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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LEE PORTER YOUNG, Defendant and Appellant.	B268070 (Los Angeles County Super. Ct. No. MA062976)

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew E. Cooper, Judge. Affirmed as modified.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lee Porter Young was charged with nine counts: first-degree burglary of an occupied residence with a person present (Pen. Code, § 459)[1] (count 3); felon in possession of a firearm (§ 29800, subd. (a)(1)) (count 4); felon in possession of ammunition (§ 30305, subd. (a)) (count 5); resisting a peace officer (§ 148, subd. (a)) (count 6); exhibiting a firearm (§ 417, subd. (a)(2)(b)) (count 7); attempting to dissuade a witness (§ 136.1, subd. (a)(2)) (count 8); battery by gassing (spitting) a custodial employee (§ 243.9, subd. (a)) (count 9); assault by means likely to cause great bodily injury (§ 245, subd. (a)(4)) (count 10); and battery (§ 242) (count 11). As to counts 3, 4, and 10, it was further alleged that appellant had suffered (1) a prior serious or violent felony (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); and (2) three prior convictions for which he had served a prison term (§ 667.5, subd. (b)). As to all counts, it was alleged that appellant had suffered a prior serious felony (§ 667, subd. (a)).[2]

The jury acquitted appellant of count 3 and returned guilty verdicts on the remaining counts. Trial on the prior conviction allegations was bifurcated, and the trial court found the allegations true. Using count 10 as the base count, the trial court sentenced appellant to a total term of 25 years eight months in state prison.

Appellant contends (1) the trial court prejudicially erred in failing to sua sponte give certain jury instructions; (2) there was

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Counts 7 and 11 were dismissed for delay in bringing the action.

insufficient evidence to support his conviction for resisting a peace officer; (3) his sentence on count 5 should have been stayed; and (4) the one-year enhancement on count 10 for his prior burglary offense should have been stricken. We agree with appellant on his last two contentions. In all other respects, we affirm the judgment.

FACTS

Assault By Means Likely to Cause Great Bodily Harm (Count 10)

Appellant and victim Udell Moon (Moon) were acquaintances who lived in the same apartment complex and socialized two or three times a week. On May 5, 2014, at around 9:00 p.m., appellant called the cell phone of Moon's wife, Andrea Gardner (Gardner), and asked to speak to Moon. Moon had just split almost a fifth of brandy with his wife. Moon was feeling the effects of alcohol; his wife was not. Appellant asked Moon to come outside and meet him.

Moon left his apartment. He and appellant walked side-by-side toward appellant's truck. Gardner stayed in bed. Her mother, sister, and daughter were also in the apartment at the time.

As Moon and appellant approached the carport, Moon was hit in the face. At trial, Moon testified that he did not remember the details of the attack. Moon did recall that appellant was with more than one person when it happened, but Moon did not know who the other people were. Moon's wallet was stolen and he never recovered it.

At some point after Moon left his apartment, appellant barged inside the apartment without knocking and went to Gardner's room. Appellant began screaming and yelling at her,

accusing Moon of having taken appellant's gun. Appellant said, "Tell your husband to give me my gun." Appellant then grabbed Gardner's cell phone and left the apartment. Gardner never saw her phone again.

When Gardner went outside, she found Moon on the ground, bleeding profusely from his face and appearing disoriented. Appellant was standing over Moon with his hands raised, screaming, "I told you guys I'm not no joke, and I'm not nobody to play with." Gardner shoved appellant away from her husband, and she and appellant "were tussling" a bit before appellant drove away toward the back of the complex where he lived.

Moon was taken by ambulance to the hospital. He suffered a fractured eye socket, bloody nose, and swelling and bruising to his face and eye. It took three weeks to a month for his face to heal.

Two days after the attack, on May 7, 2014, Los Angeles County Sheriff's Department Detective James Speed interviewed Moon. Moon testified that he told the detective who hit him. Moon did not know appellant's phone number because it was in his wife's cell phone, which appellant had taken.

Resisting Arrest While in Possession of a Firearm and Ammunition (Counts 4, 5 & 6)

On May 8, 2014, Detective Speed went to appellant's complex to arrest him. The detective drove a plain sedan, but was wearing his sheriff's uniform.

When Detective Speed pulled up, appellant was standing by a car, either loading or unloading it, and a woman and child were nearby. When Detective Speed was about 25 feet away from appellant, he stopped his car and began to get out. Appellant

made eye contact with him and took off running through the apartment complex. Detective Speed got out of the car and chased after appellant, saying, "Sheriff's Department," and telling appellant to get down. Appellant kept running.

Appellant looked back once or twice as he was running. Detective Speed continued to yell at appellant to stop. At some point, Detective Speed was about 100 feet away from appellant and could see that appellant had something in his left hand; appellant was carrying it like a football. As Detective Speed resumed the chase, he noticed that appellant no longer had the object in his hand. Appellant eventually rounded a corner, and Detective Speed lost sight of him. Appellant jumped over a wall, and the police set up a containment perimeter. Appellant was detained a short time later.

Detective Speed searched appellant but did not find any object the same size as the one he had seen appellant carrying. Detective Speed then returned to the area where he had lost sight of appellant and found a loaded .38 caliber revolver tied in a sock on a patio on the other side of the wall appellant had been running along. Detective Speed opened the gun and found live rounds in the cylinder. Detective Speed also noticed that appellant had injuries consistent with having been in a fight. Appellant had small abrasions on his hand and a small abrasion under his eye. When asked about his injuries, appellant said he got them when running away from Detective Speed.

The owner of the patio where the gun was found reported that she did not own a gun and had not seen a gun tied in a sock on her patio the last time she had used it. Appellant's ex-wife, who was married to him at the time of the crimes, knew appellant to carry a gun wrapped tightly in a sock. DNA samples

collected from the gun included appellant as a possible contributor.[3]

DISCUSSION

I. No Reversal Based on Jury Instructions

Appellant contends the trial court prejudicially erred by failing to instruct the jury sua sponte with both (1) the bracketed portion of CALCRIM No. 358 regarding the treatment of a defendant's unrecorded statements with caution, and (2) the bracketed portion of CALCRIM No. 401 regarding a defendant's presence at the scene of a crime.

A. Relevant Law

A trial court must instruct, sua sponte, on the general principles of law that are "closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) The trial court's decision whether to give a jury instruction is subject to de novo review. (*People v. Licas* (2007) 41 Cal.4th 362, 366; *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

In reviewing a challenge to jury instructions, we ask "whether there is a reasonable likelihood the jury understood the charge as defendant asserts. . . . We determine how it is reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law." (*People v. Raley* (1992) 2 Cal.4th 870, 899.) "The relevant inquiry here is whether, 'in the context of the instructions as a whole and the trial record, there is a reasonable

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[3] We do not set forth the facts pertaining to count 8 (attempting to dissuade a witness) and count 9 (battery by gassing) because they are not at issue.

likelihood that the jury was misled to defendant's prejudice.' [Citation.] Also, ""we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]"' [Citation.]" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.) "The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

B. Unrecorded Statements

Pursuant to CALCRIM No. 358, the jury was instructed as follows:

"You have heard evidence that the defendant made an oral or written statement before the trial. You must decide whether the defendant made any such statements, in whole or in part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements."

The jury was not instructed with the following bracketed paragraph of CALCRIM No. 358: "Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded."

Appellant points to Gardner's testimony that he burst into her room and screamed, "Tell your husband to give me my gun," and later screamed, while standing over her injured husband, "I told you guys I'm not no joke, and I'm not nobody to play with." Appellant argues these were inculpatory statements that tended to show he had a motive for the attack and participated in the attack. Because they were oral statements, he insists the trial

court should have sua sponte instructed the jury to treat them with caution.

In *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 (not cited in appellant's opening brief), our Supreme Court concluded that the instruction to treat with caution extrajudicial statements "need not be given sua sponte." The Court reasoned that "[t]he cautionary instruction on admissions is no longer '*necessary* for the jury's understanding of the case' [citation] because courts are now required to instruct the jury, in all criminal cases, concerning the general principles that apply to their consideration of witness testimony." (*Ibid.*) Because appellant did not request this instruction to be given, there was no error by the trial court in not giving it sua sponte.

C. Presence at the Scene

Pursuant to CALCRIM No. 401, the jury was instructed regarding aiding and abetting as follows: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been

present when the crime was committed to be guilty as an aider and abettor."

The instruction did not contain the following bracketed paragraph of CALCRIM No. 401: "If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her [an] aider and abettor."

Appellant argues that because "Mr. Moon was unable to remember anything at trial except 'getting hit by the carport' by more than one person, there was evidence that Mr. Young was merely present without being involved when Mr. Moon was attacked by other, unidentified assailants." Appellant therefore insists that the trial court was obligated sua sponte to give the bracketed instruction.

The People point out that (1) appellant did not request this instruction be given, and (2) our Supreme Court has never held that a trial court has a sua sponte duty to give this instruction.

We are not willing to say that the presence at the scene language instruction constitutes "one of those 'general principles of law' so 'necessary for the jury's understanding of the case' that the instruction must be given by the trial court even when the defendant does not request it." (*People v. Diaz*, *supra*, 60 Cal.4th p. 1189.) We agree with the People that "the language simply reflects a common sense proposition, i.e., presence at the scene of a crime is a factor to consider in determining whether a person is an aider and abettor of a crime but does [not], by itself, establish a defendant aided and abetted a crime." We also note that a defendant may not always want the instruction to be given,

particularly in light of the first sentence that his or her presence is a factor for the jury to consider.

In any event, even assuming the instruction should have been given here, the error was harmless for at least two reasons. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

First, both counsel discussed the issue in closing. (See *People v. Boyce* (2014) 59 Cal.4th 672, 709 ["In light of the standard instructions and counsel's argument, the concept was well covered"]; *People v. Young, supra*, 34 Cal.4th at p. 1202 [reviewing court "must consider the arguments of counsel in assessing the probable impact of the instruction on the jury"].)

Defense counsel pointed out to the jury there was not "one shred of evidence that if there were two other guys out there" that they had any connection with appellant, and that if appellant was "the one who made the phone call to Udell [Moon] to come out," there was no evidence that appellant "must have been part of what another person did." The prosecutor argued: "The assault on Udell Moon, I think this quote, '"I'm not no joke. I'm not nothing to play with,' really tells you everything you need to know about that assault because—think about it. [¶] If [appellant] was just walking down the street with Udell Moon and some random person came up and hit Udell Moon over the head, would [appellant have] said that? [¶] No."

Second, there was overwhelming evidence of appellant's guilt. Just before the attack, appellant called Gardner, asked to speak to Moon, and asked Moon to come outside and meet him. Moon testified that he and appellant were walking side-by-side when Moon was hit, though Moon could not remember the details of the attack. Moon further testified that appellant had other people with him when appellant attacked Moon, though Moon did

not know who they were. After attacking Moon, appellant barged into Moon's house and accused Moon of having taken appellant's gun, providing a motive for the attack. Appellant then stole Gardner's cell phone and quickly left the apartment. When Gardner went outside, she found Moon on the ground, bleeding profusely from his face, apparently disoriented. Appellant further incriminated himself by standing over Moon with his hands raised, screaming, "I told you guys I'm not no joke, and I'm not nobody to play with."

Two days later, Moon identified his attacker, and told the police where he lived, though Moon was unable to provide appellant's phone number as it was in Gardner's phone, which appellant had stolen. After arresting appellant, Detective Speed noticed that appellant had injuries consistent with having been in a fight. He had small abrasions on his hand and a small abrasion under his eye. Appellant's only explanation for his injuries was that he got them when he was running away from Detective Speed. In sum, there was overwhelming evidence that appellant lured Moon out of his apartment, attacked him, and then gloated about the attack afterward.

II. Substantial Evidence Supports the Conviction for Resisting a Peace Officer (Count 6)

Appellant contends the evidence was insufficient to support his conviction for resisting a peace officer under section 148, subdivision (a).

It is well established that an appellant "bears a massive burden in claiming insufficient evidence" because the reviewing court's "role on appeal is a limited one." (*People v. Akins* (1997) 56 Cal.App.4th 331, 336.) We review the record in the light most favorable to the judgment and determine whether it discloses

substantial evidence such that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Earp* (1999) 20 Cal.4th 826, 887.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 690.) We do not reweigh evidence, reappraise the credibility of witnesses, or resolve conflicts in the evidence, as these functions are reserved for the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The same standard applies to the review of circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) Moreover, if the findings of the trier of fact are reasonably justified by the record, our opinion that the evidence could be reasonably reconciled with a contrary finding does not merit reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.)

"'The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.'" (*In re Amanda A.* (2015) 242 Cal.App.4th 537, 546.) "'The offense is a general intent crime, proscribing only the particular act (resist, delay, obstruct) without reference to an intent to do a further act or achieve a future consequence.'" (*Ibid.*) The jury was so instructed with CALCRIM No. 2656.

Here, the evidence was sufficient for the jury to conclude that appellant was resisting Detective Speed when appellant ran away from the officer as the officer attempted to serve an arrest warrant. Detective Speed testified that three days after the

crime, he drove to appellant's complex to arrest appellant. Detective Speed was wearing his sheriff's uniform. When Detective Speed pulled up behind appellant, he was about 25 feet away. As Detective Speed began to get out of his car, appellant made eye contact with him and then took off running through the apartment complex. Detective Speed chased after appellant, saying "Sheriff's Department," and telling appellant to get down. But appellant kept running. Detective Speed also testified that appellant looked back once or twice as he was running, and Detective Speed continued to yell at appellant to stop.

While appellant argues there was no evidence that he heard Detective Speed's commands as he was running away, the obvious inference from the evidence is that appellant was evading Detective Speed. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208 [circumstantial evidence "is as sufficient as direct evidence to support a conviction"].) That appellant considers it "unlikely" he would have heard Detective Speed is not a basis for holding that no reasonable jury could have convicted appellant of resisting a peace officer. (See *People v. Hill* (1998) 17 Cal.4th 800, 850, fn. omitted ["That the evidence could be consistent with other possible scenarios is irrelevant, however, so long as there was substantial evidence from which a rational trier of fact could have found defendant" guilty].)

III. Sentence on Count 5 Should Have Been Stayed

Appellant contends, and the People agree, that the trial court's imposition of consecutive sentences for felon in possession of a firearm (count 4) and felon in possession of ammunition (count 5) violated section 654, as the evidence showed that the

only ammunition appellant possessed was the ammunition contained in the firearm he illegally possessed.[4]

Section 654 bars multiple punishments where multiple crimes are directed toward a single goal. (*People v. Chacon* (1995) 37 Cal.App.4th 52, 66.) "If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Thus, the statute applies where there was a course of conduct that violates more than one statute, but nonetheless constitutes an indivisible transaction. (*People v. Flowers* (1982) 132 Cal.App.3d 584, 588 [where both crimes are part of an indivisible course of conduct with a single objective, imposition of sentence for each violates section 654].)

In *People v. Lopez* (2004) 119 Cal.App.4th 132, Division Six of this court noted: "The Legislature has wisely declared that specified people should not possess firearms and/or ammunition. The obvious legislative intent is to prohibit these persons from combining firearms with ammunition. Appellant's obvious intent was to possess a loaded firearm." (*Id*. at p. 138.) Thus, the court concluded that "[w]here, as here, all of the ammunition is loaded into the firearm, an 'indivisible course of conduct' is present and section 654 precludes multiple punishment" when a felon both

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[4] Although appellant failed to raise a section 654 claim at the sentencing hearing, it is well-settled that a trial court acts in excess of its jurisdiction and imposes an unauthorized sentence when it erroneously stays or fails to stay execution of a sentence under section 654. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Thus, appellant may raise the issue for the first time on appeal. (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1004, fn. 2.)

possesses a firearm and ammunition. (*People v. Lopez, supra,* at p. 138.) We agree.

Accordingly, the consecutive sentence of one year four months on count 5 for felon in possession of ammunition is stayed under section 654.

IV. One-Year Enhancement Must Be Stricken on Count 10

Finally, appellant contends, and the People agree, that the trial court erred in imposing consecutive enhancements on count 10 for the same prior felony conviction.

The People alleged, and the trial court found, that appellant had suffered a conviction in 2000 for violation of section 459 (burglary) in case number MA021012, and that this constituted a prison prior under section 667.5, subdivision (b); a serious felony prior under section 667, subdivision (a); and a strike prior under section 667, subdivisions (b) through (j) (as a strike prior). At sentencing, the court imposed enhancements on count 10 under all three provisions—doubling his four-year sentence to eight years; adding five years for the serious felony prior conviction under section 667, subdivision (a); and adding one year for the burglary prison prior under section 667.5, subdivision (b).

In *People v. Jones* (1993) 5 Cal.4th 1142, 1153 (*Jones*), our Supreme Court held that a court may not use the same prior offense to enhance a defendant's sentence under both section 667, subdivision (a) and section 667.5, subdivision (b). The *Jones* court stated: "[T]he voters did not specify that enhancements under sections 667 and 667.5 were both to apply to the same prior offense; rather, subdivision (b) of section 667 and the rules of statutory construction lead us to the opposite conclusion." (*Jones, supra,* at p. 1153.) Accordingly, the *Jones* court directed

that the one-year enhancement under section 667.5, subdivision (b) be stricken. We likewise strike the one-year enhancement under section 667.5, subdivision (b) for appellant's prior burglary conviction in 2000.[5]

DISPOSITION

The sentence of one year four months on count 5 is stayed under section 654. The one-year enhancement on count 10 under section 667.5, subdivision (b) for appellant's prior burglary conviction is stricken. The clerk of the trial court is directed to correct the abstract of judgment to reflect these changes and to forward an amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT

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[5] Again, because the sentence imposed is unauthorized, we address it on appeal despite the absence of an objection below.