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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LEMERY WHITE, Defendant and Appellant.	B291130 (Los Angeles County Super. Ct. No. BA457904)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Lemery White of first degree residential burglary and assault with a firearm. He challenges the judgment, contending that the trial court committed instructional and sentencing errors, and the evidence was insufficient to support his conviction for assault with a firearm. Discerning no error or evidentiary insufficiency, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Anteneh Tadesse Damte and his son Yonathan Tadesse[1] lived in an apartment in Los Angeles. On May 31, 2017, at approximately 7:30 a.m., White, accompanied by a companion, went to their apartment and knocked on the door. When Damte answered, White angrily demanded to talk to Yonathan. White stated that Yonathan had "jumped" him two days earlier. Frightened, Damte falsely told White that Yonathan was not there. In fact, Yonathan was in his bedroom.

Damte tried to close the front door, but White and his companion blocked the door by forcing their legs inside the apartment. White lifted his clothing, displayed a gun in his waistband, and said Yonathan had hurt him and he needed money from Damte. White said he would not hurt Damte.

When Damte said he had no money, White looked "very angry." Frightened, Damte gave White two 14-karat gold rings, told him they were valuable, and exhorted him to "just go." White took the rings but said they were not enough. White then said, "I'm going to hurt somebody today." White took the gun

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[1] For ease of reference, and with no disrespect, we refer to Yonathan Tadesse by his first name.

from his waistband, and one or two bullets fell out. White picked up the bullet or bullets and reloaded the gun. White did not point the gun directly at Damte.

Yonathan, hearing the men, emerged from his bedroom holding a golf club, which he swung at White. White and his companion stepped back out of the doorway. Damte closed and locked the front door and, at the same time, White fired a shot, hitting the bottom of a wall perpendicular to Damte's front door, approximately one foot from the door jamb. White and his companion then ran from the scene.

Yonathan called 911. In the call, which was played for the jury, he told the dispatcher that he and White had had a "dispute" and a fight; White and a companion had come to the house that morning; and White shot at the front door.

Damte found his two gold rings on the floor outside the front door.

Los Angeles Police Department officers located and arrested White and his companion shortly after the incident. An officer recovered latex gloves and a knife from White. In a field show-up, Damte identified White as the shooter, and the other man as White's companion.[2]

A detective who responded to the residence removed a bullet fragment from the exterior of the perpendicular wall.

The defense presented no evidence.

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[2] White's companion was acquitted of burglary and robbery in a separate trial, and is not a party to this appeal.

2. *Procedure*

A jury convicted White of first degree residential burglary (Pen. Code, § 459)[3] and assault with a firearm (§ 245, subd. (a)(2)).[4] It found that in commission of the burglary a principal was armed with a handgun (§ 12022, subd. (a)(1)), and White personally used a firearm during commission of the assault (§ 12022.5, subd. (a)). The jury acquitted White of first and second degree robbery, and of shooting at an inhabited dwelling. (§§ 211, 246.) The trial court sentenced White to a term of five years in prison. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. White timely appealed.

DISCUSSION

1. *The evidence was sufficient to prove White committed assault with a firearm*

White contends that the evidence was insufficient to prove assault with a firearm because he did not point the gun at Damte. He is incorrect.

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable

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

[4] The trial court granted White's section 1118.1 motion for acquittal on a section 12022.53 enhancement alleged in regard to the burglary offense.

trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Booker* (2011) 51 Cal.4th 141, 172; *People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

Section 245, subdivision (a)(2), makes it a crime to commit "an assault upon the person of another with a firearm." Assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Thus, the elements of a violation of section 245, subdivision (a)(2), are: (1) the defendant willfully committed an act with a firearm that by its nature would directly and probably result in the application of force on another person; (2) at the time, he was aware of facts that would lead a reasonable person to realize his act would directly and probably result in the application of force; (3) he had the present ability to apply force with a firearm; and (4) he did not act in self-defense. (*People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1186—1187; *People v. Golde* (2008) 163 Cal.App.4th 101, 108—109, CALCRIM No. 875.) Assault is a general intent crime, and does not require a specific intent to injure the victim. (*People v. Wyatt* (2012) 55 Cal.4th 694, 702; *People v. Chance* (2008) 44 Cal.4th 1164, 1167, 1169; *People v. Leonard* (2014) 228 Cal.App.4th 465, 486.) A defendant may commit an assault without making actual physical contact

with the person of the victim, and injury is not an element. (*Leonard*, at p. 486.)

It has long been the law that displaying a weapon or firearm in a menacing manner may constitute assault.[5] "Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So, any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault. . . ." (*People v. McMakin* (1857) 8 Cal. 547, 548; *People v. Rivera* (2019) 7 Cal.5th 306, 333 [intentional display of a firearm in a menacing manner may be enough to establish assault]; *People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) " '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.]" (*People v. Chance*, *supra*, 44 Cal.4th at p. 1172.)

Nor is it necessary that the defendant point the firearm directly at the victim. "Assault with a deadly weapon can be committed by pointing a gun at another person [citation], but it is not necessary to actually point the gun directly at the other person to commit the crime." (*People v. Raviart*, *supra*, 93

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[5] Because, as we discuss *ante*, the prosecutor elected to rely only upon the display of the weapon and not its firing as the basis for the assault charge, we do not consider whether the actual discharge of the weapon was evidence supporting the assault charge. (See *People v. Brown* (2017) 11 Cal.App.5th 332, 341—342.)

Cal.App.4th at p. 263.) "[W]hen the party draws the weapon, although he does not *directly* point it at the other, but holds it in such a position as enables him to use it before the other party could defend himself, at the same time declaring his determination to use it against the other, the jury are fully warranted in finding that such was his intention." (*People v. McMakin*, *supra*, 8 Cal. at p. 549 [defendant threatened victim and pointed a revolver toward him, but downward, so that the bullet would strike the ground if the pistol was discharged]; *People v. Thompson* (1949) 93 Cal.App.2d 780, 782 [evidence supported assault conviction although defendant did not point gun directly at victims; gun was in a position to be used instantly].)

In *People v. Raviart*, for example, two officers attempted to apprehend the defendant. The defendant pointed a handgun at one of the officers, Keller, but not at the other, Wagstaff. He argued the evidence was insufficient to support his conviction for assault with a firearm on Wagstaff, because there was no evidence he pointed the gun at Wagstaff. (*People v. Raviart*, *supra*, 93 Cal.App.4th at p. 262.) *Raviart* rejected this contention, explaining that assault did not require the defendant point the gun at Wagstaff. (*Id.* at p. 263.) "[T]he 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." (*Id.* at p. 266.)

Here, the People based the assault charge on White's display of the gun and conduct prior to his actual discharge of it. There was sufficient evidence that, at that point, White had the present ability to apply force upon Damte. The present ability element is satisfied when a defendant has attained the means and location to strike immediately. (*People v. Chance*, *supra*, 44 Cal.4th at p. 1168; *People v. Licas* (2007) 41 Cal.4th 362, 366–367.) There was ample evidence White had the means to inflict injury: he was armed with a loaded, operable firearm. He was positioned within striking distance: he was standing a few feet from the unarmed victim. The fact he did not actually shoot Damte or point the gun at him does not compel a different result. "[A]n assault may be committed even if the defendant is several steps away from actually inflicting injury . . . ." (*Chance*, at p. 1168; *People v. Leonard*, *supra*, 228 Cal.App.4th at p. 486 [no requirement that injury to the victim would necessarily occur as the very next step in the sequence of events, or without delay].)

The evidence also showed White threatened the victim and had the intent to shoot. White initially demanded money, displayed the gun in his waistband, and said he would not hurt Damte. But when Damte said he had no money, White appeared very angry. White then rejected Damte's offer of the gold rings and said he would "hurt somebody today." He took his gun from his waistband and reloaded a bullet or bullets that had fallen from it. The jury could readily infer, from these facts, that White's statement about "hurt[ing] somebody today" was a threat

to shoot Damte if Damte failed to provide money. It could also infer that White intended to make good on his threat to shoot. (See *People v. Colantuono* (1994) 7 Cal.4th 206, 219; *People v. McMakin*, *supra*, 8 Cal. at p. 549 [the "drawing of a weapon is generally evidence of an intention to use it"].) And, in light of the deliberate nature of White's actions, the jury could readily find that the willfulness and knowledge elements of the offense were met.

2. *Claims of instructional error*

White raises two claims of instructional error. First, he contends that the standard version of CALCRIM No. 875 was inadequate because it did not specifically name Damte as the victim of the assault. Second, he argues that the trial court prejudicially erred by failing to give a unanimity instruction. Neither claim has merit.

a. *Additional facts*

The information alleged, in Count 3, that White assaulted "Anteneh Tadesse Damte" with a firearm.

The trial court instructed the jury with CALCRIM No. 875. As relevant here, that instruction stated: "To prove that the defendant is guilty of" assault with a firearm, "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; [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm to a person [¶] AND

[¶] 5. The defendant did not act in self-defense or in defense of someone else."

During argument, the prosecutor maintained that White committed assault with a firearm, based solely on White's conduct with Damte prior to the shooting. She repeatedly argued that the assault was completed as soon as White showed Damte the gun. The prosecutor never asserted that White's act of *firing* the gun was a basis for the assault charge; instead, she argued that his act of firing the gun supported the offense charged in court 4, shooting at an inhabited dwelling.[6]

The verdict form stated that the jury found White "guilty of the crime of assault with a firearm, to wit, as to Anteneh Tadesse Damte, in violation of Penal Code Section 245(a)(2), a Felony, as charged in Count 3 of the information." (Some capitalization omitted.)

b. *CALCRIM No. 875*

White argues CALCRIM No. 875 was inadequate because it did not list Damte by name, instead referring to the victim of the assault as a "person" or "someone." This omission, he avers, deprived him of his due process right to be convicted only of the charges alleged in the information.

White does not appear to dispute that, in general, CALCRIM No. 875 is a correct statement of law. (*People v. Kopp* (2019) 38 Cal.App.5th 47, 66, review granted November 13, 2019, S257844; *People v. Golde*, *supra*, 163 Cal.App.4th at pp. 120—123.) Instead, White bases his argument on the following principles. First, due process requires that an accused

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[6] As noted *ante*, the jury acquitted White of the charge of shooting at an inhabited dwelling in violation of section 246.

be given notice of the charges against him, so that he may prepare a defense. (See *People v. Fontenot* (2019) 8 Cal.5th 57, 63—64; *People v. Mitchell* (2011) 197 Cal.App.4th 1009, 1018.) Second, citing *People v. Christian* (1894) 101 Cal. 471, 473, White avers that an accused's name is a material element of the offense. Next, citing, e.g., *Stirone v. United States* (1960) 361 U.S. 212, 217 and *Cole v. Arkansas* (1948) 333 U.S. 196, 201, he argues that an accused may not be found guilty of an uncharged offense or based on a legal theory upon which the jury was not instructed. From these precepts, White cobbles together the theory that, because both Damte and Yonathan were present when he displayed and fired the gun, both were "potential victims," and therefore CALCRIM No. 875's failure to expressly name Damte as the victim implicated the aforementioned rights.

This argument is meritless. White was provided with notice of the victim's identity and of the nature of the offense charged: both were expressly alleged in the information, which named the victim as Damte. The prosecutor's argument made clear that the only victim of the assault was alleged to be Damte, and the display, not the firing, of the gun supported the assault charge. White was therefore provided with constitutionally adequate notice, and *Christian* is not implicated. (See *People v. Griggs* (1989) 216 Cal.App.3d 734, 741 ["The thrust of *Christian* is that the defendant must be informed of the charge against him so he may 'defend himself against the crime with which he is charged, and no other crime' "].) White was not charged with assaulting one person and tried for assaulting another. Nor was he found guilty of a different offense than that charged, or based on a theory upon which the jury was not instructed. He was charged in the information with assaulting

Damte with a firearm; the jury was instructed on precisely that offense; and he was convicted by the jury of assaulting Damte with a firearm, in a verdict form that expressly named Damte as the victim.

In short, there was no error in the instruction and no violation of White's constitutional rights.[7]

c. *Failure to give unanimity instruction*

White next argues that because there were two possible acts that could have qualified as the assault—his display of the gun, and his act of firing at the wall—the trial court should have given a unanimity instruction.

A jury verdict in a criminal case must be unanimous. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877; *People v. Jo* (2017) 15 Cal.App.5th 1128, 1178.) This means that " 'the jury must agree unanimously the defendant is guilty of a *specific* crime.' [Citation.] Thus, 'if one criminal act is charged, but the evidence tends to show the commission of more than one such act, "*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act." [Citations.]' [Citation.]" (*Jo*, at p. 1178; *People v. Grimes* (2016) 1 Cal.5th 698, 727 [unanimity instruction required if there is evidence more than one crime occurred, each of which could provide the basis for conviction on a single count].) The trial court must give a unanimity instruction

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[7] In addition to contending that there was no error, the People argue that White invited any instructional error, waived his claim on appeal, and any purported error was harmless. In light of our conclusion, we need not address these arguments.

sua sponte where the circumstances of the case require.[8] (*Covarrubias*, at p. 877; *Jo*, at p. 1178.)

Here, assuming arguendo the evidence showed two discrete acts that could have formed the basis for the assault conviction,[9] occurring during a noncontinuous course of conduct,[10] no unanimity instruction was necessary because the prosecutor made it clear during argument that the People were relying only on the display of the gun, not the gunshot, as the basis for the assault charge.[11] "The prosecution can make an election by 'tying

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[8] Thus, contrary to the People's argument, White did not forfeit this contention by failure to object below. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 877 [unanimity instruction issue was "not forfeited . . . because '[e]ven absent a request, the court should give [a unanimity] instruction "where the circumstances of the case so dictate" ' "].)

[9] Again contrary to the People's argument, we do not understand White to maintain that the display of the gun in his waistband and its removal from his waistband constituted two discrete acts, either of which could have supported the assault charge. His argument, as we understand it, is that the display and the firing constituted discrete acts.

[10] Neither an election nor a unanimity instruction is required where " 'the case falls within the continuous-course-of-conduct exception, which arises "when the acts are so closely connected in time as to form part of one transaction." ' " (*People v. Selivanov* (2016) 5 Cal.App.5th 726, 752; *People v. Jennings* (2010) 50 Cal.4th 616, 679.) We do not reach the question of whether the display and the firing of the gun amounted to a continuous course of conduct.

[11] White also avers that the jury could have disagreed about whether he assaulted Damte or Yonathan. The jury could not

each specific count to specific criminal acts elicited from the victims' testimony'—typically in opening statement and/or closing argument. [Citations.]" (*People v. Brown*, *supra*, 11 Cal.App.5th at p. 341; see *People v. Kelly* (2016) 245 Cal.App.4th 1119, 1127; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292; *People v. Mayer* (2003) 108 Cal.App.4th 403, 418–419.) "[T]here is an implicit presumption that the jury will rely on the prosecution's election and, indeed, is bound by it." (*Brown*, at p. 341.)

Here, during closing argument, the prosecutor relied solely upon White's conduct of displaying and reloading the gun as the basis for the assault charge. For example, she argued: "We have an assault completed as soon as he's shown the gun. And when he takes out the gun, even if he's not pointing it at anybody the fact that he loaded it in front of Mr. Damte shows that he's intending to use that gun." "The assault was completed as soon as he opened his jacket and showed the gun. That's an assault. That's done. That's the act. But then he took it a step further and pulled the gun out and continued to ask for more money." The prosecutor never stated or implied that White's act of shooting the gun supported the assault charge.

By relying solely on the display of the gun as the basis for the charge, the prosecutor eliminated the need for a unanimity instruction. (See *People v. Mayer*, *supra*, 108 Cal.App.4th at pp. 418—419 [prosecutor's statements and argument "were an election for jury unanimity purposes"]; *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455 ["This was not a case where the prosecutor asked the jurors to select from among several discrete

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have done so, however, because the verdict form expressly required a finding that he assaulted Damte.

acts by defendant in order to convict him"; rather, "the prosecutor repeatedly asserted in argument to the jury that the crime was completed when defendant copied his employer's source code files and took them home for installation on his home computer. The prosecutor did not rely on defendant's alleged later use of the source code as a separate violation"].)

People v. Melhado (1998) 60 Cal.App.4th 1529, is distinguishable. There, the defendant made two separate threatening statements to the victim, the manager of an auto repair shop. At 9:00 a.m., he threatened to blow the victim away if he did not release defendant's car, and said he would come back with a grenade. (*Id.* at p. 1533.) At 11:00 a.m., he returned with a grenade and threatened to blow up the establishment and the manager. (*Ibid.*) He returned a third time that day to pay for the car, with the grenade in his pocket. (*Ibid.*) During argument, when discussing the basis for a criminal threats charge (§ 422), the prosecutor referenced each of the incidents. (*Melhado*, at p. 1535 & fn. 5.) *Melhado* found the argument insufficient to amount to an election: while it was possible to "parse" the closing argument to suggest that "more emphasis was placed on the 11 a.m. event than on the others," the argument did not sufficiently communicate to the jury that the prosecution had elected to seek conviction only for the 11:00 a.m. event, or that a finding of guilt could only be returned if each juror agreed the crime was committed at 9:00 a.m. (*Id.* at pp. 1535—1536.) Here, in contrast, the prosecutor's argument referenced *only* the display of the gun as the basis for the assault charge, and her argument was far clearer than that in *Melhado*. The jury here could not have been confused. In short, the prosecutor successfully made an election by tying the specific count to the specific criminal act

underlying it. (See *People v. Brown*, *supra*, 11 Cal.App.5th at p. 341.)

3. *Section 654*

The trial court sentenced White to the midterm of four years on count 1, first degree burglary, plus a one-year enhancement for the section 12022, subdivision (a)(1) firearm enhancement. On count 3, assault with a firearm, the court imposed the low term of three years, to be served concurrently with the sentence on count 1, and stayed the section 12022.5, subdivision (a) firearm enhancement. White contends that the trial court should have stayed sentence on count 3 pursuant to section 654, rather than imposing a concurrent sentence.

Section 654, subdivision (a), provides that an act or omission punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but not under more than one provision. *People v. Corpening* (2016) 2 Cal.5th 307, clarified the requirements for application of section 654. "Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry, because the statutory reference to an 'act or omission' may include not only a discrete physical act but also a course of conduct encompassing several acts pursued with a single objective. [Citations.] We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single ' "intent and objective" ' or multiple intents and objectives. [Citations.]" (*Corpening*, at pp. 311—312.) "Whether

a defendant will be found to have committed a single physical act for purposes of section 654 depends on whether some action the defendant is charged with having taken separately completes the actus reus for each of the relevant criminal offenses." (*Corpening*, at p. 313.)

Whether section 654 applies in a given case is a question of fact for the trial court, and its findings will not be reversed on appeal if there is any substantial evidence to support them. (*People v. Jackson* (2016) 1 Cal.5th 269, 354; *People v. Buchanan* (2016) 248 Cal.App.4th 603, 611; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) When a trial court sentences a defendant to separate terms without expressly finding he entertained separate objectives or committed separate acts, the court is deemed to have made an implied finding that separate objectives existed. (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 424—425.) Where the facts are undisputed, "the application of section 654 raises a question of law we review de novo.' " (*People v. Corpening*, *supra*, 2 Cal.5th at p. 312.)

Because a sentence imposed in violation of section 654 is unauthorized, it may be corrected at any time, even if the defendant did not object below. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Soto* (2016) 245 Cal.App.4th 1219, 1234.) Where section 654 applies, the proper procedure is to " 'sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.' " (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

White contends that the "sole object of the burglary was the commission of an assault"; therefore the burglary was merely incidental to commission of the assault. White is correct that, in general, "if the defendant commits both burglary and the

underlying intended felony, . . . section 654 will permit punishment for one or the other but not for both." (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) Here, however, the evidence was sufficient to support the trial court's implied finding that White committed different acts, with a different intent and objective, in committing the burglary and the assault.

To commit burglary, White had to enter the apartment with the intent to commit larceny or any felony inside. (§ 459.) The trial court could reasonably find White committed the actus reus of the crime when he and his confederate prevented Damte from closing the door by forcing their legs inside the apartment. Burglary is complete upon the slightest partial entry of any kind by the intruder. (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 273 ["It has long been settled that the slightest entry by any part of the body . . . is sufficient"].) The intent underlying the burglary, the court could conclude, was to accost and feloniously attack Yonathan in retaliation for Yonathan's earlier act of "jump[ing]" White. The trial court was not obliged to assume White merely intended to chat with Yonathan and peaceably resolve their differences; White came armed with a gun, backed up by a confederate, and carrying latex gloves and a knife.

The court could conclude further that the assault entailed a distinct act, committed with a different objective: White's display of the gun to Damte, coupled with his demand for money. The display of the gun in a threatening manner comprised the actus reus of the assault offense. The intent motivating the assault, the court could reasonably conclude, was the objective of robbing or stealing from Damte. Although the jury acquitted White of the robbery charge, this circumstance did not preclude the trial court

from finding he had the *intent* to rob or steal when he entered the residence, even though he did not complete that crime.

The authorities cited by White (*People v. Hester*, *supra*, 22 Cal.4th 290; *People v. Miller* (1977) 18 Cal.3d 873, disapproved on another ground as stated in *People v. Oates* (2004) 32 Cal.4th 1048, 1067—1068, fn. 8; *People v. McFarland* (1962) 58 Cal.2d 748; *People v. Alford* (2010) 180 Cal.App.4th 1463; *People v. McElrath* (1985) 175 Cal.App.3d 178; *People v. Radil* (1977) 76 Cal.App.3d 702; and *People v. Scott* (1966) 247 Cal.App.2d 371) do not compel a different result. In each of those cases, only a single intent or objective was apparent. Imposition of concurrent sentences here did not violate section 654.

4. *Imposition of fines and fees*

Without objection from White, the trial court imposed a restitution fine of $300, a suspended parole revocation restitution fine in the same amount, a $60 criminal conviction assessment, and an $80 court security fee. Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), White avers that he is indigent, and imposition of the fines and fees, without a determination of his ability to pay, violated his due process and equal protection rights. White asserts that we should order the fees and fines stricken, or order the matter remanded for an ability-to-pay hearing. We disagree.

Our colleagues in Division Two recently held that *Dueñas* was wrongly decided. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 327—329, review granted November 26, 2019, S258946; see also *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1060, 1067—1069; cf. *People v. Caceres* (2019) 39 Cal.App.5th 917, 926—927 [concluding that "the due process analysis in *Dueñas* does not justify extending its holding beyond" the "extreme facts" presented

therein].) We observe that the California Supreme Court is currently considering whether a court must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments. (*People v. Kopp*, *supra*, 38 Cal.App.5th 47, rev. granted.) Pending further guidance from our Supreme Court, however, we agree with *Hicks*.

Moreover, unlike the defendant in *Dueñas*, White did not object below on the ground of his inability to pay. Generally, where a defendant has failed to object to a restitution fine or court fees based on an inability to pay, the issue is forfeited on appeal. (*People v. Avila* (2009) 46 Cal.4th 680, 729; *People v. Aguilar* (2015) 60 Cal.4th 862, 864; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 206.) We agree with our colleagues in Division Eight that this general rule applies to the restitution fine and the assessments imposed here under the Penal and Government codes. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153—1155; but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 489.)

Finally, even if White had not forfeited his argument, *Dueñas* does not apply here. *Dueñas* was the disabled, unemployed, often homeless mother of two young children. She was convicted of vehicle offenses. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160—1161.) The *Dueñas* decision is based on the due process implications of imposing assessments and fines on an impoverished defendant. The situation in which White has put himself does not implicate the same due process concerns at issue in the factually unique *Dueñas* case. White, unlike Dueñas, does not face incarceration because of an inability to pay assessments and fines. White is in prison because he committed burglary and assault with a firearm. Even if he does not pay the assessments

and fines, there is no indication he will suffer the cascading and potentially devastating consequences Dueñas faced. (*Dueñas*, at p. 1163.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I concur:

DHANIDINA, J.

LAVIN, J., Concurring and Dissenting:

Defendant Lemery White did not forfeit his challenge to the imposition of the court facilities fee (Gov. Code, § 70373), the court security fee (Pen. Code, § 1465.8), and the restitution fine (Pen. Code, § 1202.4, subd. (b)) by failing to object in the trial court.

People v. Dueñas, which held that mandatory fines and fees could not constitutionally be imposed on criminal defendants unable to pay them, represented a sea change in the law of fines and fees in California. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1169–1172 (*Dueñas*).) As explained in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), at the time the trial court sentenced White, "*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay." (*Castellano*, at p. 489; see also *People v. Santos* (2019) 38 Cal.App.5th 923, 932 ["We agree that prior to *Dueñas*, it was not reasonably foreseeable that a trial court would entertain an objection to assessments that are prescribed by statute."].) I also agree with *Dueñas* that the trial court should ascertain a defendant's ability to pay before it imposes fees and fines.

Certainly, I acknowledge the split in authority with respect to *Dueñas'*s foreseeability and applicability. But I note that the California Supreme Court recently granted review in a case presenting the following issues: "[(1)] Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? [(2)] If so, which party bears the burden of

proof regarding the defendant's inability to pay?" (*People v. Kopp* (Nov. 13, 2019, S257844) ___Cal.5th___ [2019 Cal. Lexis 8371].)

The record in this case does not establish White's ability to pay the challenged fees and fine. Given the unsettled state of the law in this area—and in the interests of efficiency and finality—I would therefore remand the matter for the limited purpose of allowing White to assert his inability to pay the assessed fees and fine. (*Castellano*, *supra*, 33 Cal.App.5th at pp. 490–491; accord, *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 [where defendant was ordered to pay a restitution fine at a time when court could not consider his ability to pay, defendant was entitled to remand so the court could consider his ability to pay under current statutory criteria].) I would also hold that if, on remand, the prosecutor chooses not to contest White's inability to pay, the trial court must stay the restitution fine and strike the fees—the best result White could obtain after a contested hearing. (See *Vieira,* at p. 306 [ordering trial court to reduce restitution fine to statutory minimum if ability to pay is uncontested on remand]; *People v. Wall* (2017) 3 Cal.5th 1048, 1076 ["if the Attorney General chooses not to contest the question of restitution on remand, he should so inform the trial court in writing with notice to [defendant]. In that event, the court shall reduce [defendant's] restitution fine to ... the statutory minimum at the time of his crime, and no hearing will be necessary"].)

In all other respects, I agree with the majority's analysis and would otherwise affirm the judgment.

LAVIN, J.