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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TYESHA MONIQUE MOORE et al., Defendants and Appellants.	B265135 (Los Angeles County Super. Ct. No. MA065051)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant Tyesha Monique Moore.

Elizabeth K. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant Jamal Price.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan M. Krauss and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Tyesha Monique Moore and Jamal Price were tried jointly by a jury. Defendant Moore was convicted of two counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b); counts 9 & 10)[1] with a finding that she used a firearm (§ 12022.5, subds. (a) and (d)), one count of possession of a firearm by a felon (§ 29800, subd. (a)(1); count 5) and one count of a felon in possession of ammunition (§ 30305, subd. (a)(1); count 8). She admitted having served two prior prison terms (§ 667.5, subd. (b)), and was sentenced to a total term of 21 years in state prison.

Defendant Price was convicted of two counts of possession of a firearm by a felon (§ 29800, subd. (a)(1); counts 4 & 6) and one count of felon in possession of ammunition (§ 30305, subd. (a)(1); count 7). He admitted having suffered two prior strike convictions (§ 667, subd. (d), 1170.12, subd. (b)) and having served a prior prison term (§ 667.5, subd. (b)). The trial court struck one of his prior strike convictions, and sentenced him to a total term of 11 years, 8 months in state prison.

Both defendants appeal from the judgment of conviction. In her appeal, defendant Moore contends that the evidence was insufficient to support one count of assault with a semiautomatic firearm, that the trial court erred in refusing to instruct the jury on brandishing a firearm as a lesser included offense, and that the court erred in failing to define the term "semiautomatic" firearm. We disagree with these contentions and affirm the judgment as to defendant Moore.

Defendant Price filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We have independently reviewed the record and have

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[1] Undesignated section references are to the Penal Code.

found no arguable issues. Accordingly, we affirm the judgment as to defendant Price.

BACKGROUND

Alexis Temple, owner of Nadine's Hair Boutique (Nadine's), hired defendant Moore in 2011, and Moore worked at Nadine's until June 2014, when she and Temple had a falling out.

On the evening of June 6, 2014, Temple drove to the house defendant Moore shared with her live-in boyfriend, defendant Price, to discuss a personal dispute with Moore. The women argued in the front yard, and defendant Moore yelled out to defendant Price. As Temple drove off, she heard gunshots being fired from the direction of the house, and a bullet struck her car, but she did not see who fired.

On the afternoon of December 20, 2014, Temple was at her salon with some of her employees, including Lynnette Perdue and Tammy Sanders, and at least one client, Tanysha Simmons. Another woman, Angela Peredo, came in and began yelling at Perdue. Temple asked the women to leave the salon. Outside, the argument escalated to physical violence. Peredo slapped Perdue, grabbed her hair, and pinned her against a wall. Perdue pulled a Taser from her pocket, but did not use it.

At that point, defendant Moore, who appeared to be coming to Peredo's defense, approached wearing a sweatshirt. Peredo released Perdue and the women separated. Defendant Moore removed a black, semiautomatic pistol from her sweatshirt pocket and pointed the gun toward Temple, who was about 16 feet away, standing behind and to the side of Sanders, who was six to seven feet away from defendant Moore. Sanders testified that defendant Moore did not aim directly at anyone, but the tip of the gun was facing "towards" and "to one side of" her.

Perdue testified that defendant Moore pointed the weapon toward Temple, Sanders and herself.

Defendant Moore moved the slide back and forth, "cocking" the gun, but the bullets ejected and fell to the ground. The other women fled into the salon. Defendant Moore picked up the bullets and left.

On January 3, 2015, a detective of the Los Angeles Sheriff's Department (LASD) was conducting surveillance at defendants' residence before serving a search warrant. He saw both defendants leave in a silver Chevrolet Tahoe; defendant Moore was driving. The detective followed the Tahoe, requested backup and, after it arrived, initiated a traffic stop at a mobile home park. Defendant Moore remained in the Tahoe and was detained. Defendant Price fled. As he ran, he leaned to one side as if carrying something. He was apprehended 75 to 100 yards from the Tahoe. A subsequent search along the route defendant Price had run yielded nothing.

Meanwhile the LASD deputy investigating the December 20, 2014 incident at Nadine's executed a search warrant at defendants' home. The search revealed that a minivan parked in the driveway of defendants' house and a minivan seen on surveillance video of the incident at Nadine's were each missing the same hubcap.[2] A search of another (inoperable, black) Chevrolet Tahoe parked in defendants' driveway, registered to defendant Moore, yielded a black .380-caliber semiautomatic handgun with five live rounds of ammunition in the magazine, a black ski mask with hand-cut eyeholes, boxes of shotgun shells and other

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[2] The parties stipulated to the authenticity of the video footage.

ammunition, and marijuana. Later, defendant Price admitted having stored ammunition and marijuana in the Tahoe, but denied possession of the handgun.

In mid-January 2015, a resident at a mobile home park found a toiletry bag 20 to 30 feet from where defendant Price had been detained. The bag contained a .40-caliber semiautomatic firearm, loaded with several rounds. DNA samples taken from the gun's trigger and trigger guard revealed the DNA profiles of four individuals, one of whom was defendant Price, and none of whom was defendant Moore. Defendant Moore's DNA profile also was not connected to samples taken from the handgun found in the Tahoe at defendants' residence.

Defendant Moore's cell phone, confiscated from the Tahoe she was driving when detained, contained photographs of defendant Price with ammunition similar to that found in the black Tahoe and the toiletry bag at the mobile home park, and of him holding a firearm of the same make and model as the one found by the mobile park resident and in the black Tahoe. The phone also contained a photo of an unidentified person wearing the black ski mask with hand-cut eye holes.

Neither defendant presented any evidence.

DISCUSSION

I. *Defendant Moore's Appeal*

A. *Assault of Tammy Sanders*

Defendant Moore contends that her conviction of assault with a semiautomatic firearm against Sanders must be reversed because there is insufficient evidence that she pointed the gun at Sanders. We disagree.

"[I]n assessing a claim of sufficiency of the evidence [the law we apply] is well established: '"'"[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial

evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.”’” [Citation.] . . . ‘We presume “‘in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.] This standard applies whether direct or circumstantial evidence is involved.” [Citation.]’ [Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.)

An assault is “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” (§ 240.) “[A] person who harbors the requisite intent for assault is guilty of the assault of all persons actually assaulted.” (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1354-1355.) For assault, there are as many crimes as there are victims. “Because the gravamen of assault is the likelihood that the defendant’s actions will result in a violent injury to another [citations], it follows that a victim of assault is one for whom such an injury was likely.” (*Id*. at p. 1355, italics omitted.)

Defendant Moore maintains the prosecution presented “no evidence . . . that [she] committed an assault with a semiautomatic firearm on Tammy Sanders,” because “Sanders testified that the gun was never pointed at any of the individuals standing outside Nadine’s, including herself,” and Temple testified that defendant Moore pointed the gun at her, not Sanders. Defendant Moore also asserts that no other witness testified that she pointed the gun directly at anyone, but acknowledges that Perdue testified that she pointed toward Temple, Sanders and Perdue.

A defendant can commit an assault with a firearm by pointing a gun toward a group, even if her intent is only to target one person among the group. (*People v. Bland* (2002) 28 Cal.4th 313, 329; *People v. Raviart* (2001) 93 Cal.App.4th 258,

267 (*Raviart*).) An assault may be committed by pointing a gun directly at another, but "it is not necessary to actually point the gun directly at the other person to commit the crime." (*Raviart, supra,* at p. 263.) The question of intent to commit assault is a question of fact for the jury. (*People v. McMakin* (1857) 8 Cal. 547, 548 (*McMakin*) ["When there is any competent evidence before the jury to show the intent to commit an assault, it is for them to determine the question of intention."].)

The decision in *McMakin* is instructive. There, a defendant was convicted of assault after drawing a gun which he aimed perpendicular to the standing victim but pointed down, so that, had the gun been fired, the shot would hit the ground. The defendant threatened to shoot the victim if he refused to leave defendant's property. (*McMakin, supra,* 8 Cal. at p. 548.) On appeal, the defendant argued there was insufficient evidence to support his conviction for assault. Our Supreme Court disagreed. The court observed that an assault can occur if, among other things, someone presents a gun at someone within range. (*Ibid*.) *McMakin* held that a defendant's intent is an issue of fact for the jury to resolve, so long as competent evidence exists to show an intent to commit an injury, and the defendant acts in preparation for immediate (not future) harm. (*Id*. at pp. 548-549.) The court also held that no assault occurs if the defendant intends to use the gun only to intimidate. (*Id*. at p. 548.) An assault occurs only if a defendant intends to go further, if necessary, to accomplish his or her purpose, and has made preparations by drawing a weapon and is in a position to use it with effect against a victim. (*Id*. at pp. 548-549.) Generally, the act of drawing a weapon is presumptive evidence that one intends to use it. (*Id*. at p. 549.) But, such evidence may be rebutted by credible evidence showing defendant lacked an intent to use the weapon. (*Ibid*.) The judgment in *McMakin* was affirmed because the defendant drew and held his

weapon in a position to use it while simultaneously declaring his intent to do so. (*Ibid*.; see also *People v. Chance* (2008) 44 Cal.4th 1164, 1172, 1174 [defendant's conduct, by which he was equipped, positioned and had the ability to inflict present injury with a loaded weapon was sufficient to establish assault, even if some steps remained to be taken, and even if the victim or surrounding circumstances thwarted the infliction of injury].)

Here, Perdue testified that defendant pointed the gun at Temple, Sanders, and herself. From this testimony, and the other evidence, the jury could rationally conclude that defendant Moore drew a loaded semiautomatic handgun and pointed in the direction of Temple and Sanders, who were within firing range, and attempted to cock it, thus evidencing her intent to use the gun against them, but the gun malfunctioned and the bullets were ejected. From this evidence, the jury could also rationally conclude that defendant Moore committed an assault with a semiautomatic firearm against both Temple and Sanders.

B. *The Court Was Not Required to Instruct on Brandishing as a Lesser Included Offense*

Defendant Moore argues the trial court committed prejudicial error by refusing to instruct the jury on brandishing a weapon (§ 417, subd. (a)(2))[3] as a lesser included offense of assault with a semiautomatic firearm. She is mistaken.

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[3] Section 417, subd. (a)(2) provides: "Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner . . . is punishable as follows: [¶] (A) If the violation occurs in a public place and the firearm is a pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in a county jail for not less than three months and not more than one year, by a fine not to exceed one thousand dollars . . . or both."

A violation of section 417, subdivision (a)(2), is not a lesser included offense of assault with a firearm. (*People v. Steele* (2000) 83 Cal.App.4th 212, 218 (*Steele*), review den. Dec. 13, 2000; cf. *People v. Escarcega* (1974) 43 Cal.App.3d 391, 393, 396-400 (*Escarcega*) [brandishing a deadly weapon is not a lesser included offense of assault with a deadly weapon].) A person can commit assault with a firearm from a concealed location, behind a victim's back, or by firing a gun through a coat pocket, without drawing or exhibiting the weapon in a rude, angry, or threatening manner, or being involved in a fight or quarrel. (*Steele, supra*, at p. 218; *Escarcega, supra*, at p. 398.)

For more than a century appellate courts have held that brandishing a firearm is not a lesser included offense of assault with a deadly weapon. (See, e.g., *Steele, supra*, 83 Cal.App.4th at p. 218 [citing illustrative cases, beginning with *People v. Piercy* (1911) 16 Cal.App. 13, 14].) Defendant Moore urges us to ignore this well-settled law, which she claims is at odds with *People v. Wilson* (1967) 66 Cal.2d 749 (*Wilson*), in which the California Supreme Court reversed an assault conviction for failing to instruct on brandishing a firearm. (*Id*. at p. 759-760, 764.) However, as observed in *Steele*—which rejected the same argument made here—*Wilson* did not actually hold that brandishing a firearm was a lesser included offense of assault with a deadly weapon. We need not repeat *Steele's* thoughtful discussion. Suffice it to say that *Steele* concluded that *Wilson's* ruling "implied—but did not directly hold—that brandishing was a lesser included offense to assault with a firearm. [*Wilson's*] holding has no prior case support, and only scant subsequent support." (*Steele, supra*, at p. 219; see *Escarcega, supra*, 43 Cal.App.3d at pp. 399-400.) *Wilson* was decided before *People v. Geiger* (1984) 35 Cal.3d 510 (*Geiger*).) Both cases were part of a trend that required instruction on both lesser related and lesser included offenses. But *Geiger* was retrospectively

overruled in *People v. Birks* (1998) 19 Cal.4th 108, (*Birks*), in which the court held that a trial court need instruct only on lesser included, not lesser related offenses. (*Id*. at p. 136, fn. 19.) A lesser offense is necessarily included in a greater offense only if the greater cannot be committed without also committing the lesser offense. (*People v. Smith* (2013) 57 Cal.4th 232, 240 (*Smith*); *Birks, supra*, at pp. 117-118.) An assault with a firearm may be committed without displaying the weapon in a rude, angry or threatening manner, as required in section 417. (See *Steele, supra*, at p. 218 [assault with a firearm may be committed in a nonthreatening manner by, e.g., firing or pointing weapon from a concealed location].)

We see no reason to part ways with *Steele's* well-reasoned analysis, including its observation that the court in *Wilson* failed to follow its own rule for analysis of lesser included offenses. (*Steele, supra*, 83 Cal.App.4th at p. 221; *Birks, supra*, 19 Cal.4th at p. 117.) Accordingly, we follow those cases that have found that brandishing is not a lesser included offense of assault with a deadly weapon. (See, e.g., *Steele, supra*, at pp. 218-220; *Birks*, *supra*, at pp. 128, 132, 134, 136, fn. 19; *People v. Kraft* (2000) 23 Cal.4th 978, 1064-1065.)

Further, even if the duty to instruct on brandishing as a lesser included offense were not foreclosed here by the rationale of *Steele*, it would be foreclosed by virtue of the statutory elements or the language of the accusatory pleading, which also are considered in determining whether the court had a duty to instruct on a lesser offense. (*Smith, supra*, 57 Cal.4th at p. 242.) Here, as to counts 9 and 10, the amended information alleged that defendant Moore "did willfully and unlawfully commit an assault" on the respective victims with a semiautomatic firearm. The language of this accusatory pleading does not implicate section 417. It does not allege that defendant Moore drew or exhibited the weapon in a rude, angry or threatening manner, or that she used the weapon in the course of a fight or

quarrel. (See § 417, subd. (a)(2).) Looking to the statutory language and the information, "the conclusion is inescapable that an assault with a [semiautomatic] firearm may be committed without the defendant brandishing such weapon. Ergo, . . . brandishing cannot be a lesser included offense to assault with a [semiautomatic] firearm." (*Steele, supra,* 83 Cal.App.4th at p. 221; see *Birks, supra*, 19 Cal.4th at p. 117.)

Finally, assuming for the sake of discussion that brandishing is a lesser included offense of assault with a semiautomatic firearm, defendant Moore was still not entitled to the instruction. Based on evidence at trial, to the extent any brandishing occurred, it was part and parcel of the assaults. Defendant Moore argues that the evidence shows she pointed the gun at only one person in particular—Temple—if any. As we have explained, the record shows otherwise.

C. *The Claim that the Court was Required to Define "Semiautomatic" is Forfeited*

Assault with a semiautomatic firearm requires proof the victim was assaulted, and that the assault was committed with a semiautomatic firearm. (§ 245, subd. (b); *People v. Le* (2015) 61 Cal.4th 416, 427.) Accordingly, the jury received pattern instructions CALJIC Nos. 9.00 and 9.01, defining a "present ability to commit injury" as an element of the crime, and CALJIC No. 9.02.1, instructing the jury that it was required to find "the assault was committed with a semiautomatic firearm." Defendant Moore did not request that the court define "semiautomatic firearm" when these instructions were given at trial. Nevertheless, on appeal, she contends that the court had a sua sponte duty to give a different or additional instruction because the pattern instructions do not define "semiautomatic," as the term is used in section 245, subdivision (b).

The Attorney General argues this claim is forfeited because defendant Moore failed to request any further clarification or definition at trial. We agree.

The essence of defendant Moore's complaint is that the language of legally correct instructions was too general and required further clarification. Her failure to request any clarification or a definition of the term "semiautomatic" constitutes forfeiture of any claimed error. (See *People v. Jennings* (2010) 50 Cal.4th 616, 671; *People v. Valdez* (2004) 32 Cal.4th 73, 113 ["Defendants failure to . . . object to the proposed instruction . . . forfeits his claim on appeal."].) A defendant simply may not "remain mute at trial and scream foul on appeal for the court's failure to expand, modify, [or] refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.) "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) Defendant Moore does not suggest that such a request would have been futile here. Thus, it is clear that she has forfeited the contention.

II. *Defendant Price's Wende Appeal*

After examining the record, defendant Price's appointed counsel on appeal filed an opening brief under *Wende, supra*, 25 Cal.3d 436, raising no issues, and asking us independently to review the record to determine whether any arguable issues exist. On December 9, 2015, we advised defendant Price he had 30 days within which to personally submit any contentions or issues he wished us to consider. To date, we have received no response.

We have thoroughly reviewed the record and are satisfied that defendant Price's counsel has fully complied with her responsibilities. No arguable issue

exists. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110; *Wende, supra*, 25 Cal.3d at p. 441.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.