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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BROCK RAY BUNGE, Defendant and Appellant.	B288333 (Los Angeles County Super. Ct. No. MA069502)

APPEAL from a judgment of the Superior Court of Los Angeles County. Shannon Knight, Judge. Affirmed with directions.

Adrian K. Panton, 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, Assistant Attorney General, Paul M. Roadarmel, Jr. and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

After Brock Ray Bunge threatened to kill his ex-girlfriend, he drove to her house and fired a shotgun at her out of his truck's passenger window while she stood outside. He drove away and parked his truck in the middle of the street at night, at which point another driver hit him. He robbed that driver at gunpoint and pointed his gun at occupants of two other vehicles driving by. He was eventually apprehended while hiding in a hole at his remote desert residence.

Bunge was convicted of 15 counts. On appeal, he challenges only the three counts involving his ex-girlfriend, which charged him with attempted murder (count 1), criminal threats (count 2), and shooting at an inhabited dwelling (count 15). He claims the trial court committed instructional and evidentiary errors, but we find none of his contentions meritorious. We correct an error in the abstract of judgment and affirm.

PROCEDURAL BACKGROUND

The jury convicted Bunge of all 15 counts charged, which included attempted premeditated murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a)),[1] criminal threats (§ 422, subd. (a)), assault with a firearm (§ 245, subd. (a)(2)), second degree robbery (§ 211), vandalism (§ 594, subd. (a)), felon in possession of a firearm (§ 29800, subd. (a)(1)), unlawful possession of ammunition (§ 30305, subd. (a)(1)), and shooting at an inhabited dwelling (§ 246). The jury found several firearm enhancements to be true. (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c).) Bunge admitted a prior conviction and strike. (§§ 1192.7, subd. (c), 667.5, subd. (c), 667, subds. (b)–(i), 1170.12.) He was sentenced to 97 years and four months to life, comprised of a

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[1] All undesignated statutory citations are to the Penal Code.

determinate term of 58 years and four months and an indeterminate term of 39 years to life.

FACTUAL BACKGROUND

Bunge's crimes involved multiple victims in several locations. Because Bunge asserts issues related only to the three counts involving his ex-girlfriend, we limit our recitation of the facts as needed to resolve those challenges.

A. Bunge Threatens to Kill His Ex-Girlfriend and Shoots at Her from His Truck

Bunge and his ex-girlfriend Andrea M. were in a relationship for about five years until it ended in December 2015. They stopped living together in February 2016. Andrea obtained a restraining order against him in June 2016, and she called law enforcement on three separate occasions when he violated it.

On September 8, 2016 at about 4:00 p.m., Andrea was walking toward her front door when she heard Bunge approaching in his truck. She hid, but after a minute she revealed herself and took photographs and video of him to report another violation of the restraining order. Bunge yelled at her, asking to borrow her generator. When she refused, he told her, "So it's gonna go down like this? You'll pay bitch. You'll pay." He drove away.

Andrea ran inside her house, then looked out the security screen when she heard Bunge returning. She watched as he drove over her neighbor's lawn and performed a "burnout" on her lawn by spinning his truck tires and kicking up the grass. He had done something similar to her lawn in July 2016.

Bunge left again, and Andrea called the sheriff's department. She also called Brenda M., Bunge's sister, and told her "her brother was 'on one' and to be careful." At about 5:15

p.m., Brenda went to Andrea's house to talk to her and see the tire marks in the lawn. Andrea also called a friend, Sarah F., who later visited Andrea at home and saw the tire tracks.

After spinning his tires on Andrea's lawn, Bunge called Andrea and left multiple voicemail messages. In one voicemail, he said (all errors in original): "Why are you such an uncaring, fucking bitch? Talk about your mom to, uh, and your phones at work and all kinds of stuff. You don't give a fuck about no one, do ya? Alright, call the cops. You think I give a flying fuck about them? No. I got a little something something for them. Anyways, um, watch yourself. Watch yourself." In another message he left an hour later, he said: "I'm telling ya, you need to listen to me. Don't hang up the fucking phone. Otherwise I'm coming for ya. And I'm guaranteed to fucking get ya. Guaran–fucking–teed. You better talk to me."

These voicemails made Andrea "very nervous," and she perceived them as a threat of violence.

About 6:30 p.m., Bunge called his sister Brenda. He told her he wanted Andrea to "drop the restraining order against him and to drop the charges and that he was going to kill her if she didn't do that." He said he "had explosives and he was gonna be able to blow up lots of things." He did not tell Brenda to pass the message on to Andrea. Some time prior to September 8, 2016, he had also told Brenda that he was going to attempt "suicide by cops" by hurting or killing Andrea and he had made several modifications to his truck in preparation to do so.

When Brenda spoke to Bunge on September 8, 2016, "he was very distraught" and she could tell he was intoxicated. She also knew he drank alcohol "[t]hroughout the day every day" for the prior three or four years, which made her believe he had been

consuming alcohol that day. Her impression was that he "was able to keep living normally despite all the drinking." She was unaware if he had been using drugs that day.

After talking to Bunge, Brenda noticed a voicemail message he left her at 4:55 p.m., before they had spoken. In it, he told her, "Give me a call. I need to talk to ya. You need to talk to Andrea or else—I, I, I'm a hundred percent ready right now, and, and, believe me, I'm gonna, I'm gonna get her. And she needs to drop those fucking charges on me, or, or, it's gonna be something—game on. I'm done. I'm done. I'm fucking done. I went and saw her today, I went to get the fucking generator. The least she can fucking do, this fucking bitch, and she, she said 'no.' So *** videotaped me so I fucking burned out on her fucking lawn again. Anyways, I don't give a fuck. I'll fucking kill her. I will kill her. I guaran–fucking–tee I will fucking kill her. And, uh, that's it. So, give me a call."

After hearing this voicemail, Brenda called Andrea to warn her that Bunge had "gone off the deep end and that she needs to be careful." Brenda went to Andrea's house and played the voicemail for Andrea, as well as Andea's friend Sarah and a Los Angeles County deputy sheriff who had arrived. At that point, Andrea was afraid Bunge would carry out the threat.

Meanwhile, Bunge went to Brenda's house in tears, where he spoke with her husband Edward M. He told Edward, "[I]t wasn't, 'your fault and it's not Brenda either,' " and, "I got to do what I got to do.' " Edward described Bunge as "wobbly," "[n]ot stable," and "[s]waying," giving the impression he had been drinking, but Edward did not smell alcohol on him. Bunge left his dog with Edward and drove away in his truck.

Edward called Brenda at Andrea's house and told her Bunge was heading there. Brenda informed Andrea, the deputy, and Sarah that Bunge could be on his way over, and she left Andrea's house, fearing Bunge would be upset if she was there when he arrived. The deputy parked his car a couple of houses down and waited for Bunge. In that position he had a partially obstructed view of Andrea's house.

About 8:30 p.m. or 8:45 p.m., Andrea and Sarah were standing outside Andrea's house when Bunge returned. He drove up in his truck, with his passenger window rolled down and facing the house. Andrea was standing about 10 to 15 feet away and Sarah was standing on the walkway nearby. Bunge yelled at Andrea, "You fucking bitch," and fired a shotgun through the open passenger window in her direction and the direction of her house. Andrea heard the shot and saw the gun pointed at her, and she saw sparks from the shot fire upward. She was not hit. Bunge withdrew the gun and quickly drove away, passing the deputy's parked car.

The deputy heard the shotgun "bang" but thought it was a backfiring car. After Andrea told him Bunge was in the truck that had just driven by, he began to pursue Bunge. He stopped his pursuit when Bunge ran a red light. The deputy returned to Andrea's house to inform her Bunge had not yet been arrested, and she was afraid Bunge would return and kill her. The deputy received a call related to Bunge and left again.

Andrea and Sarah later found leaves under the tree in Andrea's front yard with holes in them. Before leaving the house, the deputy also noticed leaves with "buckshot" holes, as if from a shotgun round. Andrea provided the leaves to deputies the next

day. Andrea later found a shotgun "wad" in her backyard pool and provided it to police.

B. Bunge Robs a Driver, Threatens Others, and Surrenders after Hiding in a Hole at His Desert Residence

After leaving Andrea's house, Bunge parked his truck in the middle of the road without its lights on. Jeff J. crashed into it and skidded to a stop. Gun in hand, Bunge approached Jeff and asked if he was okay. He then put the gun to Jeff's head and demanded he turn out his headlights because they were "giving away [their] position." Bunge eventually robbed Jeff of his cell phone and computers and hit him once or twice in the face with the gun. Bunge also smashed out the headlights on Jeff's car with the butt of his gun. During this incident, he pointed his gun at two passing cars; the occupants kept driving and contacted police.

Bunge fled to a rural desert property where he had been living for the previous couple of months. The SWAT team located him in a hole concealed by tumbleweeds and wire, with a loaded shotgun next to his leg. The team used a robot to recover the shotgun and to remove the tumbleweeds and wire, at which point Bunge surrendered and was arrested.

Officers recovered two rifles and a computer bag on the desert property. They also recovered a live shotgun round, Bunge's driver's license, and a cell phone from a residence on the property. Upon searching Bunge's truck, officers recovered live rounds of ammunition and found an expended shotgun shell under the passenger side. They also discovered that the truck contained a makeshift spike strip and two PVC pipes with screws

drilled into them. The next day Brenda and Edward found two pipes used to ingest drugs at Bunge's house.

C. Firearms Expert Testifies at Trial

A firearms expert testified that the fired shotgun shell found under Bunge's truck was fired from the shotgun recovered by the robot while Bunge was hiding. The shotgun wad Andrea found in her pool was consistent with a wad that would have come from Bunge's shotgun. The holes in the leaves Andrea found could have been made by shotgun pellets. As we discuss in more detail below, the expert responded to several hypothetical questions about the recoil of a shotgun fired from the passenger window of a vehicle.

DISCUSSION

I. The Court Properly Refused to Give Bunge's Requested Voluntary Intoxication Instruction

Before the court instructed the jury, Bunge's counsel requested the court give a voluntary intoxication instruction consistent with CALCRIM No. 3426.[2] He relied on Brenda's testimony that Bunge sounded intoxicated on the phone; Edward's testimony that Bunge appeared "wobbly," "[n]ot stable," and "[s]waying" when he visited Edward's home; Edward's and Brenda's testimony that they found drug pipes in Bunge's home; Andrea's testimony that Bunge was " 'on one' " or on a "weirdo rampage," suggesting he was under the influence of drugs; and Bunge's seemingly paranoid behavior after Jeff hit his truck.

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[2] CALCRIM No. 3426 instructs on voluntary intoxication as it applies to specific intent crimes. CALCRIM No. 625 instructs on voluntary intoxication as it applies to homicide crimes specifically.

The prosecutor opposed the request, pointing out that Brenda believed Bunge was intoxicated based on the fact that she knew he drank every day; Edward did not smell alcohol on Bunge's breath; Andrea made "very clear she didn't know if he was on drugs or not"; and there was no evidence when or if Bunge used the pipes Edward and Brenda had found.

The court denied the request, finding insufficient evidence supported giving the instruction. The court reasoned: "There was testimony that Mr. Bunge was drinking regularly around that time. And in reviewing my notes, when [Brenda] indicated that the defendant may have been intoxicated, she seemed to mention that in the context of him sounding angry.

"We do have, I believe, that voicemail that we heard was left at 4:55 p.m., which was near the time that she was speaking with the defendant I think within an hour and a half or so of the time she spoke with the defendant while at the McDonalds drive through line, and—I mean, the voicemail we heard, there was—it didn't sound to the court like any hint of intoxication. It sounded like he was angry. There was no slurred speech. No thick speech. Nothing that would sound anything like someone intoxicated from alcohol, and there was testimony that he—you know, Mr. Bunge was seemingly living a relatively normal functional life despite his drinking around that time.

"And with regard to [Edward], at first he indicated the defendant was not under the influence of alcohol to his knowledge. He did say the defendant was wobbling; that his body was moving and he was swaying. There was no odor of alcohol but he believed the defendant may have been drinking, but there didn't really seem to be much of a basis why he believed that."

On appeal, Bunge contends the court's refusal to give this instruction constituted prejudicial error with regard to the attempted murder count and criminal threats count involving Andrea.[3] He argues the court improperly weighed Bunge's 4:55 p.m. voicemail against Brenda's testimony, and the record otherwise contained substantial evidence to support the instruction. We disagree on both points.

Voluntary intoxication is not a defense; it is "admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b); see *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) A trial court must give a voluntary intoxication instruction upon a defendant's request "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' " (*People v. Williams* (1997) 16 Cal.4th 635, 677 (*Williams*).)

Bunge's contention that the trial court improperly weighed Bunge's 4:55 p.m. voicemail against Brenda's testimony is meritless. The record does not demonstrate that the trial court improperly weighed this evidence; instead, it reflects the trial court simply reviewed the state of the record to determine whether there was sufficient evidence to support an intoxication

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[3] In his opening brief, Bunge also suggests the instruction was relevant to the criminal threats and robbery counts involving Jeff. But he limits his claim of prejudicial error to the attempted murder and criminal threats counts involving Andrea, so we will also limit our analysis accordingly.

instruction. Further, even if the court had improperly weighed the evidence, the point cannot support reversal. We review de novo the denial of a requested instruction on voluntary intoxication. (*People v. Quarles* (2018) 25 Cal.App.5th 631, 634.) Hence, we must independently review the record to determine whether substantial evidence supported giving the instruction.

After review, we conclude the evidence did not support giving the instruction. No one saw Bunge drink or do drugs on the day of his crimes. Andrea testified that she "assumed" Bunge was on drugs when he visited her, but she ultimately did not know if he was under the influence of drugs or alcohol. Both Jeff and a deputy present when Bunge was arrested testified that he did not appear to be under the influence of alcohol. There was also no evidence when or if Bunge had used the pipes Edward and Brenda found at his residence, and a deputy who searched his residence found no evidence of recent alcohol consumption.

The only suggestion that Bunge *might* have been drinking came from Brenda and Edward. Yet, Brenda's testimony was at least partly speculative—while she testified that she could tell Bunge was intoxicated when she spoke to him on the phone, she described him as "distraught" and based her belief in part on his history of daily drinking. Edward described Bunge as "wobbly," "[n]ot stable," and "[s]waying," giving the impression he had been drinking, but Edward did not smell alcohol on him. Bunge visited Edward's home in tears, so he must have been upset at the time.

Even if this evidence showed some level of intoxication, nothing suggested it affected his formation of specific intent. His entire deliberate course of conduct leading up to the shooting—including dropping off his dog with Edward and

preparing a remote hiding place—belied any suggestion that he was so intoxicated he could not have intended to threaten and kill Andrea. Moreover, if he had been drinking, Brenda testified that he "was able to keep living normally despite all the drinking." Thus, nothing showed that any intoxication affected his mental state. (See *Williams, supra,* 16 Cal.4th at pp. 677–678 [even if defendant's comments that he was " 'doped up' " and " 'smokin' pretty tough then' " was substantial evidence of intoxication, "there was no evidence at all that voluntary intoxication had any effect on defendant's ability to formulate intent"].)

Bunge cites *People v. Stevenson* (1978) 79 Cal.App.3d 976 and *People v. Vasquez* (1972) 29 Cal.App.3d 81, but both cases involved far more evidence of intoxication than existed here. In *Vasquez*, the defendant himself testified that he had been drinking and he was " 'kind of high' " and " 'kind of loaded.' " His wife had taken over driving a few hours before the crime because "he had been drinking too much"; she had also refused to give him money to buy more alcohol. (*Vasquez, supra,* at p. 88.) In *Stevenson*, a witness saw the defendant drink 18 ounces of whiskey or more over the course of 45 minutes, and when he returned 20 minutes later after he had committed his crimes, she noticed he " 'looked like he had been drinking' " and "looked sort of 'like he was kind of under the influence of a little alcohol.' " (*Stevenson, supra,* at p. 982.) Thus, the court here did not err in refusing to give a voluntary intoxication instruction.

II. Sufficient Evidence Supported the Conviction for Shooting at an Inhabited Dwelling

Bunge argues insufficient evidence supported his conviction for shooting at an inhabited dwelling in violation of section 246 because the prosecutor elected to argue that Bunge targeted

Andrea when he discharged the shotgun, not her house. We disagree.

"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 or special circumstances beyond a reasonable doubt. [Citation.] 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 the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 246 provides that any person who "maliciously and willfully discharge[s] a firearm at an inhabited dwelling house" is guilty of a felony. This is a general intent crime, so a violation requires only " 'an intent to do the act that causes the harm.' " (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1357 (*Overman*); see *People v. Ramirez* (2009) 45 Cal.4th 980, 985, fn. 6 (*Ramirez*).) Because only general intent is required, multiple cases have held that a defendant need not specifically intend to shoot at a specific target to violate this section; it is sufficient that the defendant "shoots in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it." (*Overman,* at p. 1356; see *People v. Cruz* (1995) 38 Cal.App.4th 427, 432–433 (*Cruz*); *People v. Chavira* (1970) 3 Cal.App.3d 988, 993 (*Chavira*).)

Consistent with this case law, the prosecutor argued the jury was not required to find specific intent in order to convict Bunge of violating section 246. He explained: "So you may be thinking, well, how can we find that he intended to shoot [Andrea] and then also [find] that he was shooting at the house. [¶] For this one, the fact that he is shooting in the direction of a house, it doesn't matter what he is thinking. He doesn't have to think, I really want to shoot at her house. It's the fact that, you know, as he is shooting at her, that someone is home and the home is right behind her and he is shooting in the direction of that home. It doesn't require any sort of intent whatsoever. Just the fact that he is actually doing that and he has fulfilled the requirements of these elements."

Bunge does not necessarily dispute this case law or the accuracy of the prosecutor's argument. Instead, he argues that the prosecutor elected to argue that Bunge specifically targeted Andrea when arguing the attempted murder count, so "the evidence was insufficient to establish that he was shooting at an inhabited dwelling." We are not persuaded. This argument is simply a repackaging of the same arguments rejected in *Overman*, *Cruz*, and *Chavira* that a defendant must specifically intend to shoot at a specific target in order to violate section 246. We see nothing preventing the jury from finding that Bunge targeted Andrea, and in doing so, shot "in such close proximity to [her house] that he show[ed] a conscious indifference to the probable consequence that one or more bullets [would] strike [her house] or persons in or around it." (*Overman, supra*,

126 Cal.App.4th at p. 1356.)[4] We therefore reject Bunge's contention.

III. The Court Was Not Required to Instruct on the Lesser Offense of Grossly Negligent Discharge of a Firearm

Bunge contends the trial court erred in not sua sponte instructing on grossly negligent discharge of a firearm in violation of section 246.3, which is a lesser included offense of shooting at an inhabited dwelling in violation of section 246. (*Ramirez, supra,* 45 Cal.4th at p. 990; *Overman, supra,* 126 Cal.App.4th at pp. 1359–1360.)[5] His argument is based on

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[4] Bunge cites *Ramirez* to argue the California Supreme Court has interpreted section 246 "to require a specific target within the defendant's range of fire." *Ramirez* addressed the distinct issue of whether grossly negligent discharge of a firearm (§ 246.3, subd. (a)) was a necessarily included offense of discharge of a firearm at an inhabited dwelling in violation of section 246. (*Ramirez, supra,* 45 Cal.4th at p. 983.) The court quoted language from *Overman* on that issue, and did not purport to address whether a defendant must specifically target or intend to shoot at the inhabited dwelling in order to violate section 246. (*Ramirez,* at p. 986.) Belying Bunge's argument, the court in *Ramirez* did note that the difference between the two crimes at issue is that section 246 "requires that an inhabited dwelling or other specified object be within the defendant's firing range," but said nothing about requiring the defendant target or intend to shoot at the dwelling. (*Ramirez*, at p. 990.)

[5] Section 246.3, subdivision (a) states in relevant part: "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense."

his view that section 246 requires intent to shoot at a dwelling, which is incorrect as we have explained. Under the correct understanding of the relevant offenses, no evidence supported instructing on section 246.3 as a lesser offense.

"A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ' "that is, evidence that a reasonable jury could find persuasive" ' [citation], which, if accepted, ' "would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) We review de novo the trial court's failure to sua sponte give an instruction on a lesser offense. (*Ibid.*)

The elements of shooting at an inhabited dwelling in violation of section 246 are (1) the defendant acted willfully and maliciously, and (2) the defendant shot at an inhabited house. (*Ramirez, supra,* 45 Cal.4th at p. 985.) The elements of grossly negligent discharge of a firearm in violation of section 246.3 are (1) the defendant unlawfully discharged a firearm, (2) the defendant did so intentionally, and (3) the defendant did so in a grossly negligent manner that could result in injury or death of a person. (*Id.* at p. 986.)

Ramirez explained the differences between the two offenses: "Both offenses require that the defendant willfully fire a gun. Although the mens rea requirements are somewhat differently described, both are general intent crimes. The high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3(a), which requires that injury or death 'could result.' The only other difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the

greater offense requires that an inhabited dwelling or other specified object be within the defendant's firing range. All the elements of section 246.3(a) are necessarily included in the more stringent requirements of section 246." (*Ramirez, supra,* 45 Cal.4th at p. 990.)

There was no evidence that Bunge committed the lesser offense of grossly negligent discharge of a firearm but *not* the greater offense of shooting at an inhabited dwelling. He aimed the shotgun through his passenger window at Andrea, who was standing 10 or 15 feet away in front of her house. He yelled "You fucking bitch," and fired in her direction. Andrea heard the shot and saw the gun pointed at her, and she saw sparks from the shot fire upward. Although the shot missed her, it impacted leaves on a nearby tree and a shotgun wad ended up in Andrea's backyard. Under this evidence, no reasonable jury could have found Bunge not guilty of violating section 246 but guilty of violating section 246.3. In other words, no reasonable jury could have concluded he intentionally discharged the shotgun at Andrea but *not* in close proximity to her house and *not* in such a way that created a high probability of death or injury. No instruction on the lesser offense was warranted, so the court did not err in failing to give one. (Cf. *Overman, supra,* 126 Cal.App.4th at pp. 1362–1363 [evidence supported section 246.3 instruction as lesser offense because no witness saw where defendant aimed rifle when he fired, no points of impact were found on building, and defendant was excellent marksman].)

IV. The Court Did Not Abuse Its Discretion in Admitting the Firearm Expert's Responses to Hypothetical Questions

Bunge contends the trial court abused its discretion in permitting the prosecution's firearms expert to respond to three hypothetical questions about how a shotgun's recoil could affect aim depending on body position and whether the gun was held with one or two hands. He argues the expert's opinions were speculative because "[n]o evidence was presented to establish how many of [Bunge's] hands were holding the shotgun nor was there evidence of his body position at the time of the shooting." We disagree.

During trial, the prosecutor posed a series of hypothetical questions to the firearms expert related to how the shotgun Bunge fired might have behaved when he fired it out of the passenger window of his truck. The expert defined the concept of "recoil" for the jury and explained that the effect on the gun and the shooter "would be dependent on how the firearm is being held. You could have recoil going in a rear-end direction but also, since you have a long gun with a long barrel, or even with a handgun, that barrel will flip—tend to flip in an upward fashion."

The prosecutor posed this hypothetical question: "So assuming that the driver has one hand on the steering wheel and one hand holding the shotgun, what would you expect in that scenario with regards to recoil?" Defense counsel objected that the question was an improper hypothetical, but the court overruled the objection. The expert testified, "As you had described in the hypothetical, I would expect an upward movement of the barrel or of the firearm."

After the expert answered a couple of questions regarding the power of the type of shotgun Bunge used, the prosecutor posed another hypothetical question: "So hypothetically, if that individual were aiming straight out of the passenger window with the shotgun and pulling the trigger with the shotgun aiming straightforward—in other words, towards the direction of the photographer towards the direction of the home behind the photographer, would you—would it be possible that despite aiming straight, is that firearm would end up shooting farther up in the air from where the person was initially aiming?"

Defense counsel objected that the question called for speculation, but the court overruled the objection. The expert clarified that the question still involved a shooter with one hand on the steering wheel and answered, "Definitely recoil because of the fact you are only holding the grip area and it's not being held like out the fore end or the front portion. So you only have one hand holding, and since you have a shotgun which is a long gun, would definitely expect it to go in an upward fashion or you would have quite a bit of recoil."

The prosecutor posed a third hypothetical question and the following exchange occurred:

"Q . . . Now, let's change the hypothetical slightly where the driver is seated in the driver's seat facing towards what would be the right of the photograph from where we are sitting and then just turn the upper body towards the passenger seat, and let's assume this person was holding the gun with two hands, which would you say will be the proper way to hold—to fire a shotgun?

"A Well, you would have a little more control.

"Q Well, first, would you agree that two hands would be the proper way to fire a shotgun?

"A Yes.

"Q Okay. And in that scenario if the person is seated in a seat, turning their upper body and holding with two hands, would you—what would you expect in that scenario?

"A There would be some recoil. How much in an upward movement, I don't know.

"Q So it wouldn't surprise you if there was still significant recoil causing the firearm to shoot in an upward direction?

"A Yes, I would expect the recoil to go rearward and upwards. How much upper, I don't know.

"Q So in that scenario where a shotgun is fired out of that passenger window and there's a recoil causing the shotgun to move in an upward direction, you would only expect it to go so far up in that hypothetical; is that correct, given that the gun was going out of a window?

"A Where exactly is the barrel or is it—

"Q Assuming the barrel is coming out of the window at least slightly.

"A There will be a limitation as to the top of the window or the door frame."

After the prosecutor asked several more hypothetical questions, the court reminded the jury that the questions were hypothetical, and "[e]ven though [the prosecutor] is using the exhibit to assist in the hypotheticals and is including some facts in the hypothetical, just to be clear, we are still in hypotheticals at this point."

Bunge argues that these questions were improper because no evidence demonstrated whether he had one or two hands on the shotgun or turned his body toward the passenger window. He forfeited his challenge to the third hypothetical question asking about the recoil with two hands on the gun because he did not object in the trial court. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 819.) Bunge argues that objecting to the third question was futile because the trial court overruled the prior two objections. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) Assuming for the sake of argument that he is correct, we find no merit to his challenges to any of the three hypothetical questions.

An expert may give opinions in response to hypothetical questions, provided the questions are " 'rooted in facts shown by the evidence.' " (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*).) " '[T]he expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors." ' " (*Id.* at p. 1046.) We review the trial court's admission of expert testimony for abuse of discretion. (*People v. Ewing* (2016) 244 Cal.App.4th 359, 381.)

The hypothetical questions posed to the firearm expert in this case were firmly rooted in the evidence. The evidence showed Bunge drove up to Andrea's house in his truck, aimed a shotgun out the open passenger window at Andrea, pulled the trigger, and drove away. Andrea saw sparks from the shot fire upward, found leaves with shotgun pellet holes in her yard, and found a shotgun wad in her backyard. Bunge is correct no *direct* evidence showed how many hands he had on the shotgun when he fired it, but there were only two reasonable options based on the evidence—one hand or two. Likewise, there was no direct evidence of his exact body position, but he was in the driver's seat

and aiming the shotgun out the passenger window, so the jury could reasonably infer his body was turned that direction. The hypothetical questions posed to the expert permissibly explored the effect of recoil in these different scenarios. (See *Vang, supra,* 52 Cal.4th at pp. 1050–1051 ["Often the evidence presented in a trial may support varying factual findings, and the differences in the possible factual findings might affect the expert's opinion. The parties may, if they wish, explore with the expert various factual scenarios the evidence suggests and how they might affect the expert's opinion."].) Thus, once the jury decided the facts as to Bunge's hands and body position when he fired the shotgun, it could rely on the expert testimony about recoil to reasonably infer that Bunge intended to kill Andrea but the recoil of the shotgun caused him to miss. Neither the hypothetical questions nor the responses by the expert were based on speculation or were otherwise improper. We find no abuse of discretion.

V. There Was No Cumulative Error

We have found no errors, so we reject Bunge's contention that cumulative error warrants reversal.

VI. The Sentencing Minute Order and Abstract of Judgment Must be Corrected

At the sentencing hearing, the trial court imposed a sentence on the attempted premeditated murder count of "life in prison with a minimum term of 14 years. That is the minimum term of seven doubled due to the strike prior. So that will be 14 to life, plus a consecutive determinate term of 20 years for the Penal Code section 12022.53(c) enhancement, plus a consecutive determinate term of five years due to the serious felony prior pursuant to the Penal Code section 667(a)(1)." The minutes of the sentencing hearing reflect that the court sentenced Bunge on

this count to "the minimum of 7 years to life" with the sentence "enhanced" by "7 years pursuant to Penal Code sections 1170.12 and 667(a)–(j)," plus the 20-year and 5-year determinate terms for the firearm and prior felony enhancements. The indeterminate abstract of judgment contains checked boxes indicating that Bunge was sentenced on this count to seven years to life and that he was sentenced pursuant to "PC 667(b)–(i) or PC 1170.12," in addition to the determinate terms for the enhancements.

Setting the enhancements aside, Bunge argues that the indeterminate portion of his sentence was unauthorized and must be stricken from the total indeterminate term of 36 years to life imposed on the attempted premeditated murder count. Respondent concedes the minutes and abstract of judgment must be corrected, but argues the trial court pronounced the correct sentence. We agree with respondent.

The term of imprisonment for attempted premeditated murder is life with the possibility of parole. (§ 664, subd. (a).) Under section 3046, the minimum parole eligibility for a sentence of life with parole is seven years. (*People v. Jefferson* (1999) 21 Cal.4th 86, 90.) When the defendant has one strike—as Bunge had here—that minimum term of seven years is doubled to 14 years. (*Id.* at p. 96.)

The court correctly announced that Bunge's sentence for attempted premeditated murder was "life in prison with a minimum term of 14 years." The minute order should be corrected to state that the court imposed "14 years to life as to count 1," comprised of seven years to life, doubled to 14 years to life pursuant to sections 1170.12 and 667, subdivisions (a)–(j). And the abstract of judgment should reflect that the court

imposed an indeterminate term of 14 years to life on count 1, with the box checked that Bunge was sentenced pursuant to "PC 667(b)–(i) or PC 1170.12."

DISPOSITION

As set forth above, the sentencing minute order and abstract of judgment must be corrected to reflect the correct term of 14 years to life for attempted premeditated murder in count 1. The trial court shall issue an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.