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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN WALKER,

Defendant and Appellant.

B284490

(Los Angeles County  
Super. Ct. No. BA445351)

APPEAL from a judgment of the Superior Court of Los Angeles County, Melissa N. Widdifield, Judge. Affirmed.

Edward J. Horowitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant and appellant Steven Walker (defendant) was convicted of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)<sup>1</sup>). On appeal, defendant contends: (1) the trial court violated the double jeopardy clause of the United States Constitution by giving a jury instruction on alternative charges, (2) his conviction for assault with a semiautomatic firearm must be reversed because it is inconsistent with his acquittal for assault with a firearm, and (3) the court erred by failing to instruct the jury it could acquit defendant of both charges. We affirm the judgment.

## **BACKGROUND**

### **I. Factual Background**

#### **A. Prosecution Evidence**

Lauron Williams, a dog trainer, owned a dog named Bella. Defendant was one of Williams's clients. Defendant wanted Bella but defendant and Williams could not agree on a selling price.

On several occasions, Williams went to defendant's home but no one replied to Williams's attempts to contact defendant. On one occasion, after not getting a response from defendant, Williams went to defendant's side gate, stood on top of the trash cans, and yelled for defendant. Defendant pointed a gun at Williams, scaring him and causing him to run away.

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<sup>1</sup> All statutory citations are to the Penal Code.

## **B. Defendant's Evidence**

Defendant testified Williams arrived at his house one day with Bella. Defendant was concerned for Bella's well being because she appeared to be "in pretty bad shape"—she was "neglected and emaciated." Defendant fed her a special meal.

Williams "hand[ed] off" Bella to defendant, but Williams and defendant did not agree that defendant would purchase the dog from Williams, and defendant did not understand that Williams expected him to pay for Bella. According to defendant, "Williams told me that he had too many dogs. And so my understanding was that he wanted a good home for Bella." Afterwards, defendant spent money to care for Bella, and he considered Bella to be his dog.

Eventually, defendant received telephone calls from Williams's secretary asking for payment for the purchase of Bella. Defendant hung up on her. Williams later called defendant saying that "maybe we [can] work something out." Defendant told Williams that defendant was "uncomfortable," Williams was a "liar" because there was never an agreement that defendant would purchase Bella, and defendant was "done." Defendant then hung up the phone.

About one week later, on several occasions, defendant saw Williams walking toward defendant's property, pacing back and forth. Defendant believed that Williams was stalking him.

On the final occasion Williams went to defendant's property, opened the cargo door to his car and appeared to retrieve something, perhaps a weapon. Williams walked back to defendant's property, appearing agitated and angry. Defendant was startled and afraid. Williams climbed up on trash cans, reached for defendant's fence, and appeared to be pulling himself

up onto the property. Thinking Williams had a weapon, defendant grabbed his gun from his closet and ran to the back door. Williams took off. Defendant did not want to shoot anyone.

## **II. Procedural Background**

The District Attorney of Los Angeles County filed an information charging defendant with assault with a firearm, in violation of section 245, subdivision (a)(2) (count 1), grand theft dog, in violation of section 487e (count 2), and assault with a semiautomatic firearm, in violation of section 245, subdivision (b) (count 3). In count 1, the District Attorney alleged that defendant personally used a semiautomatic handgun firearm within the meaning of sections 12022.5, 1192.7, subdivision (c), and 667.5, subdivision (c). In count 3, the District Attorney alleged that defendant personally used a firearm within the meaning of sections 1203.06, subdivision (a)(1) and 12022.5, subdivision (a), making the offense a serious felony under section 1192.7, subdivision (c)(8), and a violent felony under section 667.5, subdivision (c)(8).

The District Attorney dismissed count 2 during trial. The jury found defendant not guilty on count 1 and guilty on count 3, and found true the special allegations regarding count 3.

The trial court suspended imposition of sentence and placed defendant on five years of formal probation subject to several terms and conditions, including 120 days of electronically monitored house arrest and the payment of various fees, fines and penalties. Defendant filed a timely notice of appeal.

## DISCUSSION

### I. Double Jeopardy

Defendant contends the trial court violated the double jeopardy clause of the Fifth Amendment of the United States Constitution by giving a jury instruction on alternative charges. Defendant argues his acquittal on count 1 (assault with a firearm—section 245, subdivision (a)(2)) bars his conviction on count 3 (assault with a semiautomatic firearm—section 245, subdivision (b)). We disagree.

#### A. Background

The trial court instructed the jury on the elements of counts 1 and 3 using CALCRIM Nos. 863 and 875. The two instructions were virtually identical except for the references to “firearm” and “semiautomatic pistol,” respectively.<sup>2</sup>

The court also instructed the jury with CALCRIM No. 3516, which counsel had stipulated to using “in lieu of . . . the lesser-included instruction and concomitant verdict form[ ]”:

“The defendant is charged in Count 1 with assault with a firearm and in Count 3 with assault with a semiautomatic firearm. These are alternative charges. [¶]

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<sup>2</sup> CALCRIM No. 863 defines a “firearm” as “any device designed to be used as a weapon from which a projectile is discharged or expelled through a barrel by the force of an explosion or other form of combustion.” CALCRIM No. 875 describes a “semiautomatic pistol” as one that “extracts a fired cartridge and chambers a fresh cartridge with each single pull of the trigger.”

If you find the defendant guilty of one of these charges, you must find him not guilty of the other. You cannot find the defendant guilty of both charges.”

After the trial court instructed the jury, the court asked counsel outside the jury’s presence if they had any objections to the jury instructions as read. Both counsel responded, “No.”

## **B. Analysis**

Defendant contends the trial court’s instruction on CALCRIM No. 3516 created a constitutional double jeopardy bar to proceedings on count 3 by effectively directing the jury to find defendant not guilty on count 1 if the jury found defendant guilty on count 3.<sup>3</sup> That is, defendant argues that by requiring the jury to return a not guilty verdict on one of two charges with the same elements, the instruction raised a double jeopardy bar to his conviction on the other count.

The double jeopardy bar does not apply here. “The double jeopardy clauses of the Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that a person may not be twice placed ‘in jeopardy’ for the ‘same offense.’ ‘The double jeopardy bar protects against a second prosecution for the same offense following an

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<sup>3</sup> The People argue that instead of instructing the jury according to CALCRIM No. 3516, the court should have instructed the jury that assault with a firearm is a lesser included offense of assault with a semiautomatic firearm. (See *People v. Martinez* (2012) 208 Cal.App.4th 197, 199.) But any error was harmless, the People contend, because defendant suffered no prejudice from a technical error which had the same effect as striking a lesser included offense conviction.

acquittal or conviction, and also protects against multiple punishments for the same offense. [Citations.]’ [Citation.]” (*People v. Anderson* (2009) 47 Cal.4th 92, 103-104; *People v. Parrish* (1985) 170 Cal.App.3d 336, 343 [“The double jeopardy clause of the Fifth Amendment forbids either multiple prosecutions or multiple punishments for the ‘same offense’”].)

Defendant was not subject to a second prosecution and he did not receive multiple punishments. The jury’s verdicts on counts 1 and 3 were rendered in a single proceeding in which jeopardy had not yet terminated. (See *People v. Scheidt* (1991) 231 Cal.App.3d 162, 169 [“Since the purpose of the [double-jeopardy] doctrine is to protect the defendant from the harassment of multiple trials, it is properly invoked only where there was a prior criminal proceeding which reached the jeopardy stage. It does not apply to convictions or acquittals or dismissals on separate counts in a single trial” (emphasis omitted)].) Therefore, the constitutional protections against double jeopardy were not called into play.

## **II. Inconsistent Verdicts**

Defendant also contends his conviction on count 3 (assault with a semiautomatic firearm) must be reversed because it is inconsistent with his acquittal on count 1 (assault with a firearm).

Any inconsistency between the jury’s findings does not require reversal of defendant’s conviction on count 3. “An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict.’

[Citations.]” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 406.)

### **III. Instructional error**

Defendant argues the CALCRIM 3516 instruction was “incomplete and misleading” because “it did not inform the jury that it could ‘find defendant not guilty of both [counts 1 and 3].’” Defendant cannot show any error was prejudicial because the jury was adequately instructed that it could find defendant not guilty on both counts. The court instructed the jury that “[t]he People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.”



## **DISPOSITION**

The judgment is affirmed.

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JASKOL, J.\*

We concur:

BAKER, Acting P. J.

MOOR, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.