Filed 11/2/12 P. v. McClain CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALEX MARQUIS McCLAIN, Defendant and Appellant.	B232125 (Los Angeles County Super. Ct. No. NA086245)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard R. Romero, Judge. Affirmed.

Michael Norris; Mark Bernheim for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Michael Katz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Alex Marquis McClain of four counts of first degree robbery (Pen. Code, § 211[1]), six counts of assault with a firearm (§ 245, subd. (a)(2)), and one count of possession of a firearm by a felon (former § 12021, subd. (a)(1), now section 29800, subd. (a).) The jury found true the allegation that defendant personally used a firearm in the commission of the robberies (§ 12022.53, subd. (b)) and the assaults (§ 12022.5).[2] The trial court sentenced defendant to state prison for 35 years and four months. On appeal, defendant contends that insufficient evidence supports his convictions for assault with a firearm; the trial court erred in denying his motion for mistrial concerning comments the prosecutor made in her opening statement; the trial court improperly used a lottery system to select an alternate juror; the trial court repeatedly took a proactive role in the trial, in effect becoming a second prosecutor; the trial court abused its discretion with respect to certain evidentiary rulings; the trial court erred in failing to instruct on simple assault as a lesser included offense to assault with a firearm; and the trial court erred in sentencing him. We affirm.

BACKGROUND

About 4:00 p.m., on July 1, 2010, Vincent Hollis and his sister Sarah Hollis went to Thomas Vazquez's apartment in San Pedro for a barbecue.[3] Around 6:30 to 6:45 p.m., Vazquez noticed some men hanging around his front lawn. Vincent's friend Derrick Dillard arrived about 7:00 p.m. Dillard prepared a plate of food for himself. About three

---

1 All statutory citations are to the Penal Code unless otherwise noted.

2 The jury found true the allegation that defendant personally used a firearm in commission of the offense of possession of a firearm by a felon. That enhancement was not alleged in the information and the trial court did not sentence defendant on the enhancement.

3 Because Vincent and Sarah share the same last name, we will use their first names for clarity.

minutes later, Vincent saw an African-American man jog up the stairs and enter Vazquez's apartment. The security gate had been left open after Dillard arrived. Vincent described the man who entered the apartment as between five feet nine inches and six feet tall and weighing between 180 and 200 pounds. The man was dressed in red, black, and white "basketball attire," including basketball shorts; wore a hat and sunglasses; and carried a silver semiautomatic handgun with a skinny barrel. The man appeared to be in his early 20's. The man stood behind Keith Mullen and pointed the gun to Mullen's head.

About 15 to 20 seconds later, Vincent saw a second African-American man enter Vazquez's apartment. Vincent described that man as six feet to six feet three inches tall and weighing 220 or 230 pounds. The second man was dressed in the same basketball attire as the first man, including basketball shorts, and was carrying a black semiautomatic handgun with a brown handle. Like the first man, the second man appeared to be in his early 20's. After entering the apartment, the second man closed the door. He said to the occupants something to the effect of "you guys are getting jacked. This is not a game." According to Vincent, the second man then cocked his handgun "to let us know that, 'Yes, these are real weapons, and we will be—we will use them if you don't comply.'" Vincent and the others began to "get on the floor."

Vazquez told the intruders to take whatever they wanted, but not to hurt anyone. One of the intruders put his knee and a gun to Vincent's back. The man searched Vincent's pockets and removed his wallet. There was $40 in the wallet. Vincent's cell phone was taken from a coffee table. One of the intruders ordered Vazquez to get up from the floor and took him into another room. One of the intruders asked Vazquez, "Where is the money at? You know what I'm talking about. The money, where is it at?" Vazquez replied, "Look, I'm on disability. I don't have money." Vazquez told the intruders that his girlfriend (Shanon Patterson) was in the bedroom. Vazquez asked them not to hurt Patterson. They said that they "loved ladies" and did not hurt them.

Vincent estimated that the intruders were in Vazquez's apartment for about a minute to a minute and a half. After the intruders left, Vazquez called the police who

arrived about three minutes later. While the police were there, Dillard acted "strange" and "weird." Dillard seemed to Vincent to be "just kind of calm and very friendly with all of the officers and just a little too relaxed. Maybe that was his defense mechanism, I don't know, but he just seem way, way too relaxed." According to Vincent, Dillard's descriptions of the intruders "were maybe a little different" than the descriptions the other victims gave. Dillard said that one of the intruders was six feet five inches tall and weighed between 250 and 260 pounds. According to Vincent, Dillard's descriptions were inaccurate. Prior to the incident at Vazquez's apartment, Vincent had known Dillard for 10 or 12 years. After the incident, Vincent had little contact with Dillard.

On July 7, Los Angeles Police Department Officer Andrew Gonzalez met Vincent at the police station. Officer Gonzalez showed Vincent a photographic lineup. Vincent was unable to identify anyone in the lineup. At trial, Vincent was unable to identify or exclude defendant as one of the intruders—he "couldn't say either way." Vincent "wasn't able to get a good description of the suspects." He was more focused on the intruders' guns and on his sister.

Vincent testified that People's Exhibit 4 looked like the handgun that the second intruder used, but he could not say for sure that it was the handgun. The handgun the second intruder used appeared to have a brown handle and People's Exhibit 4 did not. Vincent did not recognize People's Exhibit 5, a pair of aviator sunglasses, and could not say whether they appeared similar to the sunglasses either intruder wore.

Mullen testified that during Vazquez's barbecue, two African-American men armed with guns entered Vazquez's apartment. The intruders wore hats and sunglasses. Mullen could not describe the intruders' heights, weights, or ages. One of the intruders walked behind Mullen, cocked his gun, and put the gun to the back of Mullen's head. Mullen and his friends were told to get on the floor. As Mullen was on the floor, the second intruder took his wallet. Mullen could not say whether either of the intruders was in the courtroom.

Sarah testified that two armed African-American men entered Vazquez's apartment through an open door. Prior to the intrusion, Dillard had been the last person

to enter through that door. The first intruder to enter appeared to be about 25 years old. His gun was black. Sarah could not estimate the first intruder's height, but stated that the second intruder was taller and bigger. Sarah saw the second intruder for 30 seconds. The second intruder wore aviator sunglasses. Sarah believed that People's Exhibit 5 looked like the sunglasses that the second intruder wore. The second intruder's gun was silver with a black handle. He cocked his gun and told everybody to get down. He told Dillard to close the blinds. In doing so, the second intruder did not use Dillard's name. Dillard was calm.

As she was on the ground, Sarah "heard a bunch of walking around." Then, she heard the second intruder call Vazquez by name, saying, "Tommy, get in here." Vazquez got up, and the intruders took him into the back left bedroom. Vazquez told the intruders to take whatever they wanted, but asked that they not hurt anyone. The intruders responded, "You know what we're here for." Sarah heard the intruders search the back left bedroom. The intruders then took Vazquez to the back right bedroom. Sarah could see the back right bedroom being "trashed." The intruders told Vazquez to return to the living room. Once there, Vazquez again told the intruders to take what they wanted, and asked them not to hurt anyone. The intruders said, "Wait 20 seconds, and thank you very much." After the intruders left, Sarah determined that her camera had been taken from her purse.

Vazquez called 911, and the police arrived a short while later. Sarah testified that Dillard acted oddly after the intruders left. He was "real loud" and "real angry." "He just kept saying how big the guy was and how much he weighed. He was just real loud. 'He was this tall, this tall.'" Dillard was so "adamant" about the intruder's size, that the other victims began to argue. The police asked Dillard to calm down. After the incident, Sarah did not "hang out" with Dillard as she had in the past.

Officer Gonzalez showed Sarah a photographic lineup. She was unable to make an identification. She did not know if either of the intruders was in the courtroom. Sarah denied that she told the police that the first intruder was six feet one inch to six feet three inches tall and the second intruder was five feet nine inches tall.

Dillard testified that two men entered Vazquez's apartment. The first intruder was African-American, stood about five feet nine inches tall, weighed about 165 to 175 pounds, and had a light complexion. He carried a "small chrome gun" that might have been an automatic. The second intruder was five feet nine inches tall, weighed "close" to 250 to 300 pounds, and had a "very, very" dark complexion. He carried a black gun that might have been a nine millimeter Glock. People's Exhibit 4 looked similar to the second intruder's gun. The trial court had defendant stand, and Dillard estimated his height at six feet five inches.

Los Angeles Police Department Officer Jamie Hogg testified that when the police went to Vazquez's apartment and interviewed the victims, Dillard took a "leadership role" in describing the intruders. Dillard "kept saying, 'Remember, he was approximately,' . . . 'He was this height. I remember. I really remember.'" Because of the confusion, everyone around Dillard agreed with him, so the police recorded a general description.

Dillard told Officer Hogg that he recognized the second intruder from the San Pedro area. One of the intruders mentioned Vazquez's name. The first intruder ordered Dillard to close the blinds. Neither of the suspects took anything from Dillard even though he had a wallet and was wearing a watch. Dillard thought that was odd.

On July 2, Officer Gonzalez asked Dillard to come to the police station to look at a photographic lineup. Dillard did not go because he did not want anybody to recognize him and think he was up to something. He was afraid and did not want to be identified as a witness. Instead, Officer Gonzalez went to Dillard's house and showed him a photographic lineup. Dillard was unable to identify anyone from the lineup. Dillard testified that if one of the suspects was in court, he would not be able to recognize him.

Before the incident, Dillard and Vazquez were "really good friends." Afterward, Dillard no longer went to Vazquez's apartment or spoke with him. Dillard explained that he had gone to Vazquez's apartment and his "life ended up in jeopardy." He did not "know if they was gonna come back or not so [he] didn't want to be nowhere near there."

Vazquez testified that at some point during the barbecue he noticed two men in his courtyard and asked his guests, "Who are those guys . . . ?" Vincent and Mullen went downstairs and checked the courtyard but not the back alley. They returned to Vazquez's apartment and told him that nothing was wrong. Vazquez had a feeling that something was not right and went downstairs to the alley where he saw defendant and another man. When defendant and his companion noticed that Vazquez was looking at them, defendant immediately knelt down and acted as if he was looking for something in a car and his companion acted as if he was looking for someone. Vazquez looked at the two men in the alley for about two minutes.

Vazquez returned to his apartment. Around 7:50 or 8:00 p.m., Vazquez called Dillard and invited him over. There was too much food, and Dillard had been calling Vazquez "continuously" that night. Dillard arrived between 8:00 and 8:15 p.m. Dillard immediately prepared a plate of food for himself. Just as Dillard began to eat, the man Vazquez had seen with defendant in the alley entered Vazquez's apartment and pointed a silver gun at Vincent. Vazquez described the man as six feet three or six feet four inches tall and skinny.

Seconds later, defendant entered Vazquez's apartment, cocked his gun, and told everyone to get on the floor. Vazquez immediately recognized defendant as the person he had seen in the alley. Defendant's gun was a black Glock pistol. Vazquez identified People's Exhibit 4 as defendant's gun. Vazquez identified People's Exhibit 5 as defendant's sunglasses. When Vazquez and his friends were on the ground, defendant held "a gun to the back of everyone's head, and [went] through their pockets."

At some point, Vazquez told defendant and his companion to take what they wanted and leave. Vazquez remained on the floor while defendant's companion searched one of the bedrooms. Defendant remained in the living room about five to six feet from Vazquez. During the search, Vazquez looked up at defendant's face. Defendant told Vazquez and his friends to remain still, that "it's gonna be around 30 seconds more." Thereafter, defendant and his companion left. Vazquez testified that defendant and his companion took a laptop computer and a watch worth $10,000. `

According to Vazquez, after the police arrived, Dillard acted in an odd manner. Dillard was loud and animated compared to the other victims and was "so off with his comments of what the suspects looked like." Dillard told the police that the intruders were five feet eight inches or five feet nine inches when they were not; they were Vazquez's height—six feet five and a half inches. Prior to the incident, Vazquez considered Dillard to be a "very good friend." After the incident, other than in court, Vazquez had not seen or heard from Dillard.

On July 5, Los Angeles Police Department Detective Walter McMahon showed Vazquez a photographic lineup. Vazquez identified defendant from the lineup. Vazquez identified defendant at trial as one of the intruders, and was 100 percent sure of his identification. Vazquez stated that when he was taken into the bedroom, he and defendant were within three feet of one another for about a minute and a half to two minutes. During that time, Vazquez focused on defendant's face and his gun.

Wyatt Velazquez lived near Vazquez. About 3:00 or 3:30 p.m., on July 1, Velazquez went outside to an alley to work on his car. About 30 minutes later, he noticed something unusual—a white 2007 or 2008 Ford Expedition with large chrome wheels drove in and out of the alley two to three times over a two or three hour period. On July 1, Velazquez told two officers that the car looked like a Ford Explorer, but had changed his mind by the time of trial because he thought the SUV was bigger than an Explorer. A blue 2006 Chevrolet Malibu following right behind the Expedition. Velazquez saw the Malibu about two times. An African-American male drove each of the cars.

Apparently surprising defense counsel, Velazquez testified on cross-examination that he recognized the driver of the white car, and the driver was in the courtroom. Velazquez testified that he saw defendant during a prior court date and recognized him as somebody with whom he went to elementary school. After that court date, Velazquez told Officer Gonzalez that he recognized defendant from school. Officer Gonzalez asked Velazquez if he could identify the driver. Velazquez said that he could not. Velazquez testified that he could not identify defendant as the driver at that time. When Velazquez

spoke with Officer Brimberry in July, he told the officer that he did not recognize the driver of the car.

On redirect examination, Velazquez identified defendant as the driver of the white Ford Expedition. Velazquez testified that he came to identify defendant by thinking more about the "glimpses" he had of the driver and by seeing defendant. Velazquez testified that if he was unsure of his identification of defendant as the driver, he would tell the jury.

On July 8, Detective McMahon went to a residence at 22821 Van Deene, in Torrance to look for defendant and evidence. Defendant was at the residence, sitting on a couch in the garage. Defendant told the detective that he lived in one of the bedrooms. There were men's clothes and photographs of defendant with other people in that bedroom. A .40 caliber semiautomatic Glock handgun was recovered from under the mattress. Detective McMahon, who had worked with handguns for 16 years, testified that the handgun appeared to be operable—that is, it appeared to be capable of firing a bullet out of the chamber.

Defendant's car, a white 2007 Ford Expedition, was parked in the garage. Inside the car were three pairs of sunglasses. People's Exhibit 5 was one of the pairs of sunglasses. Detective McMahon "obtained" defendant's height and weight. Defendant was six feet five inches tall and weighed 250 pounds.

In his defense, defendant called Dr. Scott Fraser, an expert on eyewitness memory and identification, to testify about factors that bear on a witness's ability to remember and cause a witness to identify someone incorrectly. According to Dr. Fraser, when a person make a full description of a person, the chance that the witness would omit a distinctive identifying feature such as a tattoo is almost zero. Under that circumstance, the chance that the witness identified the correct person is one in 500 or one in 1,000.

Defendant called Victoria Casillas, a tattoo artist, to testify about defendant's tattoos. Casillas tattooed defendant at the end of 2009 or early 2010. At that time, defendant already had tattoos. Defendant had his name, "McClain," tattooed along the

length of his left arm in large script letters. Defendant also had tattoos on the inside of his left arm and on his right leg.

DISCUSSION

I. Sufficiency Of The Evidence In Support Of Defendant's Convictions For Assault With A Firearm

Defendant contends that there is insufficient evidence to support his convictions for assault with a firearm because the prosecution did not prove that he "did an act with a firearm that by its nature would directly and probably result in the application of force to a person."[4] The prosecutor had to prove, defendant argues, that he did more than merely brandish a firearm. Defendant further contends that the prosecution failed to prove that the gun was operable or loaded.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio*

---

[4] In his reply brief, defendant improperly attempts to recast his insufficient evidence argument as an instructional error argument. Issues may not be raised for the first time on appeal in a reply brief without a demonstration of good cause. (*People v. Senior* (1995) 33 Cal.App.4th 531, 537; *People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.) In his opening brief, in support of his insufficient evidence argument, defendant noted that the trial court did not instruct the jury on an alternative theory that a defendant commits an assault when he threatens an act that may amount to an assault, even though the threat is conditional or qualified. Defendant did not contend that the trial court erred in instructing the jury on assault.

(2008) 43 Cal.4th 327, 357.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation]." (*People v. Zamudio, supra,* 43 Cal.4th at pp. 357–358.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence." (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

In *People v. Escobar* (1992) 11 Cal.App.4th 502, the court held that there was sufficient evidence to support a conviction for assault with a firearm when the defendant stood in front of the victim and the victim heard the defendant cock a gun the defendant was holding inside a briefcase. (*Id.* at p. 503.) The court explained, "An assault is 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' (Pen. Code, § 240.) The evidence established that [the defendant] had the intent to wilfully commit an act which, if completed, had as its direct, natural and possible consequences an injury to [the victim]. [Citations.] [¶] [The defendant] argues that there was no attempt to use the weapon to inflict injury because he did not exhibit the weapon, or point or fire the weapon, but merely cocked it. We would not use so innocuous an adverb as 'merely.' Although [the defendant] did not succeed in actually inflicting injury on [the victim] with the cocked, loaded gun, the evidence showed that [the victim] was aware that [the defendant] was holding the gun inside the leather purse and that [the defendant] had the present ability to commit a violent injury. [Citation.] This evidence establishes something more than mere preparation. [The victim] did not have to see the gun. He could use his sense of hearing to perceive the intent to commit a violent injury on him." (*Id.* at p. 505.)

In this case, defendant's conduct was more egregious than the defendant's in *People v. Escobar, supra,* 11 Cal.App.4th 502. The evidence demonstrated that defendant cocked the handgun and placed it at the back of each victim's head as he searched their pockets. Such evidence is sufficient to support defendant's convictions for assault with a firearm. (*Id.* at pp. 503, 505.)

As for defendant's claim that there is insufficient evidence that the gun was operable and loaded, Vazquez identified the handgun that Detective McMahon recovered from defendant's bedroom as the firearm defendant used in the robberies and assaults. Detective McMahon, who had worked with handguns for 16 years, testified that the handgun appeared to be operable—that is, it appeared to be capable of firing a bullet out of the chamber. Moreover, during the commission of the assaults, defendant cocked the gun, suggesting both that the handgun was operable and that it was loaded. Based on such evidence, a reasonable juror could find that defendant used a handgun that was operable and loaded in committing the assaults. (*People v. Avila, supra,* 46 Cal.4th at p. 701; *People v. Medina, supra,* 46 Cal.4th at p. 919; *People v. Zamudio, supra,* 43 Cal.4th at pp. 357–358; *People v. Ugalino, supra,* 174 Cal.App.4th at p. 1064 .)

II. Defendant's Motion For Mistrial

Defendant argues that the trial court erred in denying his motion for mistrial based on predicted testimony the prosecutor addressed in opening argument and evidence adduced at trial related to that predicted testimony. Although the trial court admonished the jury to disregard the prosecutor's statements and struck the challenged evidence, defendant contends that he suffered prejudice.

A. Background

In her opening statement, the prosecutor told the jury, "You're also going to learn that Neda, who is a former girlfriend of the defendant, told the police that she had actually told the defendant a few months prior—actually, about seven months prior to this crime happening that she actually told the defendant where Tommy lived and that he was growing marijuana, that he had a lot of cash at his house, in total, about $26,000 worth of stuff that he could loot. It all adds up."

Neda Talkhooncheh testified that she dated defendant for about three years around 2007 to 2010. She admitted that she told an officer that defendant lived with his mother in Torrance on July 1. Talkhooncheh knew Vazquez. She had been to his apartment two

or three times, a "couple years ago." The prosecutor then asked Talkhooncheh about her conversation with the police on July 6, 2010. Talkhooncheh responded, "I don't want to answer any more questions. I am going to plead the Fifth."

The trial court had the jurors and Talkhooncheh step out of the courtroom. The prosecutor argued that there was no Fifth Amendment issue because Talkhooncheh did not face criminal culpability as there was no evidence that she had any knowledge that defendant was going to commit the robberies. The trial court disagreed, stating, "Oh, there is very strong evidence of culpability here."

Defense counsel argued that the prosecutor should have informed him if she knew that Talkhooncheh was going to exercise her right to remain silent. Further, defense counsel argued that if the prosecutor knew that Talkhooncheh was going to assert her Fifth Amendment rights, it was improper to ask Talkhooncheh about her relationship with defendant. The prosecutor denied any prior knowledge that Talkhooncheh would assert her Fifth Amendment rights.

The trial court appointed counsel for Talkhooncheh. At a subsequent hearing, the trial court rejected the prosecutor's argument that Talkhooncheh's prospective testimony did not implicate her Fifth Amendment rights. In light of that ruling, the prosecutor stated that the People would grant Talkhooncheh use immunity, but "only with a proffer." Talkhooncheh's attorney stated that Talkhooncheh would not provide a proffer. The trial court stated that it could not order Talkhooncheh to testify.

When the prosecutor subsequently informed the trial court that she would not re-call Talkhooncheh, the trial court offered defense counsel the opportunity to cross-examine Talkhooncheh about her limited testimony. Defense counsel declined and moved for a mistrial. The trial court denied the motion based on defense counsel's decision not to cross-examine Talkhooncheh. In light of the trial court's ruling, defense counsel asked that Talkhooncheh's testimony be stricken and the jury admonished to disregard the prosecutor's statement in opening argument about Talkhooncheh's anticipated testimony.

After the prosecutor rested the People's case, the trial court instructed the jury, "Earlier in the trial, we heard the beginning of testimony of Neda—last name [Talkhooncheh]. That ended abruptly, as you will recall. You are to disregard all of that testimony. If you've taken any notes, tear them off, cross them off. You are not to consider anything she said here in court. [¶] In addition, the prosecutor, in her opening statement, referred to some anticipated testimony of that witness. Opening statements aren't evidence so you're not to consider that as evidence at all."

B. Application of Relevant Principles

"We review a ruling on a mistrial motion for an abuse of discretion. [Citations.] A trial court should declare a mistrial only '"if the court is apprised of prejudice that it judges incurable by admonition or instruction."' [Citation.] 'In making this assessment of incurable prejudice, a trial court has considerable discretion.' [Citation.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 501.) "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' [Citation.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934–935.)

The trial court did not abuse its discretion in denying defendant's motion for a mistrial because the prosecutor's remarks in her opening statement and Talkhooncheh's testimony did not irreparably damage defendant's chances of receiving a fair trial. (*People v. Dement* (2011) 53 Cal.4th 1, 40.) After the prosecutor rested the People's case, the trial court instructed the jury to disregard all of Talkhooncheh's testimony and not to consider anything she said in court. It further instructed the jury that opening statements are not evidence and the jury was not to consider as evidence the prosecutor's reference to Talkhooncheh's anticipated testimony in her opening statement. The trial court's instructions adequately addressed the issue. In light of Vazquez's certain identification of defendant as one of the intruders, it is not reasonably probable that defendant would have received a more favorable result in the absence of the prosecutor's

remarks in her opening statement or Talkhooncheh's testimony. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750.)

III. Selection Of The Alternate Juror

Defendant contends that the trial court's procedure in selecting the alternate juror "deprived" him of an alternate juror to whom he had stipulated. The trial court properly followed section 1089 in selecting the alternate juror.

A. Background

After a jury was impaneled, the parties turned to the selection of alternate jurors. At the time, there were only two prospective jurors remaining on the panel—numbers 17 and 18. Outside the presence of the jurors, the trial court stated that the parties could use peremptory challenges or they could agree to select prospective jurors numbers 17 and 18 as the alternates. Defense counsel and the prosecutor stipulated to select prospective jurors numbers 17 and 18 as the alternate jurors.

During the prosecution's case-in-chief, the trial court excused juror number 5 for cause. The trial court then used a procedure to select the alternate juror to replace juror number 5 that defense counsel described as a "lottery." Although not fully described in the record, it appears that the clerk wrote each alternate juror's number on a piece of paper and then selected an alternate juror by drawing one of the pieces of paper.

Defense counsel objected, stating, "It's always been my experience that the first alternate is the first one that goes into the jury box. I mean, I don't care either way about either one necessarily, but why did we do a lottery approach when we already stipulated that alternate No. 1 was going to be alternate No. 1 and alternate No. 2 was the other one?" The trial court stated that it always followed the same procedure in selecting alternate jurors.

Defense counsel said, "Every other juror we took in order from the seat that they were in as we were doing voir dire and impaneling the jury. We didn't select anybody by lottery." The trial court responded, "That's different. Because I have to follow the order

in which they come down from the jury room on the jury list. This is the way I've always done it. I perhaps didn't explain that to you. But I don't call them alternate 1 and 2. It's jurors 13 and 14, or juror 13 and 18, whatever their number happens to be."

According to defense counsel, "we stipulated that there was going to be alternate No. 1 and alternate No. 2, and they even sat in that order." The trial court stated that it never used the "terminology alternate 1 and alternate 2. The clerk does. . . . They are just two alternates, and they happen to be whatever number they were before, 13, 15, or 16 or 17." Defense counsel stated that he had never been in a courtroom in which the trial court's procedure for selecting an alternate juror had been used. Defense counsel objected that "the woman that's been seated had a higher juror number than the woman that was alternate No. 1 now. I know you don't use those terms, but the clerk used those terms. And that's how we understood it, and that's how we stipulated to them was alternate No. 1 and alternate No. 2." The prosecutor stated that defense counsel was speaking for himself. She had been before the trial court before, knew how the "court process works," and did not hear either of the alternate jurors referred to as "juror No. 1 or juror No. 2."

Defense counsel again stated that during three days of jury selection, each opening on the jury was filled by the prospective juror with the lowest number; the trial court used a lottery for the first time in selecting an alternate juror. The trial court responded, "Your position is noted and overruled."

Later in the trial, after defense counsel finished his closing argument, the trial court noted that defense counsel had paused when juror number 5 "nodded off." The trial court estimated that juror number 5 was "out for about five seconds." Defense counsel disagreed, stating that juror number 5 was "out for a period of time." The prosecutor stated that she saw juror number 5's "eyes closing, and then counsel actually appeared to pause." Defense counsel asked that the trial court excuse juror number 5 because she was falling asleep in court. The trial court asked if there was evidence that juror number 5 was asleep at any other time. Defense counsel said there was not. The trial court denied the request to excuse juror number 5.

B. Application of Relevant Principles

In *People v. Thornton* (2007) 41 Cal.4th 391, the California Supreme Court approved the procedure the trial court used in this case for selecting an alternate juror. The Court stated, "In replacing the ill juror by random drawing, the trial court was following the mandate of section 1089. As relevant here, section 1089 provides: 'If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and *draw the name* of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.' (Italics added.)" (*Id.* at p. 462.)

Defendant acknowledges that section 1089 "seems to endorse the method" the trial court used in selecting the alternate juror, but argues that "this does not address the situation in which a court's own procedures imply that the order of the alternates will follow the order in which the jurors were selected for the jury pool." By its terms, section 1089's procedure for selecting alternate jurors is not limited to cases in which a trial court selected its original jurors using a particular procedure. Instead, section 1089's alternate juror selection procedure applies in all cases regardless of the procedure the trial court used to select the original jurors. Moreover, when the trial court addressed the selection of prospective jurors numbers 17 and 18 as the alternate jurors, it said nothing about designating them as alternate jurors numbers 1 and 2, respectively. Instead, it simply referred to them as prospective "alternate" jurors.

Defendant argues that the provision in section 1089 that an alternate juror "shall . . . be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors," supports his position that alternate jurors should be selected in the same manner as primary jurors. The provision on which defendant relies, however, concerns an alternate juror's conduct after having been selected to serve as a juror, and not to the selection of that alternate juror as a juror.

The trial court's procedure for selecting the alternate juror resulted in prejudice, defendant argues, because the alternate juror fell asleep during a critical part of his closing argument. The trial court estimated that the juror fell asleep for about five seconds. Defense counsel paused during that brief period. There was no prejudice.

IV. Defendant's Claim That The Trial Court Intervened In The Trial On Behalf Of The Prosecution

Defendant claims that the trial court repeatedly took a proactive role in the trial, in effect becoming a second prosecutor. According to defendant, the trial court acted improperly when it prompted the prosecutor to have defendant stand up so that Vincent could estimate defendant's height; when it failed to protect him from the unwarranted implication that Velazquez had a reason to fear him; and when it attempted to bias the jury against Dillard, a witness whose testimony was favorable to defendant.

A. Vincent's Estimate of Defendant's Height

1. Background

After defense counsel cross-examined Vincent about his physical descriptions of the suspects, the trial court informed defense counsel and the prosecutor at sidebar that it believed the jurors would be interested in whether Vincent could estimate defendant's height and weight.[5] The trial court stated its intention to have defendant stand so that Vincent could give his estimate. Defense counsel objected that the trial court was "gutting" his case. Defense counsel argued that the witnesses described the second intruder as five feet nine inches tall and weighing 250 pounds. Defense counsel intended to have a man of that height and weight stand next to defendant so the jury could compare their relative heights and weights.

The trial court permitted the prosecutor to reopen her examination of Vincent to ask him to estimate defendant's height and weight. The trial court instructed defendant to

---

[5] On appeal, defendant focuses his argument on Vincent's estimate of defendant's height and not his weight.

stand. Vincent estimate that defendant was six feet three inches tall and weighed 225 or 235 pounds.

After Vincent's testimony, defense counsel renewed his objection. He argued that if the trial court's intention was to determine Vincent's ability to estimate height accurately, Vincent should have been asked to estimate the height of something in the courtroom the exact height of which the parties knew. Allowing Vincent to estimate defendant's height from across the courtroom without establishing his ability to estimate height accurately prejudiced defendant. The trial court found that Vincent's estimates of defendant's height and weight were relevant, independent of his ability to estimate height and weight accurately.

2. Application of relevant principles

"A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.] The court may not, however, assume the role of either the prosecution or of the defense. [Citation.] The court's questioning must be '"temperate, nonargumentative, and scrupulously fair"' [citation] and it must not convey to the jury the court's opinion of the witness's credibility. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 597; Evid. Code, § 775[6].)

Vincent's estimates of defendant's height and weight were material facts in the trial. Vincent was unable to identify the intruders from a photographic lineup and was unable to identify defendant at trial as one of the intruders. Vincent explained that he "wasn't able to get a good description of the suspects" because he was more focused on their guns and his sister. Vincent was, however, able to give a general description of the

---

6 Evidence Code section 775 provides, "The court, on its own motion or on the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action, and the parties may object to the questions asked and the evidence adduced the same as if such witnesses were called and examined by an adverse party. Such witnesses may be cross-examined by all parties to the action in such order as the court directs."

second intruder whom he described as an African-American man standing six feet two inches tall and weighing about 220 or 230 pounds. Accordingly, Vincent's estimate of defendant's height and weight—whether it matched his description of the second intruder, tending to inculpate defendant or varied from his description of the intruder, tending to exculpate defendant—was material evidence. The trial court acted within its discretion in directing defendant to stand so that Vincent could estimate his height and weight. (Evid. Code, § 775; *People v. Cook, supra,* 39 Cal.4th at p. 597.) The trial court's limited role before the jury—directing defendant to stand—did not convey in any way its opinion of Vincent's credibility. (*People v. Cook, supra,* 39 Cal.4th at p. 597.)

B. Velazquez's Testimony About His Fear

1. Background

Believing that Velazquez was not forthcoming in answering her questions, the prosecutor asked him if he did not want to testify. Velazquez responded that he did not want to testify because it was too time consuming. The prosecutor then asked if Velazquez earlier told Officer Gonzalez that he was afraid to testify because he was afraid for his and his family's safety. Defense counsel objected, the trial court overruled the objection, and defense counsel requested a sidebar conference.

At sidebar, defense counsel argued that the trial court previously ruled that the witnesses were permitted only to testify that they were in fear of the suspects who came into Vazquez's apartment. Defense counsel argued that "the witnesses that were inside the house can say they were in fear of the suspects, but they can't suggest there is some type of intrinsic or extrinsic fear because [defendant] is a dangerous person." The trial court responded that Velazquez had not testified that he was afraid of defendant. Defense counsel stated, "Then it's not relevant. I mean, there is nobody else on trial but [defendant]."

The prosecutor stated that she was not asking Velazquez if he was afraid of defendant. She said that Velazquez earlier informed Officer Gonzalez that he was "afraid for his safety in general and from retaliation from anyone in this case because people

know where he lives." The trial court again overruled defense counsel's objection and declared Velazquez to be a hostile witness. It ruled that Velazquez would be permitted to testify about his fear in general, but would not be permitted to testify that he was afraid of defendant.

Defense counsel requested the trial court to instruct the jury that any fear Velazquez felt should not be attributed to defendant. The trial court agreed, and instructed the jury, "Any fear expressed by this witness is not to be associated or attributed to the defendant in any way. The jury is not to, in deliberations, consider it in that fashion at all. It's only being proffered to explain the witness's demeanor and testimony in court."

When Velazquez's testimony resumed, the prosecutor asked him if he previously told Officer Gonzalez that he was afraid of coming to court because he was afraid of retaliation. Velazquez responded, "That's correct." Later, after Velazquez identified defendant as the person who drove the white Ford Expedition, the prosecutor asked Velazquez, "It wasn't easy for you to actually say this today, was it?" Velazquez said that it was not. The prosecutor asked Velazquez if he was afraid that something would happen to him or his family. Velazquez responded, "No." The prosecutor asked Velazquez what he was afraid of. Velazquez responded, "I'm not afraid of anything."

2. Application of relevant principles

"'Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court. [Citation.]' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) Accordingly, the trial court did not err in permitting Velazquez to testify about whether he told Officer Gonzalez he was afraid to testify and the reason for that fear. (*Ibid.*) Moreover, the trial court instructed the jury that Velazquez's fear was not to be attributed to or associated with defendant. Jurors are presumed to understand and follow the trial court's instructions. (*People v. Holt* (1997)

15 Cal.4th 619, 662.) Additionally, notwithstanding his prior statement to Officer Gonzalez that he was afraid to testify, Velazquez testified at trial that he was not afraid that he or his family would be retaliated against because he identified defendant as the driver of the white Ford Expedition; Velazquez stated that he was not afraid of anything. Because Velazquez was not in fear, there was no fear for the jury to attribute to defendant improperly.

C. Bias Against Dillard

1. Background

Apparently based on Dillard's conduct after the robbery, including his demeanor when speaking with the police, his description of the intruders in variance with the other victims' descriptions, and the severance of all contact between Dillard and the other victims, the trial court found there was probable cause to believe that Dillard was an accomplice. Accordingly, the trial court appointed counsel to advise Dillard of his Fifth Amendment rights.[7]

Thereafter, at the conclusion of Mullen's testimony, the trial court asked Mullen, "When Derrick was asked to lower the blinds or close the window or both, do you remember the words that were used." Mullen responded, "They just said—just like—they signaled for everybody to be quiet and to close the window and close the blinds. I don't remember anything else." The trial court asked Mullen, "Did they use a name? Did they say, 'Hey, you,' or what?" Mullen said, "I don't recall."

At the conclusion of Sarah's testimony, the trial court asked Sarah whether she saw both of the second intruder's arms or, if she saw only one arm, which arm she saw. Sarah responded that she really focused on the arm that held the gun, which she believed to be the second intruder's right arm. The trial court then asked Sarah to describe the doors to Vazquez's apartment. Sarah responded that the apartment had a "plain . . . house door" and a security door. The trial court asked Sarah if the security door was closed

---

[7] After consulting with counsel, Dillard waived his Fifth Amendment rights and agreed to answer any question asked of him.

before Dillard arrived. Sarah replied that the "doors" were open. The trial court asked, "Through the whole evening?" Sarah said, "Yeah."

2. Application of relevant principles

Defendant contends that the trial court tried to bias the jury against Dillard when it asked questions of Mullen and Sarah that suggested to the jury that the trial court believed that Dillard was an accomplice. The trial court's questions, defendant asserts, signaled its belief that Dillard was an accomplice who should not be trusted and thereby diminished the force of Dillard's description of the second intruder as standing five feet nine inches to six feet tall and weighing from 250 to 300 pounds.

As defendant argues, Dillard gave a description of the second intruder that differed from the other victims' descriptions at trial. Thus, Dillard's credibility was a material issue in the trial. Whether Dillard was an accomplice and therefore had a reason to describe the second intruder in a way that tended to exculpate defendant bore on Dillard's credibility. The trial court did not assume the role of the prosecutor and its questions were temperate, nonargumentative, and scrupulously fair. Accordingly, the trial court acted within its discretion when it examined Mullen and Sarah. (Evid. Code, § 775; *People v. Cook, supra,* 39 Cal.4th at p. 597.) Moreover, because neither Mullen nor Sarah responded to the trial court's questions in a manner that suggested that Dillard was an accomplice to the crimes, thereby damaging his credibility and lessening any exculpatory impact of his description of the second intruder, the trial court's questions were not prejudicial. (*People v. Cook, supra,* 39 Cal.4th at p. 599.)

V. Evidentiary Rulings

Defendant contends that the trial court erred when it failed to order a gang reference redacted from Vazquez's 911 call, when it admitted photographs from defendant's cell phone of currency and a "menacing-looking" BB gun, and when it admitted statements defendant made in custody.

A. Gang Reference

"Evidence Code section 352 provides that a court 'in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' We review a trial court's ruling under this section for abuse of discretion and will reverse a trial court's exercise of discretion to admit evidence 'only if "the probative value of the [evidence] clearly is outweighed by [its] prejudicial effect." [Citation.]' [Citation.] 'Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues, not evidence that is probative of a defendant's guilt.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 133.)

In his 911 call, Vazquez described the two intruders to the operator saying, "They're two black guys. They are wearing, one's wearing red socks. They have, they look like they're bloods, they're wearing black and red, white and red shoes. One has black shoes with red socks on." Defense counsel moved to exclude gang evidence, including the gang reference in the 911 call. The trial court excluded gang evidence except for the gang reference in the 911 call, and ruled that the prosecutor would not argue that defendant was a gang member. The trial court found the gang reference in the 911 call relevant and its probative value not outweighed by undue prejudice. It reasoned that Vazquez did not accuse the intruders of being gang members. Instead, Vazquez used the gang reference to describe the color of the intruders' clothes. That is, Vazquez focused on the color red because that was the chosen color of a particular gang.

The trial court did not abuse its discretion when it declined to order the gang reference in the 911 call redacted. (*People v. Valdez, supra,* 55 Cal.4th at p. 133.) Vazquez's identification of defendant was a material issue in the trial. Thus, Vazquez's ability to see and describe the intruders, as demonstrated in his 911 call, was relevant. Vazquez's description of the intruders as being dressed in red as though they were members of the Bloods gang was an integral part of that description. Thus, the evidence had probative value. That probative value was not "clearly" outweighed by its prejudicial

effect. (*Ibid.*) Although gang evidence may, under other circumstances, evoke an emotional bias against a defendant, the fleeting gang reference in this case concerned a witness's description of clothes and not any putative gang membership by the defendant and thus was unlikely to evoke an emotional bias against defendant. Moreover, the prosecutor did not argue that defendant was a gang member. Even if the trial court erred, however, in not ordering the gang evidence redacted, any error was harmless because it is not reasonably probable that defendant would have received a more favorable outcome if the trial court had excluded the evidence in light of Vazquez's confident identification of defendant at trial and the identification of the gun found under defendant's mattress as one of the guns used in the offenses. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Partida* (2005) 37 Cal.4th 428, 439.)

B. Cell Phone Photographs of Currency and a BB Gun

"The abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. (*People v. Rowland* (1992) 4 Cal.4th 238, 264 [14 Cal.Rptr.2d 377, 841 P.2d 897].) . . . Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10 [82 Cal.Rptr.2d 413, 971 P.2d 618].)" (*People v. Guerrra* (2006) 37 Cal.4th 1067, 1113, overruled on another point by *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Over defendant's objection, the trial court admitted a photograph from defendant's cell phone that showed a black hand holding seven $100 bills fanned out. The trial court admitted the photograph on the ground that it showed a "more than ordinary fascination with money" and thus could explain a motive for the offenses. Defendant argues that the trial court erred in admitting the photograph of the currency because it was time-stamped two months before the offenses in this case and thus had no connection to this case and no probative value. The photograph was prejudicial, defendant contends, because it suggested that he had an unusual fascination with money.

Also over defendant's objection, the trial court admitted a photograph from defendant's cell phone that showed three guns—a gun that the prosecutor argued had been identified as the gun defendant used in the offenses, a chrome gun that was consistent with the gun defendant's companion used in the offenses, and a BB gun that looked like an "assault weapon." The prosecutor stated that she could not excise the image of the BB gun from the photograph, but would make no argument with respect to the gun. The trial court admitted the photograph on the ground that it was relevant because it showed two guns that appeared to have been described by witnesses. Defendant argues that the photograph had no probative value and was prejudicial because there was no evidence that the BB gun was used in the offenses, the BB gun appeared to be a more significant weapon than it was, and the image of the chrome gun suggested that he possessed the second firearm used in the offenses.

Assuming, without deciding, that the trial court erred in admitting the photographs, any error was harmless because it is not reasonably probable that defendant would have received a more favorable outcome if the trial court had excluded the evidence in light of Vazquez's confident identification of defendant at trial and the identification of the gun found under defendant's mattress as one of the guns used in the offenses. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Partida*, *supra*, 37 Cal.4th at p. 439.) The photograph of the currency had no discernable prejudicial impact. As for the photograph of the BB gun, the jury heard that defendant used a handgun in the offenses. A handgun that Vazquez identified as the gun used in the offenses was found under defendant's mattress and introduced in evidence. Given that the jury saw the gun that defendant used in the offenses, it is unlikely the jury held against defendant the fact that he also may have owned a BB gun, no matter how menacing its appearance. To the extent that defendant's possession of a chrome gun that appeared to be the second gun used in the offenses tended to implicate defendant, defendant was otherwise identified as one of the intruders by Vazquez's certain identification.

C. Defendant's In-Custody Statements

An appellate court applies the independent or de novo standard of review to a trial court's denial of a motion to suppress a statement under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) to the extent it "entails a measurement of the facts against the law." (*People v. Waidla* (2000) 22 Cal.4th 690, 730.) Questions of law pertaining to this issue are reviewed de novo, and questions of fact are reviewed under the substantial evidence standard. (*Id.* at pp. 730-731.)

In *Miranda*, *supra*, 384 U.S. at page 474, the United States Supreme Court held that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination require that custodial interrogation be preceded by advice to the accused of the right to remain silent and the right to have counsel present during questioning. After initially being advised of his or her *Miranda* rights, an accused may validly waive these rights and respond to interrogation, so long as the waiver is voluntary, knowing and intelligent. (*North Carolina v. Butler* (1979) 441 U.S. 369, 372-376.) An express waiver is not required where the defendant's conduct makes clear a waiver is intended. (*Moran v. Burbine* (1986) 475 U.S. 412, 421-423; *People v. Riva* (2003) 112 Cal.App.4th 981, 988-989.) The question of waiver must be determined on "'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (*North Carolina v. Butler*, *supra*, at pp. 374-375.)

Defendant contends that the trial court erred in admitting his statement to Detective McMahon that he lived in the bedroom at the Van Deene residence where the gun was found under the mattress. The statement was inadmissible, defendant contends, because it was taken in violation of his *Miranda* rights.

Before trial, defendant brought a motion to suppress statements made to the police that were the product of an "unconstitutional and unlawful" interrogation. The prosecutor stated that the People did not then intend to use any statement defendant made to Detective McMahon or Officer Gonzalez during questioning. The trial court told the prosecutor to inform the court if she changed her mind, and found defendant's motion moot based on the prosecutor's representation.

During trial, Detective McMahon testified that he went to the Van Deene residence to look for defendant and evidence. According to Detective McMahon, upon arriving at the residence, defendant was "taken into custody." McMahon then testified that he searched a bedroom in the house based on defendant's statement that he lived in that bedroom.

At sidebar, defendant objected that he previously brought a motion to suppress defendant's statements to the police and the prosecutor stating that she was not going to use any of defendant's statements. The prosecutor argued that defendant's motion concerned unconstitutional and unlawful interrogation at the police station. The prosecutor represented that defendant's statement was made to Detective McMahon before defendant was arrested. The trial court stated that defendant's motion addressed "'any and all statements by the defendant to the police that were the product of an unconstitutional and unlawful interrogation. [¶] Interrogation is really a term of art, and normally when there is a search warrant execution of the house and the people are asked questions about whose room this is and such, that's not considered interrogation under the case law." The trial court ruled that there was no *Miranda* violation and overruled defendant's objection.

Citing *People v. Ochoa* (1998) 19 Cal.4th 353, 401, respondent argues that *Miranda, supra,* 384 U.S. 436, does not apply when the defendant is out of custody. Respondent's argument overlooks the fact that the prosecutor questioned Detective McMahon about what took place upon his arrival at the Van Deene residence. The prosecutor asked, "[W]hat happened once you got there?" Referring to defendant, Officer McMahon responded, "He was taken into custody. He was taken into custody." Detective McMahon's testimony established that defendant was taken into custody before he made the statement identifying which bedroom was his. Notwithstanding defendant's custodial status at the time he identified which bedroom was his,[8] the record does not

---

8 "'Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would

address whether defendant was advised of his *Miranda* rights before he identified which bedroom was his and whether he made the statement voluntarily—i.e., whether he waived his *Miranda* rights.

Assuming for purposes of argument, however, that defendant's statement that he lived in a particular bedroom was taken in violation of his *Miranda* rights, any violation was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18, 23-24. (*People v. Thomas* (2011) 51 Cal.4th 449, 498.) Other evidence established that defendant lived in the room where the gun was found. Defendant was sitting on a couch in the residence's garage when the police arrived. The bedroom where the gun was found contained men's clothes and photographs of defendant with other people. Accordingly, defendant's possession of one of the guns used in the offenses was established through evidence other than defendant's statement that he lived in the bedroom that was searched. Moreover, putting aside the evidence that defendant was found in possession of one of the guns used in the offenses, Vazquez was 100 percent certain that defendant was one of the intruders.

VI. Lesser Included Instructions

Defendant claims that the trial court erred in failing to instruct the jury on being armed with a firearm under section 12022, subdivision (a)(1) as a "lesser included enhancement" of the personal use of a firearm enhancements under sections 12022.5 and 12022.53, subdivision (b). Defendant also claims that the trial court erred in failing to instruct the jury on simple assault as a lesser included offense of assault with a firearm.

A. Section 12022, subdivision (a)(1)

In *People v. Majors* (1998) 18 Cal.4th 385, the California Supreme Court declined the "defendant's invitation to extend a trial court's sua sponte obligation to instruct on lesser included *offenses* to so-called 'lesser included enhancements.'" (*Id.* at pp. 410-411

---

not reasonably be construed as calling for an incriminating response.' [Citation.]" (*People v. Dement, supra,* 53 Cal.4th at p. 26.)

disapproving *People v. Turner* (1983) 145 Cal.App.3d 658, 683-884 to the extent that it held to the contrary.) The Supreme Court stated, "One of the primary reasons for requiring instructions on lesser included offenses is '"to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between [guilt] and innocence"'—that is, to eliminate '"the risk that the jury will convict . . . simply to avoid setting the defendant free."' [Citation.] This risk is wholly absent with respect to enhancements, which a jury does not even consider unless it has already convicted defendant of the underlying substantive offenses." (*Id.* at p. 410.)

Defendant states that *People v. Majors, supra*, 18 Cal.4th 485 was decided before, and thus did not consider, the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296, 303 (*Blakely*), which held that a defendant is entitled to have a jury, and not a trial court, find beyond a reasonable doubt "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." Under *Apprendi* and *Blakely*, defendant argues, the court was required to instruct the jury on section 12022, subdivision (a)(1) as a "lesser included enhancement" to sections 12022.5 and 12022.53, subdivision (b). Defendant's argument is unavailing. Neither *Apprendi* nor *Blakely* addresses a trial court's duty to instruct, sua sponte, on "lesser included enhancements," and *People v. Majors* did not address a defendant's right to have a jury, and not a trial court, find facts on sentence enhancements. Consistent with *Apprendi* and *Blakely*, defendant's jury and not the trial court made the factual findings that defendant personally used a handgun in committing the first degree robberies and assaults with a firearm. Under *People v. Majors*, the trial court had no sua sponte duty to instruct the jury on section 12022, subdivision (a)(1) as a "lesser included enhancement" of the personal use of a firearm enhancements under sections 12022.5 and 12022.53, subdivision (b). (*People v. Majors, supra,* 18 Cal.4th at pp. 410-411.)

B. Simple Assault

"The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request. [Citations.] That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser. [Citations.] To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist. [Citations.]" (*People v. Blair* (2005) 36 Cal.4th 686, 744–745.) The existence of any evidence, no matter how weak, will not give rise to a sua sponte duty to instruct on a lesser included offense. (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

Defendant contends that the evidence supported in two ways a jury finding that he committed simple assault and not assault with a firearm. First, defendant contends, there was no evidence that the gun was operable and capable of firing a projectile. We resolved this contention against defendant above in our discussion of his claim that there was insufficient evidence to support his convictions for assault with a firearm. Second, defendant contends, the jury could have found him guilty of simple assault by finding "there was an attempted touching of a victim, but the gun was not used in a manner that would probably and directly result in the application of physical force." There is no evidence from which a reasonable juror could conclude that defendant used the gun in a manner other than as would probably and directly result in the application of force. In cocking his handgun and placing it at the back each victim's head, defendant committed an assault with a firearm. (*People v. Escobar, supra*, 11 Cal.App.4th at pp. 503, 505.) The only evidence in this case concerning the assault offenses was that defendant assaulted his victims with a firearm. There was no evidence that defendant assaulted his victims other than with a firearm. Accordingly, the trial court did not err when it did not instruct on simple assault. (*People v. Blair, supra,* 36 Cal.4th at pp. 744–745.)

VII. Sentencing

Defendant contends that the trial court erred when it imposed the upper term on his conviction for the first degree robbery of Vazquez and imposed consecutive terms for the subordinate offenses. Defendant further contends that his sentence of 35 years and four months is cruel and unusual punishment.

A. Upper Term

A trial court's imposition of an upper term sentence is reviewed for an abuse of discretion. (*People v. Castellano* (1983) 140 Cal.App.3d 608, 614-615.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.) A single aggravating factor will support the imposition of an upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

At the defendant's sentencing hearing, the trial court imposed the upper term on defendant's conviction for the first degree robbery of Vazquez stating, "[T]he high term is appropriate in this matter on count 1 because the defendant did rack the weapon, causing more viciousness and fear. A high degree of cruelty is therefore shown. He verbally threatened the victims. So, great violence, cruelty, viciousness, threat of great harm was demonstrated. There was planning and some sophistication. He apparently did case the area, sought to disguise himself with the hats and glasses, gloves, did steal an item of great value, a $10,000 watch."

The court acted within its discretion in imposing the upper term. An upper term sentence is justified by just one aggravating factor. Here, there were multiple aggravating factors. Defendant cocked his handgun when he entered Vazquez's home, an act that threatened great bodily harm and involved a high degree of cruelty, viciousness, or callousness. (Cal. Rules of Court, rule 4.421(a)(1)[9].) Defendant and his companion cased the crime scene before entering, conduct that demonstrated planning and professionalism. (Rule 4.421(a)(8).) Vazquez testified that his $10,000 watch was taken in the robbery, thus the crime involved the taking of property of great monetary value. (Rule 4.421(a)(9).)

B. Consecutive Terms

A trial court's imposition of consecutive terms is reviewed for an abuse of discretion. (*People v. Leon* (2010) 181 Cal.App.4th 452, 468.) "'Section 669 grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes. [Citations.]' (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458, 18 Cal.Rptr.3d 766.) California Rules of Court, rule 4.425 provides: 'Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose consecutive sentences.'" (*Id.* at p. 467, fn. omitted.)

In imposing consecutive terms on defendant's subordinate terms, the trial court stated, "[Defendant's] convictions are becoming more serious, a fair number of prior offenses, although not of the most serious kind, the 415 misdemeanor, 594(a) conviction, a DUI misdemeanor, an 11359 which is before the court, and the 246.3 misdemeanor. He was on probation when this offense—diversion when this offense was committed, and his performance there was not satisfactory."

---

9 All rules citations are to the California Rules of Court.

Defendant argues that the trial court abused its discretion in imposing consecutive terms because, other than the trial court having a "legal excuse" for imposing such terms, there is no rational justification for the plainly excessive sentence in this case. Defendant was convicted of numerous prior offenses for which he was granted probation. Despite or perhaps because of such leniency, defendant's criminal conduct has escalated to first degree robbery and assault with a firearm. Given defendant's prior criminal history and present criminal offenses, the trial court acted within its discretion in imposing consecutive terms.

C. Cruel and Unusual Punishment

Defendant contends that his sentence of 35 years and four months is cruel and unusual punishment because it is disproportionate to the magnitude of his offenses and his culpability. Defendant forfeited this issue by failing to raise it in the trial court. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.