Filed 12/4/03

CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JEREMY DUT CHIU, Defendant and Appellant.	C041191 (Super. Ct. No. 01F06209)

APPEAL from a judgment of the Superior Court of Sacramento County, David De Alba, judge. Affirmed.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Carlos A. Martinez and Mathew Chan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, the first two paragraphs of this opinion, along with section 3 of the Discussion and the Disposition, are certified for publication.

A jury convicted defendant Jeremy Chiu of special circumstance murder and attempted robbery arising from one incident (counts one and two), and robbery, assault with a deadly weapon and evading a police officer arising from another incident (counts three, four and five). (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17), 664, 211, 245, subd. (a)(2);[1] Veh. Code, § 2800.2, subd. (a), respectively.) The jury also found that defendant personally discharged a firearm to commit the murder; this finding resulted in a 25-year-to-life sentence enhancement. (§ 12022.53, subd. (d).)

In the published portion of this opinion, we reject defendant's contention that his 25-year-to-life enhancement under section 12022.53 must be stricken because it is subsumed within his greater sentence of life without the possibility of parole. In the unpublished portions of this opinion, we reject defendant's additional contentions that the trial court prejudicially abused its discretion in failing to sever counts one and two from counts three through five, and in failing to remove irrelevant and inflammatory material from two taped jail conversations. Consequently, we affirm.

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[1] Further undesignated section references are to the Penal Code unless otherwise noted.

BACKGROUND

Counts One and Two (Murder and Attempted Robbery at Pacesetter Corporation)

In the early afternoon of Friday, May 11, 2001, Nick Ly was shot and killed by an assailant who tried to rob him. Ly worked for a catering lunch truck business that was selling food at the Pacesetter Corporation. Friday was "payday" for Pacesetter employees, and on those days the lunch truck would often carry around $5,000 to cash the employees' paychecks. The lunch truck made two half-hour stops at Pacesetter on every business day, at 10:40 a.m. and 1:00 p.m.

Two witnesses, Ken T. and Johnny C., saw the attempted robbery and shooting. (Initials are used to preserve privacy.) The two provided similar general descriptions of the assailant--a man between 5 feet 9 inches and 6 feet tall, having long dark curly hair and weighing between 250 and 300 pounds. Defendant fit this description as far as it went. These two witnesses also apparently saw the getaway car--an older blue compact car, resembling a Dodge Colt, that was being driven by a white male with blond/rust hair. A codefendant, Ted Cole, was charged with counts one and two and tried jointly with defendant Chiu; the jury deadlocked regarding Cole, and the trial court declared a mistrial. Cole and his car matched this general description. Ken T. also saw the assailant's gun, which was a revolver.

There was a third witness, Greg M., who was not present at the robbery/shooting, but who was important in other ways. On the day of the shooting, M. dropped his daughter off at work

at Pacesetter just before 11:00 a.m. After his daughter informed him that the lunch truck operators often extended credit to Pacesetter workers, M. decided to inquire whether they were interested in buying Visa/MasterCard services from him. M. parked his car and noticed an older blue car nearby. This older car resembled a Dodge Colt or a Geo Metro and had two men in it. One of the men was white with dirty blond hair and a trimmed mustache. The other man, whom M. later passed in a breezeway in "real close proximity," "almost bump[ing] shoulders," was described generally by M. along the lines of the general description provided by Ken T. and Johnny C. (Witnesses also variously described this man as white, Asian, Hispanic, and African-American.) The two men in the older blue car did not leave during the entire 20-plus minutes that M. was on the scene and talking to the lunch truck operators (one of these operators was the eventual victim, Ly). As M. left, the white man approached the truck.

In July 2001, M. helped the police develop a composite sketch of the man whom he passed in "real close proximity" on the morning of the shooting. This sketch was published in the Sacramento Bee on July 27, along with an article about the shooting and an offer of a $7,500 reward for information leading to the perpetrator's arrest and conviction.

In August 2001, M. viewed photo lineups of defendant and Cole, and defendant's photo "jumped out" at him. Said M.: "That was the gentleman I passed in the breezeway [on the day of the shooting], . . . I recognized him right away." M. picked

out Cole's photo as well, describing it as being "the closest." At trial, M. positively identified defendant and Cole as the occupants of the older blue car that M. saw parked near him on the morning of the shooting.

At the end of July 2001, Frank Blattel informed the police, at first anonymously, that his ex-daughter-in-law, Venus Gerlach-Blattel (Venus), may have been involved or have information about the crime.

Venus subsequently provided information to the police about the Pacesetter shooting in exchange for a dismissal of charges against her (petty theft with a prior and possession of a hypodermic needle); she also admitted her role in the crime and inquired about the reward. At trial, Venus testified under a grant of immunity. Venus is a cousin of Ted Cole and his sister, Angel Leandro; Leandro was defendant's girlfriend. For about a month, all four of them roomed together until Venus was asked to move out, leaving her homeless and angry, according to Leandro.

For three or four months in 2000, Venus worked at Pacesetter and cashed her paychecks every Friday at the lunch truck. About one month before the shooting, Venus informed defendant and Cole about the truck and they discussed robbing its occupants. None of them was working at the time and they were all using substantial amounts of methamphetamine daily.

Venus acknowledged playing a role in the Pacesetter robbery/shooting on the day it happened. On that day, she followed defendant and Cole to a parking lot about a half-mile

from Pacesetter; defendant and Cole were in Cole's blue Mitsubishi (which was akin to a Dodge Colt), and she was in defendant's red Jeep Wrangler. The two men left and then returned about 20 to 25 minutes later. Upon their return, the two men switched to the Jeep and had Venus drive the Mitsubishi by putting a license plate back on it. She claimed that at that time she was not aware of the robbery.

Later, defendant told Venus about the botched robbery at Pacesetter, acknowledging that he "had to shoot the guy." He also told Venus that he had changed clothes after switching cars, and that he had thrown away on some side street the gun that he had used. Defendant was quite concerned that someone would find that weapon.

At the behest of the police, Venus twice in early August 2001 visited defendant in jail; he was there on another charge. Their conversations were recorded, and defendant made some incriminating remarks (which will be discussed later in this opinion). These taped conversations were played for the jury, accompanied by transcripts.

Venus's mother, Dawn Gerlach, testified that Venus contacted her right after the Sacramento Bee article appeared. Venus told Gerlach about what had happened while she waited in the parking lot on the day of the shooting. Gerlach replied that Venus had to report the incident. Later, Venus informed Gerlach that she might get the reward.

Counts Three, Four and Five (Robbery and Assault with a Firearm at Del Taco and Reckless Driving to Evade Police)

On July 18, 2001, about 12:40 p.m., a man robbed the cashier of a Del Taco restaurant from the drive-through lane. The man was in a red Jeep Wrangler and armed with a handgun. The cashier who was robbed, Abigail J., positively identified defendant as the robber. Two other Del Taco employees, Mark L. and Benjamin S., strongly linked defendant to the robbery through descriptions of the robber, his red Jeep Wrangler, and his shirt (a sports jersey).

Immediately after the robbery, David B., an employee at a gas station across from the Del Taco, saw defendant, who appeared panicky, pull into the station in a red Jeep and change out of the sports jersey described by the Del Taco witnesses. B. positively identified defendant from a photo lineup and in court as the person he saw in the red Jeep.

The day after the Del Taco robbery, a police officer in a marked car, who had been given a description of the robber and his car, spotted defendant in the red Jeep and, with backup, signaled defendant to stop. Defendant recklessly, but unsuccessfully, tried to evade the officers. The police found a fully loaded .357-caliber revolver in the Jeep; more likely than not, this was not the weapon that had killed the lunch truck employee, Ly.

DISCUSSION

1. *Severance*

Defendant contends the trial court prejudicially abused its discretion in denying his motion to sever the Pacesetter murder and attempted robbery counts (counts one and two) from the Del Taco robbery, assault and evasion counts (counts three, four and five). We disagree.

The governing statute is section 954, which provides in part: "An accusatory pleading may charge . . . two or more different offenses of the same class of crimes or offenses, under separate counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." Section 954.1 adds in part that "[i]n cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, . . . evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact."

For efficiency, the law prefers joinder of criminal charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409; see also § 1098.) A denial of a defendant's motion for severance is reviewed for abuse of discretion--that is, did the ruling fall "'outside the bounds of reason.'" (*Id.* at p. 408.) Factors to

consider include whether evidence of the jointly tried crimes was not cross-admissible; whether certain of the charges were inflammatory; and whether a strong case was joined with a weak case to create a spillover effect. (*People v. Osband* (1996) 13 Cal.4th 622, 666.)

Defendant contends the Pacesetter and the Del Taco offenses had little in common, and the Del Taco case was strong while the Pacesetter case was much weaker.

Both the Pacesetter and the Del Taco offenses involved robberies of eating establishments around lunch time in which defendant used a handgun. Both offenses involved the use of defendant's red Jeep at some point during the getaway. And immediately after both offenses, defendant changed his clothes. The trial court, in ruling on defendant's motion to sever, concluded that there was a "substantial element of commonality" between the two sets of offenses.

We cannot say the trial court abused its discretion in this respect. There is more commonality between the Pacesetter and the Del Taco offenses than there was between the robbery and the attempted robbery that the court in *People v. McClain* (1942) 55 Cal.App.2d 399 (*McClain*) found properly consolidated as the same class of crimes. In *McClain*, the robbery and the attempted robbery involved not only different times and places, but completely different kinds of targets and methods of operation. (*Id.* at pp. 400-402.)

Defendant is correct that the Del Taco case was strong. That case was built on a solid phalanx of eyewitness testimony.

But defendant errs in concluding that the Pacesetter case was much weaker. The Pacesetter case may have been weaker than the Del Taco case--given the strength of Del Taco--but Pacesetter was not a weak case for severance purposes. Defendant errs in characterizing the Pacesetter case as resting "almost solely on the highly impeached testimony of Venus." To be sure, Venus presented credibility issues that the jury had to consider (her own drug use, her criminal charges, her interest in the reward, her anger at being kicked out of the house, her own role in the Pacesetter offenses, and some inconsistencies in her testimony). But there was more to the Pacesetter evidence than Venus's testimony, damaging as that was. Greg M. was a critical witness who positively identified defendant as being at Pacesetter on the day of the shooting, apparently "casing" the lunch truck target. Ken T. and Johnny C. witnessed the Pacesetter incident and provided consistent general descriptions of the robber/shooter, which fit defendant, and of the getaway car that could be linked to him. And defendant himself played a major role in his demise with his incriminating statements to Venus that were taped during her two jail visits with him. In his statements, which we shall discuss in the next section of this opinion, defendant encouraged Venus not to say anything about the Pacesetter incident, inquired about who was squealing, and concocted an exculpatory theme.

We conclude the trial court did not abuse its discretion in refusing to sever the Pacesetter offenses from the Del Taco

offenses. The trial court did not act "outside the bounds of reason," but well within it.

2. *The Taped Jail Conversations*

Defendant contends the trial court erred when it denied his Evidence Code section 352 motion to remove irrelevant, prejudicial and inflammatory material from two taped jail conversations that he had with Venus, and when it denied his related motion for mistrial. Defendant also claims his counsel was ineffective to the extent his initial motion was untimely. We find no prejudicial error.

A motion to exclude evidence pursuant to Evidence Code section 352 (probative value substantially outweighed by prejudicial impact) is reviewed for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.) A motion for mistrial is also reviewed for abuse of discretion; a mistrial should be declared only when "'a party's chances of receiving a fair trial have been irreparably damaged.'" (*People v. Welch* (1999) 20 Cal.4th 701, 749.)

Venus visited defendant in jail on August 2 and 3, 2001. On the first visit, she showed defendant the business card of the detective investigating the Pacesetter incident; on the second, she showed him the July 27, 2001, Sacramento Bee article on the topic. The two conversations between Venus and defendant were taped and played for the jury, accompanied by transcripts. (In line with *Bruton-Aranda* concerns--whereby one defendant implicates another in an out-of-court statement--the tapes had been previously redacted to omit references to codefendant Cole.

(*Bruton v. United States* (1968) 391 U.S. 123 [20 L.Ed.2d 476]; *People v. Aranda* (1965) 63 Cal.2d 518.)

As noted, defendant in these taped conversations encouraged Venus not to say anything about the Pacesetter incident. Along these lines, defendant told Venus, "You know nothing. Absolutely." After Venus informed defendant about the Sacramento Bee article and referred to the detective's business card, defendant stated, "Venus, we don't know anything. You hear me?" Further comments in this regard from defendant included, "You weren't even at the scene. [¶] . . . [¶] You know nothing. I know nothing. They don't have shit. [¶] . . . [¶] Hearsay[]"; "Don't you ever spill your fuckin' guts, Venus[]"; "Don't write [down any further information you get or find out]"; "Just stay gone. [¶] . . . [¶] Months[]"; "Look. You need to be gone a few months[]"; and "Fuckin' right now just don't trust nobody."

As also noted, defendant in the taped conversations inquired about who was squealing. In this regard, defendant stated: "Who do you think is -- [?]"; and later, "Scott? [Venus's boyfriend] [¶] . . . [¶] Then who? [¶] . . . [¶] Angel?" Defendant also hinted that the Dodge Colt (apparently mentioned in the Bee article) should have been painted.

In the tapes, defendant also concocted an exculpatory theme. He stated that at the time of the Pacesetter incident, he was a "fuckin' tweak [heavy methamphetamine user]" with "no remote idea what they're fucking talking about[.]" Further comments along these lines included: "Look. Did you hear my

story? [¶] . . . [¶] I'm a fuckin' tweak. I don't know where the fuck I was at that time. Are you kiddin' me? Please. That picture [sketch in the Bee article], it looks nothing like me. [¶] . . . [¶] Nothing. 5'6["]? [¶] . . . [¶] Man, I'm 6', almost 6'1["]. Yeah, 6'." "I don't know what the fuck you're talkin' about. I have no resemblance to a short ass Mexican man. [¶] . . . [¶] I'm fuckin' Asian. . . . In fact, right now I want to talk to my fuckin' lawyer. Okay? . . . [O]h, I'm good. I'm good[]"; "Look, if you all would have just let me dye [my hair] or cut it before[]"; "Look. . . . [S]o you got the story? [¶] . . . [¶] I don't fuckin' know. Okay? [¶] . . . [¶] I'm not 5'6[]"; and "Hey, I got that thing beat, though. [¶] . . . [¶] [I]t's fuckin' beat. I know it." During these remarks, defendant went so far as to stage and script how the story would unfold.

Defendant concedes the relevance of this material, noting, though, that he also made remarks such as "I didn't do shit. Yea[]" and "You didn't do shit cuz I know I didn't."

Defendant's argument is that the relevant material appeared early in the taping, and that the irrelevant, prejudicial and inflammatory material, which could have been redacted easily, appeared later. This irrelevant, prejudicial and inflammatory material, defendant argued, included profanity, sexual and drug use references, derogatory references to homosexuals, and the use of the term, "nigger."

Indeed, the conversations were laced throughout with profanity, and there were intermittent, casual references to drug use.

As for the sexual references, defendant made a crude comment regarding his girlfriend, Angel Leandro, stating, "Tell Angel I need some fuckin' pictures of her. [¶] . . . [¶] Somethin' naked. I don't know, maybe hold the letter in the cooch or somethin'. Give me some scent." At another point, defendant expressed a sexual interest in Venus, and told her to "keep turning around like a rotisserie chicken."

The homosexual references included: "[B]ein' on 300 West [cellblock] it's like . . . for trustees, for fuckin' first timers, and fuckin' gays, and shit. [¶] . . . [¶] Let me just say this. It must just be for gays because except me and a few other guys everybody else in there is a straight up fuckin' fag. . . . [T]hey're like, 'You want a ham' -- 'No. I don't want no God damn ham sandwich.' [¶] . . . [¶] I'm telling you[]"; "Do you know what it's like weenie night on the gay ward? It's fuckin' sick, you dirty mother fuckers[]"; and "I am gonna stay heterosexual. I don't care how long they keep me in here and play with their weenies. It's not happening. [¶] . . . [¶] Dirty mother fuckers. [¶] . . . [¶] [T]hey talk like that in the pod. [¶] . . . [¶] That sexy little bitch. I'm like God damn."

The use of the term "nigger" occurred in the following context: "[Defendant]: I want somethin' where I'm hackin',

turning blue on the floor. [Venus]: That's what he's got right now. [Defendant]: Who? Fuckin' sweet nigger."

As a practical matter, the profanity could not be redacted. It was a natural part of the conversation, a lexicon of sorts.

The sexual references, although crude, played a small, fleeting role in the conversation. And the use of the term "nigger" was an even more fleeting aside, although we recognize the inherently inflammatory nature of that term, particularly when uttered by a non-African-American. (The record shows there were no African-Americans on the jury.)

The homosexual references, to be sure, were more extensive and more inflammatory than the other remarks.

Nevertheless, for four reasons, we find the trial court did not prejudicially abuse its discretion in failing to redact the challenged statements in the two taped conversations.

First, we find merit, as did the trial court, in the prosecutor's argument against redaction. The prosecutor noted that the defense had seriously questioned the trustworthiness of defendant's taped jail statements, in that defendant likely knew he was being recorded (jailhouse signs said as much). The prosecutor argued that the entire conversations between Venus and defendant, including their challenged extraneous details, showed that the two of them were comfortable talking as very close, if not intimate, friends; in turn, this demonstrated the credibility of defendant's statements to Venus.

Second, the redaction process was not as simple as defendant asserts. The line between relevant and supposedly

irrelevant statements is not as clear as defendant makes it. Interspersed through the later, supposedly irrelevant portions of the tapes were defendant's "staging" of his story, and his incriminating statements about his hair, the Dodge Colt, "the story," having nothing in writing, beating this "thing," Venus "staying gone" for months, not trusting anyone, and his red Jeep.

Third, the trial court admonished the jury regarding the challenged statements. Said the court:

"Now you are the sole judges, ladies and gentlemen, of the weight, if any, that you are to give to the defendant's declarations contained in these tapes[,] in the conversations that you will hear on these tapes.

"You're going to hear references to matters that may be extraneous to this case, perhaps the use of profanity, perhaps reference to or suggestions of drug use, perhaps overtures about sex, perhaps overtures about sexuality or homosexuality and the like. [Defendant first raised the issue about the "nigger" comment in his motion for mistrial after this admonition was given.]

"You are the sole judges, ladies and gentlemen, of the weight that you attach to any of these declarations, and I direct you to limit your consideration of the defendant's declarations on these tapes to matters that you determine bear on the factual issues before you.

"Because many of these things, references that I referred to are interrelated into the natural flow of the conversation,

we want to give you the benefit of the whole conversation, but I also want to caution you not to unduly consider extraneous matters not related factually to the issues before you."

Fourth and finally, the evidence against defendant regarding the Pacesetter incident was strong. It encompassed Venus's testimony of defendant's confession, defendant's own incriminating statements in the unchallenged portion of the taped conversations, and corroborating eyewitness testimony from Greg M., Ken T. and Johnny C.

Defendant also contends his counsel ineffectively represented him by belatedly moving to redact the challenged statements in the two taped conversations with Venus.

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was not reasonably competent, and that prejudice resulted. A defendant has been prejudiced if there is a reasonable probability that, but for counsel's performance, the result at trial would have been different; a reasonable probability is one sufficient to undermine confidence in the outcome. (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) We have concluded that the trial court did not prejudicially abuse its discretion in failing to redact the challenged statements in the taped conversations. Consequently, defendant will be unable to satisfy the prejudice prong of the ineffective assistance standard. (Defendant also concedes that he erred in claiming in his opening brief that the trial court had not actually reviewed the transcripts of the tapes prior to ruling on the matters at issue.)

3. *Section 12022.53 Enhancement*

Defendant contends that his 25-year-to-life enhancement under section 12022.53 must be stricken because it is subsumed within his greater sentence of life without the possibility of parole (LWOP). We disagree.

Defendant was sentenced to an unstayed term of 16 years for the robbery and related offenses (counts three, four and five), followed by an LWOP term plus the 25-year-to-life enhancement under section 12022.53 for the attempted robbery and murder offenses (counts one and two).

Section 12022.53 was enacted as part of the so-called "10-20-Life" bill. (Assem. Bill No. 4 (1997-1998 Reg. Sess.).) The statute imposes sentence enhancements for firearm use or discharge in the case of certain enumerated felonies such as murder, kidnapping, robbery and rape, or attempts to commit such felonies. If the defendant personally uses a firearm, the enhancement is 10 years. (§ 12022.53, subd. (b).) If the defendant intentionally and personally discharges a firearm, the enhancement is 20 years. (*Id.*, subd. (c).) If the defendant intentionally and personally discharges a firearm and proximately causes death or great bodily injury, the enhancement is 25 years to life. (*Id.*, subd. (d).)

The statute makes clear that these enhancements are to be added to the base term for the crime. Each of the three enhancement provisions of section 12022.53--that is, subdivisions (b), (c) and (d)--states in relevant part that "[n]otwithstanding any other provision of law," the defendant

"*shall* be punished by *an additional and consecutive* term of imprisonment in the state prison for" 10 years, 20 years, or 25 years to life, as applicable. (§ 12022.53, subds. (b), (c), and (d) respectively, italics added.)

At issue here are subdivisions (d) and (j) of section 12022.53 (hereafter subdivision (d) and subdivision (j)). As noted, subdivision (d) sets forth the mandatory 25-year-to-life enhancement. The language of subdivision (j) was inserted as an amendment to the original bill. (Assembly Bill No. 4 (1997-1998 Reg. Sess.) § 2, as amended Sept. 10, 1997, formerly found in subdivision (m).) Subdivision (j) states: "For the penalties in this section to apply, the existence of any fact required under subdivision (b), (c), or (d) shall be alleged in the information or indictment and either admitted by the defendant in open court or found to be true by the trier of fact. When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment."

Relying on an appellate decision that was ordered depublished after briefing in this matter, defendant argues that under the plain language of subdivision (j), the 25-year-to-life enhancement of subdivision (d) does not apply here. Defendant notes that, pursuant to subdivision (j)'s language, there is "another provision of law"--section 190.2, subdivision (a)(17)(A) (the LWOP attempted robbery and murder provision)--

that "provides for a greater penalty or a longer term of imprisonment." Consequently, the subdivision (d) 25-year enhancement must be stricken.

Unfortunately for defendant, his argument is trumped by the rules of grammar. Defendant focuses on the subdivision (j) language of "another provision of law" while ignoring the grammatical subject of the subdivision (j) sentence to which that language relates. The entire sentence at issue in subdivision (j) reads: "*When an enhancement specified in this section* has been admitted or found to be true, the court shall impose punishment pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another provision of law provides for a greater penalty or a longer term of imprisonment." (Italics added.) The subject of this sentence, grammatically speaking, is the "enhancement specified in this section"--that is, one of the three applicable enhancements for firearm use or discharge specified in subdivisions (b) through (d). When one of those three enhancements for firearm use or discharge has been properly charged and found true, the court shall impose the applicable punishment under subdivision (b), (c), or (d), unless another provision of law provides for a greater penalty or a longer term of imprisonment *for that firearm use or discharge*, in line with that subject. The "greater penalty" part of subdivision (j) ensures that the "[n]otwithstanding any other provision of law" language in subdivisions (b) through (d) does not inadvertently supersede a law that would impose an even *greater* punishment on

a defendant for employing a firearm in committing one of the enumerated crimes.

Defendant counters that there are no other enhancement provisions that currently provide greater punishment than subdivision (d), questioning anew subdivision (j)'s relevance in the subdivision (d) context. Assuming for the sake of argument this is true, subdivision (j) could be contemplating future, even more punitive legislation. In any event, section 12022.53, subdivision (a)(17), states specifically that the section 12022.53 enhancement applies to "[a]ny felony punishable by death or imprisonment in the state prison for life."

The progressive punishment set forth in the section 12022.53 enhancement aligns with how a firearm was employed in certain enumerated crimes. Defendant's argument would alter this focus by examining the punishment for the enumerated crime. If that punishment were greater than the applicable section 12022.53 enhancement, that enhancement would be stricken in accord with subdivision (j). Defendant's argument, in effect, equates offenses and enhancements for punishment purposes. But the two are different. True to its namesake, an enhancement *enhances* the punishment for an offense. Here, for example, defendant's LWOP sentence is for murder in the course of the attempted robbery. (§ 190.2, subd. (a)(17(A).) His enhancement covers his intentional and personal discharge of a firearm to carry out that attempted robbery-murder. (§ 12022.53, subd. (d).) The two are not identical and both may be punished. (See *People v.*

Hutchins (2001) 90 Cal.App.4th 1308, 1313-1315; see also § 1170.11.)

Section 12022.53's language shows the Legislature is serious about this enhancement being applied, unless an even greater enhancement-related punishment is legally available. Besides subdivision (j) itself and the "notwithstanding" language of subdivisions (b) through (d), there is subdivision (f), stating that the section 12022.53 enhancement is to be imposed in place of other specified applicable firearm enhancements, and subdivision (g), stating that probation shall not be granted to any person found to come within section 12022.53. And more importantly for our purposes, subdivision (h) specifies that "[n]otwithstanding [Penal Code] Section 1385 [judicial power to dismiss or strike action, enhancement or punishment] or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." Thus, when the applicable factual predicate of firearm use or discharge is properly charged and found true, section 12022.53 must be applied, unless something even more punitive regarding that use or discharge is available under the law. (See also *People v. Hutchins, supra,* 90 Cal.App.4th at p. 1313.)

In the end, defendant's interpretation of subdivision (j) does away with the concept of *enhancement* and opts for a lesser, rather than a greater, punishment (theoretically speaking here, because of the LWOP sentence). This interpretation is not

within the letter, and certainly not within the spirit, of section 12022.53. (See *People v. Garcia* (2002) 28 Cal.4th 1166, 1172 [the legislative intent behind section 12022.53 is clear: substantially longer prison sentences must be imposed on felons who use firearms to commit crimes]; Stats. 1997, ch. 503, § 1.)

DISPOSITION

The judgment is affirmed. **(*CERTIFIED FOR PARTIAL PUBLICATION*.)**

DAVIS, J.

We concur:

SCOTLAND, P.J.

MORRISON, J.