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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRENT ZUBEK,

Defendant and Appellant.

B262568

(Los Angeles County
Super. Ct. No. PA071240)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden Zacky, Judge. Affirmed as modified.

David H. Goodwin, 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, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Jurors found defendant—a felon who possessed multiple firearms—murdered his two housemates. He stuffed their bodies into containers, hid their decomposing bodies in his backyard and in a storage unit, and lied about their whereabouts. Jurors further found that defendant assaulted six peace officers as he attempted to elude capture for the murders. We reject defendant’s numerous challenges to his convictions, modify his sentence, and affirm the judgment as modified.

FACTS

Defendant and his ex-girlfriend Amy Harder both used methamphetamine. Harder was addicted to methamphetamine for 20 years, and admitted that she used methamphetamine at least some of the days she testified at defendant’s trial. Defendant testified that methamphetamine affects a person’s perception of reality and that a person can hallucinate when using the controlled substance. He further testified that paranoia was a side effect of methamphetamine use.

In June 2011, defendant and Harder lived in a house with John Lee and Lee’s girlfriend Oletta Williams. Defendant’s son also lived with them. Harder may have decided to move out July 1, 2011, the day before Lee and Williams were killed but was present at the time of the killings.

1. Murder of Lee and Williams

It was undisputed that on July 2, 2011, Lee and Williams were killed. Both died of multiple gunshot wounds. They were not killed with the same firearm.

It further was undisputed that defendant placed their bodies in storage containers where their bodies decomposed until police officers found them several weeks later. Defendant admitted that he moved the bodies from his trailer to a storage

unit but later returned them to his trailer when the storage unit manager alerted him to complaints of the odor emanating from his unit.

Defendant admitted that he killed Lee, but claimed that he acted in self-defense.¹ Defendant denied killing Williams. He claimed that Lee killed Williams and that he did not arm himself until after he heard gunshots. Defendant testified that after shooting Lee, he observed that Williams had been killed. Defendant admitted that he was using methamphetamine and not “thinking the most rational” on the day Lee and Williams were killed.

In contrast to defendant’s testimony, Harder testified that defendant killed Williams and that she observed the killing. According to Harder, on July 2, Harder was at defendant’s house and asked to take a shower. Harder was in a bathroom and had turned on the water for her shower when she heard Lee’s voice and gunshots. Harder exited the bathroom and heard Williams say, “Oh, my God, Brent, no, no.” She observed Lee on the floor with his head down and blood on his shirt.

Then Harder saw Williams running and observed defendant follow Williams and shoot her. Harder “saw Brent with his hand out.” She saw him point the gun at Williams and

¹ Defendant testified that Lee was upset that defendant would not loan him defendant’s truck. Defendant heard gunshots and grabbed his gun. Lee ran towards defendant screaming, “It’s all your fault.” Lee pointed his gun at defendant and defendant fired at Lee. Defendant testified that he was not hallucinating when he saw Lee shooting at him. Jurors must have rejected defendant’s testimony because they necessarily rejected his claim of self-defense when they convicted him of first degree murder.

pull the trigger. After shooting Williams, defendant hugged Harder and said, "I'm sorry I had to do it."²

Harder left the house, but then returned later that day and smoked methamphetamine with defendant.

2. Assaults on Peace Officers

Sometime after the killing of Lee and Williams, defendant fled. He took two loaded guns with him. He was concerned when the officer supervising his federal supervised release (akin to parole) called him to take a urine test to determine whether he used a controlled substance. Based on the phone message, defendant believed he would be arrested. He left his house with a backpack and two guns. When he attempted to return home he saw several police vehicles and assumed that police officers intended to search the house where he had been living and where Lee and Williams had been killed.

Defendant did not return home. Instead, he attempted to elude capture. Harder bought defendant a baseball hat in an effort to help disguise him.

On August 14, 2011, defendant believed that officers were following him, and he stopped in a grocery store parking lot, left his truck there, and walked away. He left a gun in the truck. The gun was loaded and ready to fire.

² Detective Ruben Arellano testified that when he interviewed Harder, she said she did not see defendant shoot Williams. Harder acknowledged that she had made prior inconsistent statements about whether she saw defendant shoot Williams. Harder testified that she previously had been trying to protect defendant. Defendant argued that Harder lied about seeing him shoot Williams and that she may have hallucinated.

Defendant walked a short distance to another parking lot, where he noticed a car with keys in the ignition and the engine running. Defendant stole the vehicle. A few days later defendant stole another vehicle.

a. Assault on Hechavarria

On August 21, 2011, Sergeant Rafael Hechavarria was conducting surveillance of Harder in an effort to locate defendant. Hechavarria's partner observed Harder pick up defendant and drive him to a gas station. Defendant explained that he had no gas and had called Harder to drive him to a gas station. At that time, defendant knew that there was a reward for his capture, and he was concerned that the vehicle Harder was driving had been equipped with a tracking device.

Hechavarria, who was wearing a jacket identifying him as a police officer, observed defendant in the passenger seat and attempted to stop Harder and defendant. Hechavarria yelled, "Stop, police, stop the car." Police Officer Darin Flores also yelled, "Stop, police." He yelled it several times. Defendant testified that he heard someone yell "stop" but observed no police vehicles.

Harder stopped the vehicle. Hechavarria ordered Harder and defendant to put their hands in the air.

Defendant did not comply. He exited the vehicle and fled, running. Hechavarria followed defendant and observed him climb over a five-foot high wall. Hechavarria attempted to follow defendant over the wall. As he propped himself up on the wall, Hechavarria heard a gunshot and saw a muzzle flash. Hechavarria testified that defendant fired the shot when he observed Hechavarria lifting himself over the wall. Hechavarria further testified that defendant fired to stop Hechavarria from

pursuing him. The muzzle flash was in a shape that suggested defendant fired directly at Hechavarria.³ Hechavarria testified that the flash was consistent with a shot fired at him, not one fired into the ground. No bullets were found in the wall. Officer Anthony Acosta, who was part of the team conducting surveillance on Harder, testified that defendant fired at Hechavarria after Hechavarria was halfway over the wall.

It was undisputed that defendant “fired a round” when Hechavarria was chasing him. Defendant argued that he was trying to “scare off” Hechavarria. Defendant testified that he shot into the ground but acknowledged that he earlier had admitted to firing in the air.

b. Additional Assaults on Peace Officers

After Hechavarria’s unsuccessful effort to stop defendant, officers continued to search for defendant using a trained dog and a helicopter. From the helicopter, Officer Michael Fraser, a flight officer, observed defendant hiding on a rooftop near an air conditioning unit. Fraser told officers on the ground that defendant was on the roof and then turned on a bright light from the helicopter, directing light on defendant. Defendant stood up holding a handgun. The gun was loaded, and defendant testified he had a loaded firearm to “protect [him]self” from the police if he “needed to.” Defendant testified: “I had my fears. I know now it seems silly, but when you do meth you get paranoid and it was real to me then. It was a real paranoid event then.”

Fraser broadcast to the other officers, “He’s got a gun.” Fraser was worried that it was pointed in the direction of the

³ Hechavarria was familiar with the shape of muzzle flashes based on his 27 years as a police officer and sergeant.

officers. Holding the firearm, defendant moved towards the officers on the ground: Dain Hurst, Thomas Chinappi, James Gastelo, Eduardo Perez, and Thomas Call, the canine handler.

Officers who were lined up on the ground, wore police uniforms. Call observed defendant stand up on the roof, and extend his right arm, holding a handgun. Defendant looked down at the officers. Defendant pointed his weapon at Call and the entire team. There were no structures or trees under which the officers could take cover. Defendant had a tactical advantage because he was elevated. Call warned his team members that defendant had a gun.

Hurst testified that he saw defendant appear from behind an air conditioning unit, holding a handgun. Hurst testified that defendant “rotate[d] in [his] direction with the handgun in his hand” and that defendant was trying to fire at Hurst and his teammates. The muzzle and barrel rotated in Hurst’s direction. Hurst fired one round in defendant’s direction.⁴

Perez also saw defendant stand up on top of the roof, holding a firearm. Chinappi saw defendant stand, pointing his firearm in the direction of the officers on the ground. Gastelo also testified that defendant pointed his firearm at Gastelo and his team members. The helicopter pilot also saw defendant point his firearm at the officers on the ground.

In an interview, defendant said he could have shot and killed numerous police officers, but he did not. Defendant

⁴ Hurst hit defendant in the hip. The surgeon treating defendant testified that he suffered from a graze wound, and it was impossible to determine if the bullet entered in defendant’s front or back. Defendant testified and argued that he was hit from behind.

testified that the night before he was arrested he was “paranoid and tripping.” He thought that officers were surrounding him and chasing him. He crawled into the sewer to avoid the officers who he believed were chasing him. Later he realized he had “just imagined everything.” But he crawled back into the sewer to retrieve the gun he had left there. Defendant testified, “I always had a gun around me.”

3. Felon in Possession of a Firearm

Defendant admitted to being a felon in possession of a firearm. He admitted to suffering prior convictions for bank robberies. He claimed that he could not alert police about the Williams and Lee killings because he would have been incarcerated for possessing a firearm. Defendant admitted that he cleaned up the house after the killings and lied about Lee’s and Williams’s whereabouts, testifying that he wanted to wait to report the deaths until his federal supervised release had concluded.

Defendant testified that he learned to shoot when he was nine years old. Defendant testified that he “always liked guns.” He testified that “[i]f the police would have searched the house better they would have found more guns.” He testified that he had hidden riffles and another gun in the attic. Defendant admitted prior convictions for two counts of armed bank robbery, one count of conspiracy to commit robbery, and firearm use charges. Defendant served 16 years in federal prison and was scheduled to remain on supervised release through October 6, 2011.

Alex Guevara, a federal probation officer, supervised defendant. He testified that defendant had been convicted of multiple counts of armed bank robbery, conspiracy to commit

armed bank robbery, and that defendant was convicted of four counts of use of a firearm in a violent crime. As part of his supervised release, defendant was not permitted to possess a firearm.

PROCEDURE

Defendant represented himself throughout most of the proceedings including the jury trial and sentencing. As shall be described in more detail, over defendant's objection the trial court required defendant to remain seated during the proceedings. Standby counsel was available throughout the proceedings.

During their deliberations, jurors asked about the firearm enhancement. They asked for readback of testimony during the time defendant was on the roof and when defendant allegedly assaulted Hechavarria. Jurors asked about the term "menacing" as used in the special instruction. They asked for readback of testimony concerning Williams's wounds. Jurors requested to rehear Harder's testimony concerning the guns she saw on the day Lee and Williams were killed. Jurors also wanted to rehear Harder's testimony concerning Williams running from defendant. Jurors requested readback of defendant's testimony regarding the two shootings. They also requested defendant's testimony concerning his handling of his gun while he was on the rooftop.

Juror verdicts and the court's sentence were as follows:

1. Priors

Jurors found defendant suffered five prior convictions for serious or violent felonies.

2. Count 1 (Assault on a Peace Officer)

Defendant was found guilty of assault with a firearm on Hechavarria. Jurors found defendant personally and intentionally discharged a firearm within the meaning of Penal

Code⁵ section 12022.53, subdivision (c) and personally used a firearm within the meaning of section 12022.53, subdivision (b).

For the assault on Hechavarria, the court imposed a term of 25-years-to-life pursuant to the “Three Strikes” law. The court imposed a consecutive 20 years pursuant to section 12022.53, subdivision (c) and the remaining firearm enhancement was imposed and stayed. The court also imposed an additional 25 years for defendant’s five priors. (§ 667, subd. (a)(1).)

3. Counts 2 Through 6 (Assaults on Peace Officers)

Jurors found defendant guilty of assault with a firearm on Officers Call, Chinappi, Hurst, Gastelo, and Perez. With respect to each count, jurors found defendant personally used a firearm within the meaning of section 12022.53, subdivision (b).

For each count the court imposed a prison sentence of 25 years to life. The court added an additional 10 years for the firearm enhancement and an additional 25 years for defendant’s prior offenses.

4. Count 7 (Felon in Possession of a Firearm)

Jurors found defendant guilty of possession of a firearm by a felon. The court imposed a 25-year-to-life sentence to run consecutively with the other sentences.

5. Counts 9 Through 10 (Murder)

Jurors found defendant guilty of two counts of first degree murder (Lee and Williams). With respect to each, jurors concluded defendant discharged a firearm causing great bodily injury within the meaning of section 12022.53, subdivision (d). Jurors also found section 12022.53, subdivisions (b) and (c) enhancements true. Jurors further found defendant was

⁵ Undesignated statutory citations are to the Penal Code.

convicted of more than one murder within the meaning of section 190.2, subdivision (a)(3).

With respect to each murder, the court sentenced defendant to life without the possibility of parole. The court imposed a consecutive 25-year-to-life term pursuant to section 12022.53, subdivision (d). The court imposed and stayed the remaining firearm enhancements. The court imposed an additional 25 years for the five priors. The court ordered both sentences to run consecutively.⁶

DISCUSSION

Defendant argues (1) he was denied a fair trial because the court required he remain seated even though he represented himself; (2) the record lacked sufficient evidence to support each assault conviction; (3) the prosecutor committed misconduct in referring to the killings of Lee and Williams as murders and the court should have intervened. Additionally, the parties raise sentencing issues and agree that this court should independently review the in-camera hearings on defendant's two *Pitchess* motions. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) We discuss the arguments seriatim. We conclude that the reversal of defendant's convictions is not warranted, but minor sentencing errors must be corrected.

1. No Error in Requiring Defendant to Remain Seated

It is undisputed that defendant treated the court with respect. It also was undisputed that defendant, a convicted felon, "was facing serious charges," including multiple murders and assaults with firearms. Over his numerous objections, the court required defendant remain seated throughout the proceedings

⁶ Count 8 was dismissed.

and allowed him to stand only to demonstrate the entry of the bullet shot by Hurst.

On appeal, defendant argues that he was respectful of the court, posed no security risk and should have been allowed to move around the courtroom. He argues that there was no “manifest need” to restrict him to his chair. He further argues that the limitation on movement precluded him from effectively acting as his own counsel and requires the reversal of his convictions. As we shall explain, we find neither error nor prejudice.

a. Additional Background

After he requested to represent himself, defendant signed a waiver of the right to counsel. He indicated that he understood the following provision: “[I]n conducting the trial, I will be limited in my movements in the courtroom. All documents, for example, will be handed to witnesses when necessary through the bailiff. I will be required to remain in my seat at counsel table and will not have free movement in the courtroom.” Defendant also initialed the following: “I understand that I must not act disrespectfully in court. I understand that the Judge may terminate my right to act as my own attorney in the event that I engage in serious misconduct or obstruct the conduct and progress of the trial.”

Prior to the start of trial, citing *People v. Burnett* (1980) 111 Cal.App.3d 661, defendant asked for permission to stand during voir dire, opening and closing statements. Defendant argued that confining him to his chair undermined the presumption of innocence. Defendant further argued that his right to effective self-representation was diminished by being confined to a chair. Defendant argued that the court could address any security

concerns by ordering additional deputy sheriffs to remain in the courtroom. When defendant's request to stand was denied, defendant requested the court inform jurors that he was not acting disrespectful.

In response to defendant's numerous requests for permission to stand, the court informed defendant that the courthouse was not the most secure and that using overtime deputies in the courtroom would financially burden the court. The court indicated that defendant would not be shackled or tied to his chair. The court stressed that it would work with the configurations of the courtroom to ensure that defendant could see the jurors and witnesses. The court further stated that it would instruct jurors on the presumption of innocence.⁷

During trial, the court advised jurors as follows: "During the course of the trial as I indicated Mr. Zubek is representing himself and he will be remaining in his seat during the course of the trial. He will not be standing up and walking around. [¶] That happens with anybody who elects to represent themselves in a criminal courtroom. It has nothing to do with Mr. Zubek. [¶] If he doesn't stand up and talk to you, please don't take that as disrespect. He's just following a court order."

When defendant testified, the court admonished jurors: "With respect to the fact Mr. Zubek is already sitting on the witness stand when you come out and with respect to the placement of my bailiff Deputy Hernandez, you are not to speculate as to reasons why those things have occurred, nor the reasons why the deputy is in that position, nor are you to let it

⁷ The court instructed jurors: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt."

become part of your deliberations or your conclusions in this case in any way. [¶] This is perfectly normal and standard protocol and procedure in the courtroom. [¶] You should not draw any adverse inferences from this of any kind.”

During opening statement, the court asked the prosecutor to move so that defendant could see the jurors and the prosecutor changed his position to allow defendant better visibility. On multiple occasions, the court made accommodations when defendant indicated he was unable to see a witness. The court further made arrangements to ensure that defendant could display his numerous exhibits.

Defendant was permitted to stand to demonstrate that he thought the bullet shot by Hurst entered his buttocks and exited his hip. His theory was that the police lied about where he was shot and that he was walking away from them as he was shot. The trial court did not restrict the movement of the prosecutor, and the prosecutor assisted defendant in displaying exhibits.

b. Analysis

i. Defendant Demonstrates No Error

“Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that ‘one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.’ [Citation.] This does not mean, however, that every practice tending to single out the accused from everyone else in the courtroom must be struck down. Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to

eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct.” (*Holbrook v. Flynn* (1986) 475 U.S. 560, 567.)

“ ‘In general, the “court has broad power to maintain courtroom security and orderly proceedings” [citation], and its decisions on these matters are reviewed for abuse of discretion. [Citation.] However, the court’s discretion to impose physical restraints is constrained by constitutional principles.’ ” (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 389 (*Bryant*).) Physical restraints are permissible only if there is a “ ‘ “manifest need.” ’ ” (*Id.* at p. 389.) Visible restraints may suggest to jurors that the court had adjudicated the defendant’s “character and guilt.” (*Id.* at p. 392.) Physical restraints “may erode the presumption of innocence because they suggest to the jury that the defendant is a dangerous person who must be separated from the rest of the community.” (*People v. Stevens* (2009) 47 Cal.4th 625, 632.) “In addition to their prejudicial effect on the jury, shackles may distract or embarrass a defendant, potentially impairing his ability to participate in his defense or serve as a competent witness on his own behalf.” (*Id.* at p. 633.) Being charged with a violent crime is insufficient to demonstrate “ ‘ “manifest need.” ’ ” (*Bryant, supra*, at pp. 389, 390.)

In contrast to physical restraints, “ ‘[s]ecurity measures that are not inherently prejudicial need not be justified by a demonstration of extraordinary need.’ ” (*Bryant, supra*, 60 Cal.4th at p. 390.) For example, the stationing of security or law enforcement officers in the courtroom is not inherently prejudicial. (*People v. Stevens, supra*, 47 Cal.4th at p. 634.) The distinction between shackles and security guards is that “ ‘[w]hile

shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable.'” (*Id.* at p. 635.)

Our high court has upheld the restriction of movement on a defendant who is representing himself. (*People v. Clark* (1992) 3 Cal.4th 41, 146 (*Clark*), overruled on another ground in *People v. Pearson* (2013) 56 Cal.4th 393, 462.) Although the defendant in *Clark* was allowed to stand, he was not allowed to move around the courtroom or approach witnesses. (*Clark, supra*, at p. 146.) The high court stated that “defendant’s unilateral choice to represent himself did not dictate the scope of the prosecutor’s rights in the conduct of the People’s case.” (*Ibid.*)

In *People v. Jenkins* (2000) 22 Cal.4th 900, 1042 (*Jenkins*), the defendant who represented himself in the penalty phase of trial argued that security measures were excessive and unnecessary. (*Ibid.*) The defendant was not allowed to approach witnesses or jurors, or to move around the courtroom as he desired. (*Ibid.*) Our high court held that “security reasons” warranted restricting defendant’s movement in the courtroom. (*Id.* at p. 1043.)

As in *Clark* and *Jenkins*, here the trial court properly restricted defendant’s movement. Based on defendant’s criminal record he posed a security concern, and it was reasonable to require that he remain seated. Although the court did not allow defendant to stand or move around the courtroom, it accommodated his requests to see jurors and witnesses, and to present evidence. It limited the manner of presentation (whether defendant would sit or stand) but not the ability of defendant to

present a defense. Moreover, at defendant's request the court instructed jurors that defendant was following a standard court order when he remained seated. The court effectively addressed all of defendant's secondary concerns such as viewing witnesses and jurors and displaying exhibits. Further, the court allowed defendant to stand to display his view of the location of the entry wound of the bullet Hurst shot.

Restricting defendant's movement did not bear the indicia of guilt potentially undermining the presumption of innocence such as shackles or other physical restraints. In contrast to a case involving shackles, there was no requirement to show "manifest need" to limit defendant's ability to move around the courtroom. (*Bryant, supra*, 60 Cal.4th at p. 390.) Defendant's reliance on that test therefore is misplaced.

ii. Prejudice

Assuming the trial court erred in requiring defendant remain seated, he demonstrated no prejudice.

This was not a case such as *People v. Burnett, supra*, 111 Cal.App.3d 661, relied on by defendant in the trial court. In *Burnett*, the defendant, who represented himself, chose not to testify because he was physically restrained. Here, defendant was not physically restrained and testified at length.

Although the appropriate test for prejudice resulting from the court's requirement that defendant remain seated is whether "defendant would have obtained a more favorable result absent the error" (*People v. Hernandez* (2011) 51 Cal.4th 733, 746), even under the more stringent harmless beyond a reasonable doubt standard defendant fails to demonstrate prejudice. From his seated position, defendant was able to fully and completely present his defense to jurors. He identifies no manner in which

he was precluded from presenting a defense or precluded from exercising his right to represent himself. For example, defendant was able to present evidence that Harder had given inconsistent statements prior to her testimony, that Harder was addicted to methamphetamine, and that hallucinations can occur as a result of methamphetamine use. He presented his version of events involving the killings of Williams and Lee and involving the shooting at Hechavarria and other peace officers. He fails to explain how any of this evidence could have been more powerfully presented had he been afforded the opportunity to stand as he requested.

Additionally, the court instructed jurors on the presumption of innocence and the requirement that defendant remain seated did not erode that presumption, especially given the court's admonition to jurors. The record does not support a claim that requiring defendant to remain seated was tantamount to informing jurors of his dangerousness, and the court informed jurors that it was operating according to standard procedure. Although defendant states that he was "disadvantaged in a manner which would not be tolerated for any other representative," he fails to identify any support for his claim that he was disadvantaged, and we find none.

2. Sufficiency of the Evidence of Assault on Officers

Defendant argues that his six counts of assault on peace officers were not supported by substantial evidence. He emphasizes that an assault requires a present ability to commit a violent injury on another. As we shall explain, his challenge to the sufficiency of the evidence lacks merit.

Assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

(§ 240.) The punishment for assault is increased when the assault is committed with a deadly weapon, the victim is a peace officer, and the perpetrator knew or should have known the victim was a peace officer. (§ 245, subd. (d)(1).)

Our Supreme Court has considered the evidence necessary to show a present ability to commit a violent injury on another. “[W]hen a defendant equips and positions himself to carry out a battery, he has the ‘present ability’ required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury.” (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.) “There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay.” (*Ibid.*) The high court held that the following facts constituted substantial evidence: the defendant loaded a weapon and hid from an officer in a location where he could immediately strike the officer. (*Id.* at pp. 1175, 1176.) The high court rejected the defendant’s argument that the fact he did not point the weapon in the officer’s direction reflected a lack of immediacy necessary for assault. (*Id.* at p. 1176.)

“The mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm. [Citation.] The evidence must only demonstrate that the defendant willfully or purposefully attempted a “violent injury” or “the least touching,” i.e., “any wrongful act committed by means

of physical force against the person of another.” [Citation.] In other words, “[t]he use of the described force is what counts, not the intent with which same is employed.” [Citation.] Because the offensive or dangerous character of the defendant’s conduct, by virtue of its nature, contemplates such injury, a general criminal intent to commit the act suffices to establish the requisite mental state.’” (*People v. Golde* (2008) 163 Cal.App.4th 101, 108-109.) “Assault with a deadly weapon can be committed by pointing a gun at another person [citation], but it is not necessary to actually point the gun directly at the other person to commit the crime.” (*People v. Raviart* (2001) 93 Cal.App.4th 258, 262.)

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to 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—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) “ ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “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.” ’ ” ’ ” (*Ibid.*)

3. Officers Call, Chinappi, Hurst, Gastelo, and Perez

Strong evidence supported defendant's conviction for assault on Call, Chinappi, Hurst, Gastelo and Perez. The evidence was at least as strong as that found sufficient by our high court in *People v. Chance*. In an effort to capture defendant, canine handler Call was deployed with Officers Perez, Chinappi, Gastelo, and Hurst. Call testified that defendant, who was standing on a rooftop, pointed his firearm at the entire team of officers positioned on the ground without cover. Call further testified that defendant extended his right arm, holding the firearm while it was pointed at the entire team. Based on his actions, Call believed that defendant was going to fire at the entire team. Chinappi testified that defendant pointed his gun in Chinappi's direction. Gastelo testified that defendant pointed his gun at Gastelo and his team members. Hurst testified that defendant rotated in his direction holding the firearm and he believed that defendant was attempting to fire at him and his teammates. Hurst confirmed that defendant's weapon moved in Hurst's and his teammate's direction as defendant rotated. The officers' cumulative testimony overwhelmingly supported defendant's convictions for assaulting them with a deadly weapon.

Defendant's argument that there was insufficient evidence he intended to discharge his weapon at the officers is not persuasive. The prosecution was required to demonstrate only general intent to use force, not that defendant intended a particular harm. (*People v. Colantuono* (1994) 7 Cal.4th 206, 218; *People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1352.) “ ‘Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been

held to constitute an assault.’ ” (*Colantuono*, at p. 219.) Here, jurors reasonably could have concluded defendant intended to shoot at the officers who were pursuing him but was stymied when Hurst shot him. This conclusion is further bolstered by the evidence that defendant admitted to shooting Hechavarria as Hechavarria pursued him. In short, jurors could reasonably conclude defendant intended to shoot at the officers, an act which, if completed, would result in physical force applied to another. (See *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1186.)

4. Hechavarria

With respect to Hechavarria, defendant argues that there was insufficient evidence that he “took aim and shot at Hechavarria or in Hechavarria’s direction.” His argument is meritless.

It was undisputed that defendant shot his firearm as Hechavarria pursued him. Defendant testified that he fired his firearm to scare the person chasing him. Defendant sought to elude capture by running away from Hechavarria and jumping over a wall. Hechavarria stopped and took cover because he heard the gunshot and saw the muzzle flash from defendant’s firearm. Hechavarria testified that defendant’s gun was pointed in his direction and was not pointed at the ground. This evidence strongly supported defendant’s conviction for assault on a peace officer.

Defendant’s argument that he shot into the ground ignores the standard of review. (It also is contrary to defendant’s initial statements acknowledging that he shot in the air.) Even if the evidence may be reconciled with a contrary finding reversal is not warranted because the circumstances justified the jury’s findings.

(*People v. Rodriguez, supra*, 20 Cal.4th at p. 11.) In short, defendant's challenge to the sufficiency of the evidence lacks merit.

5. Alleged Prosecutorial and Alleged Judicial Misconduct

For the first time on appeal, defendant argues that the prosecutor committed misconduct by repeatedly referring to the killings of Lee and Williams as murders during his examination of witnesses including defendant. Defendant further argues the court committed misconduct by allowing the alleged prosecutorial misconduct without intervening.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "Furthermore . . . , when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Id.* at p. 45.)

At the outset, defendant forfeited his claim of prosecutorial misconduct. Defendant did not object to the reference to the killings as murders in the trial court. Therefore, he cannot raise the issue in this court. (*People v. Tully* (2012) 54 Cal.4th 952, 1010 [" '[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury.' "]; *People v. Hines* (1997) 15 Cal.4th 997, 1045 [claim that

prosecutor committed misconduct by referring to homicide as murder forfeited by failure to object in the trial court].) Defendant acknowledged in his waiver of the right to counsel that he understood he was responsible for “making appropriate objections and motions during the course of the trial.”

Presuming the issue were preserved, defendant fails to demonstrate either misconduct or prejudice. Misconduct occurs when a prosecutor engages in “ ‘deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.’ ” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1329.) “Prosecutorial misconduct requires reversal when it ‘infects the trial with such unfairness as to make the conviction a denial of due process.’ ” (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1433.)

The record does not show that the prosecutor engaged in deceptive or reprehensible methods to attempt to persuade jurors. Although it can be improper for a prosecutor to refer to a killing as murder when that issue has not been adjudicated (*People v. Price* (1991) 1 Cal.4th 324, 480; *People v. Garbutt* (1925) 197 Cal. 200, 208), the bulk of the prosecutor’s references were not improper and the ones that should have been avoided did not amount to reprehensible misconduct.

First, as respondent argues, some of the references to the murder of Lee and Williams were appropriate under the circumstances. For example, it was undisputed that Williams was murdered, and the prosecutor therefore did not err in referring to her death as a murder. Stated otherwise, the prosecutor’s reference to Williams’s murder could not have improperly influenced jurors because that fact was undisputed. (The dispute concerned who committed the murder.)

Additionally, several of the prosecutor's references to murders concerned Harder's testimony in which she described the killings as murders. Harder testified that defendant murdered both Williams and Lee and had reported that in her prior interviews with officers. References to a poster that defendant was wanted for murder was a reference to the poster, not an effort by the prosecutor to improperly persuade jurors that defendant murdered Lee and Williams.

In the context of the 21-day trial and voluminous record, the few improper questions posed by the prosecutor referring to the killing of Lee as a murder were limited.⁸ Defendant fails to show those questions were indicative of a deceptive or reprehensible prosecutorial effort to improperly persuade jurors to convict defendant of murder. (See *People v. Friend* (2009) 47 Cal.4th 1, 29.) "Ultimately, the test for misconduct is whether the prosecutor has employed deceptive or reprehensible methods to persuade either the court or the jury." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) The fleeting references to murders or double murders did not amount to deceptive or reprehensible methods of persuasion. Moreover, during his cross-examination, defendant corrected the prosecutor stating, "you put something in that's not true. There is not a double murder here."

⁸ The prosecutor asked Detective Richard Moakley about the approximate time "of these two murders." The prosecutor asked Detective Ruben Arellano, if he had information about a "double murder" and "the murders" prior to speaking with Harder. The prosecutor referred to the events as a "double murder" when cross-examining Detective Humberto Fajardo. When cross-examining defendant, the prosecutor referred to the killings as murders.

Even assuming that all the references individually or cumulatively amounted to prosecutorial misconduct, defendant fails to show he was prejudiced by the assumed misconduct. The distinction between the prosecution's version of events and defendant's was stark. Defendant denied committing a murder, claiming that Lee killed Williams and that he acted in self-defense when he killed Lee. Juror's asked numerous questions prior to rendering a verdict, undermining defendant's claims that the prosecutor's reference to "double murder" telegraphed the result in this case. Defendant told jurors during his testimony there was no double murder. The record does not support defendant's contention that he was convicted based on the prosecutor's reference to "double murder" in his questioning of detectives and defendant.

Finally, defendant's claim that the court committed misconduct borders on the frivolous. Absent an objection, the trial court was not required to admonish the prosecutor. (*People v. Bell* (1989) 49 Cal.3d 502, 542.) Moreover, the record reflects consistent and thoughtful efforts by the trial court to ensure that defendant received a fair trial.

6. Sentencing Issues

Both defendant and respondent raise sentencing issues. As we shall explain, minor modifications to defendant's sentence are required.

a. Abstract of Judgment

The parties agree that the abstract of judgment must be corrected to reflect the sentences imposed on counts 1 through 7. On each count the court sentenced defendant to 25 years to life. The abstract of judgment incorrectly indicated the sentence was life with the possibility of parole on each count.

b. Parole Revocation Fine

It is undisputed that the court improperly imposed a section 1202.45 parole revocation fine on the assault counts. The parole revocation fine is appropriate only when a trial court imposes a determinate term sentence. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) Here, the court imposed indeterminate terms under the Three Strikes law for each count of assault.

c. Section 667, Subdivision (a)(1) Enhancement

Respondent argues that the court should have imposed a 25-year enhancement for defendant's priors on count 7. We agree (and defendant does not argue otherwise). The five-year enhancement for each prior serious felony conviction is mandatory for each indeterminate term sentence. (*People v. Williams* (2004) 34 Cal.4th 397, 404-405.)

7. Pitchess Review

Defendant requests that this court independently review the court's in camera hearings on his two *Pitchess* motions. Following defendant's motions for discovery of police personnel records, the trial court conducted in camera reviews of the personnel records of Arellano, Hechavarria, Hurst, Chinappi, Gastelo, Perez, Call, Detective Fajardo, and Sergeant Timothy Colomny.⁹

⁹ Defendant had claimed that he posed no threat to officers and the officers filed false reports and used excessive force when arresting him. In his declaration in support of his motion for discovery, defendant stated that Colomny presented false statement when he stated that he looked at defendant's face and saw no injury when defendant had a wound on his forehead. Colomny testified that defendant told him he was shot. Fajardo was a lead detective on defendant's case.

We have reviewed the in camera hearings and conclude that no police personnel record was discoverable and improperly withheld.

DISPOSITION

The judgment is modified to add a 25-year determinate term pursuant to section 667, subdivision (a)(1) to count 7 (felon in possession of a firearm). The parole revocation fine for the assault counts (counts 1 through 6) are stricken. In all other respects the judgment is affirmed. The trial court is directed to forward a certified copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

FLIER, ACTING P. J.

WE CONCUR:

GRIMES, J.

CHAVEZ, J.*

* Associate Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.