "identification issue." Defendant also failed to object to John Paul's reference to the first trial in his testimony prior to his mention of an "appeal." There is no reason to believe that defendant suffered incurable prejudice from John Paul's fleeting reference to an "appeal." Moreover, defendant cannot complain because the statement was not stricken or the jury admonished, because defendant refused the trial court's offer to strike the testimony.

Defendant's reliance on *Allen, supra,* 77 Cal.App.3d 924, is unavailing. In that case, a minor and the defendant participated in a robbery. The victim briefly observed the two robbers and described the defendant as older than the minor, with dark clothing, no cap, no beard and a "curly Afro." (*Id.* at p. 928.) The minor and his mother supplied additional information to police that led to the defendant's arrest. At trial, the minor's mother testified for the prosecution that the defendant's sister told her [minor's mother] that she [defendant's sister] would lie in court to help the defendant. This statement was denied by the defendant's sister. On rebuttal, the minor's mother stated that the defendant's sister had said that the defendant was "on parole" and "couldn't stand another beef." The defendant moved for a mistrial based on the mother's testimony that

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defendant was on parole. The trial court denied the motion. (*Id.* at pp. 928-929, 934.) The defendant presented an alibi defense, testifying that he was with his sisters the evening of the crime. The defendant's sisters corroborated the defendant's testimony. (*Id.* at pp. 929-930.)

The appellate court held that a mistrial should have been granted because defendant's parole status was the result of a prior juvenile adjudication which "cannot be deemed a conviction of a crime for any purpose." (*People v. Allen*, *supra*, 77 Cal.App.3d at p. 934.) The trial court's admonition to the jury to "disregard it completely, as if it were never said" was insufficient, the appellate court held, because the case was "extremely close" and the jury's fact determinations were based entirely on the credibility of the witnesses. (*Id.* at pp. 934-935.)

Here—even if we assume the jury surmised that John Paul's reference to an "appeal" implied that a prior jury had convicted defendant of the charges in this case—John Paul's statement likely had little effect on the jury's assessment of defendant's credibility. Unlike the situation in *Allen*, *supra*, 77 Cal.App.3d 924, John Paul did not testify, in effect, that defendant had a prior felony conviction. Rather, John Paul obliquely and fleetingly alluded to a prior appeal in *this case*. But the trial court instructed the jury that defendant was to be presumed innocent of the crimes charged in this case, and the fact that charges had been brought against defendant was not evidence that the charges were true. Moreover, defendant subsequently testified that he had no prior felony convictions. The trial court properly denied defendant's requests for a mistrial.

D. Defendant's Statement

1. Additional Background

In 1991, Kevin Lowe was a deputy sheriff working in the gang unit out of the Carson Sheriff's Station. Two days after the shooting, while being transported by Lowe from his home to the Carson Sheriff's station, defendant told Lowe that he (defendant)

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was a former member of the 118th Street East Coast Crips. Defendant moved to suppress the statement on the ground that it violated his Fifth Amendment right against self-incrimination pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

At the suppression hearing, Detective Robert Havercroft testified that, in July 1991, he was a homicide investigator with the Sheriff's Department assigned to investigate Mitchshalae's murder. In the early morning hours of July 9, 1991—approximately 30 hours after the shootings—Havercroft went to defendant's residence at 212 East 118th Place. Defendant was present with his mother and another woman.

Havercroft told defendant he would like to speak to him about the shootings, and asked if defendant would accompany one of the deputies to the Sheriff's station. Defendant told Havercroft that he was not involved in the shooting, and did not want to be arrested because he was on parole and he did not want to have to deal with his parole officer finding out that he had been arrested. Havercroft told defendant that he did not know if defendant was his suspect, although there were "strong indicators" that he was. Havercroft said he would give defendant every opportunity to establish his innocence. Defendant voluntarily agreed to accompany one of the deputies to the station for the purpose of taking a photograph to be used in a photographic lineup. Havercroft told defendant that if he was not identified by a witness, he would be home within the hour. Defendant was not placed under arrest at his house. At Havercroft's direction, Lowe drove defendant from his house to the station.

Lowe did not testify at the suppression hearing. Instead, the prosecutor made an offer of proof that Lowe would testify that, as directed by Havercroft, he drove defendant to the Carson Sheriff's station. On the way, Lowe asked defendant if he was a gang member. Defendant answered that he used to be a member of the 118th Street East Coast Crips. Lowe testified at trial in accordance with the offer of proof, and he was extensively cross-examined by defendant. No evidence was elicited that cast doubt on the admissibility of defendant's statement.

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Defendant did not object to the offer of proof regarding Lowe's testimony, and he offered no evidence at the suppression hearing. The trial court denied the motion to suppress, finding that defendant was not in custody when he made the statement to Lowe.

2. Discussion

Before being subjected to custodial interrogation, a suspect must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda, supra,* 384 U.S. at p. 444; *People v. Leonard* (2007) 40 Cal.4th 1370, 1399-1400.) "An interrogation is custodial when 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' [Citation.] Whether a person is in custody is an objective test; the pertinent inquiry is whether there was '"'a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"' [Citation.]" (*People v. Leonard, supra,* 40 Cal.4th at p. 1400; accord, *Miranda, supra,* 384 U.S. at p. 444.)

Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. (*People v. Leonard, supra,* 40 Cal.4th at p. 1400.) We review the trial court's findings of historical fact for substantial evidence, and we review independently "whether, given those circumstances, 'a reasonable person in [the] defendant's position would have felt free to end the questioning and leave' [citation]." (*Id.* at p. 1400.)

The trial court properly admitted defendant's statement. Numerous cases have held that a defendant is not in custody merely because he is a suspect in an investigation or because he is interrogated in a police car or at a police station. As the United States Supreme Court stated, *Miranda* warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495; see also *Stansbury v. California* (1994) 511 U.S. 318, 325 ["Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to

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make an arrest"]; *California v. Beheler* (1983) 463 U.S. 1121, 1122, 1125 [suspect not in custody even though police had identified him as a suspect, had found murder weapon in his back yard, and interrogation occurred at police station; defendant had "voluntarily agreed to accompany police to the station house" and was "told . . . that he was not under arrest"]; *People v. Leonard, supra,* 40 Cal.4th at pp. 1400-1401 [suspect was not in custody although fingerprinted prior to interrogation, interrogation occurred at police station, interrogation lasted over three hours, door to interrogation room was closed, and detective sat between suspect and door to interrogation room; detective had informed suspect that he was not under arrest and was free to end questioning, suspect was permitted to use bathroom and telephone, and door to interrogation room was unlocked]; *People v. Stansbury* (1995) 9 Cal.4th 824, 834 [suspect not in custody although interviewed in jail section of police station, behind locked doors, and suspect would have required assistance to leave]; *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 59, 63-66 [minor not in custody although informed he was a suspect in robberies and was interviewed in small room in nonpublic area of police station from which officer would have to escort him if he wished to leave; minor had come to station voluntarily and was told he was not under arrest].)

In this case, Havercroft testified that he spoke to defendant "very briefly" at defendant's house and told defendant that he wanted to speak to him about the shootings. Defendant denied any involvement in the murder and agreed voluntarily to accompany Lowe to the station for the purposes of taking a photograph. Havercroft told defendant that he would be home within the hour if he was not identified by any of the witnesses. Defendant was not placed under arrest either by Havercroft or the deputies who accompanied him to defendant's house. There is no indication in the record that defendant was put in restraints, that police used or threatened force, or that defendant was subjected to hostile or aggressive questioning.

Defendant argues that the prosecution did not put on evidence at the suppression hearing with respect to what actually occurred in the police car when defendant made his statement to Lowe. But the prosecution put on substantial evidence of the circumstances

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when defendant was put in Lowe's police car, and Havercroft testified that none of the deputies placed defendant under arrest or had the authority to do so. There was thus sufficient evidence to permit the trial court to infer that defendant's custodial status did not materially change before he made his statement to Lowe while on the way to the police station, absent some evidence to the contrary. Defendant submitted no such evidence. The trial court did not err in admitting the statement.

E. Readback of Testimony

1. Additional Background

During deliberations on the morning of March 26, 2008, the jury sent a note requesting a readback of the following testimony: (1) the cross-examination of Vernon Cox; (2) the testimony of John Paul Jones identifying the suspects; (3) testimony regarding the "Vernon Cox Interview from DA"; and (4) testimony regarding the "Hospital Interview of John Paul Jones." The trial court sent a note back to the jury, asking them to be more specific regarding item (3). Meanwhile, the cross-examination of Vernon Cox was prepared by the court reporter and read back to the jury that afternoon. The trial court informed the jury that, after the readback of Cox's testimony was completed, the court reporter would begin to prepare the other testimony requested.

After the readback of Cox's cross-examination was completed, the jury sent a second note stating, "The rest of Vernon Cox's testimony is not necessary." The jury also sent out a third note requesting, "Readback of John Paul Jones of Hospital Interview of Have[r]croft on Descriptions of Suspects. Also of Time John Paul saw the Jeep Turn the Corner until he was shot. What He saw at that time. Pertaining to Descriptions." In addition, the jury modified its first note to indicate that item (2) was "not needed," and modifying item (4) with the parenthetical note, "see other question"—presumably, the third note.

The testimony of John Paul Jones regarding his interview in the hospital with Detective Havercroft was read back to the jury. After the readback, defendant questioned

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why only the testimony of John Paul Jones had been read back, when Detective Havercroft also had testified regarding the hospital interview. The trial court responded that, although the first note had been ambiguous, the third note was clear that the jury had requested readback only of the testimony of John Paul Jones. The trial court assured defendant that, if the jury requested a readback of Havercroft's testimony, the readback would be provided. The jury sent out two additional notes requesting clarification of the jury instructions, but it did not request further readback of testimony.

2. Discussion

Defendant argues that the trial court erred by failing to order the testimony of Detective Havercroft regarding his hospital interview with John Paul Jones read back to the jury. We disagree.

Section 1138 provides, "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called." This section gives a deliberating jury the right to rehear evidence and instruction on request, and requires the trial court to satisfy the jury's request. (*People v. Gurule* (2002) 28 Cal.4th 557, 650; *People v. Box* (2000) 23 Cal.4th 1153, 1213, disapproved on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) The trial court, however, has no obligation to order the reading of testimony that is not requested by the jury. (*People v. Gordon* (1963) 222 Cal.App.2d 687, 689.)

The trial court reasonably could conclude that the jury's third note, which modified item (4) on its first note, requested only a readback of the testimony of John Paul Jones with respect to his interview with Detective Havercroft at the hospital. Furthermore, if the jurors had "wanted further testimony read to them, or other further clarification, they certainly would have so requested. If the testimony actually read to them did not contain the matters they wished to hear, they surely would have said so."

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(*People v. Gordon, supra,* 222 Cal.App.2d at p. 689.) Indeed, the jurors in this case sent multiple notes during their deliberations and were "quite capable of requesting extensive readback." (*People v. Cox* (2003) 30 Cal.4th 916, 969, disapproved on other grounds in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) The jurors would have asked to hear the testimony of Detective Havercroft if they deemed it necessary. The trial court did not err.

F. Discharge of Defense Counsel Retained for Post-Trial Motions

1. Additional Background

The jury rendered its verdicts on March 28, 2008. The trial court scheduled the sentencing hearing for April 25, 2008. Defendant appeared on that date, stated that he was preparing a motion for a new trial with assistance from his "federal appeal attorney," and requested a 60 day continuance. The trial court continued the matter to June 27, 2008.

On June 23, 2008, private attorney Ron White moved for appointment to represent defendant for purposes of his motion for a new trial and/or sentencing. The trial court set a hearing on the motion for the next morning. At the hearing, defendant told the trial court that he wanted defense counsel appointed, and the trial court appointed White as defendant's counsel for all proceedings. The trial court further continued the matter to August 1, 2008. White subsequently requested and the trial court granted three additional continuances.

On December 3, 2008, the final date set for the new trial motion and sentencing, White informed the trial court that, due to an error by his staff, defendant's written motion for a new trial still was not finished. The trial court stated that it would not grant a further continuance because White had been appointed five months earlier and already had been granted several continuances to prepare the motion. White said that he had not intended to request a continuance; instead, he wanted to inform the trial court that defendant had discharged him due to his failure to prepare the motion. The trial court

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denied defendant leave to discharge his attorney on the ground that defendant voluntarily had sought appointment of counsel the previous June, and had told the trial court then that he would not request to represent himself again.

White orally argued defendant's motion for a new trial. The trial court denied the motion, stating that although defendant "did a fine job representing himself" at trial, the evidence of his guilt was "pretty overwhelming." During the sentencing hearing, defendant argued that he should have been permitted to fire White because White was unprepared to argue the new trial motion. The trial court denied defendant's request.

2. Discussion

Defendant argues that the trial court erred by refusing to permit defendant to discharge White at the hearing on the new trial motion. We disagree.

In general, the Sixth Amendment right to counsel entitles a criminal defendant to discharge retained counsel with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) That right is limited, however. A trial court has discretion to deny a defendant's request to discharge retained counsel if it appears that the discharge will prejudice the defendant, or if the request is untimely and the discharge will disrupt the orderly administration of justice. (*Ibid.*; see also *People v. Munoz* (2006) 138 Cal.App.4th 860, 863 [*Ortiz* rule applies when defendant seeks to discharge retained counsel after conviction but prior to sentencing].) "The trial court . . . must exercise its discretion reasonably: 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.]" (*People v. Ortiz, supra,* 51 Cal.3d at p. 984.)

The trial court in this case did not abuse its discretion when it found that defendant's request to discharge his attorney was untimely. The verdicts in this case were returned in late March 2008. Nearly nine months later, defendant still had not filed his motion for a new trial. The trial court had continued the matter *five times* to accommodate defendant and his attorney, White. The trial court stated that it had warned defendant and White on at least two prior occasions that they "needed" to present the new

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trial motion. Moreover, the trial court reasonably could anticipate that permitting defendant to discharge White on the date of the hearing would cause further substantial delay.

Defendant argues that defendant's request was not untimely because he sought to discharge White "as soon as he found out about counsel's failure to file a new trial motion." This is incorrect. The record indicates that White previously had appeared on at least *three* hearing dates—August 1, September 10 and October 29, 2008—unprepared to proceed on the new trial motion. Defendant was present in court with White on each of those hearing dates and had the opportunity to assess White's performance and discharge him if defendant was dissatisfied. Defendant did not do so. Moreover, defendant could have, but did not, discharge White for not filing a written motion prior to the date of the hearing. It may be that White rendered ineffective assistance of counsel. That is a matter that can be raised on habeas corpus. But that does not affect the untimeliness of the request to discharge counsel. The trial court did not abuse its discretion in denying defendant leave to discharge White. Moreover, the trial court entertained the defendant's oral application for new trial and heard argument before denying the motion. (§ 1181.)

G. Sufficiency of the Evidence—Conspiracy

Defendant argues that there was insufficient evidence to sustain his conviction on count 5 for conspiracy to commit murder. "'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no

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hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) That the circumstances proved at trial might reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1290.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation]. . . . '[I]t is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]'" (*People v. Zamudio, supra,* 43 Cal.4th at pp. 357-358.) "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

To convict a defendant of a criminal conspiracy, the prosecution must prove: (1) an agreement between two or more people, (2) who have the specific intent to agree or conspire to commit an offense, (3) the specific intent to commit that offense, and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. (§§ 182, subd. (b), 184; *People v. Jurado* (2006) 38 Cal.4th 72, 120; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1024; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 68, pp. 277-278.) "The elements of conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.' [Citations.] To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design.' [Citation.]" (*People v. Vu, supra,* 143 Cal.App.4th at pp. 1024-1025.)

There was sufficient evidence in this case to permit a reasonable jury to infer an agreement to commit murder between Whitson and defendant. There was substantial evidence that Whitson was a member and defendant a former member of the 118th Street East Coast Crips. There was evidence that Crip gangs were rivals of Blood gangs in

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general, and specifically that the 118th Street East Coast Crips were deadly rivals with the Athens Park Boys, a Blood gang. The prosecution's gang expert, Deputy Patton, testified that, in 1991, drive-by shootings were a common form of gang retaliation.

The evidence showed that Whitson drove from Rance Hills's apartment building into territory controlled by the 118th Street gang—which was a surprise to Cox, who thought they were going to a local liquor store to buy beer. A reasonable jury could infer that Whitson had some agenda in doing so. There, Whitson stopped to converse with defendant. When defendant asked what Whitson was doing, Whitson responded that they were "gonna roll around to see if we see some Bloods." Defendant said he wanted to come along. Defendant ran toward a house; when he came back, he appeared to be holding something in his waistband. A reasonable jury could infer that defendant had retrieved a gun, and that Whitson had seen and was aware of this. When considered together, these circumstances evidenced an agreement between Whitson and defendant to drive around hunting for Blood gang members to shoot.

Subsequent events support that inference. Defendant got in the back of the Jeep Cherokee. Whitson drove southward, directly into territory controlled by the Athens Park Boys, a rival Blood gang. He turned the car onto Carlton Avenue, and proceeded to drive slowly by the Jones residence, with the windows of the car down. Defendant shot at the first young men they saw in the Blood neighborhood. Whitson then drove them away from the scene and back into territory controlled by the 118th Street gang. There was thus substantial evidence that Whitson and defendant entered into a conspiracy to murder.

H. Sentencing Issues

The trial court erred in two respects when sentencing defendant. First, the trial court imposed sentence enhancements for causing GBI to Katie and Albert Jones on counts 2 and 3, pursuant to sections 12022.55 and 12022.7. The jury, however, found not true the GBI enhancement allegations on those counts. The parties agree that the enhancement terms must be stricken. The People argue further that the trial court properly imposed four-year personal gun-use enhancements pursuant to section 12022.5,

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subdivision (a) on counts 2 and 3, but improperly stayed those terms pursuant to section 654 because it erroneously had imposed enhancement terms pursuant to section 12022.55. Because we strike the section 12022.55 enhancements on counts 2 and 3, there is no legal basis for staying the execution of the section 12022.5, subdivision (a) enhancements on those counts pursuant to section 654. Accordingly, we order the stays lifted.

Second, the trial court sentenced defendant to the middle term of six years for the section 12022.55 GBI enhancements on counts 1 and 4. When defendant committed his crime, however, section 12022.55 provided for a single enhancement term of five years. (See Stats. 1987, c. 1147, § 2, amended by Stats.1993-94, 1st Ex.Sess., c. 31, § 4.) To avoid a violation of the proscription against ex post facto laws, defendant's sentence on the enhancements must be reduced to five years on each count. (See Cal. Const., art. I, § 9; *People v. Jennings* (1988) 46 Cal.3d 963, 984.)

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DISPOSITION

The judgment is modified to (1) strike the sentence enhancements pursuant to sections 12022.55 and 12022.7 on counts 2 and 3; (2) lift section 654 stays with respect to the sentence enhancements pursuant to section 12022.5, subdivision (a) on counts 2 and 3; and (3) reduce the sentence enhancements pursuant to section 12022.55 on counts 1 and 4 from six years to five years. The Clerk of the Superior Court is to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.