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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEMETRICE STREETER, Defendant and Appellant.	B290158 (Los Angeles County Super. Ct. No. BA464198)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ray G. Jurado, Judge. Affirmed as modified and remanded with directions.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Demetrice Streeter (defendant) appeals from the judgment entered after he was convicted of making criminal threats, possession of a firearm by a felon, and assault with a firearm. He contends that the criminal threats conviction was unsupported by substantial evidence, that the trial court erred in failing to instruct sua sponte regarding attempted criminal threats, and that the trial court erred in denying his postverdict request to represent himself. In addition, defendant contends that the sentence imposed as to the criminal threats conviction (count 1) should have been stayed rather than run concurrently, that the firearm enhancement imposed on count 1 should be stricken, and that the case should be remanded to allow the trial court to consider striking the five-year recidivist enhancement under the recent amendment to Penal Code section 667, subdivision (a)(1).[1] We find defendant's first three contentions to be without merit or harmless error, and we affirm the judgment of conviction. We agree that the sentence on count 1 and the firearm enhancement should be stayed. We modify the judgment accordingly, and remand the matter to the trial court to consider its newly enacted discretion under section 667, subdivision (a)(1).

BACKGROUND

Defendant was charged with making criminal threats, in violation of section 422, subdivision (a) (count 1), unlawful possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1) (count 2), and assault with a semiautomatic firearm in violation of section 245, subdivision (b) (count 3). The information alleged pursuant to section 12022.5, subdivision (a),

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

that defendant personally used a firearm in the commission of the offense. As to all three counts, the information alleged that defendant had suffered one prior serious felony conviction, making him subject to the five-year enhancement of section 667, subdivision (a)(1), and subject to sentencing under sections 667, subdivisions (b) through (j), and 1170.12, subdivision (b) (the Three Strikes law).

A jury convicted defendant as charged in the information and found true the special allegation that he personally used a firearm. Defendant waived his right to a jury trial on the prior conviction allegation, and the trial court found it true. On May 11, 2018, the trial court denied defendant's motion to dismiss the strike and enhancement allegations, and sentenced him to 14 years in prison. The sentence was composed of the low term of three years as to count 3, doubled as a second strike, plus a five-year recidivist enhancement pursuant to section 667, subdivision (a)(1), and three years due to the use of a firearm. The court imposed a concurrent term of 10 years 8 months as to count 1, and a concurrent term of five years eight months as to count 2. Defendant received 150 days of presentence custody credit, consisting of 125 actual days of custody and 25 days of conduct credit. The court suspended imposition of fees and fines upon finding that defendant did not have the ability to pay.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Testimony of Alphonso Thomas

Thomas works as a janitor in the residential hotel where he also lives with his fiancée, Tiffany James (James). At around 3:00 p.m. on January 7, 2018, he was mopping a stairway. When

he reached the second floor, defendant, also a resident of the hotel, appeared at the bottom of the stairs. Thomas said, "Excuse me. This floor is wet. Can you take the other stairwell?" Defendant replied, "Fuck that. I'm coming up these stairs right here." When defendant reached the second floor, each man gave the other a mean look, and as defendant passed, Thomas said, "Fuck you, too." Defendant passed by, saying no more. Thomas continued mopping.

Thomas soon heard a door open in the next hallway, and saw defendant approaching. Defendant said, "You don't know who I am. I don't play around with people. I'm 70 years old. I'm too old for this." It appeared to Thomas that defendant was holding a stick or a knife down by his leg. Thomas thought he was going to use it on him, so he raised the mop head, ready to "jam it down his throat" if defendant came at him with a knife. By then most of the second floor residents had come out of their rooms and were watching the incident, including James, Thomas's pregnant fiancée. Thomas heard someone in the crowd scream out, "He's got a gun." Thomas then saw the gun and felt "a little concerned." He testified that he recognized the gun as a .22-calibur Derringer, similar to ones he had seen on television.[2] Standing about eight to ten feet away from Thomas, defendant raised the gun, pointed it at Thomas's chest, and said something like, "I'll shoot your motherfucking ass." At that moment, Thomas's "fear jumped in, but [not] that bad," because he thought that if defendant was going to shoot him, he would already have

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[2] Later in his testimony, Thomas denied that he had testified that the gun was a Derringer. Throughout his testimony Thomas appeared to describe unexpressed thoughts as though he had expressed them during the incident.

shot him. Thomas then began thinking that defendant would shoot him, so his "fear level, that increased some."

Defendant then said that he would wait until Thomas was outside, and shoot him. Thomas was scared for his safety and the safety of his fiancée and their unborn child. He was mostly afraid for himself because he was "in front of it." His fiancée, James then "kind of jumped" in front of him, pulled him back, and said they should call the police. Though Thomas did not want to call the police, he felt threatened, and was "kind of scared at the same time." Thomas was in fear for his life and those of James and his unborn child.

During the confrontation defendant said, "I'll shoot you and your bitch," and at that or some other point in the confrontation, Thomas said, "Shoot me, do I look like I'm scared?" Thomas's heart was "beating through his chest," but he did not want to show fear in front of his fiancée. Thomas then became angry, and the "fear of him shooting me went out the window." Feeling both fear and anger, but thinking that defendant was more scared than he was at that moment, Thomas decided that he would not call 911, but would instead go outside and wait for defendant to shoot him, because he did not want to live in fear or feel like he had to look over his shoulder whenever he went outside. James pulled him back and urged him to call 911. Ultimately Thomas was glad she was there, because if she had not been, he probably would have gone outside.

After defendant returned to his room, Thomas called 911. A recording of the 911 call was played for jury. In it, defendant explained what had happened, described defendant, said he was in room 46, and then toward the end of the call, said, "I'm really

threatened for my life, . . . really scared, I'm at my job and I'm being threatened. . . . Mam [*sic*], can you hurry up please."

The police arrived in 10-15 minutes, and Thomas went to meet them. Thomas felt nervous and scared. After the police told him they found a loaded semiautomatic Ruger firearm, James said, "He could have shot you dead right there," which made Thomas feel more scared and angry than ever. He believed that defendant would have shot him, because defendant had pulled a gun on him over a verbal confrontation. Thomas also thought he would continue to be afraid of defendant if he encountered him, speculating that "if he pulled a gun on me the first time for a . . . verbal conversation, confrontation, the second time he see me we [*sic*] sitting up in here, 'I'll shoot you now before I go back in jail.'"

Thomas had not had any prior trouble or disputes with defendant, and he had not seen defendant threaten or act rudely to anyone.

Testimony of Tiffany James

James testified that she was Thomas's fiancée, and they were expecting a child. She was inside their apartment on January 7, 2018, at about 3:00 p.m., when she heard Thomas hollering, so she went out and saw him arguing with defendant. Thomas yelled something about just cleaning, and "respect my job." He was holding his mop pointing toward defendant's face in a protective or defensive manner. James encouraged Thomas to come inside with her and not "get into it with the guy." When a spectator in the hallway said defendant had a gun, she looked and saw the gun in defendant's hand, and was scared. From about five feet away, defendant raised the gun, pointed it at Thomas's midsection, yelled, cursed, and said, "You better be

lucky I didn't shoot. I catch you outside, [I'll] shoot your bitch ass." Scared, and thinking defendant would shoot Thomas, James went in to their apartment to get a phone. She dialed 911, and handed the phone to Thomas. Defendant then turned and went back to his room.

Thomas was initially angry, but by the time the police arrived, he had calmed down. James told the police where defendant lived, and after they knocked at his door several times, defendant opened the door and came out.

The police investigation

Los Angeles Police Officer Juan Lopez testified that when he and other officers went to the hotel in response to the 911 call, he met with Thomas, and later spoke to James. Both Thomas and James appeared to him to be frantic, paranoid, and scared. Thomas directed the officers to defendant's apartment. One of the officers knocked on the door several times, defendant came out, and officers then conducted a "protective sweep" of the apartment. Officer Lopez found a Ruger firearm in defendant's room, with five bullets in its magazine.

Investigating officer James Hill, testified that the firearm found in defendant's room was a .22-caliber, Ruger long-rifle "automatic"[3] pistol in working order. The magazine was loaded with five live bullets.

Defendant's decision not to testify

After the prosecution rested and the trial court denied defendant's motion to dismiss under section 1118.1, the trial

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[3] Although the reporter's transcript quotes the witness as stating that the firearm was an "automatic," defendant was charged with possession of a "semiautomatic" firearm. The Ruger was described by the court and counsel as semiautomatic.

court explained to defendant that he had the right to testify or not. Defendant stated that he understood his rights and then waived his right to testify, thereby invoking his right to remain silent. The court found that the waiver was given knowingly, freely, and voluntarily.

DISCUSSION

I. Criminal threat

Defendant contends that his conviction of making a criminal threat was unsupported by substantial evidence.

When a criminal conviction is challenged as lacking evidentiary support, "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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

A criminal threat is a statement, willfully made with the specific intent that it be taken as a threat to commit a crime which will result in death or great bodily injury to another person "even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that

person reasonably to be in sustained fear for his or her own safety." (§ 422.)

Defendant argues that the conviction was not supported by substantial evidence that Thomas experienced sustained fear, as Thomas's testimony supports at most, a momentary fear. "'[S]ustained' . . . means a period of time that extends beyond what is momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Defendant refers to several parts of Thomas's testimony, arguing that they demonstrate that "Thomas never testified that he was in actual, sustained fear," that any fear he experienced was limited to the moment he realized that defendant had a gun, and that his fear dissipated when defendant did not shoot him. Defendant refers to the following testimony by Thomas about the moment that defendant pointed the gun at him and threatened to shoot him: "[F]ear jumped in, but fear didn't jump in that bad, because if he was gon shoot me he would have shot me. So now I'm thinking in my head, well, he's not gonna shoot me. So now the fear level, that increased some." Defendant also points to testimony in which Thomas said to defendant to go ahead and shoot him, explaining, "Fear became more or less subsided. It became more -- you know, once I seen that -- you know, he raised the gun up, but he never pulled that trigger. So I'm not really now that scared now. Now I'm more or less I can't wait 'til you go outside and shoot me." Finally defendant directs us to Thomas's testimony that he was more angry than scared when he called 911: "I was so mad, you know, the fear of him shooting me went out the window."

Defendant has essentially summarized isolated portions of Thomas's testimony which, when viewed in the light most

favorable to defendant's contention, would give rise to inferences that could indicate that Thomas's fear was not "sustained." However, "because 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Defendant does not meet his burden merely by summarizing the circumstances that support a finding in his favor, without also showing that the jury's contrary finding cannot reasonably be inferred from the evidence. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1053-1054.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

When viewed in the light most favorable to the judgment, and drawing reasonable inferences from Thomas's testimony, particularly those portions of his testimony ignored by defendant in making his argument, the evidence amply demonstrated that Thomas experienced sustained fear. Thomas testified that when defendant pointed the gun at him and threatened him, he was afraid for himself, his pregnant fiancée and his unborn child, but mostly for himself, because "at that point I'm in front of it." As defendant has also failed to note, Thomas testified that when he said to defendant, "Shoot me, do I look like I'm scared?" he explained that he did not want to show fear in front of his fiancée. He testified: "I got my fiancée behind me. So I'm not really trying to be all that chivalry [*sic*]. That don't mean I wasn't scared, because he got a gun in his hand. But she's behind me. So I don't want her to really see that, 'Oh, this dude got him

scared.' But knowing she nor [*sic*] he was going to die with me, you know, my heart was almost beating through my chest. I'm not trying to feel a bullet go through my chest."

A victim's denial that he was afraid may be mere bravado. (*People v. Borra* (1932) 123 Cal.App. 482, 485.) Thus, fear may be inferred from the circumstances of the crime even when the victim denies that he was afraid. (See *People v. Renteria* (1964) 61 Cal.2d 497, 498-499 [robbery; store clerk denied fear].) The jury could reasonably infer bravado from Thomas's conflicting statements that he was not afraid, that he was angry, that his fear increased, then decreased, and increased again, and from his admission that he did not want his fiancée to know he was afraid. It was the province of the jury to assess Thomas's credibility and to resolve his conflicting denials and admissions of feeling afraid. (See *People v. Young*, *supra*, 34 Cal.4th at pp. 1175, 1180-1181; *People v. Smith* (2011) 198 Cal.App.4th 415, 427 [even internally inconsistent testimony may be sufficient].)

Whatever Thomas said at the time that he was threatened, and however much he denied that he called 911 because he was afraid, the 911 call shows that he was in fact afraid. He said to the 911 operator, "I'm really threatened for my life, . . . really scared, I'm at my job and I'm being threatened. . . . Mam [*sic*], can you hurry up please."[4] As we must presume in support of the judgment the existence of every fact the jury could reasonably

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[4] A recording of the 911 call was played for jury. However, as defendant did not have the trial exhibits transmitted to this court, we have only the transcript of the recording. It is defendant's burden to provide an adequate record and to demonstrate error from the record. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564-565.)

deduce from the evidence (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053), we presume that Thomas's voice indicated that he was afraid.

The police arrived approximately 10 to 15 minutes after the 911 call was made. Officer Lopez testified that when he arrived both James and Thomas appeared to be frantic, paranoid, and scared. Thomas testified that when officers informed him that the gun they found had been loaded, he "became *more* scared than ever then," realizing that he could have been killed. (Italics added.) Fifteen minutes of fear is sufficiently sustained. (See *People v. Allen*, *supra*, 33 Cal.App.4th at p. 1156; *People v. Fierro* (2010) 180 Cal.App.4th 1342, 1349.)

Defendant draws several inferences to support his argument to the contrary. He cites the reasoning in *People v. Allen*, *supra*, 33 Cal.App.4th at page 1156, that the knowledge of a "defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear. [Citation.]" Because Thomas testified that he had not had any prior negative experience with defendant, defendant argues that this demonstrates that Thomas did not experience sustained fear. Defendant also cites Thomas's testimony that he was both "nervous" and "scared" when the police were there, from which defendant draws the inference that Thomas, as an ex-felon, was simply nervous in the presence of police officers. In addition, while acknowledging that Thomas expressed fear while testifying against defendant, defendant contends that such fear is

irrelevant because Thomas did not testify that any threats were ongoing.[5]

Showing "'that the circumstances also might reasonably be reconciled with a contrary finding'" does not render the evidence insubstantial. (*People v. Earp* (1999) 20 Cal.4th 826, 887-888.) "These are arguments to be made to a jury, not to an appellate court. Defendant in effect requests us to reweigh and reinterpret the evidence in a manner consistent with innocence of the crime . . . . But such a determination is the function of the trier of fact; at this stage the test is not whether the evidence may be reconciled with innocence, but whether there is substantial evidence in the record on appeal to warrant the inference of guilt drawn by the trier below. [Citation.]" (*People v. Saterfield* (1967) 65 Cal.2d 752, 759.)

We are satisfied that the record contains substantial evidence from which the jury could find beyond a reasonable doubt that the fear that defendant's threats caused Thomas was not momentary or fleeting, but endured throughout the incident, as well as during the 911 call; speaking with the police 10 or 15 minutes later; and even during the trial.

II. Attempted criminal threats

Defendant contends that the trial court erred by failing to instruct sua sponte regarding attempted criminal threats.

"[I]f a defendant, . . . acting with the requisite intent, makes a sufficient threat that is received and understood by the

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[5] Thomas did not simply say he was afraid of testifying. The prosecutor asked, "And today, if you were to see the defendant, would you be afraid of what he would do to you?" Thomas replied, "Yes," explaining that he would be afraid that defendant would shoot him because he had testified against him.

threatened person, but, for whatever reason, the threat does not *actually* cause the threatened person to be in sustained fear . . . , the defendant properly may be found to have committed the offense of attempted criminal threat." (*People v. Toledo* (2001) 26 Cal.4th 221, 231.) An attempted criminal threat is a lesser included offense of making a criminal threat. (*Ibid.*)

A trial court must instruct sua sponte on lesser included offenses that are supported by substantial evidence. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) "[T]he 'substantial' evidence required to trigger the duty to instruct on such lesser offenses is not merely '*any* evidence . . . no matter how weak' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see also *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.)

To demonstrate that substantial evidence supported a finding that Thomas did not experience sustained fear, defendant refers to his argument in section I above, and to Thomas's testimony that his fear subsided after defendant raised the gun up but did not pull the trigger, that he was so "mad" that he did not want to move, and that he told defendant to go ahead and shoot him.[6]

Assuming that such statements were sufficient to trigger the trial court's obligation to instruct regarding attempted criminal threat, we agree with respondent that the omission was

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[6] Defendant also claims that James described Thomas as "angry," not "afraid." He refers to page 922 of the reporter's transcript, which reflects James's testimony that Thomas was angry. She did not testify that Thomas was not afraid.

harmless. As "'the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law'. . . , error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses . . . must be reviewed for prejudice exclusively under [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836] . . . . '[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955, citations omitted.)

We do not agree with defendant that the evidence that Thomas did *not* experience sustained fear was strong, nor do we agree that the evidence of sustained fear was weak. Thomas testified that he was both angry and afraid, and we reject any presupposition in defendant's argument that anger and fear are incompatible emotions. Thomas described the emotional turmoil in which he felt the two emotions, each dominating the other in turns. Thomas testified that during the confrontation he told defendant to go ahead and shoot him, but afterward, he was grateful that James was there to calm him down. When defendant pointed the gun at him and threatened him, Thomas was afraid for himself, his pregnant fiancée and his unborn child. He tried not to show his fear, but he could feel his heart beating as though it would beat through his chest, and he tried to keep himself from imagining he could feel the bullet going into his chest. His fear "more or less subsided" when defendant did not pull the trigger, and that is when he became angry. Thomas's fear is apparent in the 911 call, in which he said, "I'm really threatened for my life, . . . really scared, I'm at my job and I'm being threatened. . . . Mam [*sic*], can you hurry up please."

When Officer Lopez arrived, Thomas appeared to him to be frantic, paranoid, and scared. When Thomas learned that the gun had been loaded, he "became more scared than ever then," realizing that he could have been killed.

Having reviewed all the circumstances, we conclude that if instructed regarding attempted criminal threats, there is no reasonable probability the jury would have found that Thomas was not afraid, even while feeling angry, or that his fear was not sustained.

III. Posttrial motion for self-representation

Defendant contends that the trial court erred in denying his request to represent himself in order to bring a motion for new trial.

The Sixth Amendment right to counsel implies a right of self-representation if the defendant voluntarily and intelligently elects to do so. (*Faretta v. California* (1975) 422 U.S. 806, 820-821 (*Faretta*).) "When 'a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be.' [Citation.]" (*People v. Danks* (2004) 32 Cal.4th 269, 295, quoting *People v. Windham* (1977) 19 Cal.3d 121, 128.) So long as the defendant's request is made knowingly and voluntarily, and asserted within a reasonable time prior to trial, the right of self-representation is absolute. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) When the motion is untimely, the issue is addressed to the sound discretion of the trial court. (*People v. Smith* (2018) 4 Cal.5th 1134, 1182-1183, citing *People v. Windham*, at pp. 127-129.)

When the motion is made midtrial, it is untimely. (*People v. Smith*, *supra*, 4 Cal.5th at pp. 1182-1183.) A bifurcated trial is considered to be at an end *after* the trial on the prior convictions; thus a request made between the two phases is considered a midtrial request, and untimely. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1113-1114.)

Here, sentencing and a bifurcated trial on the prior conviction allegation were scheduled for May 11, 2018, two weeks after the verdicts were entered. On that date, defendant told the court that he would like to exercise his right represent himself. Defendant's motion was thus made midtrial and was untimely.

Relying on *People v. Miller* (2007) 153 Cal.App.4th 1015 (*Miller*), defendant claims that his motion was timely because he made it at the first hearing after the verdicts were entered. In *Miller*, unlike here, the defendant made a posttrial request to represent himself at sentencing. The appellate court concluded that the motion, "made after the jury returned its verdict and his new trial motion had been denied, *but well before sentencing*, was not made during trial for the simple reason that sentencing occurs posttrial. [Citations.]" (*Id.* at pp. 1023-1024, italics added.) The motion was timely in *Miller* because the defendant wanted to represent himself only at sentencing *and* he made his motion two months prior to the date set for sentencing. (*Id.* at p. 1024.) The *Miller* court cautioned "that [not] every request for self-representation at sentencing will be timely. Much as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation at sentencing must be made within a reasonable time prior to commencement of the sentencing hearing. [Citation.]" (*Ibid.*)

Thus, *Miller* does not support defendant's claim that his request was timely. Even if defendant had waited until after the trial on the prior convictions, his request would still have been made at the time of sentencing and thus untimely, and defendant's request for self-representation was a matter for the trial court's discretion.

"In exercising its discretion over an untimely request, the court must consider whether any disruption that would be caused by granting the request is likely to be aggravated, mitigated or justified by the surrounding circumstances, [and] the reasons the defendant gives for the request." (*People v. Smith*, *supra*, 4 Cal.5th at pp. 1182-1183.) The discretionary denial of a motion for self-representation will be upheld unless the ruling exceeded the bounds of reason. (*Id.* at p. 1182.)

In any event, we agree with respondent that defendant did not clearly make an unequivocal request to represent himself. Courts must draw every reasonable inference against a waiver of the right to counsel; thus, whether timely or untimely, a request to proceed in pro se must be clear, articulate, and unmistakable, and it may be denied when it appears from defendant's words and conduct that it was made in anger or frustration, for the purpose of delay, or to frustrate the orderly administration of justice. (*People v. Valdez* (2004) 32 Cal.4th 73, 98-99; see also *People v. Marshall* (1997) 15 Cal.4th 1, 22-23.)

The lengthy discussion between defendant and the trial court (covering seven pages of reporter's transcript) demonstrates that defendant did not present a clear request to represent himself in bringing a motion for new trial. However, it was clear that defendant did not want to represent himself on the only two matters before the court on the day he made his request: the

prior conviction trial and sentencing. Defendant explained: "I'd like to exercise my *Faretta* rights and go pro per because I never . . . got a chance to testify. Nobody heard my side of the story. Never talked to an investigator, you know. And I asked my counsel [but] [h]e advised me not to testify. But . . . [a]t that point I didn't know how important it was for me to testify." Defendant went on to say that he had not been given the opportunity to speak to an investigator, no one spoke to all the witnesses to the incident, only one witness said he had a gun, and so the jury heard only one side.

The court's responses demonstrate that the court believed that defendant's request was to dismiss counsel immediately and represent himself that day at sentencing. After the trial court questioned defendant regarding his understanding of his right to testify, and defendant confirmed that he understood his right and that he had in fact chosen not to testify, the court told defendant that sentencing would not involve reopening the issues resolved at trial. The court stated: "[I]f you decided to represent yourself, you will not be able to go into the evidence that the jury heard at trial. . . . This is simply a matter of sentencing. It's not a matter of what happened because the jury's already decided you're guilty. The jury has spoken."

Defendant then replied, "I couldn't get a new trial?" The trial court explained, "You could appeal the conviction and the sentence and ask for a new trial in that, but . . . you're getting ahead of yourself. . . . If you represent yourself, you can do anything you want to do. I'm not saying that you can't make that request if I allow you to represent yourself, but . . . if you represent yourself, we can't rehash what happened at the trial." Defendant once again explained at length that he should be

entitled to an investigator to find a witness among the 40 spectators to the incident, and again complained that he never got to testify. The court again pointed out that defendant had been advised of his right to testify and chose not to do so, and that the only matters on calendar were the trial on the prior conviction and sentencing, which did not involve factual issues already determined by the jury.

Defendant replied, "I want a new trial is what I wanted. I just want somebody to hear my side, your Honor. That's all I wanted. . . . I'm not saying that I didn't have the gun. I'm just saying the gun was in my room but I didn't have it. I didn't pull the gun on the defendant [*sic*]." He added, "I just wanted somebody on my side. That's all. I told my lawyer my side, but he didn't tell it. He didn't present it."

Finally, the trial court asked defendant whether he still wanted to represent himself that day in the trial on the prior conviction. Defendant expressed surprise in his reply, "Today you said? Well, this is not for--," the court interrupted, "The trial on the prior. That's what we're here for today, the trial on the prior. Do you want to represent yourself on the trial on the prior?" Defendant replied, "No, just go ahead, your Honor."

Defendant's words and conduct demonstrated that he was not interested in representing himself in the trial on the prior conviction or at sentencing. He was clearly not prepared to go forward, but intended only to *investigate* possible grounds for a new trial, which would delay sentencing considerably. However,

defendant did not seek a continuance and did not suggest any potentially meritorious ground for a new trial.[7]

Now, defendant argues that "[r]egardless of the relative merits of any motion, [he] was entitled to personally pursue this available procedural remedy." Contrary to defendant's argument that he was entitled to pursue a new trial motion regardless of potential merit, the reason a defendant gives for his request to represent himself is a relevant factor in the trial court's exercise of discretion. (*People v. Smith*, *supra*, 4 Cal.5th at pp. 1182-1183.)

Defendant contends that he made clear to the court that he wished to bring a new trial motion because trial counsel failed to investigate 40 potential witnesses and misadvised defendant not to testify. Defendant did not state any ground relating to the effectiveness of counsel. He merely expressed regret for following the advice of counsel not to testify, and asserted that there was no investigation, apparently because *he* did not speak to an investigator.[8]

Defendant also asserts that the trial court erroneously advised him that he could not have a new trial on the grounds stated. However, defendant has made no attempt here to justify granting a new trial on the only grounds he stated to the trial

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[7] Defendant's wish to testify and to interview witnesses would not be newly discovered evidence which could not reasonably have been previously discovered or produced at trial, and thus foreclosed by section 1181, subdivision 8.

[8] In a footnote, defendant asserted that he would file a petition for writ of habeas corpus showing counsel error, but none has been filed to date.

court: his regret at having waived his right to testify; and a wish to have an investigator find and interview potential witnesses who would support his testimony. We conclude that defendant's request was not sufficiently clear to convey to the trial court defendant's intent to bring a motion in pro se for a new trial. A reasonable inference to be drawn from defendant's words and conduct is that his request was prompted by an emotional reaction such as frustration, disappointment, regret, anxiety about impending imprisonment, or for the purpose of delaying his sentencing. Under such circumstances, and because defendant withdrew his request with regard to the only matters before the court, we do not find that the trial court erred or that its procedure exceeded the bounds of reason.

IV. Multiple punishment

Defendant contends that the trial court erred in imposing a concurrent sentence for criminal threats, but should instead have stayed the sentence under section 654. Respondent agrees.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654.) In general, section 654 precludes multiple punishments for a single physical act that violates different provisions of law, although "what is a single physical act might not always be easy to ascertain. In some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) In other cases, it may be appropriate to apply the "intent and objective" test. (*Id.* at pp. 359-360.) Under that test, "[w]hether a course of criminal conduct is divisible and therefore gives rise to

more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*), disapproved on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 334, 336.)

Defendant argues that the court should have stayed the term pursuant to section 654 because threatening to shoot the victim (count 1) and the physical act of pointing the gun at him (count 3) occurred during an indivisible course of conduct pursuant to a single objective: to instill fear. We agree, and at sentencing, the prosecutor conceded the application of section 654 to counts 1 and 3. As the trial court did not disagree, the concurrent sentence was apparently pronounced in error.

As the error resulted in an unauthorized sentence, this court may correct it by ordering the lesser offense stayed. (See *People v. Sanders* (2012) 55 Cal.4th 731, 743, fn. 13.)

As assault with a semiautomatic firearm in violation of section 245, subdivision (b), carries the longer term, we will correct the sentence to stay count 1.

V. Firearm enhancement

Defendant claims that it was error to impose the enhancement for the personal use of a firearm under section 12022.5 on both counts 1 and 3, and that only one such enhancement may be imposed when two offenses arise from an indivisible course of conduct. He contends that the enhancement imposed on count 1 must therefore be stricken. Respondent

agrees that it should not have been imposed, but counters that it should be stayed under section 654.[9]

Defendant relies on *People v. Ramirez* (1979) 93 Cal.App.3d 714, which relied in turn on *In re Culbreth* (1976) 17 Cal.3d 330, which was overruled in *People v. King* (1993) 5 Cal.4th 59. In overruling *Culbreth*, the California Supreme Court held: "Subject to Penal Code sections 654 and 1170.1,[10] and any other applicable limitations, a firearm-use enhancement under section 12022.5 may be imposed for each separate offense for which the enhancement is found true." (*People v. King*, *supra*, at p. 79.) Thus, as the personal use enhancement of section 12022.5, subdivision (a), was found true as to both counts 1 and 3, the enhancement should be added to both terms, and as the execution of the sentence imposed on count 1 must be stayed under section 654, the enhancement must be imposed and its execution stayed as well. (See *People v. Guilford* (1984) 151 Cal.App.3d 406, 411.)

VI. Recidivist enhancement

Defendant asks that we remand to allow the trial court to consider striking the five-year recidivist enhancement added to counts 1 and 3, as required by section 667, subdivision (a)(1).

Effective January 1, 2019, under the recently enacted amendments to sections 667, subdivision (a)(1), and 1385,

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[9] Where punishment of one of two convictions is precluded by section 654, the sentence for the lesser is *imposed* and *then* stayed, not simply stayed, as respondent suggests. (See *People v. Deloza* (1998) 18 Cal.4th 585, 591-592.)

[10] Section 1170.1 relates to the aggregation of consecutive sentences, and thus does not apply here.

subdivision (b), trial courts have discretion to strike sentencing enhancements for prior serious felony convictions in the interest of justice. (Stats. 2018, ch. 1013, §§ 1 & 2.) The parties agree that the statute applies retroactively to defendant under the rule of *In re Estrada* (1965) 63 Cal.2d 740, 744-745. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Remand is required in cases where the sentencing record does not indicate that the trial court "would not, in any event, have exercised its discretion to strike the [sentence enhancement]. [Citation.]" (*People v. Superior Court (Romero)*, (1996) 13 Cal.4th 497, 530, fn. 13 [amended Three Strikes law].)

When the trial court does not expressly state that it would not exercise its discretion to strike the enhancement, it may be inferred from the court's statements and sentencing decisions, such as its "express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term . . . [that] there appears no possibility that, if the case were remanded, the trial court would exercise its discretion to strike the enhancement altogether." (*People v. McVey* (2018) 24 Cal.App.5th 405, 419 [firearm enhancement]; see also *People v. Jones* (2019) 32 Cal.App.5th 267, 273 [recidivist enhancement].)

Respondent contends that a clear indication that the trial court would not strike the recidivist enhancements can be inferred from the court's denial of defendant's motion to strike his prior strike conviction, and the following explanation of its ruling:

> "Given the history of these multiple convictions, the sentencing -- the sentences that he received, which included at least three state prison commitments, and the seriousness of the allegation -- rather, the violations and allegations in this case, the

court finds that [defendant] falls squarely within the spirit and scheme of the Three Strikes law."

In light of other comments and sentencing choices, we cannot infer that there is no possibility that the trial court would exercise its discretion to strike the enhancements. The court found no mitigating factors relating to the offenses, but with regard to defendant, the court considered defendant's age (70),[11] as well as the facts that defendant's last prison commitment was completed seven years before and that his only violent felony occurred in 1997. In addition, the court considered the testimony of defendant's acquaintance regarding defendant's assistance when he was homeless and suffering from an addiction, which defendant was instrumental in helping him recover. As a result of such mitigating factors, the trial court imposed the low term as to each of the three counts, and did not impose consecutive sentences.

Under circumstances when the thoughts of the trial court are unclear, we conclude that the better course of action would be to remand the matter for the limited purpose of allowing the trial court to consider whether to strike the recidivist enhancements. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111.)

DISPOSITION

The judgment of conviction is affirmed. The sentence is corrected to reflect that the term imposed as to count 1, including the firearm enhancement, is stayed pursuant to section 654. The matter is remanded for the trial court to exercise its discretion whether to strike the enhancements imposed under section 667,

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11 When the court considered age, defendant represented that he had prostate cancer.

subdivision (a)(1). If the court elects to exercise this discretion, the defendant shall be resentenced. The trial court is directed to prepare an amended abstract of judgment reflecting both the modification of sentence in count 1 made here, as well as any new sentence imposed if the court chooses to modify its sentence under section 667, subdivision (a)(1). The trial court is directed to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST