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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES WILLIAM GRANDY, Defendant and Appellant.	B186687 (Los Angeles County Super. Ct. No. SA054920)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert P. O'Neill, Judge. Affirmed in part, reversed in part and remanded.

Maureen L. Fox, 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, Senior Assistant Attorney General, Joseph P. Lee and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 976(b) and 976.1, only the Procedural Background, Facts, introductory paragraph of part D of the Discussion, part D.1. of the Discussion, and Disposition are certified for publication.

PROCEDURAL BACKGROUND

On March 2, 2005, an information was filed charging appellant Charles William Grandy in count 1 with carjacking (Pen. Code, [1] § 215, subd. (a)); in count 2, with the second degree robbery (§ 211); in counts 3 and 4, with assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)); and in count 5, with possession of a firearm as a felon (§ 12021, subd. (a)(1)). It alleged under counts 1 through 4 that appellant had personally used a firearm (§§ 12022.5, subds. (a), (d), 12022.53, subd. (b)); in addition, under count 4, it alleged that appellant had personally discharged a firearm (§ 12022.53., subd. (c)). Finally, it alleged that appellant had three prior convictions within the scope of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), three prior convictions for a serious felony (§ 667, subd. (a)(1)), and seven prior convictions (§ 667.5, subd. (b)). Appellant pled not guilty and denied the special allegations.

Trial was by jury. On September 23, 2005, the jury found appellant guilty as charged, and found the gun-related allegations to be true. [2] Following a bench trial, the trial court determined that appellant had suffered two prior convictions for serious felonies under the Three Strikes law and section 667, subdivision (a)(1). On October 3, 2005, it sentenced appellant to imprisonment for a total of 184 years to life.[3] This appeal followed.

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1 All further statutory citations are to the Penal Code, unless otherwise indicated.

2 The information, as filed, alleged under counts 1 and 2 that appellant's victims were David Willoughby and Nicholas Dale. Before the jury returned its verdict, the trial court amended the information by striking the allegations regarding Dale.

3 Under count 1, the trial court imposed a term of 25 years to life under the Three Strikes law, plus 10 years for the use of a gun (§ 12022.53, subd. (b)) and 5 years for each of appellant's two prior convictions (§ 667, subd. (a)); under count 2, it imposed and stayed a term of 25 years to life under the Three Strikes law, plus 10 years for the use of a gun (§ 12022.53, subd. (b)) and 5 years for each of appellant's two prior convictions

FACTS

A. *Prosecution Evidence*

At approximately 12:30 a.m. on December 29, 2004, David Willoughby drove his Cadillac to a Ralph's store in the Ladera Center near La Cienega and La Tijera. He intended to buy flu medication for Nicholas Dale, who was a passenger in the car. When Willoughby entered the Ralph's lot, he parked behind a red Oldsmobile with several occupants. Willoughby saw appellant standing near its driver's door, which was partially open.

Shortly after Willoughby parked, appellant smashed the driver's side window of Willoughby's Cadillac and pointed a gun at his face. Willoughby recognized it to be a semiautomatic weapon, and saw that its ejection portal -- from which empty cartridges are expelled -- was closed. Appellant demanded Willoughby's car and money. Willoughby gave appellant his cash, and he and Dale left the car. Appellant, driving Willoughby's Cadillac, then followed the Oldsmobile out of the parking lot. Willoughby heard no gunshots as appellant drove away in his car. He told the Ralph's store manager about the crime and phoned 911.

Shortly after 12:40 a.m. on December 29, 2004, Los Angeles County deputy sheriff Otha McKinney was driving a patrol car when he and his partner heard a radio call about an active burglary alarm at the Ladera Center. As he entered the Ralph's parking lot, he saw a yellow Cadillac and a red car speeding toward him.

(§ 667, subd. (a)); under count 3, it imposed a consecutive sentence of 27 years to life under the Three Strikes law, plus 10 years for the use of a gun and 5 years for each of appellant's two prior convictions (§ 667, subd. (a)); under count 4, it imposed a consecutive sentence of 37 years to life under the Three Strikes law, plus 20 years for the discharge of a gun (§ 12022.5, subd. (c)) and 5 years for each of appellant's two prior convictions (§ 667, subd. (a)); and under count 5, it imposed a consecutive sentence of 25 years to life under the Three Strikes law.

McKinney made a call about the Cadillac to a nearby patrol car assigned to Los Angeles County deputies Reynaldo McLaughlin and Timothy Brothers, who were attending to damaged power lines on La Cienega.

Brothers testified as follows: At approximately 12:30 a.m. on December 29, 2004, he and McLaughlin had diverted traffic away from a fallen light pole on La Cienega, and were directing traffic toward an off-ramp on Slauson. It was raining heavily, and Brothers wore bright yellow rain gear. After Brothers heard McKinney's call about the yellow Cadillac, he saw it approaching with its lights out. Brothers tried to stop the Cadillac, but it continued up the off ramp weaving through traffic. Brothers and McLaughlin learned by radio that the Cadillac had been stolen, and they ran up the off ramp, where it had halted at a red light.

While McLaughlin approached the driver's door, Brothers took a position for cover on the Cadillac's opposite side, about ten to fifteen feet away from appellant. Brothers stood behind a Mustang stopped in the lane next to that occupied by the Cadillac, about half a car length behind the Cadillac. From that position, Brothers could see appellant through the Cadillac's rear window.

When the deputy sheriffs told appellant to show his hands, he raised a gun and pointed it over his shoulder at McLaughlin, who was then on the driver's side of the Cadillac, near its trunk. Appellant ignored Brothers's orders to drop the gun, and he moved the gun when McLaughlin withdrew toward the Mustang. McLaughlin crossed the rear of the Cadillac and the front of the Mustang, and made his way up the Mustang's passenger side to its trunk, where he joined Brothers. Brothers did not see a muzzle flash from appellant's gun or hear it fire.

When McLaughlin was "clear," Brothers fired his weapon at appellant, who ducked down within the Cadillac. Brothers emptied his weapon, which contained 16 bullets. He and McLaughlin then evacuated the occupants of the grey Mustang,

and took cover. When patrol cars arrived, appellant popped up, raised his hands, and got out of the Cadillac, where he was arrested.

McLaughlin testified as follows: After appellant drove past him and up the off ramp, he learned that the Cadillac had been involved in a car jacking. He and Brothers pursued it on foot, and he approached the driver's side of the Cadillac. McLaughlin stated: "After I yelled my commands, [appellant] came up with his right hand with a handgun and pointed it towards my direction or coming towards my direction." McLaughlin then withdrew behind the Cadillac and along the passenger side of the Mustang to avoid being caught in front of Brothers during a crossfire. As he moved, he lost sight of appellant but heard several gunshots. He could not tell whether Brothers fired all of the shots. After he and Brothers evacuated the Mustang's occupants, appellant got out of the Cadillac, and the deputy sheriffs arrested him.

Jillian Barba testified that she drove her Mustang -- which also contained Monique Asher -- up the Slauson off ramp on the night in question. She saw an officer run up the driver's side of her car and another officer move on the passenger's side. They were focused on a car in front of her. After they yelled something, she heard gunshots. She and Monique then left the Mustang.

Viroul Gatchalian testified that at 12:40 a.m. on December 29, 2004, he stopped on the Slauson off ramp and saw two deputy sheriffs approach the Cadillac in front of him. One of them went on the driver's side of the Cadillac and the other stayed on its passenger's side. The deputy sheriffs told the Cadillac's driver to come out, but the driver instead pointed what appeared to be a gun across his left shoulder. One of the deputy sheriffs ran in front of Gatchalian's car, and both ended up behind an adjacent Mustang. Gatchalian heard gunshots, and he backed up his car approximately 20 to 30 feet. He did not know the source of the

gunshots. The driver leaned over in the Cadillac for a couple of minutes, and then got out of the car.

Investigating officers found a gun, cash, and bloodstains inside the Cadillac. Appellant's DNA matched to a very high probability DNA extracted from blood on the gun in the Cadillac.

Tracy Peck, a firearms examiner, testified that she discovered a semiautomatic pistol in the Cadillac when she examined it on December 29, 2004. The gun's safety was off, and it contained four live rounds. A ruptured cartridge case was stuck in the gun's ejection port, and a bullet was lodged in its barrel. Peck opined that the gun malfunctioned when the cartridge case entered its firing chamber, causing an explosion that tore open the case but failed to push the bullet out of the gun. After Peck removed the ruptured case and bullet, she found that the gun fired properly.

Peck also examined the Cadillac. Its driver's side window and rear window were broken, and it had fourteen bullet holes, all caused by bullets fired from a position outside and behind the Cadillac. Aside from appellant's gun, she found no evidence that bullets had been fired from inside the Cadillac.

A red Oldsmobile had stopped on the off ramp during the shooting, and investigating officers detained its occupants. Willoughby, who was taken to the Slauson off ramp, identified the red Oldsmobile there as the one he had seen earlier, but he did not recognize its occupants. The occupants were interviewed and released.

B. *Defense Evidence*

Reginald Lester, a Los Angeles County firefighter and paramedic, testified that he rendered medical care to appellant shortly after his arrest on December 29,

2004. According to Lester, appellant displayed gunshot wounds to his head and right thumb, and he was transported to a hospital emergency room.

Los Angeles County deputy sheriff Carlos Lopez testified that on December 29, 2004, he saw a red Oldsmobile parked near the Slauson off ramp while he was investigating the shooting. Los Angeles County deputy sheriff Tim Stanley testified that he took Willoughby to the Slauson off ramp for a field show up on the date in question. There, Willoughby viewed a red Oldsmobile, but was unable to identify its occupants. Steven Tillman, a Los Angeles County fingerprint examiner, testified that appellant's fingerprints did not match any of the prints found in Willoughby's Cadillac.

Tony Williams testified that after midnight on December 29, 2004, he was driving a red Cutlass also containing Andre Simmons and Courtney Duty. He saw two police officers run up a ramp, and then some officers arrested him and his passengers. Williams and his passengers were shown to someone, and then taken to another location and placed in jail cells. Williams denied that he knew appellant or that he had driven near the Ladera Center.

Courtney Duty testified that he was in Williams's car when police officers detained Williams, Simmons, and Duty while the car was stopped in traffic. They were arrested, directed to appear before a witness, and then transported to a location where they were held in cells. They were released the next morning. Duty also denied knowing appellant or that he had been to the Ladera Center.

DISCUSSION

Appellant contends that (1) the trial court improperly denied his motion for discovery pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); (2) there was error in the selection of the jury; (3) the trial court inadequately investigated potential juror bias; (4) the trial court incorrectly denied his motion for

judgment of acquittal; (5) the prosecutor engaged in misconduct; and (6) there was sentencing error.

A. *Pitchess Motion*

Appellant contends that the trial court erred in connection with a motion for pretrial discovery that he filed pursuant to *Pitchess*, *supra*, 11 Cal.3d 531. The motion sought discoverable material within the personnel records of deputy sheriffs Brothers and McLaughlin "relating to acts of aggressive behavior, violence, excessive force, or attempted violence or excessive force," as well as any records "pertaining to excessive force or display of post-traumatic stress disorder type symptoms." The trial court ordered an in camera review of only Brothers's records, and it reviewed these records solely for materials bearing on the issue of excessive force. Following the in camera review on May 5, 2005, it concluded that there were no discoverable records.

Appellant does not challenge the narrow scope of the in camera hearing, and thus the sole question before us is whether the trial court erred in determining that Brothers's records did not contain discoverable materials. We review this determination for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164. We have independently examined the materials reviewed by the trial court (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229), and conclude there is no basis to disturb its ruling on the *Pitchess* motion.

B. *Error in Jury Selection*

Appellant contends that the trial court erred in denying his motion for a new jury panel under *Batson v. Kentucky* (1986) 476 U.S. 79 and *People v. Wheeler* (1978) 22 Cal.3d 258, overruled on another ground in *Johnson v. California* (2005) 545 U.S. 162. He argues that the prosecutor failed to show that he had genuine

nondiscriminatory motives for exercising peremptory challenges to three prospective female jurors. We disagree.

1. *Governing Principles*

Generally, "[t]he use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution [citation] as well as the equal protection clause of the Fourteenth Amendment to the United States Constitution. [Citation.] . . . [¶] 'A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors has been excluded on the basis of group or racial identity. . . . Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenges at issue." (*People v. Burgener* (2003) 29 Cal.4th 833, 863-864, quoting *People v. Jenkins* (2000) 22 Cal.4th 900, 993.)

To carry this burden, the prosecutor "need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136.) Thus, justification for a challenge may be properly found in "'bare looks and gestures'" that may alienate a party (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 276), and a challenge "based on 'hunches' and even 'arbitrary' exclusion is permissible, so long as the reasons are not based on impermissible group bias" (*People v. Turner* (1994) 8 Cal.4th 137, 165, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

"The trial court's ruling on this issue is reviewed for substantial evidence[, provided that] 'the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror.' [Citations.]" (*People v. McDermott* (2002) 28 Cal.4th 946, 971, quoting *People v. Silva* (2001) 25 Cal.4th 345, 386.)

2. *Underlying Proceedings*

During voir dire, Juror No. 0089 stated that she had no prior jury experience. The prosecutor accepted a jury panel containing Juror No. 0089, but voir dire continued due to a defense challenge to a different prospective juror. Subsequently, Juror No. 1368 -- a woman -- and Juror No. 2350 -- a man -- stated that they lacked prior jury experience. The prosecutor accepted a panel containing Juror No. 0089 and No. 1368, and later, a panel containing all three of these prospective jurors.

After numerous challenges to the panel -- including a challenge against Juror No. 2350 by appellant's counsel -- the prosecutor exercised peremptory challenges regarding Juror No. 0089 and No. 1368, who were replaced by two male prospective jurors who had previously served on juries. Shortly thereafter, the prosecutor and appellant's counsel accepted the jury. During the selection of the alternative jurors, the prosecutor exercised a peremptory challenge regarding Juror No. 9472, another female.

Upon the selection of the alternative jurors, appellant's counsel requested a new jury panel, contending that the prosecutor had exercised nine peremptory challenges against females. The trial court found that this constituted a prima facie showing of discrimination, and asked the prosecutor to explain her peremptory challenges.

Noting that the jury as impaneled had eight female jurors, the prosecutor answered that she had challenged Juror No. 0089 and No. 1368 for lack of prior jury experience. The prosecutor also said that Juror No. 9472 had made what appeared to be a hostile facial expression towards the prosecutor. Appellant's counsel responded that she had not witnessed any such expression, and believed that Juror No. 9476 had been polite in answering questions. The trial court denied appellant's motion for a new jury panel.

3. *Analysis*

Because nothing suggests that trial court's evaluation was other than "'"sincere and reasoned,"'" we apply the substantial evidence standard of review. (*People v. Arias*, *supra*, 13 Cal.4th at p. 137.) Under that standard, we see no error.

Regarding Juror No. 0089 and No. 1368, prosecutors may properly exercise their peremptory challenges in a tactical manner during the jury selection process to achieve a particular mix of experienced and inexperienced jurors. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.) Moreover, they may adjust their aims during this process as their allotment of challenges dwindles and the likelihood of achieving an initially attractive balance of experience on the jury fades. (*Ibid*.) Accordingly, "the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper seems substantially similar." (*Id*. at p. 1221.)

Appellant contends that the prosecutor necessarily exercised her challenges on an impermissible basis regarding Juror No. 0089 and No. 1368 because she never asserted a challenge against Juror No. 2350, a male who also lacked jury experience. However, the prosecutor initially accepted Juror No. 0889 and No.

1368, and then accepted all three jurors; she first challenged Juror No. 0889 and No. 1368 only after the panel had undergone many changes (including appellant's removal of Juror No. 2350).

This record raises the reasonable inference the prosecutor properly exercised her peremptory challenges in response to the dynamics of the jury selection process, and not on the basis of gender bias. As our Supreme Court explained in *People v. Johnson*, *supra*, 47 Cal.3d at pages 1220-1221: "[T]he particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box. It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain. These same considerations apply when considering the . . . experience of the prospective jurors."

Finally, regarding Juror No. 9472, the prosecutor may properly challenge prospective jurors whose facial expressions evince hostility to the prosecution. (See *People v. Reynoso* (2003) 31 Cal.4th at. 903, 917.) The court credited the prosecutor's explanation, and the fact that appellant's counsel did not notice any such expression is insufficient to undermine the trial court's ruling. (*Id.* at p. 926.)

C. *Juror Bias*

Appellant contends that the trial court erred in connection with an incident at trial, when an outburst by appellant in open court upset a juror. He argues that the trial court (1) inadequately investigated whether the juror's reaction influenced other jurors, and (2) improperly denied his motion for a mistrial. We disagree.

Generally, "[t]he decision whether to investigate the possibility of juror bias, incompetence, or misconduct -- like the ultimate decision to retain or discharge a juror -- rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial." (*People v. Ray* (1996) 13 Cal.4th 313, 343-344.)

Furthermore, "[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]" (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) However, the trial court may properly deny a motion for a mistrial when "the court is satisfied that no injustice has resulted or will result from the events of which the complaint ensues. [Citations.]" (*People v. Slocum (*1975) 52 Cal.App.3d 867, 884.) We review the trial court's ruling for abuse of discretion. (*People v. Hines* (1997) 15 Cal.4th 997, 1038.)

During McLaughlin's cross-examination, appellant asserted in open court that McLaughlin had shot him, and complained that his counsel was "doing nothing for [him]." The trial court told appellant to stop speaking, declared a recess, and admonished appellant out of the jury's presence. McLaughlin's cross-examination then recommenced.

During the next recess, the trial court questioned Juror No. 12 -- in isolation from the other jurors -- about a note from the court clerk that Juror No. 12 had been crying, and was scared and worried. Juror No. 12 stated that she became frightened during appellant's outburst because only a single female deputy sheriff had been providing security in the courtroom, and that she later felt better when she saw a male deputy sheriff. She denied that appellant's outburst would affect her decision in the case.

In response to requests from appellant's counsel, the trial court agreed to ask Juror No. 12 whether other jurors had seen her crying, and to advise the jury not to hold appellant's outburst against him. When Juror No. 12 said that other jurors had seen her distress, the trial court admonished her not to discuss the incident or let it affect her judgment.

Citing concerns about jury impartiality, appellant's counsel asked the trial court to conduct a hearing into the other jurors' perceptions of the incident and their responses to it, pointing to Juror No. 12's emotional behavior in the presence of other jurors. The trial court declined this request, reasoning that it already knew what the jurors had seen during appellant's outburst. It nonetheless told the jurors not to let appellant's conduct affect their judgment, and asked whether the incident had influenced them. When no juror answered this inquiry, the trial court directed them to notify the bailiff if they later thought that the incident would affect their judgment. Appellant's counsel then sought a mistrial, explaining that she made the motion notwithstanding "the court's decision not to hold a hearing or inquire of the jurors as to what they discussed in the hallway, [and] what they perceived to be going on in the courtroom." The trial court denied this motion.

At the outset, we reject respondent's contention that appellant waived his contentions of error by failing to raise them before the trial court. The record establishes that appellant's counsel requested a hearing and a mistrial on the basis

of concerns about juror bias, including the possibility that Juror No. 12's response to appellant's misconduct caused prejudice in other jurors.

In our view, the trial court did not err in limiting its inquiry into potential juror bias to an examination of Juror No. 12. "Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged.'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 821, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 520.) However, "a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case. [Citations.]" (*People v. Ray*, *supra*, 13 Cal.4th at p. 343.)

Here, the only such information presented to the trial court concerned Juror No. 12, who had responded in an emotional manner to appellant's outburst, and the trial court conducted a hearing into this matter. In contrast, the trial court knew that the other jurors had seen appellant's outburst and (perhaps) witnessed Juror No. 12's response, but nothing before it affirmatively indicated that these events had influenced them in any way. When the trial court invited the jury to disclose potential bias stemming from appellant's conduct, it obtained no additional information justifying a hearing. Although the trial court did not expressly refer to Juror No. 12's behavior during this inquiry, its questions were reasonably likely to elicit information stemming both from appellant's outburst and any observation of Juror No. 12's response to it. Under these circumstances, we conclude that the trial court properly declined to conduct a hearing involving the other jurors.

The motion for a mistrial was also properly denied because there is no evidence of incurable prejudice. Juror No. 12 stated that appellant's outburst would not influence her decision, and the other jurors gave a similar indication upon the trial court's inquiry. Additionally, the court expressly admonished the

jury not to be influenced by appellant's conduct. We presume that the jurors complied with the trial court's instructions and admonishments when, as here, there is no evidence to the contrary. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.)

In sum, the trial court did not abuse its discretion in denying appellant's request for a hearing and a mistrial.

D. *Motion For Judgment Of Acquittal*

Appellant contends that the trial court improperly denied his motion for judgment of acquittal (§ 1181.1) regarding count 3, which charged appellant with assault on deputy sheriff Brothers, and the accompanying allegation that appellant had discharged a firearm.[4] The trial court is obliged to deny a motion for acquittal "when there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged." (*People v. Mendoza* (2000) 24 Cal.4th 130, 175.) We review this denial in light of the evidence before the trial court when it ruled. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.) Here, appellant sought a judgment of acquittal at the close of the prosecution's case-in-chief, which we examine for substantial evidence to support the trial court's ruling.

1. *Gun Discharge Allegation*

Appellant contends that the prosecutor presented insufficient evidence that he discharged a handgun within the meaning of section 12022.53, subdivision (c) (subdivision (c)), which mandates an additional and consecutive term of

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[4] Section 1118.1 provides upon the defendant's motion at the close of evidence on either side, the trial court "shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

imprisonment of 20 years for "[a]ny person . . . who personally and intentionally discharges a firearm" in the commission of enumerated offenses, including assault on a peace officer. He argues that the prosecution's case-in chief showed -- at most -- that he tried to shoot his gun, which misfired and never emitted a bullet, and that therefore there is no evidence that he *discharged* his gun. As explained below, we agree with the premise of this argument but reject its conclusion.

During the prosecution's case-in-chief, Willoughby testified that appellant's gun looked operable during the carjacking, and its ejection portal was closed. He did not hear a gunshot as appellant drove away. Deputies Brothers and McLaughlin testified that appellant aimed, or tried to aim, his gun at them during their confrontation with him. Firearms expert Peck testified that she found a torn cartridge case in the gun's ejection port and a bullet in its barrel. She opined that the gun's firing pin struck an improperly supported cartridge in the firing chamber, causing an explosion that ruptured the cartridge case but failed to propel the bullet completely out of the barrel. According to Peck, this explosion made a noise, but she did not know whether there also had been muzzle flash from the gun. Setting aside appellant's gun, Peck found no evidence that a bullet had been fired from inside Willoughby's Cadillac. In our view, this evidence supports the reasonable inference that appellant pulled his gun's trigger at least once during the confrontation with Brothers and McLaughlin, but not that his gun ever emitted a bullet. Respondent apparently agrees on this matter, but argues that appellant "discharged" the gun within the meaning of subdivision (c) when he pulled the trigger and caused the explosion in the gun's firing chamber, notwithstanding the gun's failure to project a bullet.

We therefore confront a question of statutory interpretation, viz., the interpretation of the phrase to "personally and intentionally discharge[] a firearm" within the meaning of subdivision (c). "'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.]' [Citations.] 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. [Citations.]" (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1149 (*Palmer*).)

Section 12022.53 is part of the so-called 10-20-life law enacted in 1997 to enhance penalties for firearm use in the commission of certain felonies (Assem. Bill No. 4 (1997-1998) Reg. Sess.). (*People v. Garcia* (2002) 28 Cal.4th 1166, 1171; *Palmer, supra*, 133 Cal.App.4th at p. 1149.) As our Supreme Court explained in *People v. Garcia*, *supra*, 28 Cal.4th at page 1172, "[t]he legislative intent behind section 12022.53 is clear: 'The Legislature finds and declares that substantially longer prison sentences must be imposed on felons who use firearms in the commission of their crimes, in order to protect our citizens and to deter violent crime.' (Quoting Stats. 1997, ch. 503, § 1.)

Section 12022.53 "provides for increasingly serious circumstances of firearm use. Under subdivision (b), if the defendant 'personally used a firearm' . . . , the mandatory additional consecutive punishment is 10 years. Under subdivision (c), if the defendant 'intentionally and personally discharged a firearm,' the mandatory additional consecutive punishment is 20 years. Under subdivision (d), . . . if the defendant '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,' the mandatory additional consecutive punishment is 25 years to life." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 493.) Section 12022.53 thus recognizes different degrees of culpability, and imposes "three gradations of punishment based on increasingly serious types and consequences of firearm use in the commission of the designated felonies." (*People v. Martinez, supra*, 76 Cal.App.4th at p. 495.)

It is well established that the phrase "used a firearm," as found in subdivision (b) of section 12022.53 (subdivision (b)), encompasses the display of an unloaded or inoperable firearm.[5] (*People v. Martinez, supra*, 76 Cal.App.4th at p. 495.) Under this understanding of the term "used," a defendant uses a firearm by intentionally displaying it in a menacing manner, firing it, or striking or hitting a human being with it. (*People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319-1321.) However, no court has confronted the issue before us, namely, whether a defendant who aims a gun, pulls its trigger, and thereby causes an explosion in its firing chamber, has discharged the gun within the meaning of subdivision (c). This issue concerns the boundary between the *mere* use of a firearm under subdivision (b) and the discharge of a firearm under subdivision (c).

We begin by examining the language of subdivision (c). As ordinarily understood, the verb "to discharge" carries several meanings relevant here. It means generally "to relieve of a charge, load, or burden," "to give outlet or vent to," or "to emit"; when applied to a gun, it may mean variously "to go off," "to fire"; or "to project the missile of." (Webster's 3d New Internat. Dict. (2002) p. 644.) In view of these definitions, the phrase "discharge a firearm" can connote

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[5] The term "firearm," as used here, is defined by statute to mean "any device, designed to be used as a weapon, from which is expelled through a barrel a projectile by the force or any explosion or other form of combustion." (§ 12002, subd. (b).)

the projection of a bullet, but it is not restricted to this meaning. The phrase, as commonly understood, is also appropriately applied to the shooting of a firearm that does not emit a bullet because, for example, it is loaded with blanks. (E.g. *Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 498, 500-504 [city properly terminated police officer who "discharged [his] weapon" by firing his firearm loaded with blanks at another officer].)

Here, appellant's gun "gave outlet or vent to" the explosion within its firing chamber (Webster's 3d New Internat. Dict., *supra*, at p. 644), but it did not project a bullet. Because the language of subdivision (c), taken in isolation, does not resolve whether this constitutes a discharge under section 12022.53, our inquiry shifts to the surrounding provisions and their underlying purpose, with attention to "the evils to be remedied." (*Palmer, supra*, 133 Cal.App.4th at p. 1142.)

We find guidance on the issue before us in *Palmer*, which resolved related issues concerning the phrase "discharges a firearm," as it appears in subdivision (d) of section 12022.53 (subdivision (d)). In *Palmer*, the defendant, who had robbed a store, was backing his car out of a parking space near the store when he saw a police officer exiting a patrol car in the store's parking lot. (*Palmer, supra*, 133 Cal.App.4th at pp. 1146-1147.) The defendant stopped his car, swiveled out of his seat, and fired a gun at the officer, who dove behind the patrol car's door and broke his ankle. (*Id*. at p. 1147.) No bullet from the defendant's gun hit the officer. (*Id*. at p. 1147.) A jury convicted the defendant of assault on a peace officer and found true an allegation under subdivision (d) that he had discharged a firearm in the commission of this offense, thereby causing great bodily injury. (*Id*. at p. 1148.)

On appeal, the defendant challenged this finding, contending that the officer injured himself in response to the defendant's act of pointing the gun, rather than his act of discharging the gun. (*Palmer, supra*, 133 Cal.App.4th at p. 1148.) At

trial, the officer had testified that when the defendant swiveled and pointed the gun, the officer dove for cover and saw "the flash of the gun as he ducked behind the patrol vehicle's door." (*Id.* at p. 1154.) The defendant thus argued that the officer sought cover *before* the defendant pulled the trigger, and the officer's injuries resulted from the act of pointing the gun, not from the act of discharging it. (*Id*. at pp. 1153-1155.) In addition, the defendant contended that the jury's finding was incorrect because the bullets the gun discharged played no role in causing the officer's injuries.

Following an examination of case authority, the court in *Palmer* rejected these contentions. (*Palmer*, *supra*, 133 Cal.App.4th at pp. 1148-1153.) Noting that the Legislature's purpose in enacting section 12022.53 was "to protect citizens from injury and deter violent crime," the court concluded that subdivision (d) imposes additional punishment for injuries proximately caused by the discharging of a gun, *regardless* of whether a bullet caused the injuries. (*Id.* p. 1152.) It reasoned that had the Legislature intended to limit subdivision (d) to bullet-related injuries, it could have said so in direct terms, and without reference to proximate causation. (*Id*. at pp. 1152-1153.)

The court also reasoned that any such limitation would not comport with the legislative purpose of section 12022.53: "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." (*Palmer*, *supra*, 133 Cal.App.4th at p. 1152.) The court also concluded that substantial

evidence supported the finding that the officer's injuries resulted from a discharge of the gun. It reasoned: "[The defendant's] argument rests upon the premise that the 'discharge' of a firearm refers only to the instant the firearm's trigger is actually pulled. [This] 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 [the defendant] cite any authority so limiting the term. The evidence recited ante showed [the defendant] 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 [the defendant]'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." (133 Cal.App.4th at p. 1154.)

In view of *Palmer*, we conclude that appellant's conduct also constituted a discharge within the meaning of subdivision (c), even though his gun misfired and did not emit a bullet. Because subdivisions (c) and (d) are closely related elements of a single statutory scheme, the phrase "discharges a firearm" must be viewed as carrying the same meaning in each provision. The key difference between these provisions is that subdivision (d) addresses "discharges" that *actually* cause injury, and thus imposes greater punishment on discharges than subdivision (c).

Although the defendant's gun in *Palmer* did not misfire, the rationale in *Palmer* authorizes punishment under subdivision (d) when a defendant causes injury by raising a gun and pulling the trigger, even though the gun does not emit a bullet. As the *Palmer* court explained, given the legislative purpose underlying section 12022.53, no principled distinction can be drawn within subdivision (d) between bullet-related injuries and injuries caused by the victim's evasive action in response to the defendant's gun-related conduct.

For similar reasons, no principled distinction can be drawn within subdivision (d) between evasion-based injuries caused by a defendant who aims a gun, pulls its trigger, and projects a bullet, and evasion-based injuries caused by a defendant who engages in identical conduct, but whose gun noisily misfires and fails to emit a bullet. Each defendant will prompt precisely the same response in victims, who cannot see whether the gun has actually expelled a bullet. The defendants are thus equally culpable, and should be treated alike. Accordingly, limiting "discharges" under subdivision (d) to instances in which a gun emits a bullet would arbitrarily frustrate the legislative purpose underlying section 12022.53.

Given the close link between subdivisions (c) and (d), we conclude that a defendant who aims a gun and pulls its trigger, thereby causing an explosion in its firing chamber, has discharged the gun within the meaning of subdivision (c).[6] Because the prosecution's case-in-chief supports a determination that this is what occurred, the trial court did not err in denying a judgment of acquittal with respect to the special allegation.

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6 Appellant contends that these facts constitute only an *attempt* to discharge a gun, which falls outside the scope of subdivision (c). He points to subdivision (d) of section 626.9, which renders it unlawful in some circumstances "to discharge, or to attempt to discharge, a firearm in a school zone," and argues that this provision manifests the Legislature's intent to distinguish between the discharge of a gun and an attempt to discharge a gun. However, this provision does not disturb our conclusions. Section 626.9 is not part of 10-20-life law enacted in 1997 (see § 626.9, subd. (a)), and thus it provides limited guidance regarding the Legislature's intent in enacting subdivision (c) of section 12022.53. Furthermore, nothing in section 626.9 or the case authority interpreting it establishes that the factual situation at issue here would constitute *merely* an attempt to discharge a gun under section 626.9, subdivision (c).

2. *Assault On Officer Brothers*

Appellant also contends that he was entitled to judgment of acquittal regarding his conviction for assault on Brothers with a semiautomatic firearm. Section 240 provides that "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Generally, the elements of assault with a firearm under section 245 include an assault, "the foreseeable consequence -- i.e., the 'likely' or natural and probable consequence -- of which is the infliction of great bodily injury upon the subject of the assault." (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1480-1484; see *People v. Cook* (2001) 91 Cal.App.4th 910, 920.)

Here, appellant contends that the prosecutor did not show that he had the requisite "present ability" to injure Brothers with his gun, or that great bodily injury to Brothers was foreseeable from appellant's conduct. His sole argument on these matters is that (1) given the distance separating appellant and Brothers, appellant could have injured Brothers only by shooting at him, and (2) the prosecutor presented insufficient evidence that appellant ever aimed his gun directly at Brothers.

The principal evidence in the prosecution's case-in-chief on these issues came from Brothers, who testified that as McLaughlin moved across the rear of the Cadillac towards the Mustang, appellant "maneuvered" in his seat, and his gun's line of fire swung toward Brothers, who had taken cover behind the Mustang. Appellant "continued to maneuver to acquire [Brothers] or [his] partner," that is, "to get in a position to take aim at [them]." Brothers further testified that appellant pointed the gun in his direction, but acknowledged that due to his angle of vision, he could not determine whether the gun was pointed directly at him.

The key issue, therefore, is whether this testimony established the requisite "present ability . . . to commit a violent injury" (§ 240) and foreseeability of great

bodily injury. In *People v. Thompson* (1949) 93 Cal.App.2d 780, 781, two police officers arrived at the defendant's house after they received information that the defendant had struck his wife. The defendant seized a gun, aimed it between the officers, pointed it downward, and ordered the officers to raise their hands. (*Id*. at p. 782.) When the defendant momentarily looked away, the officers disarmed him. (*Ibid*.)

The court in *Thompson* held that sufficient evidence supported the defendant's conviction for assault with a deadly weapon on the officers, even though the defendant never pointed his gun directly at them. (*People v. Thompson*, *supra*, 93 Cal.App.2d at p. 782.) It reasoned that the gun "was in a position to be used instantly," and the defendant's intention to use it if the officers did not comply with his demand could be inferred from his behavior. (*Ibid*.)

Under *Thompson*, we conclude that the prosecution's case-in-chief contained ample evidence to establish the matters that appellant challenges. Brothers testified that he wore bright yellow rain gear, which supports the reasonable inference that appellant saw Brothers as McLaughlin moved toward the Mustang. In view of appellant's conduct in moving his gun, the jury -- considering the prosecution's evidence -- properly could have determined that appellant's gun "was in a position to be used instantly" against Brothers, and that he intended to use it. (*People v. Thompson*, *supra,* 93 Cal.App.2d at p. 782).

In sum, the trial court did not err in denying appellant's motion for judgment of acquittal with respect to count 3.

E. *Prosecutorial Misconduct*

Appellant contends that the prosecutor engaged in misconduct during closing argument by misstating the standard for reasonable doubt. The principles applicable to the misconduct asserted here are explained in *People v. Gonzalez*

(1990) 51 Cal.3d 1179, 1214-1215: "[T]he prosecution must prove every element of a charged offense beyond a reasonable doubt. The accused has no burden of proof or persuasion, even as to his defenses. [Citations.] However, once the prosecution has submitted proof that permits a finding beyond reasonable doubt on every element of a charge, the accused may obviously be obliged to respond with evidence that 'raises' or permits a reasonable doubt that he is guilty as charged. [Citations.]" (Italics deleted.) Thus, a prosecutor may properly argue that the crimes alleged have been proved beyond a reasonable doubt, and "that the weakness of the defense response [has] left the record devoid of any basis for reasonable doubt." (*Id*. at p. 1215.) By contrast, the prosecutor may not offer argument "meant to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*Ibid*.)

An instructive application of these principles is found in *People v. Hill* (1998) 17 Cal.4th 800. There, the prosecutor addressed the concept of reasonable doubt during the rebuttal portion of his closing argument, and stated: "'[I]t must be reasonable. It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt*.'" (*Id*. at p. 831.) The court in *Hill* held that these remarks, though somewhat ambiguous, constituted misconduct, concluding that the jury was reasonably likely to take them to mean that the defendant had the burden of producing some evidence to demonstrate a reasonable doubt of his guilt. (*Id*. at pp. 831-832.)

Here, during the opening portion of the prosecutor's closing argument, the prosecutor argued in detail that her evidence established each element of the crimes charged against appellant. Appellant's counsel responded that if the jury viewed the evidence critically, "it really wasn't all that certain what happened." She contended that Willoughby was not a compelling witness, and suggested that

he had gone to the Ladera Center late at night with a large amount of cash for some purpose other than to buy medication for Dale. She further suggested that Willoughby had a dispute with appellant that led to the loss of the Cadillac, and that his story of a robbery was not truthful. In the course of this argument, appellant's counsel alluded to the jury instructions on reasonable doubt.[7] In addition, she argued that circumstantial evidence supported the possibility that Willoughby had initially possessed the gun found in the Cadillac, citing the instructions regarding circumstantial evidence, which tell the jury to accept any reasonable interpretation of circumstantial evidence that points to the defendant's innocence.[8]

During the rebuttal portion of closing argument, the prosecutor stated: "Now, the other thing that [appellant's counsel] misstated is she kept talking about ['']Let's consider the possibility of.['] [¶] . . . [¶] I found it very interesting when she actually used the word possibility because in the reasonable doubt instruction that the court read to you . . . , it says reasonable doubt is defined as follows: It is not mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. [¶] An imaginary doubt, ladies and gentlemen, or a possible doubt is *where there is no evidence to support it*. [¶] A reasonable

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[7] The jury received CALJIC No. 2.90, which states in pertinent part: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

[8] The jury received CALJIC No. 2.01, which states in pertinent part: "Also, if the circumstantial evidence as to any particular count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt.

doubt would be *if there is evidence to support it*. There is something that is reasonable. *That is constantly through the instructions*. [¶] In fact, the instruction which she quoted is the circumstantial evidence instruction. She said if there's two interpretations of the evidence, you have to decide on the one that's in favor of the defendant. [¶] That's not the instruction. The instruction is if there are two reasonable interpretations of the evidence. [¶] We don't even have a second interpretation of the evidence here. There is no physical evidence to say that there is some other interpretation than what Mr. Willoughby said, what the officer said, what Viruol Gatchalian said, nothing. [¶] She talks about drugs. She talks about a lost car. No evidence of either. Nothing. She's speculating. She's trying to put in imaginary doubts." (Italics added.)

Because a timely admonition and instruction would have cured any error in this argument, appellant's direct contention of prosecutorial misconduct is waived for want of an objection before the trial court. (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1216.) However, appellant also contends that his counsel rendered ineffective assistance by failing to raise any such objection. As we explain below, this failure was harmless, and thus appellant's contention fails.[9]

As in *Hill*, the prosecutor's argument here is somewhat ambiguous. Its overarching theme is permissible, namely, that the possibilities suggested by appellant's counsel were not reasonable in light of the evidence presented at trial.

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9 "In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was 'deficient' because his 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)

However, the prosecutor strayed into error in remarking that the idea that doubt is reasonable "if there is evidence to support it" is one that runs "constantly through the instructions." Under *Hill*, this argument was impermissible.

Nonetheless, it is not reasonably likely that appellant would have achieved a more favorable outcome if his counsel had objected to these remarks. The remarks were brief, the jury was otherwise properly instructed on the standard of reasonable doubt, and the evidence against appellant was compelling. In our view, had the trial court issued a timely admonition and instruction to the jury to set aside the offending remarks, the jury would have reached the same verdicts.

F. *Sentencing Error*

Appellant contends (1) the trial court erred in determining that one of his prior convictions is a serious felony (§§ 667, subd (a), subds. (b)-(i), 1170.12, subds. (a)-(d)); (2) there was sentencing error under section 654; and (3) the trial court improperly imposed consecutive sentences on his convictions for assault on a peace officer.

1. *Prior Conviction For A Serious Felony*

Appellant contends there was insufficient evidence to support the trial court's determination that his prior conviction for negligent discharge of a firearm under section 246.3 constitutes a serious felony or "strike" within the meaning of the Three Strikes law, and a serious felony under section 667, subdivision (a).

Serious felonies under the Three Strikes law and section 667, subdivision (a), are defined by reference to section 1192.7, subdivision (c), which enumerates several classes of felonies. (*People v. Banuelos* (2005) 130 Cal.App.4th 601, 604.) Although subdivision (c) of section 1192.7 does not expressly identify negligent discharge of a firearm as a serious felony, it encompasses violations of section

246.3 "'in which the defendant personally uses a firearm.'" (*People v. Leslie* (1996) 47 Cal.App.4th 198, 201, quoting § 1192.7, subd. (c)(8).)

Here, no evidence was submitted to the trial court that appellant's prior violation of section 246.3 involved his personal use of a firearm. Accordingly, the evidence before the trial court was insufficient to show that this offense constitutes a serious felony under section 1192.7, subdivision (c). (*People v. Bautista* (2005) 125 Cal.App.4th 646, 654-655.) Respondent concedes this error. The matter must therefore be remanded for a redetermination whether appellant's negligent discharge of a firearm amounts to a serious felony under the Three Strikes law and section 667, subdivision (a), and any appropriate resentencing. (*People v. Barragan* (2004) 32 Cal.4th 236, 239; *People v. Banuelos*, *supra*, 130 Cal.App.4th at pp. 604-608.)

2. *Section 654*

Appellant contends that the trial court erred under section 654 by failing to stay punishment for his conviction for possession of a gun as a felon. Subdivision (a) of section 654, which prohibits multiple punishment for "[a]n act or omission that is punishable in different ways by different provisions of law," does not bar such punishment in all circumstances. Multiple punishment is proper if the defendant pursues suitably independent criminal objectives. (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.)

Here, appellant argues that his intent in possessing the gun was merely to rob Willoughby and escape, and thus his possession of the gun as a felon merged with his other offenses, which involved the use of the gun. In *People v. Jones* (2002) 103 Cal.App.4th 1139, the court confronted and rejected a similar contention. There, the defendant, who had been convicted of a felony, drove past the home of an ex-girlfriend and fired several gunshots at it. (*Id*. at pp. 1141-

1142.) A jury subsequently found him guilty of shooting at an inhabited dwelling and possession of a firearm as a felon. (*Id*. at p. 1142.)

On appeal, the defendant contended that the trial court had improperly failed to stay punishment under section 654 for the latter offense, arguing that his possession of the gun was incidental to and simultaneous with his shooting at his ex-girlfriend's home. (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1142.) Following an examination of case authority, the court disagreed, holding that "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Id.* at p. 1145.)

The *Jones* court relied in part on *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1404-1405, in which an ex-felon used a gun to commit two robberies, and was still in possession of the gun when he was arrested 30 minutes after the second robbery. On appeal, he argued that punishment for his conviction for possession of a gun as a felon should have been stayed because gun-related punishment had been imposed in connection with his robbery convictions. (*Id*. at pp. 1405, 1406-1407.) The court affirmed his sentence, concluding that the weight of then-extant case authority established that multiple punishment for possession of a gun by a felon is impermissible solely when "fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offence." (*Id*. at p. 1412.) The *Ratcliff* court rejected a small number of cases that suggested a contrary determination, including *People v. Cruz* (1978) 83 Cal.App.3d 308 (*Cruz*).

Here, the evidence at trial established that appellant possessed the gun before he robbed Willoughby, and thus the trial court properly declined to stay punishment for possession of a gun as a felon. Citing *Cruz*, appellant disagrees.

However, we find *Jones* and *Ratcliff* persuasive on this matter, and decline to follow *Cruz*.

3. *Consecutive Sentences*

The trial court imposed consecutive sentences on appellant's two convictions for assault on a peace officer on the ground that each offense involved "a separate act of violence against a separate victim." Appellant contends that this ground is insufficient to support consecutive sentences.

Appellant did not raise this contention before the trial court, and thus it has been forfeited insofar as the trial court's ruling rests on its discretionary authority to impose consecutive sentences pursuant to California Rules of Court, rule 4.425 (rule 4.425).[10] (*People v. Scott* (1994) 9 Cal.4th 331, 348-353.) However, even if we were to address it, we would conclude that it is meritless.

In *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 360-361, the defendant, who was intoxicated, drove his car at high speeds and collided with another vehicle, killing two persons. After he was convicted of two counts of gross vehicular manslaughter, the trial court imposed consecutive sentences because each offense involved a different victim. (*Id*. at pp. 362-363.) After an analysis of case authority, the court in *Valenzuela* concluded that when "'multiple crimes are so closely connected in time and place as to comprise a single criminal transaction,'" the trial court may impose consecutive sentences upon the crimes "'upon a finding that multiple victims were involved in the transaction.'" (*Id*. at

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[10] Rule 4.425 provides in pertinent part that the "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] . . . [¶] (b) Any circumstance in aggravation or mitigation may be considered . . . ." Under California Rules of Court, rule 4.421(a), circumstances in aggravation include "[f]acts relating to the crime, whether or not charged or chargeable as enhancements . . . ."

pp. 363-365, quoting *People v. Coulter* (1983) 145 Cal.App.3d 489, 491-492.) In so concluding, the *Valenzuela* court reasoned that several courts that had embraced the contrary view had misinterpreted a prior version of rule 4.425. (*People v. Valenzuela*, *supra*, 40 Cal.App.4th at p. 363.)

Here, appellant cites the case authority rejected in *Valenzuela*. Because we believe that *Valenzuela* was correctly decided, we follow it here.[11]

DISPOSITION

For the reasons explained in this opinion (see pt. F.1., *ante*), the judgment is reversed with respect to appellant's sentence, and the matter is remanded to the trial court for further proceedings in accordance with this opinion. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MANELLA, J.

We concur:

WILLHITE, Acting P.J.

SUZUKAWA, J.

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[11] Appellant also suggests that the trial court erroneously believed that it lacked the discretion to impose concurrent sentences under rule 4.125. However, nothing in the record supports this contention, and thus it would also fail. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944.)