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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GUY E. CARLSON, Defendant and Appellant.	B269138 (Los Angeles County Super. Ct. No. MA062794)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Affirmed and remanded with directions.

Christian C. Buckley, 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, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Guy Carlson of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a))[1] and possession of a firearm by a felon (§ 29800, subd. (a)(1)). The People also proved Carlson had a prior conviction for a serious felony under sections 667, subdivision (a), and 1170.12. Carlson argues that the trial court erroneously excluded certain exculpatory hearsay evidence and that substantial evidence does not support the jury's findings Carlson acted deliberately and with premeditation. With regard to his sentence, Carlson argues that the People failed to adequately allege he suffered a conviction for a serious felony and that the trial court mistakenly believed section 667, subdivision (c)(6), mandated a consecutive sentence on the conviction for possession of a firearm by a felon.

We conclude the trial court did not abuse its discretion in ruling some of the hearsay statements were not admissible as prior consistent statements, and any error excluding some of the hearsay statements that may have qualified as prior inconsistent statements was harmless. We also conclude substantial evidence supports the attempted premeditated murder conviction, but the trial court imposed an unauthorized sentence on the conviction for possession of a firearm by a felon. Therefore, we remand to the trial court for resentencing with directions to impose a sentence on count 2 in accordance with the law and to exercise its discretion to impose a consecutive or concurrent sentence on that count because, contrary to the trial court's statements at the

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1 Undesignated statutory references are to the Penal Code.

original sentencing hearing, section 667, subdivision (c)(6), did not mandate a consecutive sentence.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Shooting*

Carlson and Charles Wynn were pimps. Latia Peters was a prostitute who worked for and lived with Wynn and had known Carlson for about six months. Peters believed Carlson wanted her to live with and work for him instead of Wynn. While walking back to Wynn's apartment from a mini-mart on January 15, 2014, Peters encountered two other women who worked for Carlson. Peters called Wynn on her cell phone. One of the women grabbed Peters, took her purse, and emptied it on the ground. Wynn arrived to break up the ensuing fight.

As Peters and Wynn began walking back to their apartment, Carlson drove up beside them in a white Suburban. Carlson got out of the car and argued with Wynn in the street. He then went back to the Suburban and picked up a gun from the back seat. Peters had continued walking toward Wynn's apartment when she heard four gunshots. Wynn ran to avoid getting hit. When Peters got back to the apartment, she noticed a bullet hole in her purse, but no one was hurt.

B. *The Investigation*

1. *Neighborhood Witnesses*

Sheriff's deputies spoke with several people who witnessed the shooting. Twelve-year-old Seth C. was playing in his front yard near the intersection where the shooting occurred. He

heard screaming and saw a white or gray "van" approach the intersection, and an African-American man he later identified as Carlson got out of the van. Seth said the man wore jeans and a T-shirt and was bald or had thin braids in his hair. The man pulled "a few" women into the van and "drove off." Seth saw several people on the street begin running the opposite direction. He heard gunshots, but he could not see where they were fired.

Jacurie Daniels lived in a second-floor apartment near the same intersection. She said she was standing by a window inside her apartment when she saw a white Suburban approach a man on the street. The driver got out of the car and confronted the other man, who held up his arms in a "what's going on" gesture. Daniels said the two men appeared to be arguing, but she could not hear them. The driver went back to the Suburban, reached inside, and pulled out a gun. The other man ran away as the driver fired multiple shots at him, moving the gun slightly to the left and right. The driver got back in the Suburban and began chasing the other man with his right arm extended, pointing the gun out the passenger window. The driver never caught up to the other man, who ran fast, "zigzagging" back and forth. The runner disappeared into an apartment building, and Daniels called 911. She described the shooter as a light-skinned African-American wearing a white T-shirt and jeans.

Robert Hanna lived in a mobile home park near the same intersection. While walking to his mailbox, he heard yelling and screaming. Hanna said a man, later identified as Wynn, yelled "very bad language" as he was crossing a street on foot, while an older Suburban was "hauling bananas after [him]." The Suburban made a sharp U-turn, and the driver got out and started shooting at Wynn. While Wynn "zigzagg[ed] back and

forth . . . trying to dodge the bullets," the driver shot multiple rounds at him. Hanna recalled the shooter "didn't do this like an amateur," and Hanna did not know how the shooter missed him.

2. *Wynn's Interviews and Phone Calls*

Two weeks after the shooting, Detective Robert McGaughey and his partner recorded an interview with Wynn. Wynn appeared nervous, but told the detectives the shooter's street name was "Wicked" or "Winky" or "something like that." Wynn said he did not know the shooter's actual name, but their kids went to the same school, and Wynn thought he was a member of a Crips street gang. After Detective McGaughey reminded Wynn he was on probation, Wynn told him there were "rumors floating around" he was a "snitch," and he felt like his "life is in danger." He nevertheless told the detectives the shooter was a slim, African-American male with braids and he drove a white Suburban.

Wynn said the shooter drove up to him, jumped out of his car, and started walking toward him. Wynn made a gesture asking, "What's the problem?" The shooter "[a]ll of a sudden . . . [went] behind the driver's seat," pulled out a gun, and fired four or five rounds. Wynn made various statements about the shooter's target. For example, he said, "I didn't even know he was even aiming at me." He said the shooter "shot at [his] feet" and "to the sides. . . . And that's when I was like zigzagging and started running, just back and forth. They taught me in boot camp, you know, don't run straight. Zig-zag. So I did that." Wynn also said the shooter got back in his car and followed Wynn, "aiming through the window at [him]." Wynn told the detectives he thought the shooter lived in the same neighborhood.

Detective McGaughey subsequently spoke with Wynn twice on recorded phone calls. In one of those calls, Wynn gave Detective McGaughey additional details about the fight involving Peters, explaining that he found her "bruised up, and her purse and stuff [was] scattered everywhere . . . in the street." While Wynn was trying to help Peters gather her things, the Suburban came up the street toward Wynn. The driver got out and confronted Wynn, "coming at [him], walking with a gun." "[W]hen he starts shooting," Wynn said, "he shot at the floor, and he shot at the, he shot at the left, and he shot to the right." Wynn continued, "I heard another shot, and so I don't know where he was aiming that one, but it was just kinda crazy." Wynn said Peters had already walked up the street toward the apartment when the driver shot at him.

Detective McGaughey again asked Wynn for the shooter's name. Wynn said, "I can't even guess, dude. . . . I don't even know this guy, man. [Wicked or Winket is] the name that was given to me from somebody. So I could be telling you something that somebody wanted me to say." Wynn did give Detective McGaughey additional details about where the shooter might live. Following up on that information, Detective McGaughey found a white Suburban matching Wynn's description and registered to Carlson parked in a driveway not far from where Wynn lived.

On April 1, 2014 Detective McGaughey recorded another interview with Wynn while Wynn was in custody on a pimping charge. Wynn suggested he wanted to help Detective McGaughey's investigation, but did not "want to be labeled as a snitch." Detective McGaughey showed Wynn a six-pack photographic lineup, and Wynn identified Carlson as the shooter,

saying, "I got shot at by this guy." Wynn also gave the detective Latia Peters's name (who up to that point was known only as "Tia").

On April 10, 2014, at Wynn's request, Detective McGaughey met Wynn at a restaurant and had another recorded conversation with him. Wynn said Carlson had followed him into a fast food restaurant the previous day and asked whether he had said "something to the police," because, Carlson said, the police were looking for him. Wynn said he was "nervous," thinking, "Is this guy comin' here to shoot me here in the store?" Wynn told Carlson he did not know anything because he had just been released from jail. Wynn asked Detective McGaughey for "protection" by helping him get "out of this area." Detective McGaughey told him the best thing he could do was to say where Carlson lived so law enforcement could "take him off the street." Wynn said he did not know where Carlson lived but thought he now was driving a Cadillac DeVille. Wynn said, "I'm very nervous, I'm very scared for my family, man, there's not a doubt at it."

Detective McGaughey later obtained a videotape from surveillance cameras in the fast food restaurant showing Wynn walking through the parking lot followed by a gray Cadillac. The recording showed Wynn and Carlson having "a fairly long decent conversation" inside the restaurant.

3. *Carlson's Arrest and Preliminary Hearing*

Detective McGaughey arrested Carlson on April 22, 2014 and seized two cell phones. Files extracted from the phones included an audio file called "The Lost Generation, The Sly, Slick, and The Wicked" and a text message sent from the phone's

owner, whose screen name was "Wiccet." Carlson had the phrase "The Sly, The Slick, The Wiccet" tattooed on his chest.

After the preliminary hearing on May 8, 2014, counsel for Carlson asked another attorney, Marc Hodges, to accompany him to a holding cell to interview Wynn. According to Hodges's notes of the interview, Wynn said he did not know who the shooter was or where the shooter was aiming, and he never saw a gun. He also said, "The police gave me a name. . . . I [tried] to tell the detectives that I wasn't the guy he was shooting at. I was under the influence of crystal meth when the police interviewed me and came with photos. This whole thing is a bunch of lies and implications." When counsel for Carlson asked Wynn if he was saying that because he was afraid of Carlson, Wynn said, "No, I don't want no lies. I know for damn sure it wasn't him."

4. *Peters's Interview*

Detective McGaughey interviewed Peters on July 30, 2015. She said that on the day of the shooting someone she knew only by the name "Wiccet" was on the phone with the women who attacked her in the street. Wynn arrived to help, and "Wiccet pop[ped] up out of nowhere," driving a white Suburban. Peters said Wiccet asked the women who had attacked her if they were all right, and Peters began walking away. Wiccet got out of his car and confronted Wynn, but Peters did not hear what was said. Wiccet got back into his car. Peters stopped to wait for Wynn, "and [Wiccet] just started dry shooting" without aiming at anything. Peters said he shot two or three times from inside his car. She said Wynn tried to "get away," and when Wiccet stopped shooting, she and Wynn started walking back to their apartment. Peters noticed her purse had bullet holes in it.

Detective McGaughey pressed Peters on the issue of Carlson's aim, asking, "Was he aiming at you and, and [Wynn], or what?" She said, "Yeah, he was shooting at me, I think. . . . He was aiming like this, like at both of us." Peters said Carlson shot out of the driver's window. Detective McGaughey asked, "And you saw him shooting?" Peters said, "I seen him, yeah." Peters identified Carlson as Wiccet in a six-pack photographic lineup and confirmed he was the person she saw "shooting the gun."

C. *The Trial*

The People charged Carlson with attempted willful, deliberate, and premeditated murder (count 1) and possession of a firearm by a felon (count 2). The People also alleged Carlson suffered a prior serious felony conviction for robbery within the meaning of sections 667, subdivision (a)(1), and 1170.12.

Trial commenced September 3, 2015. Wynn testified for the People, and, although he remembered meeting with Detective McGaughey on several occasions, he could not recall telling the detective most of what he had said in previous interviews and conversations. The trial court, over objections by counsel for Carlson, allowed the prosecutor to impeach Wynn using the transcripts from those interviews and conversations. During a sidebar discussion regarding the People's use of the transcripts, the trial court stated, "When [Wynn is] saying he doesn't recall certain things, I don't find it credible. I think it's evasive." The court also said Wynn was "basically a hostile witness who doesn't want to testify."

On cross-examination by counsel for Carlson, Wynn said he did not see anyone get out of the car, he did not see the shooter, he did not see where the shooter was aiming, and the police gave

him the name "Wiccet." Wynn explained that in previous interviews he was under the influence of drugs or cooperating with police to avoid violating the terms of his probation.

D. *The Verdict*

The jury found Carlson guilty on both counts. After denying Carlson's motion for a new trial, the trial court found true the allegations regarding Carlson's prior conviction. Counsel for Carlson submitted to the People's recommendation on sentencing without objection. The trial court sentenced Carlson on count 1 to life in prison with the possibility of parole and a minimum period of confinement of 14 years (7 years doubled), plus five years pursuant to section 667, subdivision (a)(1). On count 2 the court imposed a consecutive term of one year, four months (one-third the middle term of two years, doubled). Carlson timely appealed.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion by Excluding Hearsay Testimony from Marc Hodges*

Carlson contends the trial court erred by excluding evidence of certain statements Wynn made to Hodges following the preliminary hearing. Those statements included that Wynn "was certain [Carlson] was not the shooter," Wynn's previous identification of Carlson was false, and "the entire case against [Carlson] was fabricated." Carlson argues the court should have admitted evidence of Wynn's statements to Hodges either as prior consistent statements under Evidence Code section 1236 or prior inconsistent statements under Evidence Code section 1235.

Carlson argues the trial court's error violated his constitutional rights to due process and to present a complete defense.

"'We review the trial court's rulings on the admission of evidence for abuse of discretion.'" (*People v. Homick* (2012) 55 Cal.4th 816, 859; see *People v. Cowan* (2010) 50 Cal.4th 401, 462.) In general, "the application of the ordinary rules of evidence under state law do not violate a criminal defendant's federal constitutional right to present a defense, because trial courts retain the intrinsic power under state law to exercise discretion to control the admission of evidence at trial." (*People v. Abilez* (2007) 41 Cal.4th 472, 503; see *People v. Lawley* (2002) 27 Cal.4th 102, 155; *People v. Andrade* (2015) 238 Cal.App.4th 1274, 1290.) This general rule will give way only in extraordinary and unusual circumstances, for example, where the evidence is of such probative strength that its exclusion violated the defendant's constitutional right to present a defense. (*Abilez*, at p. 503; *People v. Snow* (2003) 30 Cal.4th 43, 90; see *People v. Robinson* (2005) 37 Cal.4th 592, 626-627 [exclusion of allegedly exculpatory testimony under Evidence Code section 352 did not violate the defendant's right to present a defense].)

1. *Relevant Proceedings*

Counsel for Carlson called Hodges to testify and established that Hodges accompanied Carlson's former attorney to interview Wynn after the preliminary hearing on May 8, 2014. Counsel for Carlson asked Hodges if Wynn told him "he knew who the shooter was." After the court overruled a hearsay objection, Hodges replied, "No." Counsel for Carlson then asked Hodges if Wynn told him the shooter was aiming at him, and the

prosecutor again objected the question called for hearsay and was "improper impeachment."

During a sidebar conference the prosecutor explained, "I'm assum[ing] he's being called to impeach [Wynn's] testimony on the witness stand. . . . So in order for it to be impeachment of Mr. Wynn's testimony on the witness stand, it has to be inconsistent with what he stated on the witness stand, and he stated all these things on the witness stand, and was impeached with his own prior inconsistent statements; so my objection is that he's improperly impeaching the testimony that was offered by Mr. Wynn on the witness stand. . . [where] he did not identify who shot at him."

Counsel for Carlson said Wynn previously gave Detective McGaughey contradictory information, stating both that he did and did not see the shooter and that he saw Carlson point the gun at him. Thus, Wynn's statement to Hodges that he did not know the shooter was aiming at him was admissible either as a prior consistent statement or a prior inconsistent statement. The court asked, "Which is it? I don't know what you are offering it for." Counsel for Carlson settled on the exception for prior consistent statements because the People had previously used the interview transcripts to impeach Wynn's testimony that he did not know who the shooter was or where the shooter was aiming, and therefore Wynn's statement to Hodges echoing those statements was consistent with previously impeached testimony. Counsel for Carlson stated, "I'm going to introduce the statement consistent with the in-court testimony."

The court observed that a prior consistent statement must comply with Evidence Code section 791. That provision provides that evidence of a prior consistent statement is admissible where "(a) [e]vidence of a statement . . . that is inconsistent with any part of [a witness's] testimony at the hearing has been admitted for the purpose of attacking his credibility, *and* the statement was made before the alleged inconsistent statement; or [¶] (b) [a]n express or implied charge has been made that [the witness's] testimony at the hearing [was] recently fabricated or [was] influenced by bias or other improper motive, *and* the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (Italics added.) The trial court ruled Wynn made the prior consistent statement offered by counsel for Carlson on May 8, 2014, after the inconsistent statements in the interview transcripts the People introduced, which Wynn made to law enforcement between January and April 2014. The court also noted Wynn made the prior consistent statement after Wynn felt threatened by Carlson, which could have motivated him to fabricate his testimony. The court therefore ruled the prior consistent statement did not comply with Evidence Code section 791.

Counsel for Carlson also asked to elicit testimony from Hodges that Wynn said he was "damn sure" Carlson was not the shooter. Counsel for Carlson argued this statement was a prior inconsistent statement under Evidence Code section 1235 because Wynn made it after he had identified Carlson in a six-pack photographic lineup. The court reminded counsel for Carlson that the declarant had to make the prior inconsistent statement before the statement it was inconsistent with, and Wynn's May 8, 2014 statement in the presence of Hodges

occurred after Wynn's April 1, 2014 six-pack photographic identification. The court therefore excluded this statement as well.

The court allowed counsel for Carlson to ask Hodges about Wynn's statements that he was carrying a bat, may not have worn a shirt on the day of the shooting, and did not see the car arrive at the scene, the shooter "fumble[ ] around" under the seat, or a gun. When counsel for Carlson resumed direct examination of Hodges, he did not ask any further questions and did not elicit any of the statements the court had ruled were admissible.

2. *Wynn's Statements to Hodges Were Not Admissible as Prior Consistent Statements*

Evidence Code section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791." Thus, "[t]o be admissible as an exception to the hearsay rule, a prior consistent statement must be offered (1) after an inconsistent statement is admitted to attack the testifying witness's credibility, where the consistent statement was made before the inconsistent statement, or (2) when there is an express or implied charge that the witness's testimony recently was fabricated or influenced by bias or improper motive, and the statement was made prior to the fabrication, bias, or improper motive." (*People v. Riccardi* (2012) 54 Cal.4th 758, 802, disapproved on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; see *People v. Crew* (2003) 31 Cal.4th 822, 843 ["[e]vidence of a previous statement made by a witness is admissible under the prior consistent statement exception to the

hearsay rule if there has been an express or implied charge that the witness's testimony is recently fabricated and the prior consistent statement was made before the motive for fabrication is alleged to have arisen"].)

Carlson argues Wynn's statement to Hodges on May 8, 2014 that Carlson was not aiming at him was admissible under subdivision (b) of Evidence Code section 791, which requires that the People expressly or impliedly charged Wynn's trial testimony was fabricated or influenced by bias or improper motive and that Wynn's out-of-court statement occurred before the bias, motive for fabrication, or other improper motive arose. (See *People v. Brents* (2012) 53 Cal.4th 599, 615.) The prosecutor did indeed go to great lengths to show Wynn's trial testimony was fabricated or influenced by bias or improper motive by eliciting testimony from Wynn that cast doubt on his claims he did not see the shooter, the police gave him Carlson's name, and he was under the influence of drugs at the time Detective McGaughey questioned him. The prosecutor also introduced evidence showing Wynn's testimony was motivated by fear.

Wynn's statements to Hodges, however, occurred after Wynn's motive to fabricate arose. As early as January 28, 2014, during Detective McGaughey's first interview with him, Wynn expressed fear that "[p]eople are pointing fingers at me, that I'm a snitch." He said, "I need to get out of here, because I feel like my life is in danger." His fear increased after his encounter with Carlson at the fast food restaurant on April 9, 2014. The next day Wynn admitted to Detective McGaughey that he was a "nervous wreck" and asked for police protection from Carlson. The evidence showed that Wynn's fear of reprisals from Carlson created a motive for him to fabricate the statements he made to

Hodges several weeks later in May 2014. (See *People v. Flores* (1982) 128 Cal.App.3d 512, 524 [trial court did not err in excluding allegedly consistent statement made after the bias, motive for fabrication, or other improper motive arose].)[2]

3. *The Statements to Hodges Were Not Admissible as Prior Inconsistent Statements or Their Exclusion Was Harmless*

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."[3] """The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial

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[2] *People v. Kennedy* (2005) 36 Cal.4th 595, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 458-459, cited by Carlson, is distinguishable because the statements in that case occurred in the right chronological order for purposes of Evidence Code section 791. The witness in *Kennedy* made the consistent statement the day after the crime, and the motive for fabrication was "alleged to have arisen" later when law enforcement and the district attorney threatened the witness with prosecution and gave her immunity. (*Kennedy*, at p. 614.)

[3] Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

testimony." [Citation.] "'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement.'" (*Homick*, *supra*, 55 Cal.4th at p. 859; see *Cowan*, *supra*, 50 Cal.4th at p. 462.) "'"When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper."'" (*Homick*, at p. 859; see *People v. Ledesma* (2006) 39 Cal.4th 641, 711.)

Carlson argues certain statements Wynn made to Hodges were admissible under Evidence Code section 1235 as prior statements that were inconsistent with Wynn's evasive trial testimony. The trial court did not rule on the admissibility of the statements as prior inconsistent statements under Evidence Code section 1235 because counsel for Carlson elected to proceed under Evidence Code section 1236 after the trial court forced him to take a position. Carlson now argues the trial court should have admitted Wynn's statements that he "was clear and certain that his identification was false and that [Carlson] was not the shooter" as prior inconsistent statements under Evidence Code section 1235.

The first statement, that Wynn said his identification was false, did not qualify as a prior inconsistent statement under Evidence Code section 1235. That statement would have been inconsistent with trial testimony by Wynn that his identification was true (or accurate). But Wynn never said that at trial. To the contrary, Wynn testified he was "totally in the blind and didn't know anything," did not get a clear look at the shooter, and never saw the shooter's face. Thus, the statement that his

identification of Carlson as the shooter was false actually would have been consistent with his trial testimony.

The second statement, that Carlson was not the shooter, may have been inconsistent with Wynn's trial testimony that he did not see the shooter. Even if the trial court erred in excluding this statement, however, any error was harmless. Carlson argues the trial court's alleged error was prejudicial because the court admitted the transcripts of Wynn's interviews with Detective McGaughey in their entirety and "prevented [Carlson] from offering an equally contradictory statement that was exculpatory." Carlson, however, does not argue the court erred by admitting the transcripts. Moreover, Peters identified Carlson as the shooter in her interview with Detective McGaughey. Therefore, because "[w]e cannot say the excluded evidence was 'so vital to the defense that due process principles required its admission'" (*Abilez*, *supra*, 41 Cal.4th at p. 503), any error was harmless. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1001 ["the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice"]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [harmless error standard applies to the erroneous exclusion of hearsay evidence]).

B. *Substantial Evidence Supported Carlson's Conviction for Attempted Murder*

Carlson argues substantial evidence does not support the jury's findings of premeditation and deliberation. He contends that, because the People conceded Carlson fired the first shot into the ground and shot "in a fit of rage," the jury could not convict

Carlson of attempted premeditated and deliberate murder. Carlson reads too much into these two concessions.

1. *Applicable Law*

The People charged Carlson with attempted murder and alleged he committed the crime willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a). "The very definition of 'premeditation' encompasses the idea that a defendant thought about or considered the act beforehand." (*People v. Pearson* (2013) 56 Cal.4th 393, 443; accord, *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1264.) "'Deliberate' means '"'"formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action."'"'" (*Boatman*, at p. 1264; accord, *People v. Houston* (2012) 54 Cal.4th 1186, 1216.) "Thus, "'[a]n intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse."'" (*Boatman*, at p. 1264; see *Pearson,* at p. 443.)

"Courts have also emphasized that '"[t]he process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"'" (*Boatman*, *supra*, 221 Cal.App.4th at p. 1265; accord, *Houston, supra,* 54 Cal.4th at p. 1216.) "Judicial reliance on this language, however, has led to criticism that courts have 'collapsed any meaningful distinction between first and second degree murder.' [Citations.] In response, our state Supreme Court reaffirmed the significance of 'preexisting

reflection, of any duration' to distinguish first degree murder (based on premeditation and deliberation) from second degree murder." (*Boatman*, at p. 1265; see *Houston,* at p. 1217; *People v. Solomon* (2010) 49 Cal.4th 792, 813.)

The Supreme Court in *People v. Anderson* (1968) 70 Cal.2d 15 identified three types of evidence—evidence of planning activity, preexisting motive, and manner of killing—to consider in determining whether the evidence supports findings of premeditation and deliberation. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069; *People v. Solomon, supra,* 49 Cal.4th at p. 812.) The Supreme Court in *Anderson* """did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation."""" (*Mendoza*, at p. 1069; *Solomon*, at p. 812.) The decision in *Anderson* nevertheless provides a useful framework for considering the sufficiency of evidence of premeditation and deliberation. (See *Mendoza*, at p. 1069; *Solomon*, at p. 812.)

"'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses 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.'" (*Abilez*, *supra*, 41 Cal.4th at p. 504; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 345.) "'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence.'" (*Abilez*, at p. 504; see *People v. Jones* (2013) 57 Cal.4th 899, 960.) """If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a

contrary finding does not warrant a reversal of the judgment.'"" (*Abilez*, at p. 504; *Jones*, at p. 960.)

2. *Evidence of Motive, Planning, and Method Supports the Jury's Findings of Premeditation and Deliberation*

There was substantial evidence to support the jury's findings. Peters told Detective McGaughey that Carlson said Peters "owed him" because she did not "help him" after he asked her "to stay at his house with his females." She admitted she was a prostitute but said she "wasn't doing it for [Carlson]." She also told the detective Carlson was on the phone with the women who attacked her "the whole time" and throughout the duration of the fight. Once Carlson arrived, he got out of his Suburban and confronted Wynn, a rival pimp. Carlson then returned to his car to retrieve a gun and shot at or in the direction of Wynn from both outside and inside his car.

This evidence supports reasonable inferences that Carlson wanted Peters to work for him instead of Wynn—the motive—and that he planned the attack on Wynn. Even if Carlson aimed the first shot at the ground, the facts that he returned to his car, got in, and pursued Wynn while firing out an open window evidence the type of planning activity indicative of premeditation. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1026 [sufficient evidence of planning shown where the defendant carried a loaded gun to the position from which he shot at the victim]; see also *Pearson*, *supra*, 56 Cal.4th at p. 443 [premeditation exists where the defendant "thought about or considered the act beforehand"].) This evidence also supports the conclusion that Carlson considered his options in formulating a course of action and chose

a manner of killing to accomplish it. Carlson could have returned to his car and ended the confrontation, but instead he chose to prolong the confrontation by pursuing Wynn and shooting at him. (See *People v. Sandoval* (2015) 62 Cal.4th 394, 425 ["[t]he fact that the manner of killing is prolonged . . . supports an inference of deliberation"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1081 [killing was deliberate and premeditated where the defendant "pursued [the victim] and persisted in the argument"]; *People v. Wells* (1988) 199 Cal.App.3d 535, 541 [manner of killing evidenced premeditation and deliberation where the defendant fired a warning shot in the air then ran after the victim and shot him].)

Carlson argues the evidence "overwhelmingly showed that [he] was 'dry firing' or shooting to the sides of Wynn and not at him."[4] While the record included evidence supporting such an inference, substantial evidence also supported the conclusion that Carlson aimed at Wynn while firing. (See *People v. Cunningham* (2016) 244 Cal.App.4th 1049, 1056 ["'[i]n evaluating the evidence, we accept reasonable inferences in support of the judgment and do not consider whether contrary inferences may be made from the evidence'"]; *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1379 ["[t]o the extent [the defendant] argues there is evidence to

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4 "Dry firing" means pulling the trigger of an unloaded firearm. (See, e.g., *U.S. v. Santiago* (S.D.N.Y. 2013) 966 F.Supp.2d 247, 254 [explaining dryfiring as "pulling the trigger with no bullets in the weapon"].) Carlson's use of the phrase, however, appears to refer inaccurately to Peters's interview statement that Carlson "just started dry shooting," by which she seems to have meant that he started shooting without aiming at anything.

support a contrary inference, he misconstrues and/or misapplies the substantial evidence standard of review"].) Wynn and Peters testified Carlson aimed and fired at Wynn, as did neighborhood witnesses. "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) We do not reweigh the evidence already weighed by the trier of fact.

The prosecutor's theory that the shooting resulted from a "fit of rage" did not preclude the jury from finding premeditation and deliberation. There is no evidence Carlson acted out of fear or passion in response to something Wynn did or said. (See *Sandoval*, *supra*, 62 Cal.4th at p. 425 ["[t]here is little indication that the murder was rash and impulsive, as when a defendant acts out of a fear or passion in response to a provocation that is insufficient to show an absence of malice"].) Indeed, there is no evidence Wynn was armed or did anything to threaten Carlson. Instead, the record contains substantial evidence that Carlson "rapidly and coldly" formed the idea to use his gun to get the upper hand in a dispute with Wynn. (See *Mendoza*, *supra*, 52 Cal.4th at p. 1070 [evidence did not support the defendant's theory that he shot a police officer on a "rash impulse" where the jury could have concluded the defendant, knowing he illegally possessed a gun, rapidly and coldly formed the idea to use the gun in an encounter with the officer].)

C. *Carlson Forfeited His Argument the Information Failed To Allege the Prior Serious or Violent Felony*

In connection with count 1, attempted murder, and pursuant to section 667, subdivision (a)(1), the information alleged Carlson suffered a prior conviction for robbery in 1997 and identified it as a "serious felony." In connection with count 2, possession of a firearm by a felon, the information alleged Carlson was a felon because he had been convicted of robbery in 1997. As Carlson observes, the "body" of the information did not allege the 1997 conviction was a serious or violent felony conviction under section 1170.12. The "information summary," however, listed several "special allegations" in connection with counts 1 and 2, including an allegation under section 1170.12. It also stated the "[e]ffect" of a true finding on that allegation would be to double the sentence imposed, which is the consequence of having a prior strike. (See § 1170.12, subd. (c)(1).) Carlson argues the information failed to adequately plead a prior serious or violent felony conviction under section 1170.12.

The People contend, and we agree, Carlson forfeited this argument. Section 1170.12 requires the People to plead and prove that the defendant has one or more prior serious or violent felony convictions. (§ 1170.12, subd. (d).) This requirement ensures the defendant has "fair notice of the allegations that will be invoked to increase the punishment for his or her crimes." (*Houston*, *supra*, 54 Cal.4th at p. 1227; see *People v. Mancebo* (2002) 27 Cal.4th 735, 747.) Where the defendant has notice of the sentence and does not object to the information in the trial court, he or she forfeits that objection on appeal. (*Houston*, at p. 1228; see *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237 ["[a] defendant who acquiesces to have the trier of fact consider a

nonincluded offense not alleged in the indictment "'cannot legitimately claim lack of notice, [and] the court has jurisdiction to convict him of that offense'"'].)

Carlson had fair notice of the special allegation under section 1170.12. Although the body of the information did not include the section 1170.12 allegation, the information summary did. Moreover, at trial the parties discussed the "strike allegation" and "strike prior" on several occasions. For example, the trial court noted Carlson stipulated to the prior robbery conviction for purposes of count 2 but not for purposes of "the strike allegation." The court also stated, "As both sides know, the jury doesn't decide identity on the strike prior. All they decide is if someone with that name suffered the conviction. Identity is to be determined by the court." In response, the prosecutor said he had provided counsel for Carlson "a copy of the 969(b)" packet, which generally includes documents proving a defendant's prior convictions, and the trial court referred to the fact that the trial on Carlson's prior strike was bifurcated from the trial on the merits. Throughout this discussion counsel for Carlson did not object or express surprise that the trial court could sentence Carlson, if convicted, under the three strikes law.

At the "priors trial" following the verdict, Carlson did not object to the propriety of the allegation he had been convicted of a serious or violent felony within the meaning of section 1170.12. Nor did he object to the People's sentencing recommendation, which included requests to double the base terms under section 1170.12. When the trial court sentenced Carlson in accordance with section 1170.12, counsel for Carlson did not object. Even if the information failed to plead the strike allegation with sufficient specificity, Carlson had fair notice of that allegation

and failed to object at trial. (See *Houston*, *supra*, 54 Cal.4th at p. 1227 [“‘where defendant failed to object at trial to the adequacy of the notice he received, any such objection is deemed waived’”].)

Carlson cites *People v. Corban* (2006) 138 Cal.App.4th 1111 in support of his contention that we can “correct” the trial court’s sentencing error even though he did not object prior to sentencing. The court in *Corban* held the defendant could challenge a sentencing enhancement imposed after she pleaded no contest without first obtaining a certificate of probable cause under section 1237.5. (*Corban*, at p. 1116.) The court in that case noted the primary issue was whether the defendant’s challenge to the sentence was essentially a challenge to the validity of her plea. (*Ibid.*) That is not the issue here.

D. *Carlson’s Sentence on Count 2 Is Unauthorized*

On count 1, which the trial court referred to as the “principal term,” the court imposed an indeterminate sentence of life in prison with the possibility of parole and a minimum period of confinement of seven years, doubled to 14 years under the three strikes law, plus five years pursuant to section 667, subdivision (a)(1). On count 2, the court imposed a determinate, consecutive term of one-third the middle term of two years, or eight months, again doubled under the three strikes law, for a total of 16 months. The sentence on count 2 is unauthorized.

“Indeterminate term crimes and determinate term crimes are subject to two different sentencing schemes.” (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) Sentencing for the indeterminate term crime of attempted murder is governed by section 664, subdivision (a). Sentencing for the determinate term crime of possession of a firearm by a felon is governed by section

18 and section 1170 *et seq.*, also known as the determinate sentencing law. (See *People v. Sasser* (2015) 61 Cal.4th 1, 8.) "Sentencing under these two sentencing schemes must be performed separately and independently of each other." (*Neely*, at p. 797; accord, *People v. Garza* (2003) 107 Cal.App.4th 1081, 1094.)

"Offenses for which an indeterminate sentence of life imprisonment or death can be imposed are not subject to [the determinate sentencing law]." (*Neely*, *supra*, 176 Cal.App.4th at p. 798; see *People v. Felix* (2000) 22 Cal.4th 651, 659 [the determinate sentencing law does not "'affect any provision of law that . . . expressly provides for imprisonment in the state prison for life'"].) Consequently, when a defendant is sentenced for an indeterminate term crime (such as attempted premeditated murder) and a determinate term crime (such as possession of a firearm by a felon), there are no principal and subordinate terms. (*Neely*, at p. 798; see *Garza*, *supra*, 107 Cal.App.4th at p. 1094 ["'[w]hen a defendant is sentenced to both a determinate and an indeterminate sentence, . . . neither term is "principal" [ ]or "subordinate"'"].) Instead, "[o]nly after each is determined are they added together to form the aggregate term of imprisonment." (*Neely*, at p. 797.)

The trial court improperly combined the two sentencing schemes by declaring Carlson's sentence for attempted murder the "principal" term, and then imposing a reduced sentence on count 2 as a subordinate term under section 1170.1. The result is an unauthorized sentence. (See *Neely*, *supra*, 176 Cal.App.4th at pp. 797-799.) Therefore, we must remand the matter for resentencing on count 2. (*Id.* at pp. 799-800; see *People v. Woods* (2010) 191 Cal.App.4th 269, 273 ["'[w]hen an illegal sentence "is

discovered while defendant's appeal is pending, the appellate court should affirm the conviction and remand the case for a proper sentence"""]; *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311 [remand is appropriate where imposition of an enhancement results in an unauthorized sentence].)

Carlson contends his "aggregate sentence" on count 2 is not unauthorized because it "is within the range of sentences that the court was legally authorized to impose but which the court arrived at in a legally unauthorized way." Carlson reasons the court could have arrived at the same 16-month sentence on count 2 had it stricken Carlson's prior serious felony conviction and imposed the low term. Carlson argues the "correct procedure" in these circumstances is to remand for correction "with the limitation that a greater aggregate sentence may not be imposed."

"[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354; see *People v. Moore* (2017) 12 Cal.App.5th 558, 572.) In this case, Carlson never asked the trial court to strike his prior serious felony conviction pursuant to section 1385 (a motion commonly referred to as a "*Romero* motion" under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), nor did the trial court strike Carlson's prior serious felony conviction on its own. Instead, Carlson submitted to the People's sentencing recommendation, including their recommendation that the trial court double Carlson's sentence based on a prior strike under section 1170.12. And "any failure on the part of a defendant to invite the court to dismiss under section 1385 following *Romero* waives or forfeits his or her right to raise the issue on appeal." (*People v. Carmony* (2004) 33

Cal.4th 367, 375-376; see *Scott*, at pp. 352-353.) Thus, in the circumstances of this case, the sentence Carlson proposes was not within the range of sentences the trial court was legally authorized to impose and, on remand, the trial court may in its discretion resentence Carlson to a longer aggregate sentence. (See *Neely*, *supra*, 176 Cal.App.4th at p. 800 ["[a] more severe sentence may be imposed following a successful appeal if the initial sentence was unlawful or unauthorized"]; accord, *People v. Craig* (1998) 66 Cal.App.4th 1444, 1449.)

Carlson also argues the trial court erred by imposing a consecutive sentence on count 2. In particular, he contends the trial court erroneously believed it had to impose a mandatory consecutive sentence under section 667, subdivision (c)(6). In sentencing Carlson on count 2, the trial court stated: "That is a mandatory consecutive sentence since this is a strike offense, and even if the court had the option of running that concurrent, the court does not believe it is a [section] 654 offense, as the possession of a firearm was separate and apart from the attempted murder, although it was used in the attempted murder. [Carlson] clearly had possession of it prior to that and it's also a status offense."

We agree with Carlson the trial court misread section 667, subdivision (c)(6), and misunderstood its discretion under that statute. Consecutive sentences are only mandatory under section 667, subdivision (c)(6), if the "current conviction" is for (here, two) felonies "not committed on the same occasion" and "not arising from the same set of operative facts." (See *People v. Hojnowski* (2014) 228 Cal.App.4th 794, 800 [section 667, subdivision (c)(6), "increases the punishment for certain recidivist offenders by making consecutive sentences mandatory in Three Strikes cases

when the defendant was convicted of more than one offense *not* committed on the same occasion or arising out of the same operative facts"].) "To remove the multiple negatives from the quotation, if the offenses share 'common acts or criminal conduct' that serve to establish the elements of the current offenses, then concurrent sentencing is an option." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1567; see *People v. Danowski* (1999) 74 Cal.App.4th 815, 821 ["if two current felonies either *were* committed on the same occasion or *do* arise from the same set of operative facts, the three strikes law does not mandate consecutive sentencing; the trial court retains discretion to sentence either concurrently or consecutively"].)

The trial court did state that, even if it had the option of imposing a concurrent sentence on count 2, section 654 did not apply because Carlson's possession of a firearm and the attempted murder were "separate and apart" and, although Carlson used the firearm in attempting to commit murder, he possessed the firearm prior to the attempted murder. The standard under section 654, however, does not apply to section 667, subdivision (c)(6). The Supreme Court has rejected the argument that the analysis for determining whether 667, subdivision (c)(6), "requires consecutive sentencing is coextensive with the test for determining whether section 654 permits multiple punishment." (*People v. Lawrence* (2000) 24 Cal.4th 219, 225-226.) To the contrary, "section 654 is irrelevant to the question of whether multiple current convictions are sentenced concurrently or consecutively under the three strikes law, because section 654 does not allow *any* multiple punishment, whether concurrent or consecutive, and the analyses performed under the two statutes are entirely separate." (*Lawrence*, at

p. 226; see *Garcia*, *supra*, 167 Cal.App.4th at p. 1566 ["the multiple punishment provisions of section 654, subdivision (a) are irrelevant in the context of such recidivist sentencing"].)

The People contend Carlson forfeited this argument because his trial attorney did not object at sentencing. The People concede, however, the court imposed an unauthorized sentence on count 2. Because we must remand for the trial court to impose a new sentence on count 2, we direct the trial court to apply section 667, subdivision (c)(6), and determine whether the circumstances warrant a consecutive or concurrent sentence on count 2. (See *People v. Leon* (2016) 243 Cal.App.4th 1003, 1023 [exercising discretion to resolve a sentencing issue not raised in the trial court "in the interests of fairness and judicial economy, since the matter is already being remanded for other sentencing matters, and to forestall unnecessary ineffective assistance of counsel claims"]; see also *People v. Deloza* (1998) 18 Cal.4th 585, 600 [remand is appropriate where "the trial court misunderstood the scope of its discretion to impose concurrent sentences for defendant's current convictions, and erroneously believed consecutive sentences were mandatory"].)

DISPOSITION

The judgment of conviction is affirmed and the matter is remanded for resentencing on count 2, possession of a firearm by a felon.

SEGAL, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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