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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JEROME HAIRSTON, Defendant and Appellant.	C057504 (Super. Ct. No. 07F01729)

APPEAL from a judgment of the Superior Court of Sacramento County, Greta C. Fall, Judge. Affirmed.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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

A jury convicted defendant Anthony Jerome Hairston of three misdemeanor counts of resisting arrest (Pen. Code, § 148, subd. (a)(1)),[1] but it deadlocked on one felony count of making a criminal threat. (§ 422.) On retrial, a second jury convicted defendant of one count of criminal threat. (§ 422.) It also determined that defendant personally used a handgun in making the threat (§ 12022.5, subd. (a)), but it found not true an allegation that defendant committed the crime for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).)

The trial court sentenced defendant to a prison term totaling 13 years, based on the upper term of three years on the criminal threat count, plus the upper term of 10 years for the personal handgun use enhancement. The court also sentenced defendant to concurrent one-year terms in the county jail for the three resisting arrest counts.

Defendant appeals, raising the following contentions:

1. Insufficient evidence supports the criminal threat conviction;

2. The trial court erred in failing to instruct sua sponte on the lesser included offense of attempted criminal threat;

3. The court erred by not bifurcating trial on the gang enhancement;

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[1] All subsequent undesignated references to sections are to the Penal Code.

4. The court improperly instructed the jury on the concept of reasonable doubt by using CALCRIM Nos. 220 and 222;

5. The jury erred in convicting defendant of three separate counts of resisting arrest instead of one count, and defendant suffered ineffective assistance of counsel when trial counsel failed to make a motion to dismiss two of the counts;

6. The court violated section 654 by imposing separate jail terms on the resisting arrest counts;

7. The court erred by imposing the upper term sentence on the gun use enhancement without stating its reasons for doing so, and defendant suffered ineffective assistance of counsel when his trial counsel failed to object on this ground; and

8. The trial court committed *Cunningham*[2] error when it imposed the upper term sentence on the criminal threat count.

We affirm the judgment in all respects.

FACTS

Braulio Meraz lived in an Oak Park apartment complex with his wife and four children. On February 20, 2007, Meraz was outside in the complex's parking lot talking with a friend who was working on a car. Patrice Watson was also there.

A maroon, four-door sedan pulled into the parking lot, with rap music blaring from inside. Three people exited the car. Defendant, the car's driver, was rapping and singing.[3] Meraz

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[2] *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] (*Cunningham*).

[3] Meraz and Watson both identified defendant at trial as the driver of the car.

told his friend that defendant's singing sounded like a song Elmo from Sesame Street had rapped.

Defendant heard Meraz's remark. He asked Meraz if he was trying to be funny. Surprised, Meraz stood back and went about his business. He also replied angrily and called defendant "boy." Watson testified that defendant told Meraz to watch his "M F" mouth, and then words went back and forth.

Defendant and his companions walked up a flight of stairs and into an apartment. Watson stated that before defendant went inside, he broke the window of one of the apartments. Meraz did not see that act or hear any glass breaking.

A man nicknamed "Pumpkin" came out of the upstairs apartment and asked Meraz if the three men had been "tripping" with him. Pumpkin said he would handle it. Meraz, thinking the incident amounted to nothing, did not respond, and he went back to talking with his friends.

Eventually, defendant and his two companions came out from the apartment. Watson testified that defendant stood at the railing, telling Meraz he did not know who he was messing with. Defendant said he ran Oak Park. As defendant walked down the stairs, he told Meraz, "I've got something for you." Defendant and Meraz renewed their verbal confrontation. Meraz told defendant he was not scared. At the bottom of the stairs, defendant told Watson to tell Meraz he had better respect him.

Meraz testified that he did not hear, or could not recall, any of these statements by defendant. He claimed he did not exchange any words with defendant while defendant was coming

down the stairs. He did, however, watch defendant come down the stairs, and he gave defendant "hard looks" while he walked back to his car. His fists may even have been clenched. Meraz was prepared to fight.

Defendant and his companions got back into their car. Meraz walked up to the car in an aggressive manner. When he put his hands on the passenger door and looked in, he saw defendant seated in the driver's seat holding a handgun up to his chest. The gun was pointed away from Meraz. Defendant repeatedly asked Meraz, "[I]s there a problem, bitch? Is there a problem bitch? Is there a fucking problem, bitch?" Defendant put his left hand down to the side, pulled out another gun, and handed it to his front-seat passenger. The passenger in the backseat leaned forward and also displayed a gun.

Meraz suddenly felt his life was in danger. He threw up his hands, backed away from the car, and told defendant he did not want any trouble "like that." Meraz backed away as far has he could to a fence. As defendant backed the car up to leave, he and his passengers continued calling Meraz a "bitch" and asking if there was "a fucking problem." Meraz believed they were doing anything they could to get him to respond. Afraid of being shot, Meraz said nothing. He "sort of blacked out to what they were saying" at that time. However, as the car drove away, Meraz heard someone from inside the car say, "[Y]ou better not be here when we get back."

Watson testified she saw defendant point his gun at Meraz as he started to back the car out. At that point, Watson moved

away from Meraz. One of the passengers in the car said to her, "[Y]eah, mom, go in the house." Believing the three men "were about to light [Meraz] up," Watson went into her apartment. She told her daughter and niece to take her grandchild into the room and lie down on the floor.

Meraz was able to remember the car's license plate. He ran to his apartment and called 9-1-1. He feared for his life and that of his family, and he believed the men would return to harm them. He told the operator the three men were going to come back because that was what they had said, and he wanted the police to get to the complex quickly in case the men returned.

Approximately 15 minutes after receiving the dispatch based on Meraz's call, Sacramento County Sheriff's Deputy Donny Vettel noticed he was driving behind defendant's car. Defendant pulled into an apartment complex and parked the car. Deputy Vettel activated his lights. Defendant and the rear-seat passenger got out of the car and ran. The deputy yelled at the men to stop, but they ran around a building and out of sight. Deputy Vettel did not pursue them. No one remained in defendant's car.

As Sheriff's Deputy Robert Patton drove past the apartment complex, he saw defendant and another person running through the complex and jumping over a wall surrounding a garbage dumpster. Deputy Patton exited his car, identified himself, and ordered the two men to put their hands over their heads. Defendant and his companion looked at the deputy, jumped back over the wall, and ran through the complex. Deputy Patton ran after them, but

when the two men ran in separate directions, the deputy stopped his pursuit.

Sheriff's Deputy Robert White arrived at the complex to assist Deputy Vettel. As Deputy White was driving around the complex, defendant ran towards Deputy White's car. Defendant's right hand was in his pants. Deputy White slammed on his brakes, got out of his car, pointed his gun at defendant, and commanded defendant to stop. Defendant turned, ran away through a parking lot, and ran behind a concrete retaining wall and out of the deputy's sight.

Seconds later, defendant ran around the retaining wall and jumped over a fence into a park. Both of defendant's hands were now visible. Deputy White jumped onto the fence, pointed his gun at defendant, and told him to lie down and give up. Defendant did.

Deputy White searched the area. Behind the retaining wall, he found a black wool jacket and a sock containing a .38-caliber handgun. There were five expended shell casings in the gun but no live ammunition.

Sacramento County Sheriff's Department Detective John Sydow testified that defendant was a validated member of the Oak Park Bloods criminal street gang. A tattoo on the back of defendant's hand indicated he was affiliated with the 33rd Street subset of the Oak Park Bloods.

Detective Sydow related two examples of the Oak Park Bloods' primary activities, neither of which involved defendant. In the first incident, a gang member was exchanging words with a

man from a rival gang in 2005. The other man stated he was from Oak Park and asked the Bloods member why he had not seen him around Oak Park. Believing he had been "disrespected," the Bloods member responded by shooting the man five times. The man survived.

The second incident occurred in April 2004. A Bloods member attempted to steal a car and yelled at the Russian driver to get out of the car. When the Russian man refused to get out, the Bloods member shot him in the chest. The man ultimately died from the shooting.

Detective Sydow stated the apartment complex where Meraz and Watson lived was generally controlled by the Oak Park Bloods and specifically by the Ridezilla subset of the Oak Park Bloods for the sale of narcotics.[4] Ridezilla and Oak Park Blood gang members would intimidate the residents and neighbors to prevent them from reporting the gang's drug sales to the police. The police received many calls from residents, but when officers responded, the complaining residents could not be found or would deny placing the call.

Detective Sydow opined that in a hypothetical situation based on the facts of this case, the criminal threats were done for the benefit of the Oak Park Bloods. If a citizen of the

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[4] Detective Sydow testified that in his experience, it was very common for members of different gang subsets to intermingle and hang out together due to their common gang membership. For instance, a member of the 33rd Street Bloods would hang out with members of Ridezilla because they were friends and had a common gang affiliation with the Oak Park Bloods.

apartment complex were to stand up to a Blood member, others would watch to see whether the gang member would respond. In the deputy's opinion, the gang member could not let the confrontation pass without responding. In order to earn respect for him and his gang, the member would do whatever was necessary to intimidate the citizen. Without earning this type of respect, the gang would be unable to accomplish their crimes.

DISCUSSION

I

Sufficiency of Evidence of Criminal Threat

Defendant contends insufficient evidence supports his criminal threat conviction. He claims the evidence does not establish that his statements conveyed the immediate prospect of execution of a threat, or that they caused Meraz to be in sustained fear for his safety. We disagree.

"[T]he crime of criminal threat is set forth in section 422. That statute provides in relevant part: 'Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or

her own safety or for his or her immediate family's safety' is guilty of a crime, which is punishable alternatively as a misdemeanor or a felony." (*People v. Toledo* (2001) 26 Cal.4th 221, 227 (*Toledo*), fn. omitted.)

Section 422 contains "five constituent elements that must be established to find that a defendant has committed this offense. In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat -- which may be 'made verbally, in writing, or by means of an electronic communication device' -- was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. (See generally *People v. Bolin* (1998) 18 Cal.4th 297, 337-340 & fn. 13 [(*Bolin*)].)" (*Toledo, supra*, 26 Cal.4th at pp. 227-228.)

Defendant claims the evidence does not support the verdict on the third element, that his statements conveyed the immediate

prospect of execution of a threat, and the fourth element, that his statements caused Meraz to be in sustained fear for his safety.

We deal with the fourth element first. Substantial evidence supports the finding that defendant's statements placed Meraz in sustained fear for his and his family's safety. Meraz testified he was so scared he backed away into a corner, and felt as if he blacked out as to what defendant was saying. Upon defendant's departure, Meraz immediately called 9-1-1 and asked that the police hurry because he feared defendant would return. This testimony sufficiently demonstrated that Meraz was in a state of sustained fear for his safety.

We turn now to the third element. To satisfy this element, the evidence must show the threat was "'on its face and under the circumstances in which it [was] made, . . . *so* unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat . . . .'" (*Bolin*, *supra*, 18 Cal.4th at p. 337, italics added.)

"'The use of the word "so" indicates that unequivocality, unconditionality, immediacy and specificity are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances to convey a gravity of purpose and immediate prospect of execution to the victim.' [Citation.]" (*Bolin, supra*, 18 Cal.4th at p. 340.)

"The four qualities are simply the factors to be considered in determining whether a threat, considered together with its

surrounding circumstances, conveys those impressions to the victim." (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157-1158-1159.)

These factors may also be found in a threat which, on first blush, appears ambiguous or conditional. "A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning. [Citation.]" (*In re George T.* (2004) 33 Cal.4th 620, 634.)

"Several appellate decisions have held, in the context of determining whether conditional, vague, or ambiguous language could be the predicate for a conviction of making terrorist [or criminal] threats, that all of the surrounding circumstances should be taken into account to determine if a threat falls within the proscription of section 422. This includes the defendant's mannerisms, affect, and actions involved in making the threat as well as subsequent actions taken by the defendant. The courts have taken this approach in order to further the legislative intent behind the statute. 'In enacting section 422 . . . , the Legislature declared that every person has the right to be protected from fear and intimidation. This act was in response to the growing number and severity of threats against peaceful citizens.' (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221.)

"For instance, in *People v. Martinez, supra,* 53 Cal.App.4th 1212, the defendant claimed the language of his threat was vague and did not specifically convey a threat of great bodily injury

or death. The appellate court conceded his threat may not have, by itself, conveyed a threat to commit great bodily injury or death but held that the trier of fact could consider all of the surrounding circumstances in deciding whether a terrorist threat had been made. In that case, the defendant set fire to a building where the victim worked a day after the defendant had made the threat. The court held the jury could properly consider that fact. It reasoned: 'Defendant's activities after the threat give meaning to the words and imply that he meant serious business when he made the threat.' (*Id.* at p. 1221, fn. omitted.)" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

Here, Meraz was not threatened or in a state of fear until he walked up to the car and looked inside the passenger window. Even then, defendant's statements are ambiguous. He continually kept asking Meraz, "Is there a problem, bitch?" Is there a fucking problem, bitch?" These statements facially do not express a direct threat. However, when considered in context -- that as Meraz heard these statements he suddenly faced three separate handguns, and he was told he had better not be there when the three men returned -- the threat becomes clear. If Meraz does not leave the apartment complex, he will be hurt.

This threat, when viewed in the surrounding circumstances, was sufficiently unequivocal, unconditional, immediate and specific to convey a gravity of purpose and immediate prospect of execution to Meraz. A juror could have reasonably determined from this evidence that defendant intended to threaten Meraz with physical harm, and that the threat was serious enough to

lead Meraz to believe he was in immediate fear for his safety. Substantial evidence supports the criminal threat conviction.

II

Lack of Instruction on Lesser Included Offense

Defendant faults the trial court for not instructing sua sponte on the lesser included offense of attempted criminal threat. He asserts the lack of substantial evidence that Meraz was in sustained or reasonable fear justified giving the instruction. We conclude the trial court did not err.

"We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, '"that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, '"would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]. [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1218, original italics.)

"Moreover, a failure to fulfill this duty is not a structural defect in the proceedings, but mere misdirection of the jury, a form of trial error committed in the presentation of the case. Hence, by virtue of the California Constitution, reversal is not warranted unless an examination of 'the entire cause, including the evidence,' discloses that the error produced a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) This test is not met unless it appears 'reasonably

probable' the defendant would have achieved a more favorable result had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)" (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

Attempted criminal threat is a lesser included offense of criminal threat. "[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear for his or her safety even though, under the circumstances, that person reasonably could have been placed in such fear, the defendant properly may be found to have committed the offense of attempted criminal threat." (*Toledo, supra*, 26 Cal.4th at p. 231, original italics.)

Here, there was no substantial evidence on which the jury could determine Meraz was not actually in sustained fear due to defendant's threat. It is undisputed that upon seeing the defendant's and his friends' guns and hearing their taunts, Meraz immediately feared for his life. He retreated from the car as far as he could. His fear overcame his ability to listen to the continued taunts. Someone from the car said, "[Y]ou better not be here when we get back." After hearing that threat, he quickly called 9-1-1 and asked the police officers to hurry. On this record, there was no evidence on which a jury could have determined Meraz was not actually in fear. The trial court did not err by not instructing on the lesser included offense.

III

Denial of Motion to Bifurcate the Gang Enhancement

Prior to the retrial on the criminal threat charge, defendant moved to bifurcate trial of the street gang allegation, arguing the gang evidence was unduly prejudicial under Evidence Code section 352. The trial court denied the motion, concluding the probative value of the gang evidence outweighed any prejudicial effect.

Defendant claims the trial court committed prejudicial error when it refused to bifurcate trial for the gang enhancement allegation. He argues bifurcation was warranted because the evidence was unduly prejudicial: the gang evidence was inflammatory, was not related at all to his crime, and had little relevance to his guilt.

Defendant acknowledges the jury determined the gang enhancement allegation was not true, but he claims the gang connection permeated the trial. He notes that besides the court admitting evidence of shootings committed by Oak Park gang members, the prosecutor focused his argument on the gang connection. "When you are talking about these Oak Park Bloods," the prosecutor told the jury, "you are talking about the Defendant." We conclude the court did not err.

"[E]vidence of gang affiliation creates a risk that the jury will infer a defendant's criminal disposition from the evidence and decide guilt of the offense charged based on that inference. As we have held previously, evidence of criminal disposition is inadmissible to prove commission of a specific

act. [Citation.] Gang affiliation evidence that is otherwise relevant, however, is admissible, although subject to trial court scrutiny because of its highly inflammatory impact." (*People v. Kennedy* (2005) 36 Cal.4th 595, 624.)

However, courts have less need to bifurcate trial on gang enhancements than on prior conviction allegations. This is because a "prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*), original italics.)

"This is not to say that a court should never bifurcate trial of the gang enhancement from trial of guilt. . . . The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.

"In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant

to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation -- including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like -- can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Hernandez, supra*, 33 Cal.4th at p. 1049, original italics.)

The decision to bifurcate trial of a gang enhancement allegation is vested in the trial court's sound discretion. (*Hernandez, supra,* 33 Cal.4th at p. 1048.) "Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself -- for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged -- a court may still deny bifurcation." (*Hernandez, supra,* at p. 1050.) Indeed, the trial court's discretion to deny bifurcation of a charged gang enhancement "is broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Ibid.*)

In this case, the trial court did not abuse its discretion when it denied defendant's motion to bifurcate the gang enhancement. The gang evidence was relevant to establishing defendant's motive and intent in making the criminal threat. It

showed defendant specifically intended that his statements would be taken as a threat. In his mind, he had been "disrespected," and he intended to ensure that did not happen again.

Also, the gang evidence's probative value was not outweighed by its potential to inflame the jury. At first glance, evidence of unrelated gang members' acts of murder and attempted murder may appear to be grossly disparate from defendant making a criminal threat. However, the evidence was offered to prove the gang enhancement, not the threat. And the evidence was probative on the charged offense. Defendant's intent to threaten Meraz was all the more credible when considered in light of his gang members' use of firearms to conduct their business and the gang's historical control over Meraz's apartment complex. The trial court did not abuse its discretion in admitting the evidence under these circumstances.

In any event, we conclude the ruling did not prejudice defendant.

IV

CALCRIM Nos. 220 and 222

Defendant claims the trial court's use of CALCRIM Nos. 220 and 222 to define the concept of reasonable doubt wrongfully precluded the jury from considering the absence of evidence connecting him to the crime, such as the gun used to threaten Meraz. He claims this occurred due to the statement in CALCRIM No. 220 that the jury is to consider all the evidence "that was received throughout the entire trial," and the statement in CALCRIM No. 222 that the jury "must use only the evidence that

was presented in this courtroom." We disagree with defendant's reading of the instructions.

The language to which defendant objects "merely instructs the jury that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof. In other words, this instruction informs the jury that the People may not meet their burden of proof based on evidence other than that offered at trial. The instruction does not tell the jury that it may not consider any perceived lack of evidence in determining whether there is a reasonable doubt as to a defendant's guilt. Further, the remainder of the instructions clearly conveyed to the jury the notion that the People had the burden of proving [defendant's] guilt beyond a reasonable doubt and that the jury was required to determine whether the People had met their burden of proving all of the facts essential to establishing his guilt. [¶] . . . [¶]

"[T]he trial court in this case did not tell the jury that reasonable doubt must arise from the evidence presented at trial, and, given the courts other instructions, it would not have been reasonable for the jury to interpret CALCRIM No. 220 as stating that the jury was precluded from considering any perceived lack of evidence in determining [defendant's] guilt." (*People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509-1510, fn. omitted; see also *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1267-1269.)

V

Multiple Convictions of Violating Section 148

Defendant claims error occurred when he was convicted of three separate misdemeanor counts of resisting a peace officer in the discharge of his duty. (§ 148, subd. (a).) He asserts that because the multiple counts arose from a single, nonviolent act, he can be convicted at most of only one count. Alternatively, he claims he suffered ineffective assistance of counsel because his trial counsel did not move to dismiss two of the counts. We disagree with both of his arguments. Defendant can be convicted for each peace officer he resisted.

Unless the Legislature says otherwise, if a defendant commits a single criminal act that affects multiple victims, he can be convicted of multiple counts of violating the same statute only if the gravamen of the offense "is centrally 'an act of violence against the person.'" (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 351, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 20.)

Regarding section 148, the Legislature has said otherwise. It has treated violations of section 148 similar to how the courts treat a violent criminal act that affects multiple victims. A defendant can be convicted under section 148 for each peace officer he obstructs, even if he engages in only one act of obstruction. This rule is found in subdivision (e) of section 148. The statute reads, in pertinent part: "A person may be convicted of multiple violations of this section [section

148] if more than one public officer, peace officer, or emergency medical technician are victims." (§ 148, subd. (e).) (Neither party cited this subdivision to us.)

The Legislature could not have been clearer. If, in the course of resisting an officer, a defendant resists another officer, he is guilty of committing a second separate offense and may be convicted separately for that offense.

The facts of this case highlight why section 148, subdivision (e), is good policy. The pursuing deputies attempted to apprehend defendant while knowing he might have been armed, and one of the deputies drew his weapon to make the arrest. Defendant put himself, the deputies, and the public at risk of harm each time, and in each place, he refused to obey the deputies. His conduct in this case makes him more culpable than a person who resists arrest by only one officer in one location.

Defendant relies on *People v. Garcia* (2003) 107 Cal.App.4th 1159 (*Garcia*) to assert he is subject to only one conviction, but that case is distinguishable. There, the defendant was convicted of three counts of felony evading a peace officer (Veh. Code, § 2800.2, subd. (a)). (*Garcia*, *supra*, at pp. 1161-1162.) The Court of Appeal reversed two of the counts. Although the pursuit had involved multiple peace officers in multiple vehicles, "the evading was an uninterrupted single course of conduct, i.e., one continuous act of driving lasting 30 minutes. The statutory language . . . contemplates a

continuous course of driving, which may transpire over a short or long period of time." (*Id.* at p. 1163.)

Here, even if defendant's acts of resisting arrest were one continuous act, the statutory language is different. Unlike the statute at issue in *Garcia*, section 148 expressly states a defendant can be convicted for each officer whose exercise of duty he resists. *Garcia* does not apply to this case.[5]

The evidence shows defendant resisted arrest by three different peace officers. Under the express language of section 148, defendant could be convicted for each officer whose exercise of duty he resisted. Thus, there was no error, and defense counsel did not render ineffective assistance by not moving to dismiss two of the counts.

VI

Multiple Punishments on Section 148 Counts

We turn from the issue of multiple convictions to the issue of multiple punishments. Defendant claims the trial court

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[5] We are aware the federal Ninth Circuit Court of Appeals has stated that "under California law, persons who violate § 148(a)(1) in a number of respects in the course of a single incident may be charged and convicted only once." (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 699, fn. 5 (*Smith*).) We refuse to give the *Smith* court's statement any weight to the extent the statement can be interpreted to limit the number of section 148 convictions to one no matter how many officers are victims. The *Smith* court made no mention of the Legislature's contrary directive in section 148, subdivision (e), perhaps because the defendant in that case pleaded guilty to only one count of violating section 148, even though he violated the statute numerous times against at least two peace officers. (*Smith*, *supra*, at pp. 693-694, 696-697.)

violated section 654 when it imposed concurrent one-year jail terms for each violation of section 148. He argues section 654 required the court to stay imposition of sentence on two of the misdemeanor counts because the three convictions were based on a single course of conduct and the acts of resisting were incident to one objective. We disagree.

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. . . ."

Case law has expanded the meaning of section 654 to apply to more than one criminal act when there was a course of conduct that violates more than one statute but nevertheless constitutes an indivisible transaction. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) "Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of 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* [*supra*,] 55 Cal.2d [at p. 19].) If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) If, however, the defendant had multiple or simultaneous objectives, independent of and not merely

incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

"The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial. [Citation.] The factual finding that there was more than one objective must be supported by substantial evidence. [Citation.]" (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Defendant claims the facts at best support a finding that he violated section 148 with one and the same objective -- to avoid arrest by the officers. The Attorney General argues the evidence supports the trial court's implicit determination that defendant violated section 148 three times with an independent criminal objective for each violation -- to avoid arrest by each particular officer.

We agree with the Attorney General. Defendant formed a new and independent intent with each officer he encountered. Moreover, each encounter by an armed peace officer and an armed, fleeing felon carried with it the potential for death or great bodily injury for the officer, for the defendant, and for differing sets of residents of the apartment complex where the three encounters occurred. We conclude on the facts of this case that substantial evidence supports the trial court's

implicit determination that defendant had a separate objective for each violation of section 148.

VII

Failure to Explain Reasons for Imposing Upper Term

Defendant claims the trial court erred when it did not state on the record its reasons for imposing the high term on the handgun enhancement. Defendant acknowledges his failure to object on this point forfeits the argument here (*People v. Scott* (1994) 9 Cal.4th 331, 353), and he thus argues he suffered ineffective assistance of counsel when his trial attorney failed to object to the court's silence. We disagree.

The parties initially disagree over whether the trial court in fact specified its reasons for imposing the high term on the enhancement. The language used by the court at sentencing is unclear in its context. The court repeatedly stated it was imposing the "high term" due to defendant's criminal record and the fact the court was running the misdemeanor sentences concurrently. However, the court did not specify whether it was referring to both the high terms on the underlying felony and the enhancement, or just the felony. For purposes of argument only, we assume the court did not specify its reasons for imposing the upper term on the enhancement, and we turn to defendant's argument of ineffective assistance.

To prevail on a claim of ineffective assistance, defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466

U.S. 668, 687-696 [80 L.Ed.2d 674, 693-699].) In other words, defendant must show that had his trial counsel objected to the court's failure to explain its reasons for imposing the upper term on the enhancement, it is reasonably probable the trial court, after explaining its reasons, would have imposed a less severe sentence.

Both defendant and the Attorney General remind us that section 1170.1, subdivision (d), which continues to require a court imposing an enhancement punishable by three possible terms to impose the middle term unless there are circumstances in aggravation or mitigation, was not revised by the Legislature in response to *Cunningham*. Thus, the imposition of the upper term of an enhancement pursuant to section 1170.1, subdivision (d), such as the enhancement here, must be consistent with *Cunningham*, i.e., the facts supporting the upper term, other than the fact of a prior conviction, must have been found by a jury or admitted by the defendant. (*Cunningham, supra*, 549 U.S. at p. __ [166 L.Ed.2d at pp. 864-865]; *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*); *People v. Lincoln* (2007) 157 Cal.App.4th 196, 205-206.)

Defendant claims we cannot determine whether he was prejudiced by his counsel's failure to object because without the court's statement of reasons for imposing the high term, we cannot determine beyond a reasonable doubt that the jury would have found true a fact supporting the upper term. He also claims the reasons the court gave for imposing the upper term on the underlying felony would not support the upper term on the

enhancement because his criminal record, consisting entirely of juvenile adjudications, cannot constitutionally support a higher term sentence, and because the potential imposition of consecutive sentences itself is subject to a jury approving the supporting facts. Defendant is mistaken, as both reasons for imposing the upper term on the threat count support the upper term on the enhancement.

Defendant's juvenile adjudications qualified as prior convictions for purposes of *Cunningham* and the imposition of the upper sentencing term. As defendant notes, this issue is currently pending before the California Supreme Court in *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted October 10, 2007, S154847 (*Nguyen*).

The majority of courts to have considered this issue, including every California appellate court besides the Sixth Appellate District in *Nguyen*, and every federal appellate court besides the Ninth Circuit in *United States v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1193-1194 (*Tighe*), have rejected defendant's argument. A juvenile's guilt must be established beyond a reasonable doubt, and the juvenile is afforded protection against double jeopardy (Welf. & Inst. Code, §§ 602, 701; *People v. Fowler* (1999) 72 Cal.App.4th 581, 585), the juvenile has the right to notice (Welf. & Inst. Code, § 658), the right to counsel (*id.* at § 679), and the right to confront and cross-examine witnesses (*id.* at § 702.5), and the privilege against self-incrimination (*ibid.*). Thus, the general reasoning has been that even without benefit of a jury trial, in

California a juvenile adjudication has sufficient procedural safeguards to permit a trial court to use it to enhance a sentence without violating the defendant's constitutional rights. (E.g., *People v. Fowler, supra,* 72 Cal.App.4th at p. 585; *People v. Buchanan* (2006) 143 Cal.App.4th 139, 149; *People v. Palmer* (2006) 142 Cal.App.4th 724, 733; *People v. Bowden* (2002) 102 Cal.App.4th 387, 393-394; *People v. Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817, 830-831 (*Andrades*); *People v. Lee* (2003) 111 Cal.App.4th 1310, 1314-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079.)

We continue to find the reasoning and considerations of the majority of opinions to be persuasive. Given that juvenile adjudications are fully consistent with constitutional principles and sufficiently reliable for juvenile court purposes, even in the absence of the right to a jury trial, we see no reason to preclude their use by trial courts in enhancing criminal defendants' sentences. These rights and protections extended to juveniles in California make the juvenile adjudicative process sufficiently reliable to satisfy the due process concerns expressed in *Cunningham* and *Apprendi*. (*Andrades, supra,* 113 Cal.App.4th at pp. 833-834.)

Additionally, defendant's assertion that the imposition of consecutive sentences is subject to *Cunningham* is incorrect. Our Supreme Court had held a trial court does not violate a defendant's right to jury trial when it finds facts for imposing consecutive sentences (*People v. Black* (2007) 41 Cal.4th 799, 812-813 (*Black II*)), and the United States Supreme Court very

recently reached the same conclusion. (*Oregon v. Ice* (Jan. 14, 2009) __ U.S. __ [172 L.Ed.2d 517].)

Having concluded defendant's prior juvenile adjudications qualify as prior convictions for purposes of imposing an upper term enhancement, and that the court has the authority to find facts necessary to impose consecutive sentences, we can easily conclude defendant would not have received a more lenient sentence had his counsel objected to the court's failure to state its reasons for imposing the upper term on the enhancement. As a juvenile, defendant earned four juvenile adjudications: misdemeanor battery against a school employee, misdemeanor possession of stolen property, misdemeanor grand theft, and felony vehicle theft. Each of these convictions was a sufficient ground for imposing the upper term, and we have no doubt the trial court would have imposed the upper enhancement term on that basis whether or not it would have explained its reasoning. Defendant suffered no ineffective assistance of counsel.

VIII

Cunningham *Error*

With his final argument, defendant contends the trial court violated the constitutional proscriptions set forth in *Cunningham* when it imposed the upper term on the criminal threat count pursuant to the revised Determinate Sentencing Law (Sen. Bill No. 40). Defendant acknowledges we are bound to follow the state Supreme Court's rejection of his argument in *Black II, supra,* 41 Cal.4th 799, and *People v. Sandoval* (2007) 41 Cal.4th

825 (*Sandoval*). (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Senate Bill No. 40, *Black II* and *Sandoval* authorized the trial court to impose the upper term based upon defendant's prior juvenile adjudications, as just explained. (Cal. Rules of Court, rule 4.421(b)(2).) The court committed no *Cunningham* error.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

We concur:

SCOTLAND, P. J.

ROBIE, J.