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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANDREW FRANCISCO VELASQUEZ, Defendant and Appellant.	F062517 (Super. Ct. No. VCF211156A) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Brett R. Alldredge, Judge.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I.A. and II. through IV. of the Discussion.

Andrew Francisco Velasquez fired a handgun 10 times at an occupied residence. A jury convicted him of numerous crimes and the trial court sentenced him to 38 years to life in prison. Among the convictions were five counts of assault with a firearm, in violation of Penal Code section 245, subdivision (a)(2).[1] Velasquez challenges four of these convictions due to erroneous jury instructions and as unsupported by substantial evidence.

The remainder of Velasquez's arguments relate to his sentence. First, he challenges his sentence as violating his constitutional right to be free from cruel and unusual punishment. Next, he argues his sentence for possession of a loaded firearm (former § 12031, subd. (a)(1))[2] must either be stayed pursuant to section 654 or vacated because the trial court relied on inappropriate factors in imposing an aggravated term. Finally, he argues the sentence on a second conviction for violating former section 12031, subdivision (a)(1) must be stayed pursuant to section 654.

We conclude some of Velasquez's arguments have merit. First, we agree the four assault with a firearm convictions he challenges must be reversed because of a prejudicial error in instructions. Second, we agree the trial court erred in sentencing Velasquez on the second former section 12031, subdivision (a)(1) conviction, but not for the reason cited by Velasquez. Instead, we will order this conviction vacated because both former section 12031, subdivision (a)(1) convictions were based on the same act, and thus there can be only one conviction. The remainder of the judgment, including the sentence, is affirmed.

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[1]All further statutory references are to the Penal Code unless otherwise stated.

[2]This statute was repealed effective January 1, 2012 (Stats. 2010, ch. 711, § 4) and reenacted without substantive change in section 25850, subdivision (a) (Stats. 2010, ch. 711, § 6).

FACTUAL SUMMARY

Adolfo Hurtado returned home from work about 9:45 p.m. on the day of the shooting. He was in his bedroom asleep when he heard knocking on his bedroom door and was told by a family member that he had heard gunshots and the family was afraid he had been shot. Adolfo's bedroom was located at the back of the residence. Inside the residence at the time were Adolfo's mother, father, and his brother Oliverio Hurtado. Adolfo went to the front yard of the house. The only person he saw outside was his brother Juan Hurtado. He did see a car go by with its lights off. Adolfo thought it was a small Honda.

The house sustained a broken window near where Adolfo's mother was sleeping in the garage and a hole in the wall near the kitchen area. Five separate bullet holes were found in the structure. Ten 9-millimeter shell casings and one intact cartridge were located in the street about 100 feet from the residence. Three bullet fragments were located near the structure.

Adolfo admitted he hung around with "Northerners" in high school because most people in his high school were Northerners (Nortenos). But by the time of the shooting, he and his brother Leo Hurtado, Jr.,[3] hung out with "Southerners" (Surenos).

Leo Hurtado, Sr., was in his bedroom watching television when the shooting occurred. His wife was in the garage lying on a bed.

Juan was in the living room of his house with his brother Oliverio when he heard the gunshots. Juan went outside to see what was going on. He heard two car doors close and then saw a black Honda depart. The vehicle had a loud exhaust. Juan also was able to identify the vehicle for the police later that night because of the distinct taillights on the vehicle.

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[3]Velasquez's father and brother have the same first name, Leo. To avoid any confusion, we will identify father as Leo, Sr., and brother as Leo, Jr.

Ali Machuca was in front of her house on the night in question when she heard gunshots. A dark vehicle sped by her house a short while later. Machuca went to the victim's house to make sure no one had been hurt. While there she heard a vehicle that sounded like the same car that had passed by earlier on a nearby street.

Officer Eliseo Mendez heard numerous gunshots while on patrol in the area. Within minutes a black Honda Civic driving at a high rate of speed passed in front of him, failed to stop for a stop sign, turned off its headlights, and then drove into a residential driveway. The passenger exited the vehicle as Mendez exited his patrol vehicle. Mendez ordered the passenger to stay inside the vehicle, but the passenger proceeded to the front door of the residence. Mendez ordered the passenger to show his hands. When the passenger refused, Mendez shot the passenger with his taser. The passenger was Velasquez. Velasquez dropped a nine-millimeter handgun and a loaded magazine when shot with the taser. A second magazine for the gun was found later in Velasquez's pocket.

Mendez later determined the driver of the vehicle was Glenn Martinez, who also was arrested that night.

Martinez was the prosecution's star witness. Velasquez is Martinez's cousin. Martinez was driving his mother's Honda Civic on the night of the shooting. He had gone to the house of his cousin, Ruben Herrera. Velasquez also was there. Around 9:30 p.m., Velasquez asked Martinez for a ride to "drop something off." They had driven for a short distance when Velasquez asked Martinez to turn right on the street where the Hurtados lived. Velasquez told Martinez to stop along the side of the road. Velasquez exited and walked towards the back of the vehicle. Martinez then heard some gunshots that sounded close by. Seconds later Velasquez reentered the vehicle and told Martinez, "Just get the fuck out of here." Martinez never saw Velasquez with a gun. Martinez drove back to Herrera's house. They were pulled over by a police officer just as they arrived at Herrera's house.

In exchange for his testimony, Martinez accepted an agreement that would result in a 12-year prison sentence.

In his statement to the police, Velasquez admitted that he associated with the "Northern" structure prison gang.

Gunshot residue tests performed on Velasquez and Martinez five hours after the incident were negative. Testing was able to determine that one of the bullet fragments shared the same characteristics as the handgun recovered from Velasquez, but there was not enough individual detail for an identification. Five of the cartridge cases found at the scene were extracted from this handgun and most likely were fired from the handgun. The other cartridge cases were similar, but there was not enough detail to permit identification.

The prosecution also offered testimony to establish that Leo, Jr., and Adolfo were members of a Sureno criminal street gang. The expert opined that Oliverio associated with "Southern" gangs, and Velasquez was an active member of the Norteno criminal street gang. Finally, the expert opined the crime was committed for the benefit of the Norteno criminal street gang.

Velasquez presented witnesses who attempted to provide him with an alibi for the time of the shooting.

PROCEDURAL SUMMARY

The third amended information charged Velasquez with shooting at an inhabited dwelling (§ 246) (count 1), shooting from a motor vehicle (§ 12034, subd. (c)) (count 2), one count of assault with a firearm for each of the five people in the residence at the time of the shooting, for a total of five counts (§ 245, subd. (a)(2)) (counts 3-7), grossly negligent discharge of a firearm (§ 246.3, subd. (a)) (count 8), carrying a loaded firearm by a gang member (former § 12031, subd. (a)(1), (2)(C)) (count 9), misdemeanor carrying a loaded firearm (former § 12031, subd. (a)(1), (2)(G)) (count 10), and resisting arrest (§ 148, subd. (a)(1)) (count 11). In addition, the following enhancements were

alleged: (1) the offense was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivisions (b)(1)(A) through (C) and/or (d) (counts 1-8 and 10), and (2) Velasquez personally discharged a firearm within the meaning of section 12022.53, subdivision (c) (count 1), personally used a firearm within the meaning of section 12022.53, subdivision (b) (count 1), and personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d) (counts 3-7).

The jury convicted Velasquez of the violations alleged in counts 1, 3, 4, 5, 6, 7, 9, 10 and 11.[4] In addition, the jury found true the following enhancements: (1) the crimes were committed for the benefit of a criminal street gang (counts 1, 3-7, and 10); (2) Velasquez personally discharged a firearm within the meaning of section 12022.53, subdivision (c) (count 1); and (3) Velasquez personally used a firearm within the meaning of section 12022.5, subdivisions (a) and (d) (counts 3-7).

The trial court sentenced Velasquez to an indeterminate term of 15 years to life on count 1 and a determinate term of 23 years consisting of an aggravated term of three years on count 9 and 20 years for the section 12022.53, subdivision (c) enhancement on count 1. The determinate sentence was ordered to run consecutively to the indeterminate sentence. The sentences on the remaining counts were either stayed pursuant to section 654 or imposed concurrently.

DISCUSSION

I. Assault with a Firearm

Velasquez was charged with five counts of assault with a firearm, one for each person inside the residence at the time of the shooting. The prosecution's theory was that Velasquez shot at the garage 10 times, thus putting each person inside the house in jeopardy. Count 3 alleged the victim was Juan, count 4 alleged the victim was Oliverio,

[4]The prosecution dismissed counts 2 and 8 before the matter was submitted to the jury.

count 5 alleged the victim was Adolfo, count 6 alleged the victim was Maria, and count 7 alleged the victim was Leo, Sr.

Velasquez concedes that he has no grounds to challenge the count involving Maria since the shots were directed at the garage and Maria was inside the garage at the time of the shooting. He does, however, argue the remaining four counts must be reversed for two reasons. First, he asserts the convictions were not supported by substantial evidence because there was no evidence these four victims were in an area of the house that put them at risk for being struck by a bullet. Second, he argues the instructions improperly allowed the jury to convict him for these counts simply because Maria was at risk of being struck by a bullet.

A. Sufficiency of the Evidence*

To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 403.) The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find Velasquez guilty beyond a reasonable doubt. (*Id.* at p. 396.)

Here, the evidence was not disputed. All of the shots were directed at the garage. Only Maria was in the garage when the shots were fired. Therefore, the issue is whether Velasquez could be convicted of assault with a firearm when the remaining victims were in the house, but not in the room at which the shots were directed. We also note there was no evidence that any bullet entered any room other than the garage; nor was there evidence of the potential for such an occurrence, i.e., there was no evidence that a bullet shot through the garage window would pass through a wall and enter another room.

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* See footnote, *ante*, page 1.

Finally, there was no evidence that Velasquez knew where the victims were located inside the house.

We now turn to the relevant legal principles. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) The crime of which Velasquez was convicted, assault with a firearm (§ 245, subd. (a)(2)), is an aggravated form of assault with greater penalties. (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1139.)

Assault is a general intent crime that is "'established upon proof the defendant wilfully committed an act that by its nature will probably and directly result in injury to another,…' [Citations.]" (*People v. Chance* (2008) 44 Cal.4th 1164, 1169 (*Chance*).) Velasquez does not contest that the charged act, firing a handgun numerous times at an inhabited dwelling, established the intent necessary to support the conviction.

Instead, Velasquez focuses on the requirement that he must have had a "present ability" to commit a violent injury on another person. He argues that he did not have the present ability to injure the four victims who were not in the garage because he aimed at the garage and all the bullets struck in and around the garage. Velasquez claims that he did not have the present ability to injure the four victims that were not in the garage because they were not in the area at which he was shooting.

The present ability element of assault "is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion. Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*Chance*, *supra*, 44 Cal.4th at p. 1168, fn. omitted.)

The factual situations in which a defendant has been found to have the present ability to inflict injury on the victim refute Velasquez's argument. In *Chance*, sheriff's deputies drove to a residence in an attempt to arrest Chance on outstanding warrants. Chance attempted to escape while armed with a loaded semiautomatic handgun, although a cartridge had not been inserted into the firing chamber of the weapon. Chance would have had to pull the slide of the handgun back to insert a cartridge into the firing chamber.

Sheriff's deputies chased Chance when he ignored their order to stop. When Chance rounded the front end of a travel trailer, the trailing deputy suspected a potential ambush, so he circled around the back of the trailer. When the deputy peered around the corner of the trailer, he observed Chance "pressed against the trailer, facing the front end. He was holding the gun in his right hand, extended forward and supported by his left hand." (*Chance, supra*, 44 Cal.4th at p. 1168.)

Relying on numerous cases, the Supreme Court rejected Chance's argument that he did not have the present ability to inflict injury on the deputy because the deputy was behind him. "Although temporal and spatial considerations are relevant to a defendant's 'present ability' under section 240, it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Chance, supra,* 44 Cal.4th at p. 1171.) "Thus, it is a defendant's action enabling him to inflict a present injury that constitutes the actus reus of assault. There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay.… 'There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient.' [Citation.]" (*Id.* at p. 1172.)

The Supreme Court cited with approval the analysis in *People v. Valdez* (1985) 175 Cal.App.3d 103 (*Valdez*). Valdez was purchasing gasoline at a gas station. A

dispute erupted between Valdez and the attendant over the amount of money Valdez had paid the attendant. Valdez shot a handgun three times at the attendant. Unknown to Valdez, the glass separating the attendant from the public was bulletproof.

Valdez appealed from his conviction for assault with a firearm, arguing he did not have the present ability to injure the attendant because the bulletproof glass protected the attendant. The Supreme Court cited with approval the following analysis. (*Chance, supra,* 44 Cal.4th at p. 1174.)

> "Nothing suggests this 'present ability' element was incorporated into the common law to excuse defendants from the crime of assault where they have acquired the means to inflict serious injury and positioned themselves within striking distance merely because, unknown to them, external circumstances doom their attack to failure. This proposition would make even less sense where a defendant has actually launched his attack—as in the present case—but failed only because of some unforeseen circumstance which made success impossible. Nor have we found any cases under the California law which compels this result. The decisions holding a defendant lacks 'present ability' when he tries to shoot someone with an unloaded gun or a toy pistol do not support any such proposition. In those situations, the defendant has simply failed to equip himself with the personal means to inflict serious injury even if he thought he had. [¶] … [¶]
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> "Once a defendant has attained the means and location to strike immediately he has the 'present ability to injure.' The fact an intended victim takes effective steps to avoid injury has never been held to negate this 'present ability.' For example, the intended victim in *People v. Yslas* [(1865) 27 Cal. 630], ran away and hid from the hatchet-wielding attacker who nevertheless was found guilty of assault. In effect, the gas station cashier's act of taking refuge in a bulletproof cage is merely another form of seeking to avoid injury. The fact it is more effective than most other actions taken by those threatened with battery is no reason to find it immunizes attackers from being found guilty of assault. Nor is the fact it is a defensive action taken before the attack is launched. Nor is the fact, if true, that it is a guaranteed 100 percent effective defense against the attack. None of this affects the intent or unlawful acts of the defendant. The latter intended and did the same things as if the victim had done nothing to avoid injury. Thus, his culpability is the same. The defendant also intended and did the same things—and is equally culpable—as if the intended victim (or

> persons on his behalf) took temporary or ineffectual—rather than permanent, absolutely effective—defensive measures. In all these instances, a defendant would have a personal 'present ability' to injure his intended victim. By one measure or another the victim or others may, in effect, make it *impossible* for the defendant to succeed. This would not, however, eliminate the defendant's 'present ability' in the sense required by the assault statute. That is, the victim's avoidance or preventive measures would not alter the fact the defendant had acquired the means and maneuvered into a location to immediately injure his victim." (*Valdez, supra*, 175 Cal.App.3d at pp. 112-113.)

In *People v. Raviart* (2001) 93 Cal.App.4th 258, another case cited in *Chance*, Raviart was suspected of committing numerous crimes. Raviart was armed with a handgun when police officers attempted to arrest him. Raviart pointed the handgun at an officer and, as a result, was shot several times. He was convicted of numerous crimes, including two counts of assault with a firearm on a police officer.

Raviart challenged his assault convictions, asserting there was insufficient evidence to support them. The appellate court rejected Raviart's argument.

> "Officer Keller testified that he and Officer Wagstaff, who ha[d] a canine partner, decided to arrest defendant as he and a female companion were getting into a car on the south side of the motel.… Defendant and his companion headed back toward their motel room, and Officers Keller and Wagstaff followed in an attempt to apprehend defendant before he got back into the room.
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> "Officer Keller testified that when he rounded the stairway at the corner of the building in pursuit of defendant, Officer Wagstaff was to his left and slightly ahead of him, although he did not know whether Wagstaff had been on the walkway between the stairway and the building or had rounded the stairway ahead of him. Officer Keller testified that he 'came around the stairs wide' because he knew Officer Wagstaff was to his left toward the building, and he was concerned about getting bitten by Officer Wagstaff's dog. As Officer Keller came around the corner, he saw defendant pointing a chrome handgun directly at him. At the same time, he heard Officer Wagstaff yell 'Gun.' Both officers fired at defendant. Officer Keller testified that when he fired, Officer Wagstaff was crouching at the corner of the building, partially behind the building but with his arm extended around the corner to fire at defendant. Officer Keller fired five rounds, until defendant was on the ground. As he did so, he moved to the

corner where Wagstaff was, where they both took cover. Keller testified that it was approximately five feet from where he started firing to where he took cover with Wagstaff behind the corner of the building. When there was no return fire, they came out from behind the corner and saw defendant on the ground with the gun slightly above his head. [¶] … [¶]

"From the foregoing evidence, the jury could have found beyond a reasonable doubt that when defendant was confronted by the two police officers outside the motel, he drew a loaded handgun from his waistband with the intent to shoot both officers, but he only managed to point it at one of the officers before they both shot him. By drawing the gun with the intent to shoot the officers, defendant performed an overt act sufficient to constitute an assault on both of them. Defendant did not have to perform the further act of actually pointing the gun directly at Officer Wagstaff to be guilty of assaulting Wagstaff. It was enough that defendant brought the gun into a position where he could have used it against Wagstaff if the officers had not shot him first. [¶] … [¶]

"As for defendant's contention that he did not have the present ability to injure Officer Wagstaff because Wagstaff was in a 'protected position' behind the corner of the building when the shooting occurred, that argument fails on the facts and on the law.… The jury could have found beyond a reasonable doubt that defendant had the ability to shoot Officer Wagstaff before he dove for cover. Furthermore, both Agent Moutinho and Officer Keller testified that Officer Wagstaff fired at defendant from around the corner, which means, at the very least, part of Wagstaff's body was still exposed to injury from defendant's gun as the shooting occurred. Second, the fact that Officer Wagstaff may have been sheltered, in whole or in part, by the building did not preclude the jury from finding defendant had the present ability to injure him. 'Once a defendant has attained the means and location to strike immediately he has the "present ability to injure." The fact an intended victim takes effective steps to avoid injury has never been held to negate this "present ability."' [Citation.]" (*Raviart, supra,* 93 Cal.App.4th at pp. 264-267.)

Finally, the Supreme Court in *Chance* found *People v. Ranson* (1974) 40 Cal.App.3d 317 "particularly instructive." (*Chance, supra,* 44 Cal.4th at p. 1172.) Ranson was convicted of assault with a deadly weapon on a peace officer as a result of a confrontation at a gas station. Ranson was armed with a rifle and pointed the rifle at police officers after they ordered him to drop the gun. Officers eventually shot Ranson and arrested him. Upon examining the rifle, officers discovered the magazine for the gun

contained cartridges, but the top cartridge was jammed, preventing cartridges from entering the firing chamber. Testing of the rifle confirmed that it was operational when the magazine was not jammed. (*Ranson*, at pp. 319-320.)

Ranson argued he did not have the present ability to shoot the officers because a cartridge could not enter the firing chamber because the magazine was jammed. The appellate court disagreed.

> "It is settled in California that pointing an unloaded shotgun does not constitute 'present ability.' [Citations.] Similarly, threatening to shoot someone with a toy gun or candy pistol does not show the requisite present ability to commit a violent injury. [Citation.] On the other hand, an automatic rifle does present such 'present ability' when there are loaded cartridges in the magazine of the rifle even though the firing chamber is empty; only an 'instantaneous transfer' is necessary. [Citation.]
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> "The instant case presents a unique fact situation. The rifle held by appellant was definitely loaded and operable; however, the top cartridge that was to be fired was at an angle that caused the gun to jam. There was evidence from which the trial court could infer that appellant knew how to take off and rapidly reinsert the clip.
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> "Time is a continuum of which 'present' is a part. 'Present' can denote 'immediate' or a point near 'immediate.' The facts in *People v. Simpson* [(1933)] 134 Cal.App. 646 for example, present a situation where the gun could be fired nearly immediately. We are slightly more removed from 'immediate' in the instant case; however, we hold that the conduct of appellant is near enough to constitute 'present' ability for the purpose of an assault." (*Ranson, supra,* 40 Cal.App.3d at p. 321.)

Velasquez attained the means, a semiautomatic pistol, and the location, 100 feet from the residence, to inflict immediate injury on each of the victims. That the victims were located inside the residence away from where Velasquez was aiming does not relieve him of responsibility for his actions. This situation is similar to *Valdez*. In each case, the shooter had the means and was located in a position to assault the victim, but the assault was unsuccessful because of external factors. In *Valdez*, the external factor was the bulletproof glass. Here, the external factor was walls presumably constructed of

wood and sheetrock. Simply because the intended victims were not located in the garage is not relevant.

B. Jury Instructions

The trial court instructed the jury with CALCRIM No. 875. The relevant portion of the instruction stated:

"To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a *person*;
2. The defendant did that act willfully;
3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force *to someone*;

   AND
4. When the defendant acted, he had the present ability to apply force with a firearm to a *person*." (Italics added.)

Velasquez points out that five counts of assault with a firearm were charged, with each count identifying a different member of the Hurtado family as the victim. He argues that because the instruction referred to application of force *to a person or to someone*, the jury could have believed that if any member of the family was at risk of injury, then the People adequately proved each count of assault. Since Maria was at risk because of her location in the garage, Velasquez asserts the jury could have found him guilty on these four counts of assault without considering whether his act of shooting at the residence would directly and probably result in the application of force to the victim named in each count.

While, as the People argue, CALCRIM No. 875 is a correct statement of the law, the potential for juror confusion is obvious. One cannot assault John Doe, when the defendant aimed at Tom Smith, if John Doe was standing hundreds of feet behind the

defendant when the defendant shot the firearm (assuming the defendant's aim was reasonably accurate, but did not result in injury to Tom Smith). Tom Smith was the victim of an assault because the act in this hypothetical would directly and probably result in application of force to him. But John Doe, who was hundreds of feet away in the opposite direction, unthreatened and unharmed, was not a victim of assault because the defendant did not commit an act that "by its nature would directly and probably result in application of force" to John Doe.

The jury could have determined that when Velasquez shot at the residence, the result was a direct and probable application of force to Maria because she was located in the area at which the shots were aimed. The jury also could have concluded that none of the other members of the household were in any danger of being hit by a bullet because of their location in the residence. Indeed, there was evidence to support such a conclusion, although not necessarily compelling the conclusion. Nonetheless, by following the letter of the instruction, the jury may have found Velasquez guilty of assaulting the other four individuals because firing the shots resulted in a direct and probable application of force to a *person* (Maria). If so, Velasquez was convicted of four counts of assault, even though the prosecution failed to prove beyond a reasonable doubt the elements of the offense.[5]

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. [Citation.] Jury instructions relieving States of this burden violate a defendant's due process rights. [Citations.] Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." (*Carella v. California* (1989)

[5]Because this error affected Velasquez's substantial rights, we reject the People's assertion that the issue was forfeited. (§ 1259.)

491 U.S. 263, 265.) Because the error violated Velasquez's constitutional rights, we must review the record to determine whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Our review of the record did not reveal any instruction that may have clarified the requirement that each victim must have been subject to the application of force. Nor did the argument of the attorneys address the vagueness of this instruction. Indeed, while the issue was raised by defense counsel, no one explained to the jury that it must conclude beyond a reasonable doubt that the bullets fired by Velasquez would directly and probably result in application of force to the victim named in each count.

Accordingly, we conclude the error was prejudicial, and the convictions in counts 3, 4, 5, and 7 must be reversed.

II. Cruel and Unusual Punishment*

Velasquez argues the sentence imposed for his acts constitute cruel and unusual punishment. The sentence imposed, unaffected by the reversal of the four assault counts in the previous section, consisted of an indeterminate term of 15 years to life for the shooting at an inhabited dwelling count (§ 246), plus 20 years for the personal discharge of a firearm pursuant to section 12022.53, subdivision (c), and a consecutive aggravated term of three years for carrying a loaded firearm by a gang member (former § 12031, subd. (a)(1)).

Both the federal and California Constitutions prohibit cruel and unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) While current federal precedent establishes that sentences that are grossly disproportionate to the crime committed violate the Eighth Amendment, application of this principle to a term of years is exceedingly rare and will be applied only in an extreme case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 72-73 (*Lockyer*).)

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* See footnote, *ante*, page 1.

Velasquez relies primarily on two cases interpreting California's Constitution provision prohibiting cruel and unusual punishment -- *In re Lynch* (1972) 8 Cal.3d 410 (*Lynch*) and *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*).

Lynch held that the punishment imposed on a defendant violates the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Lynch, supra,* 8 Cal.3d at p. 424.) "Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment." (*Id*. at pp. 423-424.)

The *Lynch* court established three techniques to administer this rule. First, courts should examine the nature of the offense and/or the offender. (*Lynch, supra,* 8 Cal.3d at p. 425.) Second, courts should compare the punishment with the penalty for more serious crimes in the same jurisdiction. (*Id*. at p. 426.) Third, courts should compare the punishment to the penalty for the same offense in different jurisdictions. (*Id*. at p. 427.)

In *Dillon*, the Supreme Court applied the *Lynch* factors to conclude that the sentence imposed on the defendant, who had been convicted of first degree murder under the felony murder rule, violated the California Constitution. (*Dillon, supra,* 34 Cal.3d at p. 489.) The Supreme Court focused on the defendant's youth, immaturity, lack of criminal record, the reluctance of the jury and the trial court to find the defendant guilty of first degree murder, the reluctance of the trial court to impose the life sentence with the possibility of parole, and the fact that all first degree murders, including felony murder,

were punished identically without consideration for the circumstances of the offense. (*Id.* at pp. 483-489.)

Velasquez focuses on (1) the claimed harshness of his sentence (he must serve 32.3 years before being eligible for parole), (2) his age at the time of the shooting, which was 19, (3) his lack of a criminal record, (4) his graduation from high school and gainful employment, (5) his good behavior while in custody and on bail, (6) his possible intoxication at the time of the shooting, (7) that no one was harmed in the shooting, and (8) the numerous character witnesses who testified to his responsibility, politeness, and lack of indicia of gang activity.

Velasquez's only consideration given to the crime he committed was that no one was hurt. Instead, we see a malicious and callous crime that could have resulted in the deaths of five people. It is only through luck that no one was hurt. We also note the use of a firearm and the gang motivation behind the crime. The Legislature has expressly found that the state is in a state of crisis because of criminal street gangs that terrorize peaceful citizens and neighborhoods and that "present a clear and present danger to the public order and safety." (§ 186.21.) Also, Velasquez was subject to a life sentence only because this crime was committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(4)(B).) Without the gang element, Velasquez would have been subject to a maximum term of seven years for shooting at an inhabited dwelling. (§ 246.)

We also note that Velasquez's sentence was enhanced by 20 years because he personally discharged a firearm. (§ 12022.53, subd. (c).) The Legislature has spoken on the use of firearms during the commission of a felony, concluding 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." [Citation.] (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172.)

These valid policy considerations demonstrate that the Legislature used its skill to appraise the evil to be corrected and considered relevant policy factors and practical

options, and the public's will, in determining the appropriate punishment to be imposed in the factual situation presented in this case. (*Lynch, supra,* 8 Cal.3d at p. 423.) We have no difficulty in concluding the Legislature acted well within its authority and that there was no constitutional infirmity. In other words, the sentence imposed did not violate either the state or federal Constitution.

III. Carrying a Loaded Firearm While a Member of a Criminal Street Gang*

Velasquez was convicted in count 9 of violating section former 12031, subdivision (a)(1) and (2)(C), carrying a loaded firearm while a member of a criminal street gang.[6] The trial court imposed a consecutive aggravated term of three years for this conviction.

Velasquez argues the sentence on this count should have been stayed pursuant to section 654 or, in the alternative, the trial court erred by imposing an aggravated sentence.

A. Section 654

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.]" (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.) "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.)

Velasquez argues there was no evidence the firearm was loaded at any time other than when the shots were fired at the Hurtado residence. According to Velasquez, since

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* See footnote, *ante*, page 1.

[6] This statute was repealed effective January 1, 2012 (Stats. 2010, ch. 711, § 4) and reenacted without substantive change in section 25850, subdivision (c)(3) (Stats. 2010, ch. 711, § 6).

the evidence established his intent to shoot at the house, his possession of a loaded firearm at that time was incidental to that objective. Since his intent and objective for possessing the loaded firearm at the time he fired the shots were incidental to his intent to shoot at an inhabited dwelling, Velasquez asserts section 654 precludes a separate sentence for the possession conviction.

We agree with Velasquez that section 654 would preclude punishment for possession of a loaded firearm while he was shooting at the Hurtado residence. For example, in *People v. Venegas* (1970) 10 Cal.App.3d 814, the appellate court stated that "where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense. [Citations.]" (*Id*. at p. 821.) On the other hand, "where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. [Citations.]" (*Ibid*.) The appellate court held that since the "evidence shows a possession only at the time defendant shot [the victim]," the "possession [was] physically simultaneous" and incidental only to the objective of shooting the victim. (*Ibid*.) Accordingly, section 654 precluded punishment for both the assault and possession convictions. (*Venegas,* at p. 821.)

In *People v. Jones* (2002) 103 Cal.App.4th 1139 (*Jones*), Jones was convicted of shooting at an inhabited dwelling, as well as possessing a firearm after having suffered a felony conviction. The evidence showed that Jones drove by his ex-girlfriend's house and fired several shots at the residence. Fifteen minutes before the shooting, Jones and a friend had driven to the residence and the friend had knocked on the door seeking to speak with the ex-girlfriend. The appellate court rejected Jones's argument that section 654 precluded punishment for both offenses.

After citing the same rules cited in *Venegas*, the appellate court concluded 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." (*Jones*, *supra*,

103 Cal.App.4th at p. 1145.) The appellate court concluded that section 654 did not preclude multiple punishments "because the evidence was sufficient to allow the inference that Jones's possession of the firearm was antecedent to and separate from the primary offense of shooting at an inhabited dwelling. It strains reason to assume that Jones did not have possession for some period of time before firing shots at the Walter home. Any other interpretation would be patently absurd. Jones committed two separate acts: arming himself with a firearm, and shooting at an inhabited dwelling. Jones necessarily had the firearm in his possession *before* he shot at [the victim's] house, when he and his companion came to the house 15 minutes before the shooting, or, at the very least, when they began driving toward the house the second time. It was therefore a reasonable inference that Jones's possession of the firearm was antecedent to the primary crime. [Citation.]" (*Jones,* at p. 1147.)

Apparently, recognizing the holding in *Jones* precludes the argument that Velasquez possessed the firearm only while shooting at the Hurtado residence, Velasquez seeks to distinguish the case by pointing out that Jones was convicted of possessing a firearm after having suffered a felony conviction, which was complete when he possessed the firearm, whether loaded or not. Velasquez was convicted of possessing a *loaded* firearm. He focuses on the asserted lack of evidence that the firearm was loaded at any time other than when it was being fired.

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*Jones, supra,* 103 Cal.App.4th at p. 1143.) The issue, therefore, is whether there was substantial evidence that the firearm possessed by Velasquez was loaded at any time either before or after the shooting.

As in *Jones*, it strains reason, and contradicts the evidence, to conclude the firearm was not loaded at any time before or after the shooting. Martinez testified he did not see the firearm at any time. The only logical conclusion that can be drawn from this statement is that the firearm was hidden on Velasquez's person. While one could argue Velasquez did not insert a magazine into the gun until just before he began firing at the residence, it defies logic to suggest he took the time to remove the magazine from the gun before he returned to Martinez's vehicle and ordered Martinez to flee the scene. Moreover, when Velasquez was shot by a taser after he fled the vehicle, he dropped the gun and a magazine for the gun to the ground. The magazine was not in the gun but it contained cartridges in it. The jury logically could have concluded the magazine dislodged from the gun when it hit the ground. This evidence was substantial enough to support the trial court's conclusion that section 654 did not apply to the two convictions.

B. Imposition of the Upper Term

Velasquez next complains the trial court erred because it relied on improper factors when imposing the aggravated term on count 9. First, Velasquez asserts the trial court relied on his refusal to admit guilt for the crime as an aggravating factor. Second, Velasquez claims the trial court relied on factors relating to the shooting that were inapplicable to the gun possession count, especially considering that Velasquez was severely punished for the use of that gun when sentence was imposed on count 1.

At the time of sentencing, section 1170, subdivision (b) provided the trial court with discretion to choose the mitigated, mid, or aggravated term. "In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports … and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim … and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact

of any enhancement upon which sentence is imposed under any provision of law." (*Ibid.*) The trial court is required to apply the sentencing rules of the Judicial Council. (*Id.*, subd. (a)(3).)

The Judicial Council rules confirm the trial court has discretion to choose the appropriate sentence and state the trial court "may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision." (Cal. Rules of Court, rule 4.420(b).) Circumstances in aggravation include factors related to the crime, such as whether (1) the crime involved the threat of great bodily harm, (2) the defendant used a weapon, (3) the victim was particularly vulnerable, (4) the defendant induced others to participate in the crime, or (5) the manner in which the crime was committed indicated planning, sophistication, or professionalism. (*Id.*, rule 4.421(a).) Factors relating to the defendant also may be considered circumstances in aggravation, although none are relevant here. (*Id.*, rule 4.421(b).) The trial court's sentencing decisions are reviewed for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

At the sentencing hearing, the trial court first heard from counsel and then issued its sentence.

> "Within the determinate sentencing law it is also my obligation to make those findings necessary to choose from a sentencing triad, which is set forth in the Code, and it is not something that is submitted to the jury to decide. [¶] … [¶]
>
> "I will emphasize at the beginning, I don't recall a single piece of evidence in this trial that anybody in that house that night had done anything to cause a beef between them and Mr. Velasquez.
>
> "I have considered those factors in mitigation according to the rules of court, and most specifically, that the defendant has no prior record or a very minimal record of criminal conduct, which is set forth in [California Rules of Court,] [r]ule 4.423(b)(1).

"However, [California Rules of Court,] [r]ule 4.421(a)(1) requires that the Court take into consideration as a factor in aggravation the crime involved great violence, great bodily harm, the threat of great bodily harm, or other acts disposing a high degree of cruelty, viciousness, or callousness.

"As I recall the evidence Mr. Velasquez got out of the car and essentially emptied a clip of bullets into a home, not just a house, a home where a family lived. Not just kids, not just people he knew, but other people including a mother and father.

"As I recall the evidence one of the bullets or bullet fragments was found 18 inches or less from a mother, who certainly had no contact or no beef with Mr. Velasquez. A woman who worked out in the fields. As I recall the evidence to have presented and was laying down on a mattress to get some rest before she went back to work the next day.

"She could have been killed. Her husband could [have] been killed. They're the occupants in that house. All are foreseeable and probable consequences of that kind of conduct.

"[California Rules of Court,] [r]ule 4.421(a)(3) speaks about the victims being particularly vulnerable. I've spoken about Mrs. Hurtado trying to get rest or seeking the refuge of her home at night is about as vulnerable as one could be, and that doesn't speak to the other members who are either sleeping themselves or watching TV.

"[California Rules of Court,] [r]ule 4.412(a)(8), speaks to the manner in which the crime was carried out indicating a planning, sophistication, or professionalism.

"I understand the argument made by [defense counsel] about a bad choice. The problem though in this case is that it wasn't just one choice. It was a series of choices. The choice was made in the first place to get in the car and to go by the house.

"It's a separate choice to get out of the car and go to the house. It's a separate choice to fire off a gun not only [once] but many times. I think the testimony was around thirteen bullets that were possibly shot out of this gun.

"It's a separate choice to get back into a car and speed down suburban roads. The testimony was at one point in excess of fifty miles an hour at one point with the lights out. [¶] I understand Mr. Velasquez was

not driving the car at that time. Innocent people again could have been hurt or killed.

"It's another choice when an officer pulls up behind you in the car and says get out of the car. You could have sat there, put your hands up in the air, obeyed the officer's commands. But you choose to move as quickly as you could towards the entry of the house, which again put lives in danger because of the exigency of the circumstances.

"You chose again, not to obey the officer's orders. You ended up having to get tased, which is another level of dangerousness.

"At some point the occupant of the house came out and tried to either distract, or hassle, or otherwise prohibit the officer from doing his sworn duty, which is to protect the innocent people of Lindsay from this kind of behavior.

"Those factors in aggravation much outweigh any factors in mitigation as set forth in the rules of court that they relate to both Mr. Velasquez not so much his person, but the conduct associated with the crimes that he was convicted of.

"I need to speak to one more issue. And that relates to the letter that Mr. Velasquez sent me. I read that letter more than once. And I am convinced of the truth of what Mr. Velasquez says, and that his children are going to be significantly and severely impacted by this.

"But no more than your parents are Mr. Velasquez by sitting in court and having to watch their child be taken away. *I am very concerned about the fact that after this whole proceeding, everything that went down, you have never once accepted responsibility for your conduct. In fact in the probation report you say,* '*Nobody saw me pull the trigger.*'

"You chose to exercise your absolute Constitutional right that you will never be punished for, and that is to go to trial. You with your attorney chose the 12 jurors to listen to the evidence and every single one of them independently and unanimously found you to be guilty of every single thing you were charged with.

"And now at time of sentencing, you tell the probation officer that you're innocent. I listen[ed] to the evidence. I don't disagree with the conclusion reached by the jurors." (Italics added.)

The trial court then sentenced Velasquez. "For the reasons cited, for those argued and made part of the record, for those relied upon by me, I need to first find that Mr. [Velasquez's] request[,] to the extent he made one[,] to be considered for probation is denied. He is presumptively ineligible for probation. [¶] … [¶] … And if he were not, it would not be appropriate under the circumstances. Therefore Mr. Velasquez's application for probation is denied. [¶] In Count 9, he is committed to state prison for the aggravated term of three years with credit …."

Velasquez's first argument focuses on the above quoted italicized portion of the trial court's comment. From this comment Velasquez asserts the trial court relied on his failure to accept responsibility for his conduct as an aggravating factor. We disagree. We quoted at length the trial court's comments because these comments establish the lack of merit to this argument. The trial court stated the factors on which it relied when it chose the aggravated term. It was only after setting out those factors and its conclusion that the aggravating factors outweighed the mitigating factors that the trial court turned to Velasquez's refusal to take responsibility for his actions or his assertion that he was innocent, despite the overwhelming evidence of his guilt. We understand this comment to be one made in amazement, rather than a factor relied on by the trial court to impose an aggravated term.

Second, Velasquez argues the trial court relied on factors related to count 1 to impose the aggravated sentence. Velasquez asserts that at least three factors—threat of great bodily harm, the victims were particularly vulnerable, and the plan was carried out with planning, sophistication or professionalism—were all directly related to the shooting at an inhabited dwelling and thus were punished by the sentence imposed on count 1.

Once again, we disagree. The sentence imposed on count 1 was based on the crime committed, Velasquez's discharge of a firearm, and that the crime was committed for the benefit of a criminal street gang. The vulnerability of the victims was significant to count 1, but also was relevant to count 9 because the crime in count 9 was committed

after the loaded firearm was transported to the Hurtado residence. In other words, there would not have been any victims had the crime in count 9 not occurred. In addition, the trial court noted the reckless manner in which the firearm was transported from the Hurtado residence. This action put additional innocent and vulnerable victims at risk.

Reckless transportation of the firearm also posed the potential for great bodily injury to other individuals using the roadways. In addition, Velasquez's refusal to comply with the officer's orders just prior to his arrest, while in possession of the loaded firearm, also created the potential for great bodily injury.

The planning factor also is applicable to both counts 1 and 9. Part of the planning process was transportation of the firearm to the Hurtado residence. Accordingly, this factor was applicable to count 9.

Since each of these factors equally was applicable to count 9, and were not used when imposing the sentence on count 1, the trial court did not abuse its discretion when it imposed the aggravated term on count 9.

IV. The Conviction On Count 10 Must Be Vacated*

In counts 9 and 10, Velasquez was convicted of violating former section 12031, subdivision (a)(1), carrying a loaded firearm while in any vehicle or public place. Even though there was only one incident, the prosecution charged both offenses under the theory that Velasquez could be convicted twice because he fell into two of the penalty provisions: (1) he was an active participant in a criminal street gang (*id.*, subd. (a)(2)(C)) and (2) misdemeanor possession of a loaded firearm in a public place (*id.*, subd. (a)(1) and (2)(G)).

This court explained in *People v. Ramon* (2009) 175 Cal.App.4th 843 that former section 12031, subdivision (a)(1) sets forth the elements of the crime, while subdivision (a)(2) sets forth the penalty to be imposed for violating subdivision (a)(1), depending on

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* See footnote, *ante*, page 1.

the circumstances surrounding the offense or the offender. (*Ramon,* at p. 857.) Accordingly, there can be only one conviction for violating former section 12031, subdivision (a)(1), with the sentence determined by the various circumstances found in subdivision (a)(2). Since the jury found that Velasquez was an active participant in a criminal street gang at the time of the offense, the conviction in count 9 will be enforced and the conviction in count 10 will be vacated.

DISPOSITION

The conviction for violating former section 12031, subdivision (a)(1) and (2)(G)[7] in count 10 is vacated. The convictions for assault with a firearm in counts 3, 4, 5, and 7 are reversed. The judgment is affirmed in all other respects. The matter is remanded to the trial court for issuance of a new abstract of judgment and for retrial of counts 3, 4, 5, and 7 if the People should choose to do so.

_____
CORNELL, Acting P.J.

WE CONCUR:

_____
GOMES, J.

_____
FRANSON, J.

[7]The abstract of judgment incorrectly refers to subdivision (a)(2)(C).