Filed 11/18/13 P. v. Shaw CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. IRVIN RANDOLPH SHAW, et al., Defendant and Appellant.	B239817 (Los Angeles County Super. Ct. No. MA054450)

APPEAL from judgments of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

Christine C. Shaver, under appointment by the Court of Appeal, for Defendant and Appellant Irvin R. Shaw.

Laura Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant Emanuel K. Shaw.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants in this case, brothers Emanuel Shaw (Emanuel[1]) and Irvin Shaw (Irvin), appeal from their respective judgments upon their convictions for a number crimes, including two counts of attempted premeditated murder.

Before this court, Emanuel challenges the validity of his sentence. He claims that a conflict of interest arose with his lawyer as the verdict was being announced and the conflict required substitution of his counsel during the penalty phase of the trial. Moreover, Emanuel argues alternatively that even if the court did not find a conflict that required substitution of counsel, the trial court erred by failing to conduct a *People v. Marsden* (1970) 2 Cal.3d 118 hearing when Emanuel voiced his dissatisfaction with his lawyer. Emanuel argues that both alleged errors separately require remand to the trial court for resentencing. As we shall explain, these claims lack merit and did not result in prejudice. Accordingly, we affirm the judgment with respect to Emanuel Shaw.

Irvin appeals his conviction and sentence. Specifically he assails his conviction on counts 6 and 7, for violation of Penal Code section 136.1, subdivision (c)(1), dissuading a witness by force or threat arguing that there was insufficient evidence to prove beyond a reasonable doubt that he used "force or threat of force." Irvin also appeals the validity of his sentences on the attempted murder counts, asserting that the trial court abused its discretion when it sentenced him to consecutive indeterminate life terms with seven-year minimum parole eligibility. In asserting abuse of discretion, Irvin argues the shooting incident was a single crime or one continuous act that occurred in one place at the same time and same location. Additionally, Irvin asks the court to remand the case for resentencing based on his belief that the trial court erred in imposing the one-year enhancement. For the reasons set forth below, we disagree. Accordingly, we affirm with respect to Irvin's appeal.

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[1] Because appellants have the same last name they will be referred to in this opinion by first name to avoid confusion.

FACTUAL AND PROCEDURAL BACKGROUND

Emanuel and Irvin Shaw are brothers. The prosecution presented testimony through its witnesses that Emanuel and Irvin are both part of the Inglewood Family Bloods Gang. Treven Hicks (Hicks) has been friends with Emanuel and Irvin since he was about 13 or 14 years old. Hicks and Emanuel were close friends, but they stopped being friends when Emanuel accused Hicks of exposing himself to Emanuel's sister and punched him in the eye. Treven Hicks' roommate, Brandon Williams (Williams), also knew of Emanuel and Irvin. Salima Shutes (Ms. Shutes) had stayed with Hicks and Williams at their apartment in Lancaster at one point.

During the months of February and March 2010, Hicks and Williams witnessed arguments between Irvin and Ms. Shutes on multiple occasions. In late February, both Hicks and Williams saw Irvin arguing with Ms. Shutes about a cash tax refund. Irvin had apparently referred Ms. Shutes to someone he knew that worked at H&R Block, and Irvin hoped to receive a finder's fee as soon as Ms. Shutes received a tax return payment. According to Irvin, Ms. Shutes allegedly lied to him about not receiving the payment. Around March 8, when Ms. Shutes was living with Hicks and Williams in their apartment, Williams observed Irvin arguing with Ms. Shutes again. On March 13, Williams witnessed Irvin slapping Ms. Shutes and calling her a "bitch" to which Ms. Shutes replied, "I'm going to get my cousin. You don't know who you are fucking with."

On March 15, 2010, Tiffanie Taylor (Taylor) drove Ms. Shutes and her cousin Ervin Ford (Ford) to Lancaster where Ford's brother Bernard lived. At Bernard's apartment in Lancaster, Shutes and Ford met with a few males who came in a black SUV. Among the males were Irvin and Emanuel. Taylor recalled Shutes yelling and Ford and Bernard fighting the males that exited the black SUV. They were engaged in two fistfights before the males fled the scene in the black SUV. Taylor drove Shutes and Ford away.

Taylor, Shutes, and Ford drove to Hicks' and Williams' apartment, Shutes and Ford seemed excited, and Ford bragged that he had just beat up Irvin. After hearing

about the fistfight that had just occurred minutes prior, Hicks asked them to leave the apartment. Hicks and Williams went outside on their driveway to see the visitors off.

As the visitors got inside Taylor's car to leave, Irvin suddenly drove his black SUV in front of the driveway and blocked Taylor's car from driving off. Irvin was driving and Emanuel was sitting in the front passenger seat. Two unidentified males were sitting in the back. Emanuel and Irvin acknowledged Hicks and Williams with a head-gesture, Emanuel pointed and fired a handgun at Taylor's car. The bullets went through the backseat window and struck Ford's head. After Emanuel shot at the car, Irvin drove away from the scene. Taylor drove Ford and Shutes to the hospital, and Hicks and Williams escaped to their neighbor's home. Williams returned to his house after an hour because the police wanted to talk to him, but he felt safe knowing that the Shaw brothers would not return while the police were at the apartment. Hicks stayed with his neighbor until midnight, and he did not report the incident to the police.

About two months after the shooting incident, around May 10, 2010, Irvin visited Hicks' and Williams' apartment. He entered their home unannounced and uninvited. Upon entry, Irvin asked Hicks and Williams, "Who is snitching?" and "who is talking to the police?" Irvin did not seem angry but did seem paranoid. Shortly after Irvin left their apartment, Detective Robert Gillis (Detective Gillis) arrived at their apartment and knocked on the door. Detective Gillis stated that Hicks looked very nervous and told the detective that Irvin had just come by and the detective just missed him.

The Shaw brothers were arrested. They were both charged in counts 1-4 with four counts of attempted premeditated murder under Penal Code sections 664 and 187, subdivision (a) (counts 1-4); and shooting at an occupied motor vehicle in violation of Penal Code section 246 (count 5). It was further alleged that they committed these crimes for a gang purpose under Penal Code section 186.22. With respect to Emanuel, it was further alleged that he personally discharged a firearm under Penal Code section 12022.53, and two counts of firearm possession by a felon under Penal Code section 12021, subdivision (a)(1) (counts 8 and 9). Irvin was also charged in counts 6 and 7 with two acts of dissuading a witness by force or threat under Penal Code section 136.1,

subdivision (c)(1) and firearm possession by a felon in count 10. The information also alleged that both Emanuel and Irvin had served prior prison terms.

After a jury trial, the Shaw brothers were found guilty of counts 1-2 of attempted premeditated murder and shooting at an occupied vehicle in count 5, and that Emanuel had personally fired a handgun in counts 1, 2 and 5. Emanuel was found guilty of firearm possession in count 9, and Irvin was found guilty of dissuading a witness in counts 6 and 7.[2]

On counts 1 and 2 both Emanuel and Irvin were sentenced to two consecutive terms of life in prison with a possibility of parole (with a 15-percent limit on custody credits and a seven year minimum parole). In addition, Emanuel was also sentenced to 25 years to life (i.e., 50 years to life) on each of the two gun use enhancements, and concurrent three-year upper term on count 9; a 32-year term on count five was stayed under Penal Code section 654. Emanuel was awarded custody credits and ordered to pay various fines. In addition to the sentences on counts 1 and 2, Irvin was also sentenced to two consecutive three year terms on counts 6 and 7 (the court also imposed a one-year enhancement under 667.5, subdivision (b) for his prior prison term), and a seven-year term on count 5 was stayed under Penal Code section 654. Irvin was given custody credits and various fines were imposed.

Appellants filed notices of appeal.

DISCUSSION

I. Emanuel Shaw's Appeal

On appeal Emanuel claims that the trial court erred in failing to find that a conflict had arisen with his counsel at the time the verdict was announced and that he was denied effective assistance of counsel during the penalty phase of the trial when the court failed to replace his lawyer for sentencing. He further claims that the court committed

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[2] The jury acquitted the Shaw brothers on counts 3, 4, 8 and 10. They found none of the gang purpose allegations true, and none of the special allegations true as to Irvin.

prejudicial error when it failed to conduct a *Marsden* hearing when he expressed that he wanted new representation for sentencing. We address these claims in turn.

A. Background

On Thursday, February 16, 2012, Emanuel assaulted his trial counsel, Mr. Morse, as the verdicts were being read during his trial. Emanuel grabbed "Mr. Morse by the head and pull[ed] Mr. Morse's head back with such force that Mr. Morse's glasses went flying when it happened."[3] As a result of Emanuel's actions he was removed from the courtroom.

On Tuesday, March 6, 2012, the trial court commenced the penalty phase of the trial. At this point, Mr. Morse was still acting as Emanuel's counsel. The trial court then proceeded to ask if any of the parties or counsel wished to speak. Emanuel wished to speak on his own behalf. The following discussion took place with the court:

> "Mr. Morse: Mr. Shaw wants to speak on his own behalf.
>
> "The Court: Go ahead, sir.
>
> "Defendant E. Shaw: All right. I have been going to this court – I have been doing this for almost two years now, and I am being – not getting, like, a good defense from my attorney because he never really came to see me and talk to me. He told me not to even get on the stand when somebody got on the stand on me and try to put, like, I done a crime that I don't know nothing about. And he told me it is in my best interest I shouldn't get on the stand.
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> "I think that I feel that I should have got on the stand. Like when jump, I don't know these people. I don't' deal with you people. I didn't even get a chance to defend myself. He told me not to. The whole time he never even came to see me. Every time I get ready to talk to him about my case, he's doing this, he's doing that. He never had time for me. He had

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[3] We granted Emanuel's request for judicial notice. The notice indicated a criminal complaint was later filed against Emanuel, alleging assault with force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)) and elder abuse (Pen. Code, § 368, subd. (b)(1)), naming Mr. Morse as the alleged victim in Los Angeles Superior Court case No. MA055759. Emanuel was held to answer to these charges on May 24, 2012.

too many other cases. He didn't' even have time to make the defense for me.

"Every time, he didn't do nothing. The last thing he ever, ever did when he was talking to the jury or whatever, he didn't say a few words. He never did give me a good defense. I don't feel it is in my best interest having him. I remember the time that I am getting rid of him. Can you do this. Can you do that. It was, no. He never helped me with nothing. Like, he didn't do nothing. It was, like, I don't even feel, like, I got a good defense in my case.

"I don't know the people to go threat nobody and say anything to these people or anything. I don't even know these people. Like he said about a fight, they said about a fight. I told him about a fight. The only thing I was guilty about a fight, I left. After the fight, I left and went home.

"The Court: Okay, sir. Stop. This is here for sentencing. It is not an attempt to re-litigate the merits or the facts of the case. The jury has made decisions. We are facing sentencing, and you are only facing sentencing on counts that the jury has returned verdicts of guilty. Is there anything else?

"Defendant E. Shaw: I just want you to know that my lawyer told me not to get up on the stand because he didn't feel it was in my best interest. And I don't understand why.

"The Court: Okay. Anything else Mr. Morse?

"Mr. Morse: No."

After this discussion, the court proceeded with the sentencing hearing. The prosecution argued its reasons for consecutive sentences as opposed to concurrent sentences. Mr. Morse then offered his contentions of why Emanuel's sentences should run concurrently rather than consecutively:

"Mr. Morse: I would ask that it be concurrent because, basically, it is one act. And if this were separate incidents, it might be a different story. But we're talking about really one act. I think there should be one punishment for one act. I think they should be run concurrently.
"The Court: Submitted?

"Mr. Morse: Especially with the defendant's age. Submitted."

The court exercised its discretion and imposed consecutive sentences for Emanuel's separate counts.

B. The Trial Court Did Not Err by Refusing to Substitute Counsel.

A criminal defendant's right to the effective assistance of counsel, guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, imposes on his or her counsel "a duty of loyalty, a duty to avoid conflicts of interest." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*); accord, *People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*) ["[t]his constitutional right includes the correlative right to representation free from any conflicts of interest that undermines counsel's loyalty to his or her client"].)

"'[A] defendant is deprived of his or her constitutional right to the assistance of counsel in certain circumstances when, despite the physical presence of a defense attorney at trial, that attorney labored under a conflict of interest that compromised his or her loyalty to the defendant.' [Citation.] 'As a general proposition, such conflicts "embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or his own interests. [Citation.]"'" (*Doolin, supra*, 45 Cal.4th at p. 417.)

In *Mickens v. Taylor* (2002) 535 U.S. 162 (*Mickens*), the United States Supreme Court confirmed that a Sixth Amendment violation based on conflicts of interest are a category of ineffective assistance of counsel that should be analyzed under the standard developed in *Strickland.* Moreover, in *Doolin*, the California Supreme Court "harmoniz[ed] California conflict of interest jurisprudence with that of the United States Supreme Court and adopt[ed] the standard set out in *Mickens*." (*Doolin, supra*, 45 Cal.4th at p. 421.) Under the *Strickland* standard, a defendant must show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. (*Id.* at p. 417.)

Deficient performance in the context of a conflict of interest claim is demonstrated by a showing that the "defense counsel labored under an actual conflict of interest '*that*

affected counsel's performance—as opposed to a mere theoretical division of loyalties.'" (*Mickens, supra,* 535 U.S. at p. 171, 122 S.Ct. 1237; *Rundle, supra,* 43 Cal.4th at p. 169.) A determination of whether counsel's performance was "adversely affected" under the federal standard "'requires an inquiry into whether counsel "pulled his punches," i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict.'" (*Doolin, supra,* 45 Cal.4th at p. 418.) Second, a criminal defendant asserting a conflict must also show prejudice. (See *id.*, at pp. 422, 428 [except in the context of multiple concurrent representation, *Strickland* provides the appropriate analytic framework for assessing prejudice arising from attorney conflicts].) Specifically, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Mickens, supra,* 535 U.S. at p. 166.)

Although Emanuel's physical attack on his counsel while the verdicts were being read likely demonstrates that Emanuel was angry with his counsel, his conduct does not, as a matter of law, demonstrate a conflict of interest warranting the substitution of counsel. Indeed the Supreme Court has recognized that a defendant cannot create or engineer a conflict requiring the substitution of counsel based on the defendant behavior towards counsel. (*People v. Smith* (1992) 6 Cal.4th 684, 696; *People v. Hardy* (1992) 2 Cal.4th 86, 138.) For example, in *People v. Roldan* (2005) 35 Cal.4th 646, 674-675,[4] the Supreme Court rejected the defendant's claim he had a conflict with his lawyer and was entitled to new counsel after he threatened to kill his defense counsel. The *Roldan* Court observed "there is something perverse in this argument, for although defendant unquestionably was entitled to the effective assistance of a conflict-free attorney, defendant's own behavior created the alleged conflict and threatened to undermine his lawyer's effectiveness. We are reluctant to recognize a rule of law that would empower criminal defendants to inject reversible error into their trials by simply threatening their lawyers." (*Id.* at p. 674.)

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[4] Disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22.

In reaching this conclusion the Court analogized the case to *People v. Horton* (1995) 11 Cal.4th 1068, in which the Court concluded the defendant was not entitled to relief for attempting to create a conflict by filing a lawsuit against his lawyer: "[T]he trial court properly determined, in the exercise of its discretion, that the filing of the complaint did not create any actual conflict of interest necessitating the withdrawal of appointed counsel. Although being named as a defendant in a collateral lawsuit by one's client may place an attorney in a situation in which his or her loyalties are divided [citation], a criminal defendant's decision to file such an action against appointed counsel does not require disqualification unless the circumstances demonstrate an actual conflict of interest. [Citation.] A contrary holding would enable an indigent criminal defendant to challenge each successive appointment of counsel, delaying indefinitely the criminal prosecution." (*Id.* at p. 1106.)

Based on the foregoing, we conclude the trial court did not err in failing to find that Emanuel had a conflict with his counsel that warranted substitution of counsel.

In any event, Emanuel has failed to prove that the any perceive conflict adversely affected counsel's performance. Emanuel has not shown that Mr. Morse "pulled his punches"—and failed to vigorously defend him at sentencing. On the contrary, the record before this court shows that Mr. Morse did engage in argument at sentencing in an attempt to modify appellant's sentencing from a consecutive sentence to a concurrent sentence. Morse argued to the court, "I would ask that [the sentence] be concurrent because, basically, it is one act. And if this were separate incidents, it might be a different story. But we're talking about really one act. I think there should be one punishment for one act. I think [the sentences] should be run concurrently." He also added that the sentences should run concurrently "especially with the defendant's age." In short, Emanuel fails to show how any asserted conflict adversely affected counsel's performance regarding the representation of appellant in the penalty phase.

C. Emanuel Has Not Demonstrated Error With Respect to the his *Marsden* Claim.

Emanuel also contends on appeal that this court should remand the case for a new sentencing hearing based on the trial court's failure to conduct a *Marsden* hearing. We disagree. When a defendant seeks substitution of counsel based on a claim of ineffective assistance of counsel, the trial court must permit the defendant to articulate the basis for his concerns in order for the court to determine if those concerns have merit. (*Marsden, supra,* 2 Cal.3d at pp. 123-124; accord, *People v. Smith* (1993) 6 Cal.4th 684, 691.) Moreover, the right to a *Marsden* hearing applies equally to a post trial claim. (*People v. Smith, supra,* 6 Cal.4th at p. 695 ["[T]he trial court should appoint substitute counsel when a proper showing [pursuant to *Marsden*] has been made at any stage [of the proceedings]. A defendant is entitled to competent representation at all times. . . ."].)

Although, a proper formal legal motion is not required to invoke a *Marsden* hearing, the defendant must still provide "'at least some clear indication . . .' . . . that [he] 'wants a substitute attorney.'" (*People v. Lee* (2002) 95 Cal.App.4th 772, 780 (*Lee*).) A trial court "is not obliged to initiate a *Marsden* inquiry sua sponte. [Citation.] The court's duty to conduct the inquiry arises only when the defendant asserts his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel. (*People v. Lara* (2001) 86 Cal.App.4th 139, 150-151.) "The mere fact that there appears to be a difference of opinion between a defendant and his attorney over trial tactics does not place under a duty to hold a *Marsden* hearing." (*People v. Lucky* (1988) 45 Cal.3d 259, 281.) Moreover, "mere grumbling" about counsel's failures is insufficient to invoke a *Marsden* hearing. (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.) If a defendant makes an unequivocal indication that he wants substitute counsel, a trial court cannot discharge its duty without hearing the reasons for the defendant's belief that his or her attorney has not afforded adequate representation. (*Marsden, supra,* 2 Cal.3d at pp. 123-124.)

For example, in *People v. Dickey* (2005) 35 Cal.4th 884, 945, the Supreme Court of California held that complaints of counsel's inadequacy involving tactical agreements

did not warrant a *Marsden* hearing. There, the defendant raised a disagreement he had with his counsel where he stated, "I'm not satisfied with the competency of my attorney. There are witnesses that are—that were available that [were] not called that I feel [were] crucial to my defense, and issues that were not raised that I feel [were] crucial, and questions that [were] not asked of me while I was on the stand that should have been raised." (*Id.* at p. 919.) The California Supreme Court affirmed the decision of the appellate court ruling that the defendant did *not* clearly indicate he wanted substitute counsel appointed for the penalty phase of the defendant's trial. (*Id.* at p. 921.)

We agree that the present case offers a similar situation as in *Dickey*. Here, Emanuel indicated in the same context that he did not feel satisfied with his defense counsel. He also told the court, "[Morse] told me not to even get on the stand when somebody got on the stand on me and try to put, like, I done a crime that I don't know nothing about. And he told me it is in my best interest I shouldn't get on the stand." Emanuel and his counsel Mr. Morse disagreed because Emanuel believed that he should have gotten on the stand. The key phrase at issue here is Emanuel's statement, "I don't feel it is in my best interest having him."

When viewed in the context of his other complaints about his counsel's representation during the trial, this statement is not a clear indication that Emanuel wanted substitute counsel for sentencing. This statement was made in the context of tactical disagreements with defense counsel. When asked whether he had anything else to say to the court Emanuel summarized his comments as, "I just want you to know that my lawyer told me not to get up on the stand because he didn't feel it was in my best interest. And I don't understand why." Thus read in the full context, it is unclear whether Emanuel wanted change counsel or whether he wanted an explanation of why defense counsel did or did not take certain actions or whether he simply wanted to express his dissatisfaction with his legal representation. In essence, his disagreement with counsel's tactics is similar to the dissatisfaction expressed by the petitioner in *Dickey*; and as in *Dickey*, complaints of counsel's inadequacy involving tactical

agreements do not warrant a Marsden hearing. On this record, Emanuel has failed to demonstrate the trial court erred.

II. Irvin Shaw's Appeal

Irvin Shaw's appeal centers on the sufficiency of the evidence supporting his convictions for dissuading witnesses and his sentences. As we shall explain, none of his complaints warrants reversal.

A. Sufficient Evidence Supported Irvin's Convictions for Dissuading Witnesses.

Irvin contends the evidence presented during trial was insufficient to support the jury's verdict on counts 6 and 7. More specifically, Irvin contends the prosecution failed to prove that he attempted to prevent or dissuade a witness by force or an express or implied threat of force from reporting the crime to law enforcement within the meaning of Penal Code section 136.1, subdivision (c)(1). We disagree.

1. Standard of Review

In reviewing a claim of insufficiency of evidence to support a criminal conviction, "'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*People v. Streeter* (2012) 54 Cal.4th 205, 243, quoting *People v. Combs* (2004) 34 Cal.4th 821, 849.)

Furthermore, the California Supreme Court added, "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is in the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder.

[Citations.]" (*People v. Jones* (1990) 51 Cal.3d 34, 314.) Therefore, reversal is unwarranted "unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*), quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

2. Analysis

Irvin argues that there was insufficient evidence to support his conviction of dissuading a witness by force or threat of force. Irvin contends the words he uttered multiple times to Hicks and Williams: "who is snitching?" and "who was talking to the police?" did not qualify as force or threat of force or violence as those terms have been defined in the case law. He acknowledges, however, that he appeared at the residence of Hicks and Williams and entered into their apartment unannounced and uninvited. He also concedes that he made the statements at issue to Hicks and Williams and that the jury could find that he *intimidated* the men. Thus, the issue in contention here is whether a jury could reasonably conclude that Irvin's words and actions constitute a force or threat of force or violence under Penal Code 136.1, subdivision (c).

As we shall explain, we believe that there was sufficient evidence of force or threat for a rational trier of fact to find Irvin guilty beyond a reasonable doubt on these counts.

Under Penal Code 136.1, subdivision (c)(1), dissuading and intimidating a witness becomes a felony when "the act is accompanied by force or by an express or *implied threat* of force or violence, upon a witness or victim or any third person." (Emphasis added.) There are no magic words or phrases that constitute force or threat of force. (*People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1344.) In fact, the court in *People v. Thomas* remarked:

> There is, of course, no talismanic requirement that a defendant must say "Don't testify" or words tantamount thereto, in order to commit the charged offenses. As long as his words or actions support the inference that he (1) sought to prevent or dissuade a potential witness from attending upon a trial [citation] or (2) attempted by threat of force to induce a person to withhold testimony [citation], a defendant is properly held to answer.

(*People v. Thomas* (1978) 83 Cal.App.3d 511, 514; accord, *Mendoza, supra,* 59 Cal.App.4th at 1344.)

To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific.[5] (*Bolin, supra,* 18 Cal.4th at p. 340.) As long as the communication is *sufficiently* so and thereby conveys a gravity of purpose and immediate prospect of execution, the communication constitutes a threat, in light of surrounding circumstances. (*People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861.) The four elements are "simply factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim. [Citation.]" (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1538.)

Therefore, the alleged threat must be examined not only at face value but both on its face and under the context in which it was made. (*People v. Wilson* (2010) 186 Cal.App.4th 789, 807.) Similarly, a threat is not insufficient simply because it fails to communicate a time or precise manner of execution. (*Wilson, supra,* 186 Cal.App.4th at p. 816; accord, *People v. Butler* (2000) 85 Cal.App.4th 745, 752; *In re David L.* (1991) 234 Cal.App.3d 1655, 1660.) "A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning." (*In re George T.* (2004) 33 Cal.4th 620, 635; *Butler, supra,* 85 Cal.App.4th at pp. 753-754.)

Relevant case law instructs that seemingly ambiguous statements may violate Penal Code section 136.1, subdivision (c)(1) when those statements are viewed in their full context. This court's decision in *People v. Mendoza* offers such an example. In

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[5] Cases involving violations of Penal Code section 422 discuss the element of threat of death or great bodily injury to a person, which is similar to the element of express or implied threat of force or violence in Penal Code section 136.1, subdivision (c)(1). In fact, the court in *Mendoza* directly applied its analysis of threat under section 422 to its analysis of threat under 136.1(c)(1). (*People v. Mendoza, supra,* 59 Cal.App.4th at p. 1343.) ("Based on our discussion in part I, *ante*, we reject appellant's latter contention.") Here, section 422 cases are used to explain section 136.1 element of threat of force.

Mendoza, Elva Arambula had testified at the preliminary hearing against defendant's brother. (*People v. Mendoza, supra,* 59 Cal.App.4th at p. 1337.) Two days after, defendant showed up outside Arambula's door and told her that Arambula had "fucked up his brother's testimony" and that "[h]e was going to talk to some guys from Happy Town." (*Id.* at pp. 1337-1338.) Although Arambula said that defendant did not look angry or upset, she still felt threatened and scared; the officer who responded to her call also observed that Arambula seemed very nervous and afraid. (*Ibid.*)

First, the court in *Mendoza* utilized the surrounding circumstances test to determine whether defendant's ambiguous statement constituted a threat under Penal Code section 422. (*Mendoza, supra,* 59 Cal.App.4th at p. 1340 ["[T]he jury was free to interpret the words spoken from all the surrounding circumstances of this case."].) When reviewing the surrounding circumstances, the court stressed the importance of considering the parties' history, background, language, context, knowledge, and purpose. (*Id.* at pp. 1340-1341.) The court took into account the fact that defendant and Arambula knew each other for several years and that Arambula was aware that defendant and his brother were members of the Happy Town gang. (*Id.* at p. 1341.) From this, the court gathered that a rational juror could reasonably conclude that Arambula was fearful because she knew the "gang members were capable of violence" and would not hesitate to hurt or kill her for "ratting" out another gang member. (*Ibid.*) Furthermore, the court admitted "in the abstract, the words 'I'm going to talk to some guys from Happy Town' could mean something as innocuous as, for example, Arambula would no longer be invited to Happy Town parties." (*Ibid.*) However, based on all surrounding circumstances, "Arambula knew [defendant's] words meant [. . .] 'they were going to come back and kill me.'" (*Ibid.*) The court determined that there was substantial evidence to support defendant's conviction under Penal Code section 422.

Second, after finding that defendant's statement was a threat under Penal Code section 422, the court applied the same reasoning to determine if the evidence was sufficient to convict defendant under Penal Code section 136.1, subdivision (c)(1). (*Mendoza, supra,* 59 Cal.App.4th at p. 1343.) The court cited *People v. Ford* (1983)

145 Cal.App.3d 985, 989 to show that "'[t]he words "You punk mother fucker, we'll get you, you've got kids," have more than a plain meaning'" and that they "'also carry with them an inherent baggage of connotation which plainly suggests to the auditor, "You are in trouble for testifying so do not let it happen again or things will only get worse."'" (*Mendoza, supra,* 59 Cal.App.4th at p. 1344.) In reference to the statements in *Ford,* the *Mendoza* court stated that the jury could reasonably interpret those words as a warning or threat to the witnesses. (*Ibid.*) In the same way, the court concluded sufficient evidence showed defendant's words "I'm going to talk to some guys from Happy Town" was an attempt to dissuade witness Arambula by an express or implied threat of force or violence.

Irvin's questions, "who is snitching?" or "who was talking to the police?" may seem ambiguous and innocuous. Like the *Mendoza* court noted, these words alone do not carry much meaning beyond asking who, if any, gossiped or who, if any, talked to police officers. In fact, in a different setting, the words would have a completely different meaning. For example, if a child had asked his classmate, "Who is snitching?" he could be asking who was a tattletale; if an attorney had asked another attorney, "Who is talking to the police?" she could be asking which lawyer has already contacted the officer for more information regarding an upcoming case. However, this language viewed in all surrounding circumstances may have a different meaning. Understanding the full context permits an accurate assessment of whether certain vague language could qualify as a threat of force or violence under Penal Code section 136.1, subdivision (c)(1).

Just as the *Mendoza* court considered the history of the parties, here the witnesses, Treven Hicks and Brandon Williams, knew appellant Irvin and his brother Emanuel from before and were also aware of the brothers' gang membership. Witness Hicks testified that he is not a gang member but has been an associate of a gang and has friends who are part of gangs. He admitted that he knew people in Inglewood Family Bloods; in particular, he knew that both Emanuel Shaw and Irvin Shaw were members of that gang and even knew their gang monikers. Hicks was friends with the Shaw brothers since he was 13 or 14. After an incident where Emanuel hit him in the eye, Hicks stopped

hanging out with Emanuel, although he maintained a neutral relationship with Irvin. Williams maintained a neutral relationship with the Shaw brothers, but he had been roommates with Hicks for a while. If there were to be any retaliation against Hicks, it would negatively affect Williams as well because they lived together.

The above facts are important because the witnesses are not complete strangers to the Shaw brothers. The witnesses knew that either Irvin or Emanuel Shaw could easily get in contact with them through mutual connections. Because the witnesses were aware of the brothers' gang membership, they understood that Irvin or Emanuel had the support and backing of the Inglewood Family gang members.

In addition, both Hicks and Williams witnessed Emanuel and Irvin involved in a dangerous shooting only a few months prior on March 15 in the driveway of Hicks' and Williams' residence. Both witnesses correctly identified Irvin as the driver of the getaway car and Emanuel as the shooter inside the car. Having witnessed the crime, both Williams and Hicks knew that the Shaw brothers were capable of violence and murder, even before Irvin arrived at their apartment unannounced and uninvited and asked who had "snitched" to the police. Moreover, Hicks saw the argument between Emanuel and Ms. Shutes and how it precipitated the shooting. In view of Emanuel and Irvin's history of and propensity for violence and Hick's and Williams awareness of it, the jury could reasonably infer that Irvin's comments intended to convey a threat of force or violence for cooperating with law enforcement.

Furthermore, in the world of gangs, being a "snitch" is one of the worst labels to have or to put on another individual. Detective Gillis, the prosecution's expert witness, testified that being a "snitch" is very dangerous in the gang community, and the penalty for being viewed as a "snitch" is death. Detective Gillis testified that he considered the situation – where Irvin came over to Hicks' and Williams' apartment unannounced and asked, "who is snitching?" – as a "deterrent to cooperation on the part of those witnesses." He further stated that "when somebody is a witness to a crime and they come into court and testify against gang member defendants, oftentimes they are in danger." Martin Flores, the defense expert witness, agreed that being a snitch in the gang

community is very dangerous, and the person could be killed for snitching. He expressed that snitching is considered a "real bad thing" in gang culture and that there is no way for snitches to redeem themselves.

More importantly, both Hicks and Williams testified to threats of force or violence associated with snitching. Hicks acknowledged that what he was doing, which was testifying in trial, was considered "snitching," and shortly after, he remarked that it was "real bad" and that he wanted to go home. Hicks was extremely concerned about his own safety. Hicks specifically mentioned that "[he] might get killed" for testifying and that there might be a "fight" because of it; he even stated that "[he is] in danger already."

Similarly, Williams admitted he was afraid for his family's safety and his own safety. He testified that since the shooting, he has been especially concerned about his daughter's safety because if Emanuel could shoot into a car with a baby inside, then "they could care less about [his daughter]." When the prosecutor asked what would make him think that his daughter was in danger, Williams replied that somebody could come by his apartment and "shoot up the house." Williams did not want anyone to know where he was at because he did not want anyone to come at him for testifying in court.

When Irvin's questions, "who is snitching?" and "who was talking to the police?" are viewed in light of all surrounding circumstances, including the parties' history, personal knowledge, past events, gang culture, and witnesses' testimonies, a trier of fact could reasonably find that a threat of force or violence existed.

In view of all of the foregoing, we conclude sufficient evidence was presented for the jury to conclude that appellant Irvin Shaw violated Penal Code section 136.1, subdivision (c) in counts 6 and 7.

B. Trial Court Did Not Abuse Its Discretion When It Imposed Consecutive Indeterminate Life Terms With Seven-Year Minimum Parole Eligibility as to Counts 1 and 2.

Irvin argues that the trial court erred when it imposed consecutive sentences for counts 1 and 2. Specifically, he argues that the court failed to properly consider California Rules of Court, rule 4.425; and that had the court done so, it would not have

imposed the consecutive sentences because the crimes were one continuous act that was taking place at the same time and same location.

1. Background

The prosecutor asked the trial court to impose on Irvin a life sentence with a minimum parole eligibility of seven years as to count 1 and a consecutive sentence of life with a minimum parole eligibility of seven years as to count 2. In response, the trial court imposed a sentence of an indeterminate life term with minimum parole eligibility of seven years for count 1, the attempted premeditated murder of Ervin Ford. Similarly, the trial court imposed the same sentence for count 2, the attempted premeditated murder of Salima Shutes. The court stated it was exercising its discretion to run sentences consecutively and listed reasons for the discretion. Specifically, the court found the aggravating factors outweighed any mitigating factors. As for aggravating factors, the court listed Irvin's prior record and noted that the crimes were of increasing seriousness. Because the crimes constituted great threat and violence, the court found the consecutive sentences were justified.

2. Analysis

As the Attorney General points out, appellant failed to object to the consecutive sentences in the trial court and therefore forfeited any complaint about the court's exercise of discretion in sentencing him on these counts. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Anticipating this argument, appellant Irvin asserts that his counsel was ineffective for failing to object to the imposition of the consecutive sentences for these counts. His claim is not well taken. As we shall explain any objection to the court's sentencing choice for these counts would have properly been overruled because the criteria in California Rules of Court, rule 4.425 support the imposition of consecutive sentences on appellant Irvin Shaw's convictions on counts 1 and 2.

"It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively." (*People v. Bradford* (1976) 17 Cal.3d 8, 20, called into question on other grounds by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1065 as stated in *People v. Thomas* (2012) 53 Cal.4th 1276, 1288.)

Appellate courts do not have the power to modify or reduce a sentence absent error and, unless a clear abuse of discretion is shown, error cannot be predicated on a trial court's determination that several sentences are to run consecutively. (*People v. Giminez* (1975) 14 Cal.3d 68, 71-72.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.] However, in the absence of a clear showing that its sentencing decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate sentencing objectives and, accordingly, its discretionary determination to impose consecutive sentences ought not be set aside on review." (*Ibid.*)

Judicial discretion "'implies absence of arbitrary determination, capricious disposition or whimsical thinking.' [Citation.] [D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez, supra*, 14 Cal.3d at p. 72.) The burden is on the party attacking the sentence to clearly show the sentencing decision was irrational or arbitrary. (*People v. Superior Court* (1997) 14 Cal.4th 968, 977–978.) In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and therefore we will not set aside its discretionary determination to impose a particular sentence. (*Ibid*.)

To assist the trial court in the exercise of its discretion, rule 4.425 of the California Rules of Court sets out "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences," which include that the "crimes and their objectives were predominantly independent of each other," they "involved separate acts of violence or threats of violence" and the "crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)-(3).) The sentencing court may consider "[a]ny circumstances in aggravation or mitigation . . . in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term; [¶] (2) A fact used to otherwise enhance the defendant's prison sentence; and [¶] (3) A fact that is an element of the crime may not be used to impose

consecutive sentences." (Cal. Rules of Court, rule 4.425(b); see also Cal. Rules of Court, rule 4.406 [sentencing judge is required to state reasons for imposing consecutive sentences].)

These criteria are not exclusive. (*People v. Caesar* (2008) 167 Cal.App.4th 1050, 1060, disapproved on another ground in *People v. Superior Court* (*Sparks*) (2010) 48 Cal.4th 1, 18.) Rule 4.408(a) of the California Rules of Court states: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge." (See also *People v. Caesar*, *supra*, 167 Cal.App.4th at p. 1060.)

Appellant Irvin Shaw contends the trial court abused its discretion because the attempted murders alleged in count 1 and 2 were committed on the same occasion and arose from the same set of operative facts. Although those are relevant factors, the key issue here is whether the trial court's exercise of discretion is supported by other proper considerations, and specifically whether "crimes and their objectives were predominantly independent of each other." (Cal. Rules of Court, rule 4.425(a).)

Counts 1 and 2 involved crimes and objectives that were predominantly independent of one another. Irvin was found guilty of count 1, the attempted premeditated murder of Ervin Ford, and count 2, the attempted premeditated murder of Salima Shutes which occurred at the same time and place; however, the court could reasonably infer from the evidence presented at trial that the underlying objectives of those two crimes are unrelated and "predominantly independent of each other."

Based on the evidence presented at trial, it appears the shooting of Ervin Ford was largely the result of the fistfight between Ford, Ford's brother, and the Shaw brothers 30 minutes prior to the shooting. The record does not reveal any personal, preexisting animosity between Ford and the Shaw brothers prior to the fight. Although there is conflicting evidence about the exact details of the fight, the fact that an altercation occurred is undisputed.

Detective Gillis testified that retaliation is very important in gang culture. He stated that gang members would try to "one up" what occurred to them. Specifically, he said "it is always one upping to be more violent, to be more intimidating, to be more crazy […] than the person who came after [the gang member]." Irvin's conduct after the fistfight is consistent with Detective Gillis' statement regarding retaliation. Irvin drove the SUV to the apartment, and Emanuel fired his handgun multiple times into the car where Ford sat. Instead of another fistfight, the Shaw brothers "one upped" the violence by using a gun. From this evidence, the court could reasonably infer that Irvin's objective in attempting to murder Ford was to seek vengeance and retaliate.

The evidence supports a separate objective for shooting at Ms. Shutes. Unlike the shooting at Ford, the shooting of Ms. Shutes was largely the result of a personal dispute arising over money. Ms. Shutes and Irvin had negative history, stemming from the failure to pay Irvin a finder's fee for his referral of Ms. Shutes to a tax preparer. Irvin and Ms. Shutes argued on several occasions about the finder's fee, including one incident where Williams witnessed Irvin slapping Ms. Shutes and calling her a "bitch." Ms. Shutes replied she was going to get her cousin. This incident took place only two days before the shooting.

As the evidence shows, Irvin's intent in attempting to murder Ms. Shutes was distinguishable from his intent in attempting to murder Ford. Ms. Shutes was not engaged in the same fistfight that provoked Irvin to attempt to murder Ford. Ms. Shutes and Irvin did get into fights, but the underlying reasons for those fights involved their tax refund conflict, which is entirely unrelated to the physical confrontation between the Shaw brothers and the Ford brothers. These facts support the reasonable inference that Irvin's objectives in shooting at Ms. Shutes was to end the conflict in his favor. As explained above, Irvin's objectives in attempting to murder Ervin Ford was largely separate and predominantly independent from his objectives in attempting to murder Salima Shutes.

Under California Rules of Court, rule 4.425(a)(1), the court had authority to apply consecutive sentences to predominantly independent crimes and objectives underlying

count 1 and 2. Also, the fact that the trial court specifically mentioned, "I am not taking into account a subsequent conviction of Penal Code section 32 because that is being separately considered as an enhancing prior," reveals two things. First, unlike Irvin's assertion that the trial court failed to properly consider Rule 4.425, the court did in fact consider it because its statement reflects its awareness of Rule 4.425(b)(2) ("Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except a fact used to otherwise enhance the defendant's prison sentence"). Second, his prior crimes had escalated from misdemeanors to attempted premeditated murder, and the trial court was permitted to take such escalation into consideration.

Furthermore, the trial court was not required to state other specific reasons for its decision to impose a consecutive term. Even if the trial court articulated only one criterion, namely how the aggravating factors outweigh the mitigating factors, this would be sufficient. (*People v. Bravot* (1986) 183 Cal.App.3d 93, 98; see also *People v. Covino* (1980) 100 Cal.App.3d 660 670.) As a result, "[i]t is not reasonably probable that a result more favorable to appellant would be reached and there was no miscarriage of justice." (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Wright* (1982) 30 Cal.3d 705, 714; see also *People v. Reynolds* (1986) 178 Cal.App.3d 407, 420.) Thus, trial court did not abuse its discretion in sentencing Irvin Shaw to consecutive indeterminate life terms on counts 1 and 2.

B. The Trial Court Did Not Err When It Imposed a One-Year Enhancement Under Penal Code Section 667.5, Subdivision (b).

Irvin also argues that the trial court erred in imposing the sentences on the Penal Code section 667.5, subdivision (b) enhancement because the court failed to exercise its discretion in making that sentencing choice.

The trial court found true the allegation that appellant Irvin Shaw served a prior conviction of a felony under Penal Code section 32, accessory after the fact. When imposing the additional one-year enhancement under section 667.5, subdivision (b), the

trial court stated, "Under 667.5 (b), that is the accessory Penal Code section 32, that was the subject of the first trial, a consecutive one year is mandated under that."

Irvin asserts that the court's use of the word "mandated" implies that the court did not understand it had discretion to strike the additional term. As a result, Irvin argues this court should remand his case for sentencing. We disagree.

First, aside from the trial court's use of the word "mandated," appellant Irvin does not offer additional evidence of the court's alleged error. The fact that the trial court was silent as to its reasons for imposing the enhancement adds nothing to Irvin's argument. "The general rule is that a trial court is presumed to have been aware of and followed the applicable law." (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496-497; *Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443.) Moreover, "an appellate court must presume that the decision of the trial court is correct," (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 321), and "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown." (Evid. Code, § 664.) These general rules that require presumption of the lower court's proper discretion also apply to sentencing issues like the one before us today. (*People v. Moran* (1970) 1 Cal.3d 755, 762.) Where sentencing involves imposing a mandatory additional prison term, it is not a "sentence choice" requiring explanation for the record. (*People v. Johnson* (1980) 104 Cal.App.3d 598, 611-612.)

Second, the trial court's use of the word "mandated" does not necessarily imply that it believed it lacked discretion when imposing the one-year enhancement. The word "mandated" has multiple meanings. To "mandate" means "to *make* [something] mandatory" or to "*order*" something. (Merriam Webster Collegiate Dict. (10th ed. 1995) p. 706, col. 2; italics added.) According to this definition, the trial court did not necessarily use the word to imply the one-year enhancement was absolutely mandatory but to state that the enhancement was being *made* mandatory in its view under the circumstances of the case. Here, the trial court merely meant to communicate that it had authority to make the decision, made the decision, and the decision applied to appellant.

The trial court did not erroneously believe that the one-year enhancement was mandatory without any further consideration.

Moreover, the trial court used the word "mandated" several times during sentencing. When deciding on imposing a consecutive term for counts 6 and 7, the court stated, "The court finds that a consecutive term is *mandated* based on separate occasions, separate threat of violence"; "The same allegation of force or violence having been found true on [. . .] a separate victim, great threat of violence, separate occasion, the court finds the mid term consecutive three years is *mandated*." (Italics added.) In those instances, the court clearly considered the separateness of the occasions or the increasing degrees of violence before mandating, or ordering, a consecutive mid term. And in each of those instances, the court appears to have used the term "mandated" when it meant "warranted" or "justified" under the circumstances. Thus, it cannot be presumed that the trial court meant "mandatory" when it used the term "mandated."

Third, there is evidence the trial court did in fact exercise its discretion when it imposed the one-year enhancement. Although the language of the statute is mandatory, "the trial court must exercise its discretion and either impose or strike the section 667.5, subdivision (b) prior prison term enhancements pursuant to section 1385, subdivision (a)." (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561.) The prosecutor presented the certified document showing that Irvin was convicted of violating Penal Code section 32 and that he served prison time. The prosecutor urged the court to impose the additional term, but the prosecutor did not argue or state that the additional one-year term was mandatory ("The People would also *ask* for additional one year for the state prison prior"; italics added). After receiving and reviewing the exhibit, the court found that Irvin served a prior conviction of a felony; the court also reviewed the probation report. Then the court specifically excluded Irvin's accessory conviction in evaluating whether to run his sentence consecutive. The court also did not consider the prior conviction when assessing the additional one-year term. ("I am not taking into account a subsequent conviction of Penal Code section 32 because that is being separately considered as an

enhancing prior.") In view of the foregoing, it appears the court exercised its discretion to consider all circumstances before imposing sentences.

Finally, the fact that the statute contains mandatory language is undisputed. In the *Garcia* case, the court notes that "[Penal Code] [s]ection 667.5, subdivisions (a) and (b) contain *mandatory* language, which requires the additional terms be imposed on every count. The enhancement language in section 667.5 is *mandatory* unless the additional term is stricken." (*People v. Garcia, supra,* 167 Cal.App.4th at p.1561 (recognizing that even though the term is mandatory, it may be stricken under 1385); italics added and fn. omitted.) However, in Irvin's case, even if the trial court mistakenly believed it lacked discretion to impose or strike the one-year enhancement, the error was harmless. (See *People v. Mack* (1986) 178 Cal.App.3d 1026, 1033.) During sentencing, the trial court stated "aggravating factors outweigh any mitigating factors" and noted that "he does have a prior record, and it appears that the crimes are of increasing . . . seriousness." The court reviewed Irvin's probation report as an adult and noticed the various convictions from 2001 onward. The court then found that they were "crime[s] of great threat and violence." The trial court's comments regarding his record and crime demonstrate that the imposition of the one-year term was not a mechanical application but a result of careful consideration under the circumstances. Such consideration implies exercise of discretion.

DISPOSITION

The judgments are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **SEGAL, J.**[*]

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