Filed 8/19/09

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ROBERT LEE MOBERLY,<br>Defendant and Appellant. | F054954<br>(Super. Ct. No. BF116563A)<br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. Lee Phillip Felice, Judge.

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part I. of DISCUSSION.

Appellant Robert Lee Moberly shot and killed his son during an argument. A jury acquitted him of first and second degree murder, but found him guilty of voluntary manslaughter. The trial court sentenced him to 21 years in prison.

Appellant challenges both his conviction and sentence, arguing that (1) the trial court's failure to give a "benefit of the doubt" instruction regarding the choice between voluntary and involuntary manslaughter violated the requirements of *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*), and (2) the trial court violated the proscription against dual use of facts when it relied on the same fact to impose the upper term for manslaughter and for the related gun use enhancement.

We conclude as to appellant's first argument that the trial court's use of CALJIC Nos. 2.02, 8.74, and 8.75 satisfied the requirements of *Dewberry*. Thus, the jury was properly instructed regarding reasonable doubt in connection with the choice between voluntary and involuntary manslaughter.

As to appellant's second argument, we find no prohibited dual use of facts occurred.

We order that errors in the abstract of judgment be corrected. The judgment is otherwise affirmed.

## PROCEDURAL HISTORY

By an amended information filed in September 2007, the district attorney charged appellant with first degree murder (Pen. Code, § 187, subd. (a); count 1),[1] being a felon in possession of a firearm (§ 12021, subd. (a)(1); count 2), and being a felon in possession of ammunition (§ 12316, subd. (b); count 3). The murder count included an allegation that appellant personally used a firearm (§ 12022.5, subd. (a))[2] in commiting the offense.

---

[1]All further unlabeled statutory references are to the Penal Code.

[2]The amended information, verdict, and abstract of judgment all refer to the charge as section 12022.5, subdivision (a)(1), a nonexistant subdivision.

Appellant pled not guilty as to count 1 and denied the enhancement allegations. He entered a no contest plea as to counts 2 and 3.

Jury trial on count 1 began in December 2007. The jury reached a decision on December 18, 2007, finding appellant not guilty of murder but guilty of voluntary manslaughter and finding true the enhancement for personal use of a firearm (§ 12022.5 subd. (a)).

The trial court denied probation and sentenced appellant to a total of 21 years in state prison: the upper term of 11 years for the voluntary manslaughter conviction and the upper term of 10 years, consecutive, for the firearm enhancement. The court also imposed a concurrent three-year upper term on the count 2 charge and a three-year upper term on the count 3 charge, which it stayed pursuant to section 654.[3]

**FACTS**

We provide only a limited summary of the facts relating to the crime because the details and the conflicts in the evidence are not material to the issues decided in this appeal. It is enough to state that substantial evidence exists to support appellant's conviction.

In October 2006, appellant was 59 years old and lived with his wife and their four grandchildren in Bakersfield. Their son, Thomas Moberly, was the father of the four children.

On October 16, 2006, appellant, his wife, and Thomas took one of the children to a counseling session. Thomas's wife, Jackie, also attended the session. During the counseling session, appellant became angry with Jackie, and he and his wife left.

When the counseling session was over, Thomas went to the home of appellant. An argument ensued and Thomas refused to leave. Appellant went to his bedroom and returned with a gun. He again told Thomas to leave. Instead of leaving, however,

[3]The abstract of judgment does not indicate that the term on the count 3 charge was stayed pursuant to section 654.

Thomas moved closer to appellant and said, "'Go ahead, Dad. Go ahead and shoot me.'" A witness testified that Thomas touched his head to the gun a couple of times.

Appellant's wife, who was standing between her husband and son with her back to her son, heard a gunshot and turned to see Thomas had been shot in the head. Appellant went outside, saw one of his grandsons, and handed him the gun. Then he got in a car and left.

Appellant drove to his brother's house. He was hysterical, crying that an accident had just occurred. He told his brother that, during a dispute in which he wanted his son to leave the house, his son head-butted the gun, saying to go ahead and shoot because he was not leaving.

## DISCUSSION

### I. Reasonable Doubt Regarding Voluntary and Involuntary Manslaughter*

#### A. Instructions Given

##### *1. Elements of the crimes*

The trial court instructed the jury on the elements of first and second degree murder and used CALJIC No. 8.50 to inform the jury how to distinguish murder from manslaughter.[4]

---

*See footnote, *ante*, page 1.

[4]CALJIC No. 8.50 reads:

"The distinction between murder [other than felony-murder] and manslaughter is that murder [other than felony-murder] requires malice while manslaughter does not.

"When the act causing the death, though unlawful, is done [in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation,] [or] [in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury,] the offense is manslaughter. In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent.

"To establish that a killing is murder [other than felony-murder] and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel] [or] [in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury]."

The court used CALJIC No. 8.37 to instruct the jury: "The crime of manslaughter is the unlawful killing of a human being without malice aforethought. It is not divided into degrees but is of two kinds, namely, voluntary manslaughter and involuntary manslaughter." The court then instructed the jury on the elements of the two kinds of manslaughter using CALJIC Nos. 8.40 (voluntary manslaughter) and 8.45 (involuntary manslaughter).

Both kinds of manslaughter included the elements that (1) a human being was killed and (2) the killing was unlawful. The voluntary manslaughter instruction also included elements "three, the perpetrator of the killing either intended to kill the alleged victim or acted in conscious disregard for life; and, four, the perpetrator's conduct resulted in the unlawful killing."

***2. Instructions relating to reasonable doubt and unanimity***

The trial court instructed the jury that the prosecution had the burden of proving beyond a reasonable doubt that the killing was unlawful—that is, it was not justifiable or excusable. The court also stated: "If you have a reasonable doubt that the homicide was unlawful, you must find [appellant] not guilty."

The jury was instructed with CALJIC No. 8.71 that if it was convinced beyond a reasonable doubt and unanimously agreed that appellant committed murder, but unanimously agreed a reasonable doubt existed as to whether appellant was guilty of first degree or second degree murder, it must give appellant the benefit of the doubt and convict him only of second degree murder.

Similarly, the jury was instructed with CALJIC No. 8.72 that if it was convinced beyond a reasonable doubt and unanimously agreed that the killing was unlawful, but had a reasonable doubt whether the crime was murder or manslaughter, it must give appellant the benefit of the doubt and convict him only of manslaughter.

A third "benefit of the doubt " instruction regarding whether any unlawful killing was voluntary manslaughter or involuntary manslaughter was neither requested by

appellant nor given sua sponte by the trial court. The court did, however, instruct the jury as follows, using CALJIC No. 2.02:

> "Also, if the evidence as to any specific intent and/or mental state permits two reasonable interpretations one which points to the existence of a specific intent and/or mental state, the other to its absence, you must adopt that interpretation which points to its absence."

In addition, the trial court relied on CALJIC No. 8.74 to instruct the jury: "Before you may return a verdict in this case, you must agree unanimously not only as to whether [appellant] is guilty or not guilty but also if you should find him guilty of an unlawful killing you must agree unanimously as to whether he's guilty of murder of the first degree or murder of the second degree or voluntary or involuntary manslaughter."

Using CALJIC No. 8.75, the trial court provided the jury with detailed directions about how it should complete the verdict forms and reiterated the need for unanimity. The first and last paragraphs of that instruction addressed (1) conviction of a crime lesser than first degree murder and (2) the choice between voluntary and involuntary manslaughter:

> "If you're not satisfied beyond a reasonable doubt that [appellant] is guilty of the crime of first degree murder as charged in Count 1, and you unanimously so find, you may convict him of any lesser crime provided you're satisfied beyond a reasonable doubt that he's guilty of the lesser crime. [¶] … [¶]
>
> "If you unanimously find [appellant] not guilty of murder of the first degree and not guilty of murder in the second degree, but are unable to unanimously agree as to the crime of voluntary and/or involuntary manslaughter, your foreperson should sign and date the not guilty verdict form for first and second degree murder and report your disagreement to the Court."[5]

---

[5]CALJIC No. 17.10, which is a general instruction regarding conviction of lesser included or lesser related offenses, was not requested or used to instruct the jury. (See *People v. Friend* (2009) 47 Cal.4th 1, 55-56 [failure to give CALJIC No. 8.71, regarding benefit of the doubt between first and second degree murder, would not have misled jury in light of other instructions given, including CALJIC No. 17.10]; *People v. Barajas* (2004) 120 Cal.App.4th

### B. Contentions

Appellant contends that "the trial court committed prejudicial error in failing to instruct the jury that if it had a reasonable doubt whether the crime was voluntary or involuntary manslaughter, it should give [him] the benefit of that doubt and find him guilty of involuntary manslaughter." Appellant bases his contention on *Dewberry* and section 1097.[6] In *Dewberry*, the California Supreme Court stated:

> "It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense. [Citations.]" (*Dewberry, supra*, 51 Cal.2d at p. 555.)

The Attorney General argues that (1) appellant forfeited this argument by failing to request such an instruction at trial, (2) *Dewberry* did not require the instruction because involuntary manslaughter is not a lesser included offense of voluntary manslaughter, and (3) any instructional error was harmless. Though we disagree with respondent's analysis,[7] we find the jury was sufficiently instructed.

---

787, 793 [*Dewberry* requirement satisfied by use of CALJIC No. 17.10 in place of CALJIC No. 8.72].)

[6]Section 1097 provides in full: "When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only."

[7]As to forfeiture, appellant argues the trial court had a sua sponte duty to instruct. Thus respondent's forfeiture position is a non sequitur. As to the question whether the *Dewberry* instruction is required only in connection with lesser included offenses, we note that the California Supreme Court has, at least twice, said otherwise. (*People v. Friend*, *supra*, 47 Cal.4th at p. 55 ["We held in *People v. Dewberry* that 'a criminal defendant is entitled to the benefit of a jury's reasonable doubt with respect to all crimes with lesser degrees or related or included offenses.' (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262)]."")

**C. Analysis**

We will assume for purposes of this opinion that under *Dewberry* (1) the offense of involuntary manslaughter qualifies as a lesser offense of voluntary manslaughter and (2) a "benefit of the doubt" instruction (or an equivalent) regarding the choice between the two should be given when "benefit of the doubt" instructions have been given regarding (a) the choice between first degree murder and second degree murder and (b) the choice between second degree murder and manslaughter.

Based on these assumptions, we will consider whether the trial court's use of CALJIC Nos. 2.02, 8.74, and 8.75 nonetheless satisfied the requirements of *Dewberry*.

The jury was told that, to convict appellant of voluntary manslaughter, the jury had to find that he "either intended to kill the alleged victim, or acted in conscious disregard for life." This element regarding appellant's intent or state of mind was not included in the elements that defined involuntary manslaughter.

With respect to state of mind, the trial court used CALJIC No. 2.02 to instruct the jury that, if the evidence as to specific intent or mental state permitted two reasonable interpretations, one of which pointed to the existence of a specific intent or mental state and the other to its absence, the jury must adopt the interpretation which points to its absence.

The effect of CALJIC No. 2.02 and the instructions regarding the elements of voluntary manslaughter and involuntary manslaughter is as follows: The jury convicted appellant of voluntary manslaughter because the only reasonable interpretation of the evidence regarding his state of mind was that he intended to kill or acted in conscious disregard of life.

We conclude that CALJIC No. 2.02, coupled with the unanimity requirements set forth in CALJIC Nos. 8.74 and 8.75, adequately apprised the jury that it could not convict appellant of the greater crime of voluntary manslaughter unless it unanimously found beyond a reasonable doubt that appellant acted with the intent to kill or with a conscious

disregard of life. We further conclude that the *Dewberry* requirements are satisfied by the instruction regarding the reasonable interpretation of the evidence and that an explicit admonition regarding the "benefit of the doubt" is not essential. These conclusions are consistent with the California Supreme Court's view of CALJIC No. 2.02.

In *People v. Musselwhite, supra,* 17 Cal.4th 1216, the defendant relied on *Dewberry* in claiming "the trial court prejudicially erred when it failed to instruct the jury, sua sponte, that if it had a reasonable doubt whether defendant attempted to murder [one of the victims], but believed he assaulted her with a deadly weapon, they should give defendant 'the benefit of the doubt' and find him guilty of the lesser offense of assault with a deadly weapon." (*Id*. at p. 1261.) The defendant argued the instructional omission was especially prejudicial "because the trial court *did* give the jury two similar 'benefit of the doubt' instructions—with respect to first and second degree murder and with respect to murder and manslaughter." (*Ibid*.; see CALJIC Nos. 8.71 & 8.72.) The defendant argued the instructions regarding the benefit of any reasonable doubt the jury might have with respect to these offenses and the omission of such an instruction regarding the attempted murder charge and the lesser offense of assault with a deadly weapon left the jurors with the erroneous implication that the benefit of the doubt rule did not apply to the latter charge and lesser offense. (*Musselwhite, supra,* at p. 1261.) The California Supreme Court discussed *Dewberry* and rejected the defendant's argument:

> "… That was a murder case in which the trial court instructed the jury on the elements of murder and manslaughter, explained that there were two degrees of murder and that, if the jury decided defendant had committed murder but had a reasonable doubt as to the degree, 'they should give defendant the benefit of the doubt and find him guilty of second degree murder.' [Citation.] Although the *Dewberry* jury also was instructed that if it had a reasonable doubt whether the killing was manslaughter or justifiable homicide, it was to acquit, the trial court refused a *general* defense instruction that would have told the jury that if it found the defendant '"was guilty of an offense included within the charge …, but entertain a reasonable doubt as to the degree of the crime of which he is guilty, it is your duty to convict him only of the lesser offense."' [Citation.]

"We reversed the jury's ensuing conviction of Dewberry of second degree murder on the ground that a criminal defendant is entitled to the benefit of a jury's reasonable doubt with respect to *all* crimes with lesser degrees or related or included offenses. [Citation.] The 'failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.' [Citation.] Defendant's case is different. Here, the trial court *did* give the jury several generally applicable instructions governing its use of the reasonable doubt standard. All redounded to defendant's benefit in the sense that each required the jury, where it had a reasonable doubt as to *any included or related offenses or degrees*, to find defendant guilty of the lesser included or related offense or lesser degree, that is, to give defendant the benefit of any reasonable doubts it may have had. Granted, the trial court gave *specific* reasonable doubt benefit instructions only with respect to first and second degree murder (CALJIC No. 8.71) and murder and manslaughter (CALJIC No. 8.72), and did not give such a specific instruction with respect to attempted murder and assault with a deadly weapon.

"But that omission alone does not place this case within *Dewberry*'s orbit. A jury instructed that it must give a defendant charged with murder the benefit of any doubt with respect to first and second degree murder but not instructed to that effect generally is obviously different from a jury instructed with respect to the degrees of murder *and* instructed as the jury was here: '[I]f the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.' In effect, the jury instruction just quoted fulfilled the same function as the instruction proffered by the defendant in *People v. Dewberry*, *supra*, 51 Cal.2d at page 554, and erroneously refused by the trial court in that case. There was no instructional error on this score at defendant's trial." (*People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1262-1263.)

The trial court in this case, like the trial court in *Musselwhite*, instructed the jury with the benefit of the doubt instructions between first degree murder and second degree murder, and between murder and manslaughter using CALJIC Nos. 8.71 and 8.72. Both trial courts also instructed the jury that it must adopt the interpretation which points to the

absence of the specific intent or mental state if that interpretation was reasonable (CALJIC No. 2.02). In *Musselwhite*, our Supreme Court determined the use of this instruction effectively functioned as a *Dewberry* instruction regarding the benefit of the doubt. We find *Musselwhite* controlling and, as a result, conclude there was no instructional error in this case.

## II. Dual Use of Aggravating Factor in Imposing Upper Terms

### A. Rules of Law Governing the Choice of Terms

Appellant was sentenced under the post-*Cunningham*[8] version of section 1170. (Stats. 2007, ch. 3, § 2, effective Mar. 30, 2007.) Under that provision, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, subd. (b).)

The California Supreme Court has stated that the broad discretion given to trial courts by section 1170 is subject to review for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "[A] trial court will abuse its discretion … if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid*.)

Neither section 1170 nor the California Rules of Court attempts to provide an inclusive list of aggravating circumstances. Thus, a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made. (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 848; see Cal. Rules of Court, rules 4.408(a) & 4.420(c), (d).)

### B. Trial Court's Reasons for Imposing Upper Terms

At the March 2008 sentencing hearing, the trial court heard argument from counsel and stated its determinations regarding mitigation and aggravation:

---

[8] *Cunningham v. California* (2007) 549 U.S. 270.

"Within the sentencing framework, the Court makes the following findings: In mitigation, notwithstanding [the prosecutor]'s arguments, I do find that [appellant] did complete drug diversion in [case No. ]BF079000. His record, given his age, I don't know that the number of convictions are of significance.

"But in aggravation, the crime involved great violence. [Appellant] has served a prior prison term. [Appellant]'s prior performance on misdemeanor probation, felony probation, and parole has been unsatisfactory in that he violated terms and conditions of those statuses and reoffended. And most significantly—I am not going to impose consecutive terms as to the second and third count, the ex-felon in possession of the firearm or ex-felon in possession of the ammunition, but I think the fact that he was an ex-felon and did have those items is a significant factor in aggravation in this case and to a great deal—to a great extent, I should say, is the manner in which I end up coming to the determination that as to both the voluntary manslaughter and the use of firearm, the aggravated terms are appropriate."

**C. Contentions**

Appellant contends the trial court erred in relying on a single significant factor to impose the upper term on both the voluntary manslaughter count and the gun use enhancement. He argues this violates the prohibition against dual use set forth in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*) and *People v. Velasquez* (2007) 152 Cal.App.4th 1503. We disagree.

As noted in *Scott*, the prohibition against dual use of facts in sentencing is a limited one: "Although a single factor may be relevant to more than one sentencing choice, such dual or overlapping use is prohibited *to some extent*." (*Scott, supra,* 9 Cal.4th at p. 350, italics added.) The opinion in *Scott* describes three circumstances in which dual use of the same fact or facts is prohibited. We will discuss them seriatim.

The first circumstance in which dual use is proscribed is set out in section 1170, subdivision (b): "[T]he court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed …." California Rules of Court, rule 4.420(c) states principle rule as follows: "To comply with section 1170(b), a fact charged

and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so." (See *Scott*, *supra*, 9 Cal.4th at p. 350.) The trial court here did not use the same fact or facts to impose an upper term and to impose an enhancement. The fact underlying the enhancement (personal use of a firearm), that is, was not used by the trial court as a circumstance in aggravation to select the upper term.

A second circumstance in which dual use is prohibited also is addressed in California Rules of Court, rule 4.420(d): "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term." *Scott* states the rule as follows: A sentencing court may not "use a fact constituting an element of the offense either to aggravate or to enhance a sentence." (*Scott*, *supra*, 9 Cal.4th at p. 350.) That is not what occurred here.

*Scott* states a third circumstance in which dual use is proscribed and also notes the limited reach of the proscription: "[T]he court cannot rely on the same fact to impose both the upper term and a consecutive sentence. [Citations.] However, one relevant and sustainable fact may explain a series of consecutive sentences. [Citations.]" (*Scott*, *supra*, 9 Cal.4th at p. 350, fn. 12.) Again, the present situation does not involve a violation of the described prohibition.

Appellant provides the following quotation found in dicta, in a footnote, in the opinion in *Velasquez*: "The same fact cannot be used to impose an upper term on a base count and an upper term for an enhancement. (*People v. Scott*, *supra*, 9 Cal.4th at p. 350.)" (*People v. Velasquez*, *supra*, 152 Cal.App.4th at p. 1516, fn. 12.) An examination of the opinion in *Scott*, however, nowhere reveals support for this proposition. *Scott* simply does not mention the use of the same fact or facts to select both an upper term for a count and an upper term for an enhancement—the situation that occurred here. We therefore will not follow the lead of *Velasquez*.

We will, instead, conclude that the dual use of a fact or facts to aggravate both a base term and the sentence on an enhancement is not prohibited. We draw this conclusion by comparison with cases recognizing there is no prohibition on the dual use of facts to impose more than one aggravated term. (See, e.g., *People v. Robinson* (1992) 11 Cal.App.4th 609, 616, disapproved on other grounds in *Scott*, *supra*, 9 Cal.4th at p. 353, fn. 16; *People v. Williams* (1984) 157 Cal.App.3d 145, 156.) In *People v. Price* (1984) 151 Cal.App.3d 803, the trial court sentenced the defendant to the upper term on each of four fully consecutive counts in a sex crimes case.[9] It used the same set of aggravating circumstances both to make the choice to sentence consecutively and to impose the upper terms on all of the counts. While the appellate court found that the trial court violated the dual use prohibition by using the same facts to select upper terms and sentence consecutively, it found no error in the dual use of facts to select the upper term on the four different counts. (*Price*, *supra*, at pp. 812, 815-816.)[10] This use of the same facts—to impose the aggravated sentence on multiple, consecutive terms—is for present purposes similar to use of the same fact or facts to impose the aggravated sentence on a single offense and on its accompanying, consecutive enhancement. Appellant provides no rationale for distinguishing the situations, and we find no principled distinction exists. We therefore find no sentencing error occurred.

**DISPOSITION**

The judgment of conviction and sentence are affirmed. The trial court is directed to amend the abstract of judgment to reflect that (1) the enhancement to count 1 is for section 12022.5, subdivision (a), not section 12022.5, subdivision (a)(1), and (2) the term

---

[9]The court had discretion to make the sentences on each count fully consecutive pursuant to section 667.6 subdivision (c). (*People v. Price*, *supra*, 151 Cal.App.3d at pp. 811.)

[10]The *Price* court held that the dually used fact must be reasonably related to each count for which the fact is used. (*People v. Price*, *supra*, 151 Cal.App.3d at pp. 812-813.) This requirement is not an issue here.

imposed for count 3 is stayed pursuant to section 654. The trial court is further directed to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

_____
DAWSON, J.

WE CONCUR:

_____
CORNELL, Acting P.J.

_____
KANE, J.