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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RALPH CARL PALMER, Defendant and Appellant.	B170281 (Los Angeles County Super. Ct. No. KA057035)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed.

Susan Pochter Stone, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, Lawrence M. Daniels and Susan Sullivan Pithey, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III.B through III.F of the Discussion. The portions of this opinion to be deleted from publication are those portions enclosed within double brackets, [[ ]].

I.

INTRODUCTION

Defendant and appellant Ralph Carl Palmer committed an armed robbery of a Stein Mart store. As Palmer was attempting to drive from the crime scene, La Verne Police Officer Michael Burks stopped Palmer in the store parking lot. As Burks was exiting his patrol vehicle, Palmer suddenly exited his car, swiveled around, and shot at Burks. Burks dove for cover behind his patrol vehicle's door, breaking his ankle in the process. A jury convicted Palmer of second degree robbery, attempted murder, and assault on a peace officer with a semiautomatic firearm. It also found true allegations that Palmer personally and intentionally used and discharged a firearm during commission of the attempted murder and assault, proximately causing great bodily injury. (Pen. Code, § 12022.53, subd. (d).)[1] As a result of the jury's findings on the section 12022.53, subdivision (d) allegations, Palmer's sentence was enhanced by a prison term of 25 years to life.

In the published portion of this opinion, we conclude that the section 12022.53, subdivision (d) enhancement for discharging a firearm, proximately causing injury, is satisfied even though the injury at issue is not a bullet wound but a broken ankle resulting from the victim's evasive action. We further conclude the evidence was sufficient to prove the injury was caused by the discharge of the gun, rather than the mere pointing of the gun, and defense counsel therefore was not ineffective for failing to advance an insufficiency theory. Finally, we conclude that the jury was not mislead by CALJIC No. 17.19.5.

In the unpublished portion of the opinion, we consider and reject Palmer's contentions that the trial court committed instructional error; his counsel was ineffective; the trial court erred by allowing admission of evidence of a prior

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

conviction and prison term; the trial court erred by denying his *Pitchess*[2] motion for in camera review of peace officer records; the prosecutor committed prejudicial misconduct; jurors committed prejudicial misconduct; the trial court failed to exercise informed discretion when sentencing him; and his sentence was imposed in violation of *Blakely v. Washington.*[3]

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Facts.*

On the evening of December 23, 2001, Palmer robbed three employees at a La Verne Stein Mart store. Palmer, who was wearing a beanie with a star embroidered on the front, and a bandanna covering his face from the nose down, entered the store carrying a semiautomatic firearm. He approached cashier Dustin Figueroa, who was counting the money in the register, pointed a gun at Figueroa, and told him to leave the register open. Palmer took bills from the register and placed them into a black pouch he was carrying.

Palmer then approached cashier Sara Guillen. While holding the gun, he told her to "open [her] till." She backed away and allowed Palmer to remove money from the register. Palmer took only bills, not coins.

Assistant Manager Jill Cochran was at the front of the store when Palmer entered. Alarmed by the fact he was wearing a bandanna over the lower half of his face, she headed to the customer service desk to telephone police. Palmer displayed the gun and told her not to move.

After removing money from the two registers, Palmer departed. Cochran telephoned police.

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2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

3 *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531].

La Verne police officer Michael Burks, who was on patrol without a partner, happened to be in the Stein Mart parking lot when Palmer hastily departed from the store. Palmer was no longer wearing the bandanna over his face. When Palmer saw Burks, Palmer entered a dark-colored Mazda. As Palmer was backing out, Burks received a radio call regarding the robbery. Because the description of the robber matched Palmer's appearance, Burks drove behind the Mazda and activated the patrol car's lights. Palmer "almost instantaneously" stopped the Mazda. As Burks was exiting his patrol car, Palmer suddenly stepped out of the driver's seat, swiveled around with the gun, and fired a shot at Burks. Burks dove behind his open car door, pivoting on and breaking his ankle in the process.[4] A bullet hit the patrol vehicle's driver's side mirror. Burks fired approximately 10 shots at Palmer, but struck the pavement because he was unable to aim due to his ankle injury. Palmer drove from the scene. Burks notified a police dispatcher of a portion of Palmer's license plate.

Palmer sped down Foothill Boulevard, committing various traffic violations and accelerating to speeds up to 100 miles per hour. Travis Bauer, an off-duty police officer for the City of Covina, observed Palmer's driving. He followed Palmer and telephoned police. Eventually Palmer crashed into a chain link fence. Bauer approached Palmer's vehicle to determine whether anyone was hurt. Palmer emerged from the driver's side and fled, eluding authorities.

The Mazda was determined to belong to Palmer's girlfriend, Sonja Edwards. Edwards reported the car as stolen approximately one hour after the crash. In the Mazda, officers discovered, among other things, an employee identification card bearing Palmer's name and photograph, and a roll of film that, when developed, contained a photograph of Palmer. Eight hundred dollars, the

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[4] Burks's injury required that he wear a cast for three to four months. At the time of trial, he was still suffering swelling and bruising in his foot as a result of the break.

same amount taken from the Stein Mart store, was also discovered in the car. The first four digits of the vehicle's license plate corresponded to those reported to the dispatcher by Officer Burks. The vehicle's airbags had deployed during the crash, and Palmer was the "major donor" of DNA found on the driver's side airbag, suggesting he was the person who was struck by the airbag during the collision. Edwards told police that Palmer owned a white beanie with a star logo embroidered on the front.

B. *Procedure.*

Trial was by jury. Palmer was convicted of attempted willful, deliberate, and premeditated murder (§§ 664, 187, subd. (a)); assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)); and three counts of second degree robbery (§ 211). The jury further found true allegations that Palmer attempted to murder a peace officer engaged in the performance of his duties; personally and intentionally used and discharged a firearm during commission of the attempted murder and assault, proximately causing great bodily injury (§ 12022.53, subds. (b), (c), (d)); and personally used a firearm during commission of the robberies (§ 12022.53, subd. (b)). In a bifurcated proceeding, the trial court found true allegations that Palmer had suffered three prior serious or violent felonies (§§ 667, subd. (a)(1); 667, subds. (b) – (i); 1170.12, subds. (a) – (d).) The trial court sentenced Palmer to a term of 155 years to life in prison, and imposed a $10,000 restitution fine and a stayed parole revocation fine in the same amount. Palmer appeals.

III.

DISCUSSION

A. *Issues related to the section 12022.53, subdivision (d) enhancements.*

As noted, Palmer's sentence was enhanced as a result of the jury's findings that he personally discharged a firearm, proximately causing great bodily injury to Officer Burks. Palmer challenges the jury's true findings on the section 12022.53,

subdivision (d) enhancements on several bases. The premise underlying each of Palmer's claims is that Officer Burks dove for cover and broke his ankle in response to Palmer's act of *pointing* the gun, not *discharging* the gun. Therefore, he urges, the *discharge* was not a proximate cause of Burks's injury within the meaning of section 12022.53, subdivision (d). He also asserts that section 12022.53, subdivision (d) only applies when the victim's injury is "proximately caused by a discharged bullet," not when the injury was caused by the victim's evasive action. We reject Palmer's contentions.

1. *Section 12022.53, subdivision (d)'s proximate cause and injury requirements.*

Section 12022.53, also known as the "10-20-life" law (Assem. Bill No. 4 (1997-1998 Reg. Sess.)), was enacted in 1997 to substantially increase the penalties for using firearms in the commission of enumerated felonies, including, as relevant here, attempted murder and assault on a peace officer with a firearm. (§ 12022.53, subds. (a)(1), (7), (18); *People v. Oates* (2004) 32 Cal.4th 1048, 1052; *People v. Garcia* (2002) 28 Cal.4th 1166, 1171; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493; Stats. 1997, ch. 503, § 3.) The statute prescribes sentence enhancements (prison terms of 10 years, 20 years, and 25 years to life) for increasingly serious circumstances of firearm use. (*People v. Oates*, *supra*, at p. 1052; *People v. Martinez*, *supra*, at p. 493.) Section 12022.53, subdivision (b) requires imposition of an additional, consecutive term of 10 years when the defendant personally *uses* a firearm during commission of the crime. Subdivision (c) requires imposition of an additional, consecutive 20-year term when the defendant personally and intentionally *discharges* a firearm during commission of the crime. Subdivision (d), the provision at issue here, requires imposition of an additional, consecutive 25-years-to-life term when the defendant "personally and intentionally discharges a firearm and proximately causes great

bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice . . . ." (§ 12022.53, subd. (d); *People v. Garcia*, *supra*, at p. 1171.)

"In construing a statute, our task is to determine the Legislature's intent and purpose for the enactment. [Citation.] We look first to the plain meaning of the statutory language, giving the words their usual and ordinary meaning. [Citation.] If there is no ambiguity in the statutory language, its plain meaning controls; we presume the Legislature meant what it said. [Citation.] 'However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' [Citations.]" (*People v. Garcia*, *supra*, 28 Cal.4th at p. 1172; see also, e.g., *People v. Leal* (2004) 33 Cal.4th 999, 1007; *People v. Lopez* (2003) 31 Cal.4th 1051, 1056; *People v. Tapia* (2005) 129 Cal.App.4th 1153, 1160-1161.) We examine the statutory language in the context in which it appears, and adopt the construction that best harmonizes the statute internally and with related statutes. (*People v. Jefferson* (1999) 21 Cal.4th 86, 94; *People v. Tapia*, *supra*, at p. 1161.)

The parties do not dispute that, for the section 12022.53, subdivision (d) enhancement to apply, the discharge of the firearm must be the proximate cause of the victim's injury. We agree. Subdivision (d) provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."[5] Our Supreme Court has interpreted this

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[5] When Palmer committed the crimes in 2001, section 12022.53, subdivision (d) provided: "Notwithstanding any other provision of law, any person who is

language to mean that "[t]he enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*People v. Bland* (2002) 28 Cal.4th 313, 338; see also *People v. Garcia, supra,* 28 Cal.4th at p. 1169, fn. omitted ["Under Penal Code section 12022.53, subdivision (d), a defendant convicted of a qualifying felony who intentionally and personally discharges a firearm, proximately causing great bodily injury or death, is subject to an additional term of 25 years to life."]; *People v. Martinez, supra,* 76 Cal.App.4th at p. 495 ["25 years to life if the defendant's intentional discharge of the firearm proximately caused great bodily injury."].) Read in the context of the statutory scheme, the plain language of subdivision (d) clearly supports this interpretation. If there was any doubt, the legislative history of the statute is replete with evidence that the Legislature intended subdivision (d) to apply when the discharge of the firearm was the proximate cause of the injury.[6] (See Legis. Counsel's Dig., Assem. Bill No. 4 (1997-1998 Reg. Sess.) ["If great bodily injury was *proximately caused to any person other than an accomplice as a result of the firearm being discharged* under those circumstances, the person would be punished by an additional term of 25 years to life in the state prison . . . ." (italics added)]; Assem. Com. on Public Safety, Rep. on Assem. Bill No. 4 (1997-1998 Reg. Sess.) as amended Apr. 9, 1997, p. 1 [Assembly Bill No. 4 "[p]rovides that a 25-years-to-life enhancement shall also apply to any person who

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convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony." (Stats. 2000, ch. 287, § 23.) Because the post-2001 amendments of the statute do not alter our analysis, for clarity's sake we hereinafter refer to the current version of the statute.

intentionally *discharges a firearm so as to proximately cause great bodily injury* to another person during the commission of [enumerated crimes]" (italics added)]; *People v. Valencia* (2000) 82 Cal.App.4th 139, 146-147, and materials cited therein].)

We believe it is equally clear that a defendant can proximately cause injury by discharging a firearm within the meaning of section 12022.53, subdivision (d) *even if his or her bullet does not actually strike the victim. People v. Bland, supra,* 28 Cal.4th 313, is instructive. As noted *supra, Bland* concluded that section 12022.53, subdivision (d), "does not require that the defendant fire a bullet that directly inflicts the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*People v. Bland, supra,* at p. 338.) In *Bland,* the defendant and another man both fired shots at a vehicle occupied by three persons. One vehicle occupant was killed; the other two were injured. It was unclear whether the defendant or his accomplice actually fired the bullets that hit the surviving victims. (*Id.* at p. 318.) The defendant was convicted of first degree murder and two counts of attempted murder. The jury found true section 12022.53, subdivision (d) allegations on all three counts. (*Ibid.*) On appeal, the section 12022.53 findings were reversed, because the trial court had failed to define proximate cause. (*Id.* at pp. 334-335.) The appellate court also held the enhancement could not be found true " 'unless defendant personally fired the bullets which struck the victim.' " (*Id.* at p. 335.)

The California Supreme Court disagreed with the Court of Appeal, reasoning as follows. "Section 12022.53(d) requires that the defendant 'intentionally and *personally* discharged a firearm' . . . but only that he 'proximately caused' the great bodily injury or death. The jury, properly

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6 We take judicial notice of the legislative history of the statute, as requested by the People. (Evid. Code, § 452, subd. (c); *People v. Muszynski* (2002)

instructed, reasonably found that defendant did personally discharge a firearm. The statute states nothing else that defendant must *personally* do. Proximately causing and personally inflicting harm are two different things." (*Id.* at p. 336.) Personally inflicting an injury means to directly cause an injury, not to proximately cause it. (*Id.* at p. 337.) "The Legislature is aware of the difference. When it wants to require personal infliction, it says so. [Citation.] When it wants to require something else, such as proximate causation, it says so, as in section 12022.53(d)." (*Id.* at p. 336.) *Bland* cited *People v. Cole* (1982) 31 Cal.3d 568, 571, for the "obvious" proposition that " '*an individual can and often does proximately cause injury without personally inflicting that injury*.' " (*People v. Bland*, *supra*, 28 Cal.4th at p. 337.) The *Bland* defendant's discharge of his firearm may have been a proximate cause of the victims' injuries, even though it may have been his cohort's bullets that hit the victims. (*Id.* at pp. 337-338.)

In the instant case, of course, the victim's injury was not a gunshot wound, but a broken ankle suffered when he attempted to avoid being shot. Nevertheless, *Bland*'s reasoning directly informs our analysis. *Bland* made clear that section 12022.53, subdivision (d) does *not* require the defendant *personally* inflict the injury. *Bland* teaches that, as long as the injury was proximately caused by the discharge of the firearm, the statute's requirements are met. Put differently, the defendant's discharge of a firearm may be the proximate cause of a victim's injury, even if the defendant's bullet does not hit the victim. Applying that principle here, the statute does not require that the qualifying injuries are limited to bullet wounds. Nothing in the statutory language or legislative history suggests a different conclusion. To the contrary, both support our analysis. The legislative purpose behind the statute is unambiguous: to impose " 'substantially longer prison sentences . . . on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.' [Citation.]"

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100 Cal.App.4th 672, 681, fn. 15.)

(*People v. Garcia*, *supra*, 28 Cal.4th at p. 1172, quoting Stats. 1997, ch. 503, § 1; *People v. Oates*, *supra*, 32 Cal.4th at p. 1057; *People v. Martinez*, *supra*, 76 Cal.App.4th at p. 493; *People v. Mason* (2002) 96 Cal.App.4th 1, 12.) "In the case of subdivision (d) . . . the statute's purpose quite specifically is to deter persons from inflicting great bodily injury or death through the intentional discharge of firearms in the commission of such felonies . . . ." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1314.) "The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives. [Citations.]" (*People v. Martinez*, *supra*, at pp. 497-498.)

The Legislative purpose to protect citizens from injury and deter violent crime would not be furthered if subdivision (d) was interpreted to encompass only bullet wounds. It is surely to be expected that persons attempting to dodge a bullet may react in panic with evasive maneuvers that are likely to cause injury to themselves or others. There appears to be no principled reason to distinguish the type of injury here – suffered when the victim took life-saving evasive action -- from a direct hit by the bullet. Both are equally caused by the discharge of the firearm. In both instances, the defendant's culpability is the same. A defendant should not benefit simply because he or she is a bad shot, or because the victim is fortuitously able to move out of harm's way.

Moreover, the plain language of the statute supports our conclusion. Had the Legislature wished to limit section 12022.53, subdivision (d)'s reach to gunshot wounds only, it certainly could have said so. Instead, it used the phrase "great bodily injury," which on its face does not narrow the statute's reach to gunshot wounds. Further, the existence of the proximate cause requirement supports the conclusion that other injuries qualify to impose the enhancement. Had the Legislature intended the statute to encompass only gunshot wounds, the

proximate cause requirement would have been unnecessary. If the victim is hit by the defendant's gunshot, the discharge would necessarily be the *actual* cause of the injury, and the proximate cause requirement would be superfluous. " 'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage. [Citation.]' [Citation.]" (*People v. Flores* (2005) 129 Cal.App.4th 174, 182.) A proximate cause requirement would seem to be necessary in only two scenarios: first, in the *Bland* situation, where there is more than one shooter; and second, in the instant situation, where the bullet itself does not hit the victim, but the discharge of the firearm is nonetheless the proximate cause of the injury. We see no reason to assume the Legislature enacted the proximate cause language only to cover the concurrent shooter situation, as Palmer argues.

In sum, the plain language of the statute, as well as its underlying purpose, supports the conclusion that section 12022.53, subdivision (d) encompasses any injury, not just bullet wounds, when the defendant's discharge of a firearm was the proximate cause of the injury.

2. *The evidence was sufficient to support the jury's true findings on the section 12022.53, subdivision (d) enhancements.*

We next turn to the question of whether the evidence was sufficient to establish Palmer's gunshot was the proximate cause of Officer Burks's broken ankle. Palmer argues the evidence was insufficient, because Burks dove for cover when Palmer *pointed* the gun at Burks, not when Palmer actually *discharged* the gun. Again, we disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, we review the entire record in the light most favorable to the judgment to determine " 'whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People*

v. Hillhouse (2002) 27 Cal.4th 469, 496; *People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Here, the evidence was sufficient to establish Burks's injury was the result of Palmer's discharge of the firearm, rather than a distinct act of pointing the gun. Burks testified that he received the dispatch informing him of the robbery; observed Palmer and radioed his observations to the dispatcher; and activated his vehicle's lights. Palmer stopped his car. Burks put his patrol vehicle in park and exited, simultaneously unholstering his weapon. At the same time, Palmer exited his vehicle, swiveled around, and pointed the gun at Burks's chest. The gun was pointed at Burks "almost instantaneously" when Palmer swiveled out of the car. Burks dove for cover and saw the flash of the gun as he ducked behind the patrol vehicle's door. At the same time he felt pain in his ankle. The entire incident transpired quickly; *only a "second or two" elapsed from the time Burks activated his patrol vehicle's lights and the shooting*. There was no evidence that Palmer held Burks at bay by pointing the gun at him for a distinct period of time without firing. To the contrary, Burks's testimony, fairly read, suggests that Palmer's exit from the car, Burks's dive for cover, and the discharge of the firearm occurred almost simultaneously.

Palmer's argument rests upon the premise that the "discharge" of a firearm refers only to the instant the firearm's trigger is actually pulled. Palmer's interpretation of the statute is unduly crabbed. We see nothing in the statutory language that so limits the meaning of "discharge" as applied on the facts of this case, nor does Palmer cite any authority so limiting the term. The evidence recited above showed Palmer exited his vehicle and immediately turned, pointed the gun,

and fired, all in one essentially seamless motion. The most reasonable interpretation of this evidence was that Palmer's conduct of pulling out and pointing the gun, and pulling the trigger, all constituted a single act of "discharging" the gun for purposes of the statute. This was not a case in which the defendant pointed a gun for some distinct and significant period of time without firing, impelling the victim to dive for cover merely in response to the *pointing* of the gun. Palmer's attempt to artificially compartmentalize the circumstances of the shooting is unpersuasive.

We do not disagree with Palmer that, had he pointed the gun at Burks for some significant length of time before firing it, and Burks's injury occurred during that period, before the gunshot, the proximate cause requirement would not be established. It is axiomatic that X cannot be a proximate cause of Y if Y has already occurred before X. As *People v. Bland* explained, "Even if the jurors did not know exactly what proximate causation means, no juror who is conversant in the English language would find that discharging a firearm proximately caused injuries that had already occurred." (*People v. Bland*, *supra*, 28 Cal.4th at p. 338.) However, on the evidence presented here, the jury could reasonably find that Palmer's conduct of exiting the car, pointing the gun, and pulling the trigger constituted a single act of "discharging" the gun for purposes of the statute. Accordingly, the evidence was sufficient to support the jury's true finding on the section 12022.53, subdivision (d) enhancement.[7]

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[7] In arguing for an alternative interpretation of section 12022.53, subdivision (d), Palmer invokes the "rule of lenity," which compels a court to resolve true statutory ambiguities in a defendant's favor. (*People v. Oates*, *supra*, 32 Cal.4th at pp. 1068-1069; *People v. Lee* (2003) 31 Cal.4th 613, 627.) However, "that rule applies 'only if two reasonable interpretations of the statute stand in relative equipoise.' [Citation.]" (*People v. Oates*, *supra*, at p. 1068; *People v. Lee*, *supra*, at p. 627.) Because, as we have explained, the statutory language is clear and Palmer's interpretation is not equally reasonable, the rule of lenity is inapplicable.

3. *CALJIC No. 17.19.5 adequately advised the jury of the relevant legal principles.*

The trial court instructed the jury with CALJIC No. 17.19.5, the standard instruction pertaining to the section 12022.53, subdivision (d) enhancement. As relevant here, that instruction stated: "It is alleged . . . that the defendant[s] intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] to a person] during the commission of the crime[s] charged. [¶] If you find the defendant[ ] . . . guilty of [one or more of] the crime[s] thus charged, you must determine whether the defendant[s] . . . intentionally and personally discharged a firearm [and [proximately] caused [great bodily injury] to a person] [other than an accomplice] in the commission of [that] [those] [felony] [felonies]. [¶] . . . [¶] The term 'intentionally and personally discharged a firearm,' as used in this instruction, means that the defendant [himself] [herself] must have intentionally discharged it. [¶] . . . [¶] [A [proximate] cause of [great bodily injury] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [great bodily injury] and without which the [great bodily injury] would not have occurred.]" (CALJIC No. 17.19.5.)

Second, Palmer argues that under our interpretation of the statute, he lacked fair notice of what conduct was covered by section 12022.53, subdivision (d), in violation of his due process rights. " 'Due process requires fair notice of what conduct is prohibited. A statute must be definite enough to provide a standard of conduct for its citizens and guidance for the police to avoid arbitrary and discriminatory enforcement. [Citations.]' " (*People v. Tapia*, *supra*, 129 Cal.App.4th at p. 1166.) We see no due process problem. A statute will not be held void for vagueness if any reasonable and practical construction can be given its language. (*Id.* at p. 1167.) As we have discussed, our interpretation of section 12022.53, subdivision (d) flows from the statute's plain language and the obvious legislative purposes underlying it. The plain language of the statute was sufficient to put Palmer on notice that his conduct of shooting at Officer Burks, under the circumstances here, fell within section 12022.53, subdivision (d)'s ambit.

CALJIC No. 17.19.5 directly tracks the language of section 12022.53, subdivision (d), which provides for the enhancement when the defendant "personally and intentionally discharges a firearm *and* proximately causes great bodily injury . . . " (Italics added.) In the absence of a request for amplification, the language of a statute defining a crime is usually an appropriate and desirable basis for an instruction, as long as the jury would not have difficulty understanding the statute. (*People v. Roldan* (2005) 35 Cal.4th 646, 740; *People v. Bland, supra,* 28 Cal.4th at p. 334; *People v. Rodriguez* (2002) 28 Cal.4th 543, 546.) " '[I]f the instruction as given is adequate, the trial court is under no obligation to amplify or explain in the absence of a request that it do so.' [Citation.]" (*People v. Roldan, supra,* at p. 740.) Moreover, our Supreme Court has held that CALJIC No. 17.19.5 "does correctly define proximate causation." (*People v. Bland, supra,* at p. 336.)

Because CALJIC No. 17.19.5 was an accurate statement of the law, we agree with the People that Palmer's claim is waived. It is of course true that a defendant need not object to preserve a challenge to an instruction that incorrectly states the law and affects his or her substantial rights. (§ 1259; *People v. Hillhouse, supra,* 27 Cal.4th at pp. 505-506; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) On the other hand, " 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.) However, because Palmer argues that his trial counsel was ineffective for failing to object to the instruction or request a clarifying instruction, we address his claim.

Palmer argues that CALJIC No. 17.19.5 is flawed because it "failed to advise the jury that the injury suffered [by] Burks had to be proximately caused by the discharge of a firearm and not just proximately caused by appellant's actions."

He complains that the instruction "presents two seemingly independent elements: (a) the defendant discharges a firearm; and (b) the defendant proximately causes great bodily injury."

When reviewing a purportedly ambiguous jury instruction, we ask whether there is a reasonable likelihood the jury misconstrued or misapplied the challenged instruction. (*People v. Harrison* (2005) 35 Cal.4th 208, 251-252; *People v. Smithey, supra,* 20 Cal.4th at p. 963; *People v. Welch* (1999) 20 Cal.4th 701, 766; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

Our Supreme Court has already determined in *People v. Bland, supra,* 28 Cal.4th at pages 335 to 336, that CALJIC No. 17.19.5 correctly defines proximate cause. We are, of course, obligated to follow *Bland.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, we do not believe reasonable jurors would have interpreted the instruction as Palmer suggests. In essence, Palmer's argument is that the instruction's use of the conjunctive "and" – which tracked the statutory language – would have mislead the jury into considering the issue of proximate causation separately from the issue of discharge of the firearm. While such an interpretation might be possible if the instruction was viewed entirely out of context, we do not believe it is likely. The instruction was obviously addressed to, and linked, the issues of Palmer's discharge of the firearm and Burks's injury. The instruction's language – "you must determine whether the defendant. . . intentionally and personally discharged a firearm and proximately caused great bodily injury to a person" -- clearly tied the two elements together. Reasonable jurors would not have assumed the single word "and" meant the discharge and proximate cause issues were divorced from each other. To the contrary, the most natural and commonsense reading of CALJIC No. 17.19.5 is that the discharge of the firearm must be the proximate cause of the injury. There is no reasonable likelihood the jury would have construed the instruction to suggest a true finding was warranted

if the great bodily injury was caused by something other than Palmer's personal and intentional discharge of a firearm.

Moreover, on the facts of this case, the purported instructional error was harmless under any standard. (See, e.g., *Neder v. United States* (1999) 527 U.S. 1, 15-16 [use of an instruction that omits an element of an offense does not require reversal if the error is harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18]; *People v. Flood* (1998) 18 Cal.4th 470, 487, 490 [misdirection of the jury, including incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error, are reviewed under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836].) As we have explained, the evidence overwhelmingly suggested the discharge of the gun *was* the cause of the injury. Additionally, the prosecutor's argument reinforced the concept that the discharge of the firearm had to have proximately caused the injury.[8] (Cf. *People v. Majors* (1998) 18 Cal.4th 385, 410.) Therefore, even if the instruction had been modified as Palmer suggests, it is clear beyond a reasonable doubt that the jury would not have rendered a more favorable verdict for Palmer.

4. *Trial counsel was not ineffective for failing to argue the absence of proximate cause.*

In a third related argument, Palmer urges that his trial counsel was ineffective for failing to advance the theory that the gunshot was not the proximate

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8 The prosecutor urged during argument, "the court read to you about causation, if it would not have happened but for the defendant shooting at the officer, then he caused it. Okay. . . . [¶] . . . [¶] What about Officer Burks, here. He's being shot at. [¶] Is it foreseeable that a man would try and get out of the way? [¶] Of course it is. [¶] But, more importantly, did it happen because of being shot at? [¶] Of course it did. [¶] When he raised that gun and shot at him, Officer Burks had a very fraction of a second to react. [¶] But he broke his own leg. All right. He broke his own leg. [¶] The question you have is would that have happened if the defendant had not been shooting at him?"

cause of Burks's broken ankle, both by failing to argue in closing that there was no evidence the discharge proximately caused the injury, and by failing to object to or request modification of CALJIC No. 17.19.5. We disagree.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211; *Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the defendant makes an insufficient showing on either component, the claim must fail. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus." (*People v. Carter*, *supra*, at p. 1211; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.) "A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." (*People v. Carter*, *supra*, at p. 1211.)

Palmer has not met this burden. He has not shown that defense counsel was asked for an explanation but failed to provide one. The record before us does not suggest counsel's performance was obviously inadequate, or that there could be no satisfactory explanation for his failure to argue the theory proposed on appeal. To the contrary, counsel could have made a legitimate tactical choice not to argue that Burks dove for cover in response to the gun being pointed at him, rather than its discharge. Counsel could reasonably have concluded the argument

was too hypertechnical to appeal to a jury of laypersons. Counsel may also have concluded, as we have set forth *supra*, that Palmer's actions of turning, pointing, and shooting the gun occurred as one seamless event, making the evidentiary basis for the proposed argument questionable at best. Counsel may have wished to concentrate on the argument he viewed as more persuasive -- mistaken identity -- rather than potentially confusing the issues and detracting from his credibility with the jury by making a nonpersuasive argument. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531-532 [failure to argue an alternative theory is not objectively unreasonable].) Accordingly, Palmer's ineffective assistance claim lacks merit.

[[BEGIN NON-PUBLISHED OPINION]]

[[B. *The trial court did not err by declining to order in camera review of peace officer records pursuant to Pitchess v. Superior Court.*

1. *Additional facts.*

Prior to trial Palmer brought two *Pitchess* motions, seeking information from the personnel records of officers Burks and Bauer[9] regarding any complaints about the officers' "dishonesty."[10] Palmer's moving papers briefly summarized the facts surrounding Burks's and Bauer's interactions with Palmer, in general consistently with the evidence eventually adduced at trial. Counsel's declarations stated that "Defendant's arrest in this matter is an effort" by Officers Bauer and Burks "to obtain a conviction"; Palmer's arrest was "designed to harass Defendant and served no legitimate law enforcement purpose"; "Complaints of dishonesty . . . by an officer may be relevant to this action in that it may demonstrate a plan, custom, habit or modus operandi of the officers, consistent with the actions in this

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9 Palmer's motions sought the same information on two other officers. The trial court denied in camera review of those officers' files, and that ruling is not at issue on appeal.

10 Palmer's written motions also contained a request for information related to "the planting of evidence." At the hearing on the matter, defense counsel

case and may thus lead to the discovery of admissible evidence"; and "This evidence is also necessary to properly assess the credibility of witnesses, to refresh witnesses' recollections and to confront and cross-examine the witnesses against Defendant." At the hearing on the motion, defense counsel also stated that the defense believed records related to complaints about Burks's use of excessive force were relevant.

The cities of La Verne and Covina, representing the officers, opposed the motion. Counsel for the City of Covina argued that because Officer Bauer was merely a witness to the crash, Evidence Code section 1047[11] barred "any kind of *Pitchess* inquiry," and in any event Palmer had failed to set forth a sufficient factual scenario demonstrating good cause for discovery. Counsel for the City of La Verne concurred that Palmer had failed to meet the good cause and materiality requirements.

The trial court denied the motions. It explained, "As to Officer Bauer, I agree that he was a mere witness. I'm going to deny that motion outright." "As to Burks, . . . I don't find I have sufficient facts showing good cause and materiality. This is an unusual case. There appears to be – at least on the facts that I understand them, absolutely zero contact, physical contact, between Burks, [other officers] and Mr. Palmer. [¶] They didn't process the vehicle after the crash. They didn't recover the film or the identification card showing the photograph of Mr. Palmer. They weren't present for the robberies inside the store. As a matter of fact, for most of the things that were going on, the officers were unaware the

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represented the request had been inadvertent. Accordingly, the language was stricken from the motion.

11 Evidence Code section 1047 provides: "Records of peace officers or custodial officers, as defined in Section 831.5 of the Penal Code, including supervisorial officers, who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking, or who were not present at the time the conduct is alleged to have occurred within a jail facility, shall not be subject to disclosure."

robbery had even taken place. So I don't find that the motions are well taken." Accordingly, the trial court declined to order an in camera review of either officers' records.

2. *Discussion.*

a. *Relevant legal principles.*

Evidence Code sections 1043 and 1045 establish a two-step procedure for a criminal defendant's *Pitchess* discovery of peace officer records. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1472-1473; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019; *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 9.) "To initiate discovery, the defendant must file a motion supported by affidavits showing 'good cause for the discovery,' first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue. [Citation.]" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) If a defendant shows good cause, the trial court examines the material sought in camera to determine whether disclosure should be made and discloses "only that information falling within the statutorily defined standards of relevance." (*Ibid.*)

Recently, in *Warrick v. Superior Court*, our Supreme Court clarified the good cause standard. To establish good cause, "defense counsel's declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges. The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses. These requirements ensure that only information 'potentially relevant' to the defense need be brought by the custodian of the officer's records to the court for its examination in chambers. [Citations.]" (*Id.* at p. 1024.) "Counsel's affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario,

depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Id.* at pp. 1024-1025.) The affidavit, when viewed in conjunction with police reports or other pertinent materials, must articulate a valid theory as to how the information sought might be admissible at trial. (*Id.* at p. 1025.) Discovery is limited to instances of officer misconduct related to the misconduct asserted by the defendant. (*Id.* at p. 1021.) In sum, "a showing of good cause requires a defendant seeking *Pitchess* discovery to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Ibid*.) However, a defendant need not establish that it is reasonably probable the defendant's version of events actually occurred, or that his story is persuasive or apparently credible. (*Id.* at pp. 1025-1026.)

Trial courts are vested with broad discretion when ruling on *Pitchess* motions (*People v. Memro* (1995) 11 Cal.4th 786, 832), and we review a trial court's ruling for abuse. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

b. *Palmer's motions failed to establish good cause for discovery.*

Here, Palmer's *Pitchess* motions fell woefully short of the mark. Palmer did not assert that the officers in this case had engaged in any misconduct that might support a defense. Palmer did not allege the officers lied, planted evidence, or engaged in any other dishonest behavior. Palmer did not propose a defense to the pending charges or articulate how *Pitchess* discovery regarding complaints about dishonesty would support that defense. Palmer's motion was limited to vague and nonspecific contentions that his arrest was an effort by Officers Bauer and Burks to obtain a conviction, and that the arrest was made to harass him and served no legitimate law enforcement purpose. These allegations do not advance a defense or allege misconduct relevant to a defense. Indeed, as neither Bauer nor

Burks arrested Palmer, the allegations made in the motion appear especially irrelevant. Having failed to explain what defense he intended to offer, Palmer necessarily failed to establish that the requested discovery would support a defense. (See *Warrick v. Superior Court, supra,* 35 Cal.4th at pp. 1021, 1024-1025.)

Palmer urges that the trial court's ruling was erroneous because the court mistakenly assumed that records of an officer were not subject to the *Pitchess* in camera review procedures when the officers were "mere witnesses" to the crime. First, the record does not support this characterization in regard to Burks. To the contrary, the trial court expressly found that, as to Burks, the motion did not set forth "sufficient facts showing good cause and materiality." The trial court's comments about Burks's lack of participation in the investigation and lack of physical contact with Palmer, quoted above, do not suggest otherwise. In any event, even assuming arguendo that the trial court denied in camera review of Bauer's records on the incorrect assumption that Evidence Code section 1047 prohibited discovery,[12] the in camera review was properly denied because Palmer clearly failed to establish good cause. " ' "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 976.)

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12 Given our conclusion that Palmer's *Pitchess* motions failed to establish good cause for in camera review, we need not and do not reach the question of whether Evidence Code section 1047 barred discovery of Officer Bauer's records. (See, e.g., *Alt v. Superior Court* (1999) 74 Cal.App.4th 950, 956-957.)

C. *Issues related to admission of evidence regarding Palmer's prior conviction and prison term.*

1. *Additional facts.*

Prior to trial, the prosecutor sought to introduce evidence that Palmer had previously been convicted of robbery and was on parole, on the theory the evidence was probative on the issue of Palmer's intent to kill, i.e., Palmer was motivated to kill Officer Burks in order to avoid being returned to prison. Over defense counsel's objections, the trial court allowed the People to present evidence of one of the prior convictions but excluded evidence Palmer had been on parole at the time of the charged crimes.

During direct examination, the prosecutor questioned Detective Christian Surgent regarding the steps he had taken in investigating the crimes. When asked what information he had gathered regarding Palmer, Surgent answered, inter alia, that Palmer "had recently been released from prison for a robbery conviction." Palmer's motion for a mistrial was denied.

Immediately after Detective Surgent's statement, the trial court instructed the jury, "[I]n the law there are a number of different classifications of evidence. Some evidence is admissible for all kinds of different reasons and some [is] admissible for very limited purposes. [¶] Now, the officer's last statement is admissible, but it's only admissible for the limited purpose of showing the defendant's intent relating to counts 1 and 2. [¶] You're not to consider that information for any purpose as to counts 3, 4, and 5 or for any other purpose other than as it bears on whether the defendant had the specific intent required in count 1 and count 2." Later, the trial court instructed with CALJIC No. 2.09 ("Evidence Limited as to Purpose) and CALJIC No. 2.50 ("Evidence of Other Crimes").

During closing argument, the prosecutor argued, "[I]f you have any doubts about Mr. Palmer's intent here, you received information . . . that Mr. Palmer had suffered a conviction for robbery . . . . [¶] He had been to prison." Palmer had

the intent to kill Burks because he knew he would be facing a worse experience in prison if apprehended. "He shot at this officer. But believe me, the stakes for him were prison. He knew what was going to happen. He didn't want to repeat that experience. Even more succinctly than somebody who has just done a robbery and they don't know what to do when they get caught. He knows exactly what's going on here. And he knows he's not going back. And it if means he's going to back over the body of Officer Burks, that's exactly what he's going to do." The prosecutor also carefully clarified, however, that the prior conviction evidence was not offered to prove identity or intent in the robberies, but that the evidence related only to "the intent of Mr. Palmer when he shot at the officer."

2. *Admission of the evidence was not prejudicial error.*

Evidence that a defendant committed misconduct other than that currently charged is inadmissible to prove he or she has a bad character or a disposition to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1017.) However, such evidence is admissible if it is relevant to prove, among other things, intent. (Evid. Code, § 1101, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 145-146; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402; *People v. Kipp, supra*, at p. 369.) " 'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.) " 'There is ample authority for the admission of evidence of prior criminal activity when such evidence provides considerable circumstantial proof of the actor's mental state at the time of the charged offense.' [Citation.]" (*People v. Powell* (1974) 40 Cal.App.3d 107, 155.)

Even if the evidence of other crimes is relevant to prove matters other than the defendant's character or disposition, it is inadmissible unless its probative

value is substantial and is not outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Kipp, supra,* 18 Cal.4th at p. 371; *People v. Ewoldt, supra,* 7 Cal.4th at p. 404; *People v. Scheer, supra,* 68 Cal.App.4th at p. 1018.) Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful analysis. (*People v. Ewoldt, supra,* at p. 404.)

The admission of evidence of a prior offense, and the evaluation of prejudice under Evidence Code section 352, is entrusted to the sound discretion of the trial court and its ruling will not be overturned except upon a finding of manifest abuse. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314; *People v. Waidla* (2000) 22 Cal.4th 690, 724; *People v. Kipp*, *supra*, 18 Cal.4th at p. 369.)

Relying on *People v. Combes* (1961) 56 Cal.2d 135, 147-148, *People v. Powell, supra,* 40 Cal.App.4th 107, and *People v. Scheer, supra,* 68 Cal.App.4th at page 1020, the People urge admission of the prior conviction was proper because the evidence was highly probative of Palmer's intent to kill Officer Burks. In essence, the People's theory was that a person who has experienced prison will have a strong motive to kill an officer who might apprehend him for a subsequent crime, in order to avoid another prison term.[13] "[W]here the victims of murders were police officers who had stopped the defendants for investigation or to arrest them, evidence that the defendants had previously committed serious crimes has always been held properly admitted to prove that the motive for the killing was to prevent arrest and punishment for the crimes they had committed." (*People v.*

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13 As the People concede, assault, the crime charged in count 2, is a general intent crime (*People v. Williams* (2001) 26 Cal.4th 779, 788), so Palmer's prior robbery conviction was irrelevant to prove intent in regard to that count. (See *People v. Scheer, supra,* 68 Cal.App.4th at p. 1019.) Although the trial court orally informed the jury that the prior crime evidence was admissible to show

Combes, supra, at pp. 147-148; see also *People v. Powell, supra,* at p. 155 ["The circumstance of [the defendant's] parole status could reasonably tend to prove that he killed [the officer] to avoid revocation of his parole and return to prison."].)

However, as Palmer correctly points out, in *Combes, Powell,* and other cases, either the prior crimes evidence pertained to outstanding, uncharged crimes for which the defendant feared apprehension; or the defendant was on parole and subject to being returned to prison for parole violations; or the defendant had made extrajudicial statements that he was motivated to kill in order to avoid returning to prison. (See *People v. Combes, supra,* 56 Cal.2d at pp. 139-140, 147 [defendant, a parolee, went on crime spree and told his confederates he would be killed before being sent back to prison; in his trial for killing an officer who stopped him at a roadblock, evidence of the other crimes, committed just days before the murder, was admissible to show he had premeditatedly killed the officer to avoid apprehension for those crimes]; *People v. Powell, supra,* 40 Cal.App.3d at pp. 154-155 [evidence of parole status of defendant who killed police officer during routine traffic stop was relevant to show he killed the officer to avoid revocation of his parole and return to prison]; *People v. Heishman* (1988) 45 Cal.3d 147, 168-169 [defendant raped victim and killed her after charges were filed, to prevent her from testifying; prior rape conviction was properly admitted to show motive for murder, where he had expressed fear of returning to prison]; *People v. Robillard* (1960) 55 Cal.2d 88, 100 [evidence of defendant's probation status and commission of recent crimes for which he had not yet been apprehended was probative of his motive to kill officer who detained him for driving stolen car]; *People v. Durham* (1969) 70 Cal.2d 171, 189 [evidence of defendant's parole status and criminal activity committed three weeks before officer's murder was relevant to show motive for killing]; cf. *People v. Daly*

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intent on counts 1 and 2, its written instruction correctly indicated the evidence was admissible only on count 1, the attempted murder charge.

(1992) 8 Cal.App.4th 47, 55-56 [severance of robbery and attempted murder charges properly denied because, inter alia, evidence of the robberies was admissible on the murder charge; prosecution theory was that the defendant "fired on police at the motel in order to avoid going back to prison for the robberies and the kidnapping for which he knew he was under investigation."]; *People v. Scheer, supra*, 68 Cal.App.4th at p. 1020, fn. 2 ["Service of a prison term is highly probative to show a motive to flee apprehension for the current crime, i.e., to avoid service of future additional prison time"].)

In the instant case, unlike the foregoing authorities, Palmer had already been convicted of the prior crime and served his time. We cannot say the evidence was entirely lacking in probative value; it is certainly possible that a defendant who has spent time in prison may be more highly motivated than a first time offender to avoid prison at all costs, including killing an officer to avoid apprehension. However, in the absence of evidence of any statements by Palmer to this effect, the People's theory appears speculative and is not particularly probative. In *People v. Hamilton* (1985) 41 Cal.3d 408, 426, vacated on other grounds by *California v. Hamilton* (1986) 478 U.S. 1017, for example, the murder victim discovered the defendant as he was burglarizing her car. The People's theory was that the defendant killed her to eliminate her as a witness and avoid return to prison. The court rejected this view, explaining, "The proffered motive of killing eyewitnesses because of defendant's extreme fear of prison simply does not wash. It rests entirely on speculation on how an assumed 'normal' burglar would have behaved after being discovered, which, in turn, is based entirely on speculation on how such a 'normal' burglar would have weighed the possibility of going to prison against the problems associated with the taking of a human life. The jury is then asked to compare this supposed reaction of a 'normal' burglar with the assumed reaction of a person who dislikes prison with the intensity which

the defendant's letters imply. It is difficult to imagine a more tenuous chain of inferences . . . ." (*People v. Hamilton, supra* at p. 426.)

Additionally, the probative value of the evidence was quite weak on the facts of this case. Officer Burks discovered Palmer as Palmer was in the Stein Mart parking lot, fleeing from the robbery. No reasonable juror could doubt that this circumstance already provided a strong motivation for Palmer to kill the officer in order to effectuate his escape, regardless of the existence of the prior conviction and prison term. In other words, the central motive of escape was already established by the circumstance that Palmer was discovered fleeing from the crime scene. The additional evidence added little to the People's case.

People v. Alcala (1984) 36 Cal.3d 604, is instructive. There, the defendant was alleged to have kidnapped and killed a young girl. At trial, evidence he had committed prior sex crimes against young girls was admitted. The California Supreme Court rejected the argument that the evidence provided a motive for the killing. "Finally, we reject any implication that the prior crimes were admissible to establish a *motive* for premeditated murder. Common sense indicates that one who commits a felony upon another wishes to avoid its detection. That may lead him to the calculated murder of his victim. Here, the jury could consider the possibility that defendant killed [the child victim] in cold blood to prevent her from naming him as her kidnaper. [Citation.] [¶] However, the prosecutor argued in effect that defendant's prior crimes increased his incentive to eliminate [the victim] as a witness, since they might result in more severe punishment for the current offense. We cannot accept the notion that evidence of past offenses is admissible on this basis. If it were, one's criminal past could always be introduced against him when he was accused of premeditated murder in the course of a subsequent offense. The accused's mere status as an ex-criminal would place him under an evidentiary disability not shared by first offenders. The prejudical effect

of the prior-crimes revelations would vastly outweigh their slight and speculative probative value." (*Id.* at pp. 634-635.)

Nonetheless, assuming admission of the prior crime evidence in the instant matter was error, it was harmless. The erroneous admission of prior crimes evidence is evaluated under the *Watson*[14] test. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 749-750; *People v. Whitson* (1998) 17 Cal.4th 229, 251; *People v. Malone* (1988) 47 Cal.3d 1, 22; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) Here, the evidence of Palmer's guilt was very strong. As Palmer concedes, there was no genuine dispute the robbery occurred as described by the victims. The evidence the perpetrator attempted to kill Burks was also overwhelming: there was a bullet hole in the exterior of the rearview mirror, and Burks's account of how Palmer shot at him was undisputed. Firing directly at an officer from short range under these circumstances could hardly be considered anything but an intentional attempt to kill the officer. (See generally *People v. Jackson* (1989) 49 Cal.3d 1170, 1201 [firing shotgun toward officer at close range permitted an inference of intent to kill].) Based upon this evidence, the jury could have had little doubt that the assailant intended to kill Burks.

As Palmer agrees, the major issue in the trial was identity. The People presented overwhelming evidence that Palmer was the culprit. There was no doubt the robber was the individual who drove the car from the store and crashed it into the fence: the robbery loot was found in the car and the assailant was seen by Burks leaving the robbery scene in the car. There was ample evidence connecting Palmer to the car: it belonged to his girlfriend, and numerous personal effects demonstrating his connection to the car were found within the vehicle. While, as Palmer points out, the witnesses did not all identify Palmer as the culprit in all identification procedures, four out of five people who came into contact with the robber identified Palmer before or at trial as the perpetrator or as one who

closely resembled the perpetrator. Palmer's DNA was found on the airbag in a sufficient quantity to strongly suggest he was the individual driving the car when it crashed and the airbag deployed. Under these circumstances, there is no reasonable probability the jury would have rendered a more favorable result for Palmer had the challenged evidence been excluded.

Additionally, the jury was instructed to use the challenged evidence only on the question of Palmer's intent. We presume the jury followed this instruction. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 725; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17; *People v. Williams* (2000) 79 Cal.App.4th 1157, 1171.) Thus, the jury would not have used the prior conviction as propensity evidence, and it cannot have been damaging on the robbery counts.

3. *The trial court's instructions regarding use of the evidence did not create a constitutionally flawed permissive inference.*

In a related argument, Palmer urges that the limiting instructions given by the court improperly allowed the jury to infer his intent to kill from the fact of the prior conviction in violation of his due process rights. As noted *supra*, the trial court instructed the jury it could consider the prior crime evidence only "for the limited purpose of showing the defendant's intent relating to counts 1 and 2," and only "as it bears on whether the defendant had the specific intent required in count 1 and count 2." It also instructed with CALJIC Nos. 2.09 and 2.50.[15] Palmer

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[14] *People v. Watson*, *supra*, 46 Cal.2d at p. 836.

[15] CALJIC 2.09 provided, "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

CALJIC No. 2.50 provided, "Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he] is on trial. [¶] [Except as you will otherwise be instructed,] [This] [this] evidence, if believed, [may not be considered by you to prove that defendant is a person of bad character or that [he] has a disposition to commit crimes. [It]

argues that the limiting instructions created an unwarranted permissive inference. Even assuming this claim is preserved for review, it lacks merit.

A permissive inference "allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one . . . ." (*People v. McCall* (2004) 32 Cal.4th 175, 183, fn. 5.) " 'An instruction about a "permissive presumption" is really an instructed inference. . . .' " (*Ibid.*) "Because
a jury may accept or reject a permissive inference 'based on its evaluation of the evidence, [it] . . . does not relieve the People of any burden of establishing guilt beyond a reasonable doubt.' [Citation.]" (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1226.) Accordingly, a " 'permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.' [Citations.]" (*People v. Yeoman* (2003) 31 Cal.4th 93, 131 [quoting *Francis v. Franklin* (1985) 471 U.S. 307, 314-315]; *People v. Mendoza* (2000) 24 Cal.4th 130, 180.)

Assuming arguendo the limiting instructions implicitly suggested a permissive inference, they were not improper. As we have explained *supra,* numerous cases have held that the fact a defendant had committed other crimes or was on parole, motivating his attempt to escape from police to avoid return to prison, is admissible to show intent to kill. (See *People v. Combes, supra,* 56 Cal.2d at pp. 147-148, *People v. Powell, supra,* 40 Cal.App.3d at p. 155; *People v. Robillard, supra,* 55 Cal.2d at p. 100; *People v. Durham, supra,* 70 Cal.2d at p. 189; *People v. Daly, supra,* 8 Cal.App.4th at pp. 55-56.) Thus,

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may be considered by you [only] for the limited purpose of determining if it tends to show: [¶] [The existence of the intent which is a necessary element of the crime charged in Count 1 only;] [¶] [A motive for the commission of the crime charged in Count 1 only.] [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] [You are not permitted to consider such evidence for any other purpose.]"

reason and common sense allow an inference of intent from the evidence, and the inference was not impermissible in light of the proven facts before the jury. (See generally *Francis v. Franklin, supra,* 471 U.S. at pp. 314-315 [setting forth "reason and common sense" standard].) If the evidence was inadmissible here, it was inadmissible on Evidence Code section 352 grounds, i.e., because the evidence was more prejudicial than probative given its cumulative and speculative nature, *not* because there was no relationship between "the permissively inferred fact and the proven fact on which it depends." (*People v. Mendoza, supra,* 24 Cal.4th at p. 180 [due process requires a relationship between the permissively inferred fact and the proven fact on which it depends].) "Use of this permissive inference comports with due process unless there is no rational way for the jury to make the logical connection which the presumption permits." (*People v. Snyder, supra,* 112 Cal.App.4th at p. 1228, fn. 11.) Here, the jury could rationally make the connection between the evidence and Palmer's intent to kill.

Finally, even assuming the instruction was improper, any error was harmless. "Jury instructions must be considered in their entirety, and not in isolation. [Citations.]" (*People v. Snyder, supra,* 112 Cal.App.4th at p. 1228.) The trial court instructed, among other things, that "an inference is a logical and reasonable deduction which may be drawn from proven facts; that circumstantial evidence is evidence from which an inference 'may' be drawn; and that when circumstantial evidence is equally susceptible to two reasonable interpretations, the jury was required to adopt that pointing to innocence. Viewing all these instructions as a whole," (*id.* at pp. 1228-1229), the challenged instructions did not lessen the prosecution's burden of proof. (*Id.* at p. 1229; see also *People v. Barker* (2001) 91 Cal.App.4th 1166, 1172-1177.)

Furthermore, as we have discussed, the People's evidence was strong, and there is no reasonable probability Palmer would have obtained a more favorable result had the evidence been excluded. The same is necessarily true in regard to

the use of the challenged instructions. (See generally *People v. Snyder, supra,* 112 Cal.App.4th at p. 1228; *People v. Barker, supra,* 91 Cal.App.4th at p. 1177.)

D. *Issues related to admission of Detective Surgent's "opinion" testimony.*

1. *Additional facts.*

During cross-examination of Detective Surgent, the lead investigator in the case, defense counsel asked a series of questions aimed at demonstrating that the police investigation was inadequate because police did not have a pair of gloves tested for DNA and a shell casing tested for fingerprints. During the course of this questioning, defense counsel asked Surgent, "So you assumed when you got the serology back and it had the person that you were looking for that you believed that committed the crime you thought that was enough; right?" Surgent answered, "That along with all the other evidence we had gathered."

On redirect, the prosecutor asked questions aimed at establishing that the investigation was thorough. The following colloquy transpired:

"[Prosecutor]: Sir, by the way, as you're gathering this evidence up in this case, do you know who committed this crime? [¶] Do you know who committed it as you're conducting the investigation?"

"[Surgent]: *Well, towards the latter part of my investigation, yes.*

"[Prosecutor]: "Well, what I'm talking about when the first initial stages where you're starting out with, you know, you've got that I.D. in the car, and you're looking at Mr. Palmer, you talked to [Palmer's girlfriend], and at this point you just don't know what you've got; is that correct?

"[Surgent]: No.

"[Prosecutor]: You start putting together six-packs, you show them to witnesses, and they start making identifications; is that correct?

"[Surgent]: Correct." (Italics added.)

The prosecutor then continued asking Surgent about other steps undertaken during the investigation.

2. *There was no prosecutorial misconduct.*

Palmer asserts that the prosecutor committed misconduct by eliciting the response italicized above, which he contends amounted to irrelevant and inadmissible opinion testimony that Palmer was the culprit. We discern no reversible error.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Cole* (2004) 33 Cal.4th 1158, 1202.) We may not reverse unless it is reasonably probable that a more favorable result for the defendant would have been reached absent the misconduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Palmer is correct that a witness may not express an opinion on the defendant's guilt or innocence, because such an opinion is of no use to the jury. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46-47.) He is also correct that a prosecutor may not intentionally elict inadmissible testimony. (*People v. Cox* (2003) 30 Cal.4th 916, 952.)

Palmer's claim, however, lacks merit. First, Palmer failed to object to the question or move to strike the answer. It is well established that to preserve a claim of prosecutorial error for appeal, " ' "the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." ' [Citations.]" (*People v. Barnett, supra*, 17 Cal.4th at p. 1133; *People v. Hughes,*

supra, 27 Cal.4th at p. 392; *People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) This was not the sort of extreme case in which an admonition would have been futile. (*People v. Riel* (2000) 22 Cal.4th 1153, 1212-1213.) However, because Palmer also raises a claim of ineffective assistance, we address the merits of his claim.

The prosecutor did not commit misconduct. The prosecutor's single question, eliciting an unexpected answer, did not constitute a pattern of conduct so egregious that it rendered the trial fundamentally unfair. (See *People v. Cox*, *supra*, 30 Cal.4th at p. 952.) Nor can it be said that the challenged portion of the prosecutor's questioning employed deceptive or reprehensible methods. The prosecutor was simply attempting to counter the suggestion, made during defense counsel's examination of the witness, that the investigation had been sloppy.

In any event, admission of the challenged portion of the officer's testimony was harmless. A defendant's conviction will not be reversed for prosecutorial misconduct unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Harrison*, *supra,* 35 Cal.4th at p. 244.) Here, in the challenged testimony Surgent did *not* state his opinion that Palmer was the culprit. To the contrary, he stated that by the end of his investigation, he knew who the perpetrator was. The most this statement would have conveyed to the jury was the wholly unremarkable fact that, as the investigation progressed, Detective Surgent believed he had identified the suspect responsible for the crimes. This fact could hardly have come as a surprise to the jury. Indeed, any other conclusion would be contrary to common sense and common experience. On these facts, we believe Palmer overstates the significance of the challenged testimony when he contends that it was "more persuasive overall than the individual eyewitnesses." There is no reasonable probability that the verdict

would have been more favorable to Palmer had the challenged response been excluded.

For the same reasons, Palmer's ineffective assistance claim fails because he cannot establish prejudice. (See *People v. Holt, supra,* 15 Cal.4th at p 703.) Because the officer's testimony was not prejudicial, any mistrial motion would likely have been denied. Representation does not become deficient for failing to make meritless objections or make futile motions. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463; *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

E. *Juror misconduct.*

1. *Additional facts.*

The jury began deliberating at approximately 10:00 a.m. on January 14, 2003. The next day, January 15, 2003, the jurors buzzed with a verdict at 9:20 a.m. The trial court excused them until 2:00 p.m. Before the jury reconvened, a juror telephoned the court clerk and stated that she "was upset about something that had occurred [the previous] afternoon after the jurors had reached their verdicts." According to the complaining juror, Juror No. 5, who had "been very vocal" during deliberations, showed other jurors a picture, printed from the internet, of a Dallas Cowboys beanie.

When the jury reconvened at 2:00 p.m., the trial court individually interviewed each juror to determine whether prejudicial misconduct had occurred. The foreperson stated that Juror No. 5 had brought in the picture of the beanie after the jury was excused for its lunch recess on the first day of deliberations. The jury had reached verdicts on all counts before the beanie picture was shown. One verdict form was signed the next morning, after the foreperson learned that a grammatical question the jury had was not significant. None of the jurors had changed their votes after seeing the picture, and the jury had not discussed the beanie during deliberations.

Juror No. 5 explained that she had brought the picture in because she was familiar with the beanie's appearance and wanted to show it to the prosecutor after the case was over. She "knew about it in real life" and had "just wondered why it was never brought up in court." She "never said a word about it in deliberations." She had gone home for lunch on January 14 (the first day of deliberations), and pulled the picture from the internet at that time. She "said nothing about it to anybody until [the jury] had signed and put in the envelope [the] verdicts." Juror No. 5 believed deliberations had concluded at that point. Juror No. 5 provided the picture in question to the trial court. The trial court described it as a "two-and-a-half by two-inch picture" of a "black beanie with a white band and a large what appears to be a large Dallas Cowboy star on the rolled up band." The picture bore a date of January 14, 2003.

Nine of the twelve jurors informed the court they had seen the picture brought in by Juror No. 5. Three others had not seen the picture, but were aware of its presence. The jurors unanimously stated that the picture had not been revealed until after deliberations had ceased, late in the afternoon as jurors were leaving for the day. All jurors stated that neither they nor any other juror had changed their votes after seeing or learning of the picture. All jurors stated that deliberations and voting were complete before Juror No. 5 showed the picture. Most jurors believed the verdict forms had already signed by the foreperson and were in the verdict envelope when the picture was shown. Some jurors indicated their view that Juror No. 5's conduct had been inappropriate.

After completing interviews with the jurors and hearing arguments from counsel, the trial court ruled that Juror No. 5 committed misconduct by printing the picture and bringing it into the jury room, but that the misconduct had had no effect on deliberations. The court concluded the jurors had reached most, if not all, their decisions before the picture was brought in. As to Juror No. 5, the trial court concluded the beanie picture had not affected her deliberations as it was

clear she already knew what the beanie looked like. Further, the issue of the beanie had not surfaced during deliberations. Accordingly, the trial court denied Palmer's motion for a mistrial. It concluded juror misconduct had occurred, but it was nonprejudicial. The trial court explained, "Nobody changed their position. Nobody changed their vote. Most thought it was inappropriate. And as of these folks, other than [the foreperson], everything had been signed prior to 4:30 yesterday afternoon." It concluded it was "substantially and highly unlikely that any juror was actually biased against the defendant . . . . [¶] And under the facts of our case I cannot find that the material was inherently and substantially likely to have influenced any of the jurors, given the posture of the case."

2. *Discussion.*

Palmer argues that the jury committed prejudicial misconduct and that Juror No. 5 was actually biased against him, and therefore he is entitled to a new trial. We disagree.

A juror's receipt of information outside of court about a pending case constitutes misconduct. (*In re Carpenter* (1995) 9 Cal.4th 634, 653.) "Juror misconduct generally raises a rebuttable presumption of prejudice, but '[a]ny presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.' [Citation.]" (*In re Lucas* (2004) 33 Cal.4th 682, 696; *People v. Ramos* (2004) 34 Cal.4th 494, 519.) " '[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial.' " (*People v. Danks* (2004) 32 Cal.4th 269, 303.) Bias may be established in two ways: (1) if the extraneous material, judged objectively, was so prejudicial in and of itself that it was inherently and substantially likely to have

influenced a juror, i.e., the information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal; or (2) from the nature of the misconduct and the surrounding circumstances, it is substantially likely a juror was actually biased against the defendant. (*People v. Ramos, supra*, at p. 519; *People v. Danks, supra*, at pp. 303-304; *In re Carpenter, supra*, at p. 647.)

" 'Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination.' [Citation.] . . . '[W]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citation.]" (*People v. Danks, supra*, 32 Cal.4th at pp. 303-304; *People v. Ramos, supra*, 34 Cal.4th at p. 520; *In re Carpenter, supra*, 9 Cal.4th at p. 651.)

Here, the trial court determined that misconduct occurred but was not prejudicial because it did not influence jurors to the defendant's detriment. We agree. Certainly the photograph of the beanie, judged objectively, was not prejudicial in and of itself. It was not "inherently and substantially likely" to have influenced a juror.

Second, the trial court was correct that there was no showing any juror was actually biased. The trial court's conclusion that the beanie picture had no bearing on the verdicts was well supported by substantial evidence. Indeed, jurors unanimously and individually told the trial court that the deliberations had been completed when the picture was shown, and that no juror changed his or her vote after seeing the photograph. Despite Palmer's attempts to argue to the contrary, the record simply does not support a finding that the beanie picture biased any juror.

Nor was there a basis for finding Juror No. 5 was biased against Palmer. The fact she had personally seen beanies like the one described at trial does not establish bias: " 'Jurors bring to their deliberations knowledge and beliefs about

general matters of law and fact that find their source in everyday life and experience.' [Citation.]" (*In re Lucas, supra,* 33 Cal.4th at p. 696.) Palmer also argues that Juror No. 5 was biased against him because another juror described her as "very vocal" during deliberations. But a juror's outspokenness or enthusiastic participation in deliberations is not the equivalent of misconduct and does not demonstrate bias. The record suggests Juror No. 5 wished to show the prosecutor the picture because she wondered why a similar picture had not been introduced into evidence, not due to some animus against Palmer. In sum, these facts simply do not suggest bias against Palmer, implicitly or explicitly, and the record presents no basis for a determination that Juror No. 5's misconduct was prejudicial.

F. *Purported sentencing errors.*

At sentencing, the trial court imposed consecutive sentences on two of the robbery counts (counts three and four) and ordered that those counts run consecutively to count one (attempted murder). Palmer raises two challenges to this sentence. First, he asserts that the trial court "did not understand it had the discretion to run the two robbery counts, [counts 3 and 4], concurrently to each other." Second, he asserts *Blakely* error in the imposition of the concurrent sentences. Neither claim has merit.

1. *The record does not suggest the trial court misunderstood the scope of its discretion in sentencing.*

Under the Three Strikes law, when a defendant is convicted of two or more current serious or violent felonies not committed on the same occasion, and not arising from the same set of operative facts, " 'not only must the court impose the sentences for these serious or violent offenses "consecutive to each other, it must also impose these sentences consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." ' [Citation.]" (*People v. Lawrence* (2000) 24 Cal.4th 219, 223, fn. 2; § 667, subds. (c)(6), (7); *People v. Deloza* (1998) 18 Cal.4th 585, 591, 595;

People v. Hall (1998) 67 Cal.App.4th 128, 139-140.) When the felonies are all committed on the same occasion or arise from the same set of operative facts, however, the trial court has discretion to impose either concurrent or consecutive sentences. (*People v. Deloza, supra,* at p. 591; *People v. Lawrence, supra,* at p. 223; *People v. Hendrix* (1997) 16 Cal.4th 508, 514; *People v. Hall, supra,* at pp. 139-140.) A trial court is required to explicitly state the basis for its imposition of consecutive terms. (*People v. Hall, supra,* at p. 138.)

When the record affirmatively shows a trial court misunderstood the scope of its discretion to impose concurrent sentences, or when the evidence before the trial court was insufficient to enable the court to determine whether the offenses occurred on the same occasion or arose from the same set of operative facts, remand for resentencing is required. (*People v. Deloza, supra,* 18 Cal.4th at p. 600; *People v. Hall, supra,* 67 Cal.App.4th at pp. 139-141.)

Here, the trial court failed to state on the record the reasons for its sentencing choices.[16] Palmer argues that the robberies and attempted murder occurred on the same occasion and arose from the same set of operative facts. Because the trial court failed to state its reasons for imposing consecutive sentences, Palmer argues, it must have been unaware it lacked discretion to sentence concurrently, or mistakenly equated a section 654 analysis with the analysis required to determine whether consecutive sentences are appropriate. (See, e.g., *People v. Lawrence, supra,* 24 Cal.4th at p. 226 [analysis for determining whether the Three Strikes law requires consecutive sentencing is not coextensive with the test for determining whether section 654 permits multiple punishment; section 654 is irrelevant to the question of whether multiple current

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16 The trial court conducted two sentencing hearings. At the first hearing, just after imposing sentence, the parties and the court decided further research into the application of the section 12022.53 enhancements was warranted. The trial court vacated the initial sentence and scheduled the matter for a new sentencing hearing.

convictions are sentenced concurrently or consecutively, and the analyses performed under the two statutes are entirely separate].)

The People counter that the attempted murder did not arise from the same set of operative facts, precluding concurrent sentences on the attempted murder and robbery counts, and in any event the record does not indicate the trial court misunderstood the scope of its sentencing discretion.

We need not reach the question of whether the crimes all arose on the same occasion or from the same set of operative facts, because we agree with the People that Palmer has failed to demonstrate the court was unaware of its sentencing discretion. As the People point out, the general rule is that a trial court is presumed to have been aware of and followed the applicable law. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.) This principle applies to sentencing issues. (*Ibid.*) Here, the applicable legal principles were neither novel nor recently decided. Moreover, in contrast to *People v. Deloza, supra,* 18 Cal.4th at pages 599-600, the trial court made no comments suggesting it was unaware of, or misinformed about, the applicable law and its sentencing discretion. Unlike in *People v. Hall, supra,* 67 Cal.App.4th at page 140, where the trial court lacked an evidentiary basis to determine whether the offenses were committed on the same occasion or arose from the same set of operative facts, here the trial court presided over the trial and heard all the evidence relevant to the determination.

To the extent the trial court erred by failing to articulate the basis for its sentencing choices on the record (see, e.g., *People v. Hall, supra,* 67 Cal.App.4th at p. 138; § 1170, subd. (c)), Palmer waived any objection to the trial court's failure to state the reasons for its consecutive sentencing choices by failing to raise the issue in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 352-354.)

2. *Blakely error.*

Palmer contends that the imposition of consecutive sentences violated his constitutional right to a jury trial, citing *Blakely v. Washington, supra,* 542 U.S.

296 and *Apprendi v. New Jersey* (2000) 530 U.S. 466. After the parties completed initial briefing in this matter, our Supreme Court resolved the issue in *People v. Black* (2005) 35 Cal.4th 1238. *Black* concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*People v. Black, supra,* 35 Cal.4th at p. 1244.) *Black* explained, "*Blakely*'s underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently," (*id.* at p. 1262), because "[t]he jury's verdict finding the defendant guilty of two or more crimes authorizes the statutory maximum sentence for each offense." (*Id.* at p. 1263.) Accordingly, Palmer's *Blakely* claim lacks merit.[17]]]

[[END NON-PUBLISHED OPINION]]

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.

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17 Given our resolution of this issue, we find it unnecessary to address the People's contention that Palmer's claim is waived because he failed to object to the sentence on constitutional grounds below.