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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA KANE SMITH, Defendant and Appellant.	B278416 (Los Angeles County Super. Ct. No. MA067421)

APPEAL from the judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed as modified.

Sally Patrone Brajevich, 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, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

A jury found defendant and appellant Joshua Kane Smith guilty of multiple serious felonies, including torture, assault, and causing injury to a spouse. The jury also found true special allegations that defendant personally used a firearm and inflicted great bodily injury. Defendant was sentenced to a state prison term of 100 years to life, plus 44 years.

Defendant contends the trial court committed prejudicial error in the admission of prior acts of domestic violence against a former girlfriend, and abused its discretion in denying his motion for a mistrial due to prosecutorial misconduct. We reject both contentions. Defendant also raises three sentencing errors. We conclude one has merit and strike one 5-year enhancement imposed pursuant to Penal Code section 667, subdivision (a). We otherwise affirm the judgment of conviction in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by amended information with 14 felony counts involving four separate victims: his wife Charity K., his mother Betty S., his sister April D., and his sister's boyfriend Yasha P.[1] The charges included four counts of causing injury to a spouse (Pen. Code, § 273.5, subd. (a); counts 1-3, 14; Charity); one count of torture (§ 206; count 4; Charity); one count of filing a false police report (§ 148.5, subd. (a); count 5); one count of elder abuse (§ 368, subd. (b)(1); count 6; Betty); two counts of assault by force likely to produce great bodily injury (§ 245, subd. (a)(4); counts 7-8; Betty and Yasha); two counts of assault with a firearm (§ 245, subd. (a)(2); counts 9-10; Charity and April); one count of making criminal threats (§ 422, subd. (a); count 11; April); one count of possession of a firearm by a felon

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[1] We refer to the victims by their first names only to protect their privacy.

(§ 29800, subd. (a)(1); count 12); and one count of first degree residential burglary (§ 459; count 13).

It was alleged as to counts 2, 3, 4 and 8 that defendant inflicted great bodily injury in the commission of the offenses within the meaning of Penal Code section 12022.7. As to count 11, it was alleged defendant personally used a firearm within the meaning of section 12022.5. It was further alleged defendant suffered five prior convictions for serious or violent felonies within the meaning of the Three Strikes law (§ 667, § 1170.12), and three prior prison terms (§ 667.5, subd. (b)).

The charges arose from a course of conduct that took place over a period of approximately 16 months. Because defendant has not raised a substantial evidence question, we have summarized only those facts germane to our discussion.

Charity married defendant in June 2014. Within a month of their marriage, defendant began subjecting Charity to violent assaults, which often consisted of defendant punching her in the face or, as defendant called it, "checking" her because of her alleged "attitude."

The first violent attack occurred on July 4, 2014 when she and defendant were at the home of his mother, Betty. Several other family members were also there to celebrate the holiday, including April, Yasha, defendant's brother Toby, and Toby's girlfriend.

Defendant started punching Charity, accusing her of flirting with Yasha. He yelled at her and yanked and pulled her by her hair, eventually pulling out clumps of hair. Charity suffered a black eye and contusions to her mouth due to her bottom teeth "punctur[ing]" her lip. She did not seek medical attention because defendant apologized, told her he drank too much, and said if she went to the hospital, a police report would have to be filed. It was the first time he had assaulted her, so

Charity believed his apology was sincere and did not report the incident to the police.

By October 2014, they had moved to a different home in a rural area of Lancaster. Betty lived with them as well, and April and Yasha often stayed in the back guest house. On October 5, defendant assaulted Charity in their bedroom after she disagreed with him. She could not recall exactly how many times he hit her, but she believed it was at least five punches to her face. Defendant hit her so hard she saw "bright lights." She was three months pregnant at the time so she was trying to protect her stomach, and was unable to block the blows to her head. At some point, she lost consciousness. When she awoke, she was disoriented and started yelling for defendant's mother. Defendant grabbed a curtain and started wrapping it around Charity's face and head, telling her to "shut the f--k up." Defendant ripped off her blouse. Charity had blood all over her. After Betty came into the bedroom and yelled at defendant to stop, he eventually did so and ordered Charity to clean herself up in the bathroom. When she tried to get to the bathroom, she could not put weight on her left ankle. Her face was swollen and she was bleeding from her mouth and nose. Her right ear was swollen and it was difficult to hear for awhile. She had numerous scratches all over her chest.

Charity did not immediately seek medical help for her injuries because she knew defendant would hurt her again. However, her ankle continued to be painful, so she eventually went to a doctor and was told her ankle was broken. Afraid to report defendant, Charity told the doctor she had suffered the injury in a bicycle accident.

Sometime in November 2014, Charity inherited a gun from her mother, but it was not in working order. Defendant had the

gun fixed and the ivory handle changed out to gold. After the gun was fixed, defendant regularly fired the gun in the yard.

On the night of April 22, 2015, about a week after their daughter was born, Charity was in bed nursing the baby. Defendant barged into the room and started yelling and hitting Charity. He hit her several times in the face. One punch nearly hit the baby. The baby started to scream and cry. At that point, Yasha came into the room and tried to get defendant to calm down. Defendant turned on Yasha. He kicked, punched and "headbutted" Yasha repeatedly. Defendant had known Yasha for 10 years and knew he had bad knees, so he repeatedly kicked and hit him in the knees, knowing it was his "weak" spot. Charity saw Yasha fall to the ground. He appeared to be unconscious.

Betty also pleaded with defendant to stop. Defendant turned toward Betty, who was holding the phone, and said "You want to call the f------g police?" He chased Betty into her room and started punching her about the head and face. She tried to block the blows with her arms crossed in front of her face. Betty fell onto the bed. Defendant grabbed a coat hanger and started hitting her with it. Yasha tried to intervene again, jumping on defendant's back, largely to no avail. Defendant picked up the television and threw it across the room, and also smashed various personal items and glass shelves in Betty's room.

At some point, defendant turned on his sister, April. Defendant had armed himself with a gun. April said he was very angry and yelling about various things. He demanded that she and Yasha move out of the house. From a window, Charity saw April kneeling on the ground. Charity could not make out defendant's words, but she heard April say, in a pleading voice, "please don't." Yasha saw defendant point a gun at April's head and threaten to kill her and her sons. Defendant then yelled for Charity and demanded she come out. When Charity came out,

still holding the baby, defendant pointed the gun at her and started in her direction.

Charity ran into the back yard and tried to hide inside a shed. Defendant yelled at Yasha to go get Charity. Yasha found Charity hiding inside the shed, but pretended he did not see her. Charity heard defendant yelling for her, and then heard their dog barking and defendant firing the gun in the yard. The dog quit barking and Charity was scared defendant had shot the dog. Yasha eventually coaxed Charity back into the house, explaining that defendant said he would not hurt her anymore.

On May 10, 2015, defendant assaulted Charity again because he said she was ungrateful for the food, flowers and card he had bought for her for Mother's Day. Defendant punched her in the face and she heard her jaw "crack." There was a lot of blood and her teeth were not aligned when she tried to close her mouth. The next day she sought medical care, but again lied about how the injury happened.

After Mother's Day, the attacks became more frequent, "almost once a week." It was "normal" for Charity to have at least one black eye. Defendant accused Charity of cheating on him and told her he did not believe the baby was his. One time defendant kicked open the bathroom door when Charity was inside and then started hitting her with a piece of the wooden door trim that had broken off. He caused a wound to her scalp that bled profusely. Another time, defendant told her he would kill her if she tried to leave.

In October 2015, defendant woke Charity up around 11:00 p.m. and ordered her to go to the grocery store to get beer and cigarettes. He demanded she return in 45 minutes or she would "pay for it." Charity put her daughter in the car seat, and grabbed her purse and a diaper bag. Once in the car, she made the decision to leave defendant. She was normally not allowed to

leave the house alone. After getting some assistance from family members in Rosamond, Charity left the car in an Alberton's parking lot and mailed the key back to defendant because she did not want him to know where she was. Charity filed for divorce.

During Yasha's testimony, the prosecution played a pretrial recorded statement Yasha gave to the investigating detectives. The trial court had ruled the statement admissible but ordered the prosecutor to redact the statement to omit any and all references to defendant having previously served time in prison. When the recorded statement was played for the jury, there was one reference to defendant having been in "prison." Defendant moved for a mistrial on that basis. We reserve a more detailed recitation of the relevant facts to part 2 of the Discussion below.

The prosecutor also presented the testimony of defendant's former girlfriend, Christine H.-G. Christine and defendant dated when Christine was just 18 years old. In March 1991, Christine was home with her one-month-old son. Defendant was the baby's father. Defendant called Christine on the phone and told her "if you don't f--k me, I'm going to f--k you up and then you'll f--k me." Defendant came to her house later in the day and started yelling at her. While Christine was holding the baby, defendant punched her in the head several times with his fist. He also broke several picture frames in her home. Christine put the baby down in the playpen, and tried to get away. Defendant grabbed her by the hair and dragged her to the back of the house. Christine was not asked to describe how the incident ended.

Christine testified that several months later, in September, she came home and found defendant there with her two roommates. She could not recall exactly how the argument started, but defendant became angry and shoved Christine into the wall. He grabbed her by the throat and pushed her to the ground. He choked her until she became unconscious. When she

awoke she was in a different room, so she assumed he had dragged her there. Defendant picked up a metal baseball bat and hit her several times in the hip, torso, and at least one time in the head. She tried to escape out the front door, but he grabbed her arm and took her back inside. Defendant told her, "Bitch, you're not going to put me back in jail. I'll kill you first." Christine suffered two black eyes, a swollen ear, and significant bruising all over her torso, neck and hip.

Christine reported both incidents to the police.

Defendant stipulated he was a convicted felon for purposes of count 12 (possession of a firearm by a felon). The stipulation read to the jury provided: "The defendant and the people have stipulated, or agreed, that the defendant was previously convicted of a felony. This stipulation means that you must accept this fact as proved."

The jury found defendant guilty on all counts, except count 13 (burglary). The jury also found true all of the special allegations regarding defendant's personal use of a firearm and infliction of great bodily injury, except for the great bodily injury allegation as to count 7 (assault of defendant's mother, Betty).

Defendant waived jury on the prior allegations. After presentation of evidence, the court found four of the five strike priors to be true, and also found true the three prison priors.

The court sentenced defendant as a third-strike offender to a state prison term of 100 years to life, plus 44 years. The indeterminate term consisted of four terms of 25 years to life on each of the following counts: count 4 (torture; Charity), which was designated the base count, count 8 (assault with GBI; Yasha), count 9 (assault with firearm; Charity), and count 11 (criminal threats; April). The determinate term of 44 years consisted of the following: (1) four consecutive five-year enhancements for the four strike priors; (2) a consecutive five-

year great bodily injury enhancement on count 4; (3) a consecutive four-year upper term, doubled due to the strikes, on count 6 (elder abuse; Betty); (4) a three-year great bodily injury enhancement on count 8; (5) two 4-year gun use enhancements on each of counts 9 and 11; (6) a concurrent term of 180 days on count 5 (false police report); and (7) a concurrent two-year midterm, doubled due to the strikes, on count 12 (possession of firearm by a felon). The court imposed and stayed the terms on counts 1, 2, 3, 7, 10 and 14. The court struck the three 1-year prison priors. Defendant was awarded 374 days of custody credits.

This appeal followed.

DISCUSSION

1. The Admission of Prior Acts of Domestic Violence

Defendant contends the trial court committed prejudicial error by admitting the testimony of his former girlfriend, Christine, regarding two incidents of domestic violence that occurred in 1991. We disagree.

Evidence Code section 1109, subdivision (a)(1), provides in relevant part that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." "By its incorporation of section 352, section 1109, subdivision (a)(1) makes evidence of *past domestic violence inadmissible only if the court determines that its probative value is 'substantially outweighed' by its prejudicial impact*. We review a challenge to a trial court's decision to admit such evidence for abuse of discretion." (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 (*Johnson*), italics added, fn. omitted; see also *People v. Lewis* (2001) 26 Cal.4th 334, 374-375 [trial

courts are vested with broad discretion in determining the admissibility of evidence under section 352].)

By enacting Evidence Code section 1109, the Legislature created an express exception in cases involving domestic violence to the general rule that prior criminal acts are inadmissible. " '[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.' [Citation.] Section 1109, in effect, 'permits the admission of defendant's other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]' [Citations.] '[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.' [Citation.]" (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233.)

Defendant objected to the prosecution's request to present the testimony of his former girlfriend. Defendant contends, as he did below, that the prior acts were more than 20 years old and therefore presumptively inadmissible under the statutory scheme. He further argues Christine's testimony about his use of a baseball bat during one of the assaults was highly inflammatory and unduly prejudicial.

Subdivision (e) of Evidence Code section 1109 provides that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, *unless the court determines that the admission of this evidence is in the interest of justice*." (Italics added.) Trial courts are vested with broad discretion to consider the probative value of prior acts of domestic violence that are more than 10 years old, and to

conclude that such acts are nonetheless admissible in the interests of justice. "Indeed, '[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible.' [Citation.]" (*Johnson*, *supra,* 185 Cal.App.4th at p. 535; accord, *People v. Branch* (2001) 91 Cal.App.4th 274, 284 (*Branch*).)[2]

In *People v. Culbert* (2013) 218 Cal.App.4th 184 (*Culbert*), the court rejected a defendant's challenge to the admission of evidence pursuant to Evidence Code section 1109. The defendant was charged with making a criminal threat with the use of a firearm against his minor stepson. The trial court allowed the prosecution to present evidence that the defendant, 11 years earlier, had threatened to kill his former wife, but had not used a weapon in doing so. (*Culbert,* at pp. 187-188.)

Culbert held the prior incident was properly admitted, despite being factually dissimilar and more than 10 years old. The court explained the "prior offense had probative value. Appellant threatened to kill [his stepson and his former wife]. Regardless of whether appellant was armed when he broke into the apartment and made the threat, his conduct was relevant to show his intent that his statements be understood as threats, his propensity to make threats to family members and the reasonableness of [his stepson's] fear after the threat was made." (*Culbert, supra,* 218 Cal.App.4th at p. 192.) The court further

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[2] Cases discussing Evidence Code section 1108, the analogous provision for admission of prior sexual offenses, similarly have concluded there is no set time limit defining what prior acts are too remote and that even a prior act from 20 years earlier is not per se inadmissible. (See, e.g., *People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395.)

explained that the prior incident was not unduly inflammatory as it did not involve more extreme or violent conduct, there was no risk the jury would be confused by the separate incident, and the incident did not require a lengthy amount of testimony so there would be no undue consumption of time. (*Id.* at pp. 192-193.)

Here, the trial court aptly noted that while the prior violent crimes against Christine occurred in 1991, defendant had been in custody for a significant portion of the time preceding the current charges. Defendant had been convicted of the prior acts of domestic violence against Christine (they were not mere allegations), as well as other felonies thereafter. He had only been free of custody for approximately six years before the current charges. Defendant could not contend that the 1991 acts were merely youthful indiscretions and that he had led a blameless life since then.

More importantly, the probative value of the prior incidents was strong given the striking similarity with the current charges. "[I]f the prior offenses are very similar in nature to the charged offenses, the prior offenses have greater probative value in proving propensity to commit the charged offenses." (*Branch*, *supra*, 91 Cal.App.4th at p. 285.) Both Christine and Charity were assaulted by defendant in a similar fashion. Defendant punched both women with a closed fist about the head and face, causing both to lose consciousness; he tried to choke or silence both women; he dragged both women by their hair; he attacked both women when they were holding their infant children.

We reject defendant's contention that the 1991 incidents were more egregious and inflammatory because Christine testified that defendant hit her with a baseball bat. The extensive testimony regarding the current charges involved equal or more serious conduct, including threatening multiple victims

with a gun, and breaking down the bathroom door and beating Charity with a broken piece of the door frame.

Moreover, there was no risk of confusion of the issues or undue consumption of time. Christine's testimony took less than 30 minutes, consisting of just 16 pages of trial transcript.

The trial court acted well within its discretion in concluding that the potential prejudice did not substantially outweigh the probative value of the 1991 incidents, and the interests of justice warranted their admission.

2. The Denial of the Motion for Mistrial

Defendant contends the trial court erred in denying his motion for mistrial based on prosecutorial misconduct. We disagree.

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

Here, the court and parties discussed at length outside the presence of the jury the admission and use of a pretrial recorded statement made by Yasha to the investigating detectives. The court ruled the statement could be used, but the prosecution was required to redact parts, including, as relevant here, any reference to defendant having been in prison. The redactions were made to the recording, as well as the written transcript that was provided to the jury when the statement was played. However, one reference to defendant previously being "in prison" remained in the recording and the written transcript.

When the word "prison" was uttered during the playing of the recorded statement to the jury, defendant, despite being represented by counsel, immediately stood up and demanded a mistrial three separate times, while the court admonished him to

be quiet. The court advised the jury that a quick break in the proceedings was necessary and they were to return to the jury room. The transcripts that had been passed out were collected.

Once the jurors were gone, defense counsel moved for a mistrial, arguing the reference to prison was unduly prejudicial and its inclusion in the recording and transcript was in direct violation of the court's order regarding the admissibility of the statement.

The prosecutor apologized for the error but emphasized it was an error and she had endeavored to remove all references as ordered by the court. She indicated she had provided copies of the redacted statement to defense counsel in advance and defense counsel never said there was a problem, and therefore either missed it himself or did not preview the materials. The prosecutor argued the brief reference was not unduly prejudicial.

After entertaining further argument, the court denied defendant's motion. The court found the prosecutor's error to be inadvertent, a point which defendant conceded. The court also found that the brief one-word reference in a 20-page transcript and a 23-minute video would not create unfair prejudice. The court offered to admonish the jurors, but defendant declined. The prosecutor provided corrected transcripts and a corrected recording to be played to the jury when Yasha's testimony was resumed.

" ' " ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to

attempt to persuade either the court or the jury.' " ' " ' [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793.)

The prosecutor's error was plainly inadvertent, as found by the court and conceded by defendant. There is no suggestion in the record that the prosecutor intentionally violated the court's order or otherwise engaged in deceptive or reprehensible conduct.

The record further supports the court's conclusion there was no undue prejudice to defendant. First and foremost, this was not a weak case. The evidence was strong and ample that defendant engaged in repeated acts of violence against his wife, and also attacked his 68-year-old mother, his sister and her boyfriend.

Second, the jury was well aware that defendant had a criminal history and had been in custody, based on evidence to which no objection was interposed. Defendant stipulated that he was a convicted felon for purposes of count 12 and that stipulation was read to the jury. Defendant's parole agent, Ms. Gomez, also testified. The court had previously ordered she was not to be identified as a parole agent, but she was identified as an employee of the Department of Corrections and Rehabilitation who regularly met with defendant during the course of the year. She attested to seeing an injury on Charity during one such meeting and that Charity contacted her after she left defendant in October 2015.

Further, defendant's sister April testified she became friends with Charity before defendant "got out," and that after "he first got out," he had a job working at the pound. Defendant's brother Toby made a similar reference during his testimony. The jurors also heard from Christine about defendant's assaults on her in 1991 and her statement that defendant was angry with her and said, "Bitch, you're not going to put me back in jail." Defendant did not object to any of this testimony.

The singular reference by Yasha that defendant had been in prison could not have unfairly altered the jury's view of defendant or prejudiced them against him. Defendant has not shown that the trial was rendered fundamentally unfair. The court was well within its broad discretion in denying defendant's motion.

3. The Great Bodily Injury Enhancement on Count 4

Defendant argues it was error for the court to impose a five-year great bodily injury enhancement pursuant to Penal Code section 12022.7 on count 4 (torture) because great bodily injury is an element of the substantive charge of torture. Defendant's contention disregards the statutory language making clear the enhancement may be imposed when torture is committed in the context of domestic violence.

Penal Code section 12022.7 contains numerous provisions providing for the imposition of a sentence enhancement for the infliction of great bodily injury under a variety of circumstances. As relevant here, subdivision (e) provides that "[a]ny person who personally inflicts great bodily injury *under circumstances involving domestic violence* in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three, four, or five years." (Italics added.)

The statute also expressly enumerates and delimits those situations where the enhancement does *not* apply. Subdivision (g) of Penal Code section 12022.7 provides that "[t]his section shall not apply to murder or manslaughter or a violation of Section 451 or 452. *Subdivisions (a), (b), (c), and (d) shall not apply* if infliction of great bodily injury is an element of the offense." (Italics added.) Subdivision (g) does *not* exclude subdivision (e), which requires imposition of the enhancement for the commission of a crime involving domestic violence.

The statutory language is clear and unambiguous. Where, as here, a defendant inflicts great bodily injury under circumstances involving domestic violence, the Legislature intended for the enhancement to be imposed in addition and consecutive to, the punishment prescribed for the substantive offense, even if infliction of great bodily injury is an element of that offense.

Defendant was specifically charged with inflicting bodily injury on his wife Charity pursuant to subdivision (e) of Penal Code section 12022.7. The record contains substantial evidence demonstrating that defendant inflicted great bodily injury on Charity under circumstances involving domestic violence. There is no contention otherwise. The court therefore properly imposed a consecutive five-year term on count 4.

Moreover, Penal Code section 654 does not dictate a stay of the enhancement. When confronted with the interplay of arguably conflicting sentencing statutes, our Supreme Court has instructed that "courts should look first to the statutory language concerning the enhancements to determine how they interact and consider section 654 only if those statutes do not provide the answer." (*People v. Ahmed* (2011) 53 Cal.4th 156, 161.) As we explained above, section 12022.7, the more specific statute, provides the answer. The mandatory enhancement was properly imposed and we need not consider application of section 654.

4. The Concurrent Term on Count 12

Defendant contends the concurrent term of four years imposed on count 12 (felon in possession of a firearm) must be stayed pursuant to Penal Code section 654. Defendant argues the evidence showed only that his possession of a firearm was incidental to, and simultaneous with, the primary offenses involving gun use against Charity and April that arose from the April 22, 2015 incident.

Respondent argues there was evidence defendant had possession of the firearm prior to, and after, the primary offenses were committed and therefore imposition of a sentence on count 12 was proper.

" '[Penal Code] [s]ection 654 precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts.' " (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

In arguing Penal Code section 654 applies here, defendant relies heavily on *People v. Bradford* (1976) 17 Cal.3d 8 *(Bradford)* and *People v. Venegas* (1970) 10 Cal.App.3d 814 (*Venegas*) which both involved defendants charged with being a felon in possession of a firearm and assault with a deadly weapon. Defendant's reliance is misplaced.

In *Bradford*, the defendant was stopped for speeding by a highway patrol officer. Once stopped, the defendant confronted the officer, wrested away the officer's gun and shot him with it. The Supreme Court concluded the possession was simultaneous with the use of the firearm to shoot the officer, and therefore Penal Code section 654 barred multiple punishment. (*Bradford*, *supra*, 17 Cal.3d at pp. 22-23.) *Venegas* involved a similar factual scenario where the defendant got into a bar fight. The evidence suggested the defendant took the victim's gun during the struggle

and shot him with it. (*Venegas*, *supra,* 10 Cal.App.3d at pp. 818-820.)

Where the evidence demonstrates, as in *Bradford* and *Venegas*, that " 'fortuitous circumstances' " account for the defendant's possession of the firearm " 'only at the instant of committing' " the primary offense, Penal Code section 654 plainly applies. (*Jones*, *supra*, 103 Cal.App.4th at p. 1144.) But, "multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent." (*Ibid*.)

The crime of being a felon in possession of a firearm " 'is a relatively simple crime to commit[.]' " (*Jones*, *supra*, 103 Cal.App.4th at p. 1145.) The crime is committed "whenever a felon intentionally has the weapon in constructive or actual possession." (*Id*. at p. 1147.) And, it is not necessary for the defendant to possess the weapon for a lengthy period of time. (*Id*. at pp. 1147-1148.)

In *Jones*, the defendant went to the home of an ex-girlfriend who had taken out a restraining order against him. He sat in the front passenger seat of the car he had arrived in while the driver went up to the door and asked if the ex-girlfriend was home. A family member said no and the defendant and his friend drove off. They returned in the same car about 15 minutes later and defendant, still seated in the front passenger seat, fired several shots at the home. (*Jones*, *supra*, 103 Cal.App.4th at pp. 1141-1142.)

In concluding that Penal Code section 654 did not bar multiple punishment for both the felon in possession charge and the shooting at an inhabited residence charge, *Jones* explained that "the evidence was not reasonably susceptible to a conclusion that [the defendant] fortuitously came into possession of the gun

at the moment he drove by [the victim's] house the second time." (*Jones*, *supra*, 103 Cal.App.4th at p. 1148.)

Similarly, the evidence here is not reasonably susceptible to a conclusion that defendant fortuitously stumbled upon the gun somewhere in the family home on the evening of April 22, 2015, immediately before he used it in the attacks on Charity and April. Rather, the evidence showed that defendant, since as early as November 2014, had a gun within his actual or constructive possession in the family home to use at any time to threaten and intimidate. Defendant chose to arm himself on April 22, 2015, and thereafter, over the course of the evening, he chose to commit several additional crimes.

Defendant argues the operative information stated the firearm possession charge was alleged to have occurred on April 22, 2015, and not on any prior date in November 2014 or otherwise. Defendant contends the prosecution never argued there was antecedent possession prior to the events of April 22, 2015, and therefore cannot now be allowed to argue that evidence as the basis for count 12.

However, the record described above includes substantial evidence that defendant's possession was antecedent to and independent of the other crimes committed on April 22, 2015. The crime of being a felon in possession of a firearm " 'is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.' " (*Jones*, *supra*, 103 Cal.App.4th at p. 1146.) Penal Code section 654 does not apply.

5. The Five-year Enhancements Pursuant to Penal Code Section 667, Subdivision (a)

The trial court imposed four 5-year enhancements pursuant to Penal Code section 667, subdivision (a) based on the four qualifying priors the court found to be true. It is undisputed that two of defendant's qualifying priors, both 1991 assault convictions, were charged and resolved together pursuant to a guilty plea in case number MA003351. The trial court imposed two separate five-year enhancements for those two assaults. As respondent concedes, one of those five-year enhancements imposed must be stricken. (See § 667, subd. (a) [providing for a mandatory "five–year enhancement" only for each prior arising from "charges brought and tried separately"]; *People v. Jones* (2015) 236 Cal.App.4th 1411, 1415-1416.) We therefore strike one of the five-year enhancements and modify defendant's judgment accordingly.

DISPOSITION

The judgment is modified as follows: one consecutive five-year enhancement pursuant to Penal Code section 667, subdivision (a) is stricken. The total determinate term is reduced from 44 years to 39 years. The superior court is directed to prepare and transmit a modified abstract of judgment to the Department of Corrections and Rehabilitation in accordance with this opinion.

The judgment of conviction is affirmed in all other respects.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. FLIER, J.