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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE MIGUEL PEREZ, Defendant and Appellant.	B267648 (Los Angeles County Super. Ct. No. TA132938)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Law Offices of William J. Kopeny, William J. Kopeny; Quinn Law, Stephane Quinn, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Jose Miguel Perez guilty of the attempted murder of Jaime Jauregui (Pen. Code, §§ 664/187, subd. (a)[1]), assault with a firearm on Carmen Gamez (§ 245, subd. (a)(2)), and shooting at an occupied motor vehicle (§ 246). With respect to each offense, the jury found true the allegation that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)); as to the attempted murder offense, the jury found true the allegation that defendant personally used and personally and intentionally discharged a handgun causing great bodily injury (§ 12022.53, subds. (b)-(d)); and as to the shooting at an occupied motor vehicle offense, the jury found true the allegation that defendant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)). The trial court sentenced defendant to 59 years, eight months to life in state prison.

Defendant contends the trial court erred in failing to instruct, sua sponte, on heat of passion; his due process rights were violated by the combination of the prosecutor's closing argument and a unanimity instruction; testimony from a police detective was erroneously admitted; defense counsel's failure to object to that police detective's testimony was ineffective assistance of counsel; the trial court improperly restricted defense counsel's closing argument; insufficient evidence supports a great bodily injury finding under section 12022.7, subdivision (a); and the amended information did not give him notice of the section 12022.53, subdivision (d) allegation as to the

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1 All statutory citations are to the Penal Code unless otherwise noted.

shooting at an occupied motor vehicle offense.[2] We asked the parties to submit letter briefs addressing whether the trial court: (1) should have imposed and stayed the term for the section 12022.7, subdivision (a) enhancement found true as to the attempted murder offense; (2) erroneously stayed the term on the assault with a firearm offense as the victim in that offense was different from the victim of the attempted murder; and (3) should have imposed and stayed the term for shooting at an occupied motor vehicle because a term was imposed on the attempted murder offense and the multiple victims exception to section 654 permits only one unstayed sentence per victim of all the violent crimes a defendant commits incidental to a single criminal intent (the verdict forms for both offenses identified Jauregui as the victim).

We hold that the trial court should have stayed the section 12022.7, subdivision (a) enhancement as to defendant's attempted murder offense pursuant to section 654; the trial court erred in staying the term on defendant's assault with a firearm offense pursuant to section 654; and the trial court should have imposed and stayed the term for defendant's shooting at an occupied motor vehicle offense. Accordingly, we reverse defendant's sentence and remand for resentencing; we otherwise affirm the judgment.

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[2] Defendant also initially claimed insufficient evidence supports the jury's section 12022.53, subdivision (d) enhancement with respect to the shooting at an occupied motor vehicle offense. He concedes in his reply brief that sufficient evidence supports the finding.

BACKGROUND

Gisela Martinez lived with her aunt and defendant, her cousin, at 2402 Bliss Avenue in Los Angeles County. Between 9:00 a.m. and 10:00 a.m. on April 15, 2014, Martinez's van was parked in her aunt's driveway. Martinez stood beside her van while "working on papers." As she stood in the driveway, Martinez heard defendant's voice from the street near the mouth of the driveway. Martinez looked over and saw defendant bent down next to a car, "leaning into the passenger's side of the door."

Initially, defendant's voice was muffled. At some point, the tone of the conversation changed and defendant's "pitch" became "upset." Defendant said something to an occupant of the car "along the line of, 'What? My girl?'" The change in the tone of the conversation caused Martinez to walk toward the car. By the time Martinez opened the gate at the end of the driveway, defendant had moved to the driver's side of the car. At some point, Martinez heard a gunshot. Martinez then saw defendant holding a gun in his hand. His arm was extended and he was pointing the gun at the driver.

Hearing the gunshot upset Martinez, and she yelled something like, "Why the fuck did you do that?" Martinez picked up her pace and moved to a position between defendant and the driver. The driver appeared to Martinez to be a Hispanic man between 20 and 30 years old. Blood was "spewing" from his left elbow. Martinez also saw a female in the car. She had the same complexion as the driver.

The driver appeared to be in shock, and stared at defendant before speeding away. As Martinez and defendant walked back toward the gate, defendant stopped, pointed a long barreled

revolver at the back of the car, and fired a shot. Martinez did not know if the shot hit the car.

Martinez went inside her aunt's house to call 911. Her aunt refused to allow Martinez to use the phone, saying something like, "No, you're crazy." Defendant grabbed some keys, and left in a blue SUV. Martinez also left, driving to the Compton Sheriff's Station to report the shooting. At the Compton Station, she was redirected to the Alameda Station.

A short time later, a Los Angeles County Sheriff's Department deputy stopped defendant's car. The deputy recovered a .357 revolver from the car. There were four live rounds and two spent rounds in the revolver's cylinder. Defendant's hands were tested for gunshot residue. Two particles of gunshot residue were found.

Between 9:00 a.m. and 10:00 a.m., on April 15, 2014, Jauregui and Gamez arrived by car at his stepmother Alejandra Mora's house. Jauregui, who had been shot in the stomach, was driving. Mora got in the car and drove Jauregui and Gamez to the hospital. During the drive to the hospital, Gamez did not speak to Mora. Mora did not realize Gamez was injured until Gamez's head "went down"—"she was passing out"—as they arrived at the hospital. A video of the area outside of the hospital was played for the jury. The video showed Gamez on her hands and knees in the front of the hospital.

Deputy Sheriff Oscar Rodriguez responded to the hospital. There, Rodriguez saw a vehicle just outside of the emergency room that appeared to have a gunshot to the rear window and blood inside. He also saw a male Hispanic and a female Hispanic gunshot victims. The male appeared to have a through-and-through gunshot wound to his left elbow and a gunshot wound to

his left chest. The female appeared to have a gunshot wound either above or below her elbow. She was bleeding, but Rodriguez did not see "too much blood" because she had personally cleaned the wound. The female was "crying, a bit hysterical, and seemed flustered."

While at the hospital, Rodriguez recovered bloody clothes. He turned the clothes over to another deputy sheriff who found a bullet fragment stuck to the blood on the clothes. Another bullet fragment was recovered from the street at the scene of the shooting. Both were examined and determined to have been fired from the .357 revolver recovered from defendant's car. A bullet fragment recovered from Jauregui had a circumferential groove or "knurling" consistent with the fragment having been fired from a revolver, but the fragment could not be matched with the .357 revolver in this case.

DISCUSSION

I. Heat of Passion Instruction

Defendant contends his convictions on all counts must be reversed because the trial court erred in failing to instruct the jury, sua sponte, with an instruction on heat of passion attempted voluntary manslaughter. Because substantial evidence did not support such an instruction, the trial court did not err.

A. Background

Martinez testified she saw defendant speaking to someone in a car. She walked over to the car when there was a change in "tone" of the conversation between defendant and an occupant of

the car. Describing how the "tone" changed, Martinez said, "I can't remember the entire phrase. It was somewhere along the line of, 'What? My girl?' But he was—his pitch, it was upset." Martinez was referring to defendant.

B. Application of Relevant Principles

"'[I]t is the "court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed." [Citation.]' [Citations.] 'Conversely, even on request, the court "has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction" [Citation.]' [Citation.] Substantial evidence '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.]' [Citation.] "'On appeal, we review independently the question whether the court failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327-1328; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137-1139 [a trial court has a sua sponte duty to instruct on heat of passion theory of attempted voluntary manslaughter when supported by the evidence].)

"'California statutes have long separated criminal homicide into two classes, the greater offense of murder and the lesser included offense of manslaughter. The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice. (Compare § 187, subd. (a) ["[m]urder is the unlawful killing of a human being . . . with malice aforethought"] with §

192 ["[m]anslaughter is the unlawful killing of a human being without malice"].)'" (*People v. Randle* (2005) 35 Cal.4th 987, 994, overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.) "'Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Attempted murder requires express malice, that is, the assailant either desires the victim's death, or knows to a substantial certainty that the victim's death will occur.' [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1217.)

"Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citation.] . . . [¶] . . . [¶] Subjectively, 'the accused must be shown to have killed while under "the actual influence of a strong passion" induced by such provocation.'" (*People v. Enraca* (2012) 53 Cal.4th 735, 759; *People v. Williams* (1988) 199 Cal.App.3d 469, 475 ["For a finding of attempted voluntary manslaughter under the heat of passion theory, both provocation and heat of passion must be demonstrated"].)

Based on the evidence adduced at trial, the trial court did not have a sua sponte duty to instruct on heat of passion. No evidence was presented to satisfy the first component of heat of passion—i.e., that Jauregui engaged in "conduct . . . sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Enraca, supra,* 53 Cal.4th at p. 759.) The only evidence concerning defendant's interaction with Jauregui prior to the shooting was Martinez's testimony that defendant said, "What?

My girl?" in an "upset" pitch. No evidence was presented about what, if anything, Jauregui said to precipitate defendant's response. Because substantial evidence did not support a heat of passion instruction, the trial court did not err. (*People v. Houston, supra,* 54 Cal.4th at p. 1217; *People v. Enraca, supra,* 53 Cal.4th at p. 759.)

Apparently also in support of his heat of passion argument, defendant cites the "*Toledo* doctrine" (*People v. Toledo* (1948) 85 Cal.App.2d 577) which the California Supreme Court described as follows: "'The courts may sometimes say that the prosecution is "bound by" extrajudicial statements of defendant which are introduced by the prosecution and which are irreconcilable with guilt, but this concept is applicable only where there is no other competent and substantial evidence which could establish guilt.' [Citation.]" (*People v. Burney* (2009) 47 Cal.4th 203, 248.) The *Toledo* doctrine has no application in this case. Defendant's statement, "What? My girl?" is not irreconcilable with his guilt. Moreover, Martinez's testimony and the forensic bullet fragment evidence was other competent and substantial evidence of defendant's guilt. (*Ibid.*)

II. The Unanimity Instruction and the Prosecutor's Argument

Defendant argues his right to a unanimous verdict on counts 1 (attempted murder of Jauregui) and 2 (assault with a firearm on Gamez) was violated because, in argument to the jury, the prosecutor elected the act that constituted each crime but the court nonetheless instructed on unanimity thereby allowing the jury to use the act that the prosecutor relied on for the assault

offense to find him guilty of attempted murder, and vice versa. Because the trial court did not instruct the jury with a unanimity instruction, defendant's argument fails.

A. Background

Defendant does not provide record cites to those parts of the prosecutor's closing argument he challenges. Although we are under no obligation to search the record for support of a claim on appeal (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1574), it appears defendant relies on the following:

In closing argument, the prosecutor said:

"And the defendant's personal use of the firearm caused great bodily injury. Now, this would work for either [Jauregui] or [Gamez], because both of them were shot.

"In other words, the defendant tried to kill the male by shooting him with the gun, but he was unsuccessful, but he hurt him greatly. That the defendant used a gun and hurt the female greatly. That's that second shot. The defendant shot a gun at a car with people in it. It's that simple."

Later, the prosecutor said,

"Now, another point is, beyond the fact that he fires at point blank range at this man, how do we know that he really wanted to kill him? Because after that, after seeing all of that blood pour out, seeing all of that blood on the ground, it wasn't enough for the defendant. He fired another shot at the car, a car that was taking off, that not only had that man in it but also had a young woman in it."

Still later, the prosecutor said,

"I want to talk to you about the intent to kill, because that goes to Count 1. Count 1 is attempted murder and there's a specific intent to kill involved. How do we know that took place? It's common sense really.

"The defendant is within a few feet and fires a revolver right into the abdomen, right into the chest area of the male victim. He's successful. Blood's going everywhere. That alone would be enough for an intent to kill. But how do we know that he was committed to that? That's that second shot. Once he saw that that guy was going to get away? No. He fired another shot."

B. Application of Relevant Principles

Defendant argues, "The long-standing rule where, as here, the People offer evidence of two distinct acts that *could* constitute a charged crime, is that the People must either elect a single act that constitutes the offense, or the jury must be informed that to convict, it must find the People have proven the *first act* beyond a reasonable doubt. [¶] . . . [¶] The problem in this case is that *both* the following occurred: (1) the prosecutor did clearly elect which act constituted which charged crime; and (2) the trial court still gave a unanimity instruction. [¶] . . . [¶] The result of giving the unanimity instruction, and the prosecutor 'electing,' combined with the fact that the prosecutor relied heavily on the second shot, which purportedly was not the attempted murder 'act' but may have been, rendered this unanimity instruction hopelessly confusing and misleading."

Defendant's argument is based on a false premise—that the trial court instructed the jury with a unanimity instruction. As the Attorney General points out in her respondent's brief and

defendant concedes in his reply brief[3], the trial court did not give a unanimity instruction. Accordingly, the jury could not have been confused by the interplay of the prosecutor's "election" and a non-existent unanimity instruction.

Confronted with the flaw in his argument—the absence of a unanimity instruction—defendant argues in his reply brief for the first time that the prosecutor's argument that the second shot was proof of defendant's intent to kill "was misleading in that it conflated the maliciousness element of section 246 with the malice element of homicide. The elements of an attempted murder offense and shooting at an occupied vehicle offense are not congruent." "[W]e do not consider an argument first raised in a reply brief, absent a showing why the argument could not have been made earlier." (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005.) Defendant has made no such showing.

Defendant next turns the argument he raised in his opening brief on its head and claims the error at trial was the trial court's *failure* to give a unanimity instruction: "The prosecutor's argument also improperly suggested that more than one discrete act supported the attempted murder charge. This is problematic, especially since . . . the jury was not actually given [a] unanimity instruction." Again, we do not consider issues raised for the first time in the reply brief on appeal absent a

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3 Defendant states, "[A]s respondent correctly points out, even though a unanimity instruction under CALCRIM No. 3500 is included in the Clerk's Transcript, the jury was not actually given the unanimity instruction." The unanimity instruction defendant references was from defendant's first trial, which ended in mistrial after the jury was unable to reach a verdict, and not from the trial at issue in this appeal.

demonstrated justification. (*People v. Newton, supra,* 155 Cal.App.4th at p. 1005.)

III. Detective Boisvert's Testimony

Defendant appears to contend the trial court improperly permitted Los Angeles Police Department Detective Marc Boisvert to testify about Martinez's veracity when Boisvert testified the version of the shooting Martinez provided the police matched the evidence he saw at the scene. Because defendant did not object to Boisvert's testimony on this ground, he forfeited appellate review of the issue.

A. Background

In the prosecution case, on direct examination, Boisvert testified:

"Q Now I want to go back over Ms. Martinez's interview. At the time you spoke with Ms. Martinez, had you been to the scene of 2402 Bliss?

"A At the time—the very first time that I spoke to her, I had not been at the scene. But then, during the interview, I had been at the scene.

"Q And she told you that there had been a shooting at 2402 Bliss?

"A Yes.

"Q And when you went to the scene, did you see evidence consistent with that?

"A I did.

"Q She told you that the shooting had taken place basically right by where she stayed at 2402 Bliss?

"A Yes. She explained it to me, saying she lived in the area of Largo and Bliss and that the incident had occurred directly outside the driveway that leads into the house that she's staying at.

"Q When you went to the scene, was what she said verified by what you saw at the scene?

"A Yeah. When I went to the scene, everything was consistent with what she had told me, that there was a shooting that occurred directly outside the driveway where she had—where she was inside of her vehicle.

"Q When you spoke to her, did she tell you how many shots that had taken place?

"A She did.

"Q What did she say?

"A She stated two shots were—happened.

"Q When you went to the scene, and through further investigation, did that match up with the evidence that you saw?

"A When I went to the scene, I seen [*sic*] one bullet fragment on the ground. I didn't see any casings. And it matched up with her telling me it was a revolver, because there was no bullet casings at the scene but there was that one bullet fragment on the ground. So, again, it was consistent with the information that she was relaying to me or had relayed to me.

"[¶] . . . [¶]

"Q Now, what did [Martinez] tell you regarding who was inside the car?

"A [Martinez] explained to me that there was a male individual—unsure if he was White or Hispanic—there was a female, and she was very nervous that there was possibly a baby because she had seen a car seat.

"Q Now, when you investigated this further, was there a baby car seat in that car?

"A There was.

"Q Did she tell you, at the time that you interviewed her, that the male had been shot?

"A She did.

"Q What did she say?

"A She stated that he had been shot in the elbow area.

"Q And later on, when you were able to see Mr. Jauregui, was he shot in the elbow area?

"A He was.

"Q To be clear, did she tell you if it was the left elbow or the right elbow?

"A Yes. She would point to her left elbow, explaining to me the area where he was shot.

"[¶] . . . [¶]

"Q Did she tell you if she saw a lot of blood?

"A She explained the large blood pool in the street . . . .

"Q Did she tell you, other than that shot at the male, if any other shots were fired?

"A And then she explained to me a second shot was fired as the car was driving away.

"Q Did you later have an opportunity to look at that car to see if evidence on that car matched up with what she said?

"A Yes.

"Q What did you see that matched up with what she said?

"A I was able to see that, again, her statements were consistent with the vehicle evidence of a shot—a bullet hole in the rear window."

Boisvert later testified:

"Q Despite the fact that you were not at the scene with Ms. Martinez, did what she tell you—what she told you happened match up with the evidence that you saw at the scene?

"A Yes, it did."

B. Application of Relevant Principles

"The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful. [Citations.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82 (*Coffman*).) "[A] lay witness's opinion about the veracity of another person's particular statements is *inadmissible* and *irrelevant* on the issue of the statements' credibility." (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 239, 21.) The failure to object and move to strike testimony on a witness's veracity forfeits appellate review of claims concerning the admission of the testimony. (Evid. Code, § 353, subd. (a); *Coffman, supra,* 34 Cal.4th at pp. 81-82 [expert witness].)

Whether the detective's testimony amounted to a proper expert opinion on a specialized subject, i.e., the interpretation of a crime scene (Evid. Code, § 801), or an improper opinion concerning Martinez's credibility (*Coffman, supra,* 34 Cal.4th at p. 82) is arguable. It certainly was not an outright opinion that Martinez was telling the truth. Rather, it was an assessment that the scene of the crime was consistent with the type of shooting described by Martinez. (Compare *People v. Torres*

(1995) 33 Cal.App.4th 37, 44 [officer improperly testified that "a robbery 'is what happened in this particular case'"]; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39 [improper for officers to render an opinion about whether child was telling the truth].) Nonetheless, defendant did not provide the trial court with an opportunity to either rule on the admissibility of the detective's testimony or instruct the jury on the appropriate consideration of it because he did not, at any time, voice a concern that the detective's testimony was infringing on the jury's province to determine credibility. Defendant's failure to object to the testimony forfeited the appellate claim.

IV. Ineffective Assistance of Counsel

Defendant claims defense counsel was ineffective when he failed to object to Boisvert's testimony that the version of the shooting Martinez provided the police matched the evidence he saw at the scene. Defendant's claim fails because he has not demonstrated prejudice.

"'Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]'" (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) "Generally, . . . prejudice must be affirmatively proved. [Citations.] 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster, supra,* 111 Cal.App.4th at p. 383.)

Even assuming Boisvert's testimony described above was opinion testimony about Martinez's veracity and not simply corroborating fact testimony, any deficiency in defense counsel's failure to object to it was not prejudicial. (*In re Fields* (1990) 51 Cal.3d 1063, 1079 [a reviewing court need not determine "'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed'"] quoting *Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Boyette* (2002) 29 Cal.4th 381, 430-431 ["We reject defendant's contention that his counsel were ineffective for failing to object, because even assuming counsel's inaction was unreasonable, no prejudice resulted"].)

Defendant contends Boisvert's testimony was "highly prejudicial" because the prosecutor said in closing argument that Martinez's testimony was a "big point" and "everything that she says is backed up by the evidence." Instead, the admission of Boisvert's challenged testimony was not prejudicial because there is no reasonable probability that the jury would have acquitted defendant if the testimony had been excluded. (*People v. Ledesma, supra,* 43 Cal.3d at pp. 217-218.) Absent that

testimony, the jury still would have heard Martinez, defendant's cousin, testify that as she walked to Jauregui's car, she heard a shot and saw defendant standing next to the car with a gun in his hand. His armed was extended and he was pointing the gun at Jauregui. She further testified that when Jauregui's car drove away, she saw defendant fire a shot at the car with a long barrel "revolver."

Martinez's testimony was corroborated by other evidence. The gun recovered from defendant's car was a revolver. Bullet fragments fired from the gun found in defendant's car were discovered at the crime scene and in bloody clothing retrieved from the hospital. Shortly after the shooting, there was gunshot residue on defendant's hands. Jauregui had a bullet wound to his left elbow, just as explained by Martinez. And, a pool of blood was found in the precise area Martinez described as the location of the shooting.

There was no real doubt about the veracity of Martinez's account of the events. Even if defense counsel could have successfully excluded the above-referenced testimony of the detective, there is no reasonable probability the result of the trial would have been different.

V. Defense Counsel's Closing Argument

Defendant argues the trial court's rulings sustaining the prosecutor's objections to defense counsel's closing argument violated his federal constitutional right to due process by interfering with his right to a fair trial and to present his defense. Even assuming the trial court erroneously restricted defense counsel's closing argument and thus violated defendant's

right to due process, any such error was harmless beyond a reasonable doubt.

A. Background

Defendant's argument is based on the following excerpts from defense counsel's closing argument:

Excerpt 1

"[Defense Counsel]: [¶] . . . [¶] The first thing my client is on trial for is shooting [Jauregui] as [Jauregui] sat in the driver's seat, with his elbow on the door, and his arm hanging over the steering wheel.

"[Prosecutor]: Objection. Misstates the evidence, improper argument.

"The Court: Why don't you approach real quick.

"[¶] . . . [¶]

"Counsel, you just have to make sure that you are basing your argument and demonstrations on facts that were presented in this case."

Excerpt 2

"[Defense Counsel]: The bullet fragment. [¶] . . . [¶] Now, my client is accused of firing a second shot as the car sped away, and that second shot went through the back window, went through the headrest on the back seat, hit [Gamez]'s left elbow, and then that bullet fragment somehow ended up in the bloody clothes.

"[Prosecutor]: Objection. Improper argument.

"The Court: Sustained."

Excerpt 3

"[Defense Counsel]: So we have the shot through the elbow, the shot into the chest, with no exit, and we have the fragment that was actually matched to the gun in the car, and that's near the pool of blood, and it's indicated by flag No. 1.

"Now, we know there was a shot fired through the back window of the car that went through the headrest, and we had the nice picture with the yellow pole through it. Okay. Rear window, headrest.

"We also have the bullet that hit [Gamez]'s left elbow. And, again, on that one, no exit wound.

"[Prosecutor]: Objection. Assumes facts not in evidence.

"The Court: Sustained."

"[Defense Counsel]: I specifically asked the—

"The Court: Sustained, counsel. If you want to argue, you can come up.

"[¶] . . . [¶]

"[Defense Counsel]: I specifically asked the deputy if he identified there was an entrance wound, and I asked him if he saw an exit wound, and he said, 'No,' specifically.

"[Prosecutor]: He said he didn't see one. There was no testimony—

"[Defense Counsel]: He just saw the hole. That's it.

"[Prosecutor]: He's representing there's five different bullets. There's been no evidence of that.

"The Court: Right. That's true. And you can get up and point and—when it's not based on evidence.

"[Defense Counsel]: Okay.

"The Court: So you can—when you're talking counsel, you can say that the deputy testified, when he observed it, he saw

just an entrance wound, and you can draw a conclusion that—but the way you are arguing, you're arguing like it was fact and it was presented as such. That's the difficulty I have with the way you're arguing.

"[Defense Counsel]: Okay."

Excerpt 4

"[Defense Counsel]: Now, again, if we look at my No. 4, 5, and 6, is it reasonable that the shot that went through the back window, hit the headrest, also hit her in the left arm? Did anybody testify that she was sitting in the passenger's seat, with her left arm up?

"[Prosecutor]: Objection. Assumes facts not in evidence, misstates evidence.

"The Court: Counsel, you're twisting your arm up in the air, so your demonstration might not be based on anything that's been testified to."

Excerpt 5

"[Defense Counsel]: They didn't actually do any investigation. He interviewed her for 17 minutes. He said he found her credible, nothing about what she said didn't match the evidence. You saw Ms. Martinez.

"[Prosecutor]: Objection. Misstates testimony.

"The Court: Sustained."

Excerpt 6

"[Defense Counsel]: Their biggest indication of my client being guilty is that, when he was pulled over in Compton, a young Hispanic man, he stuck his hands out the window. Really?

Maybe he just didn't want to get shot. You get pulled over nowdays—

"[Prosecutor]: Objection. Improper argument.

"The Court: Sustained."

Excerpt 7

"[Defense Counsel]: And [Martinez] testified then—this will become important later—that she was just stuck on [Jauregui]'s face. She didn't know [Jauregui]'s name. I mean, the victim. You know, he was in shock. And for one minute—one minute—a minute is a long time—I looked at his face. Time a minute in the jury room. It's a long time.

"The Court: I'm not going to encourage anybody to do experiments—[¶] . . . [¶]—back there. So you're going to base it on the evidence and common sense and experience. I just don't want to encourage anyone to do experiments back there."

B. Application of Relevant Principles

"The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (*Herring v. N.Y.* (1975) 422 U.S. 853, 862.) "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how

strong the case for the prosecution may appear to the presiding judge." (*Id.* at p. 858, fn. omitted.) Nevertheless, it is the trial court's duty to limit the "argument of counsel to relevant and material matters." (§ 1044; *People v. Nails* (1963) 214 Cal.App.2d 689, 693 ["A trial judge has discretionary power to restrict argument within reasonable limits"].) A violation of a defendant's federal right to due process is reviewed for prejudice under *Chapman v. California* (1967) 386 U.S. 18, 24—i.e., reversal is required in the case of the deprivation of due process rights unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Zamora* (1980) 28 Cal.3d 88, 104, fn. 11.)

Even assuming the trial court's rulings during defense counsel's closing argument constituted a violation of defendant's federal right to due process, any such error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) We have previously addressed the issue of prejudice when considering whether defendant was deprived of his right to the effective assistance of counsel. The thrust of the analysis also applies here. As we pointed out, Martinez provided an eye-witness account of many aspects of the first shooting and an eyewitness account of the entire second shooting and her version of the events was corroborated, with some precision, by other evidence. In addition, after reviewing defense counsel's closing argument in its entirety, it is quite clear counsel was able to make his case that, because the prosecution team did not test certain blood found at the scene and Martinez was not able to identify Jauregui as a victim when she was shown a picture of him, defendant was not the shooter; rather he simply picked up the gun after it was used in the shooting. We are comfortable

holding any erroneous restriction of defense counsel's closing argument was harmless beyond a reasonable doubt.

VI. Sufficiency of the Evidence That Defendant Inflicted Great Bodily Injury on Gamez

Defendant contends insufficient evidence supports the jury's finding that he inflicted great bodily injury on Gamez within the meaning of section 12022.7, subdivision (a).[4] Sufficient evidence supports the finding.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

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[4] Section 12022.7, subdivision (a) provides: "(a) Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

"Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.) In determining whether substantial evidence supports a conviction, "we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses." (*People v. Little* (2004) 115 Cal.App.4th 766, 771, citing *People v. Jones* (1990) 51 Cal.3d 294, 314.) We review a claim of insufficient evidence to support an enhancement finding under the same standard of review that we use for a claim of insufficient evidence to support a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

Section 12022.7 is to be applied broadly. (*People v. Sainz* (1999) 74 Cal.App.4th 565, 574.) Section 12022.7, subdivision (f) defines "great bodily injury" as "a significant or substantial physical injury." The significant or substantial physical injury "standard contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) "It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. '"Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding."' [Citation.]" (*Ibid.*, fn. omitted.)

During the drive to the hospital, Gamez did not speak to Mora. Mora did not realize Gamez was injured until Gamez's head "went down"—"she was passing out"—as they arrived at the hospital. A video was played for the jury that showed Gamez on her hands and knees in the front of the hospital. Rodriguez testified he saw Gamez at the hospital and observed a gunshot wound either above or below her elbow. Gamez was bleeding, but Rodriguez did not see "too much blood" because Gamez had cleaned it up. Gamez was "crying, a bit hysterical, and seemed flustered." A reasonable juror could conclude from the evidence that Gamez suffered a gunshot wound that: bled and caused her to lose consciousness in the car on the way to the hospital; forced her to her hands and knees after getting out of the car at the hospital; and caused her to cry and become hysterical. We hold this type of gunshot wound constitutes great bodily injury—i.e., a significant or substantial physical injury—within the meaning of section 12022.7, subdivision (a).

Defendant contends the evidence showed that Gamez suffered a minor and not a great bodily injury. He bases his contention on evidence that Gamez did not speak during the drive to the hospital and thus did not complain about her injury, she was alert enough at the hospital to speak with Boisvert, and she cleaned up her wound herself even though she was in a hospital and could have obtained any needed assistance. Defendant also notes the prosecution did not provide evidence that Gamez had surgery on her elbow, was hospitalized, or suffered from pain or lasting ill effects. He characterizes Gamez's "crying and hysterical demeanor" at the hospital as "much more consistent" with someone who was concerned about a loved one who had sustained a bullet wound to the chest than

with someone who had suffered a minor injury that required no medical attention.

Defendant's argument asks that we reweigh the evidence and come to a conclusion different from the jury. That is not our role. As explained above, when addressing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the verdict (*People v. Edwards, supra,* 57 Cal.4th at p. 715) and do not reweigh or resolve conflicts in the evidence or draw inferences contrary to the jury's verdict (*People v. Little, supra,* 115 Cal.App.4th at p. 771). Even if the facts might be reconciled with a contrary finding, we are bound to accept the jury's determination because sufficient evidence supports it. (*People v. Escobar, supra,* 3 Cal.4th at p. 750.)

VII. Notice of the Firearm Discharge Allegation as to the Shooting at an Occupied Motor Vehicle Charge in the Amended Information

Defendant argues the amended information did not give him notice the prosecution was alleging he personally discharged a firearm causing great bodily injury or death under section 12022.53, subdivision (d) in connection with the charged offense of shooting at an occupied motor vehicle. The failure to give such notice was, he claims, a violation of his right to due process. Because defendant did not object when the trial court informed the parties that it was modifying the verdict forms to include a section 12022.53, subdivision (d) allegation, he has forfeited this argument.

A. Background

As to count 3, the original and amended informations alleged a violation of section 12022.5, subdivision (a). Neither alleged a violation of section 12022.53, subdivision (d) with respect to count 3.

When the amended information was filed, the following discussion took place:

"The Court: [¶] . . . [¶] Defendant waive formal reading of the amended information, statement of rights, enter a plea of not guilty, deny all special allegations?

"[Defense Counsel]: Yes, Your Honor.

"The Court: And my understanding is the only difference from the other information is that in count 2 a G.B.I. was also added.

"[The Prosecutor]: That's correct, Your Honor."

While the jury deliberated, the trial court discussed with the parties changes to the verdict forms as follows:

"The Court: With regard to the verdict forms, I know that we're probably going to have to do a couple of changes on there because I do note that, People, I think you had alleged a 12022.5 in count 2, but let me—I don't think that applies.

"And count 3—maybe not count 2, but in count 3, I don't think it applies, so I would grant the 1118 motion as to that. And the additional 12022.53(d) does apply to count 3.

"[The Prosecutor]: Right.

"The Court: So look at the verdict forms, and then we'll talk."

The next morning, the trial court—Judge Eleanor Hunter—was not available. Judge Richard Ocampo took Judge Hunter's place and informed the parties of Judge Hunter's unavailability.

Judge Ocampo stated he had been informed that the jury had reached a verdict and he intended to take the verdict if there was no objection. Neither party objected, and Judge Ocampo then clarified the charges with the parties as follows:

"The Court: . . . [B]efore we bring in the jurors, I just want to make sure that I'm on the same page as everyone.

"There's Count 1, attempt murder, with the special allegation under 12022.53(a) through (d); 12022.7, subsection (a).

"As to Count 2, 245(a)(2); 12022.7, subsection (a), special allegation.

"And the Count 3, the 246. It has 12022.53, subsection (d) and the 12022.7, subsection (a).

"Is that correct?

"[The Prosecutor]: Yes.

"The Court: Just want to make sure. That way—anything we need to take up beforehand?

"[The Prosecutor]: No, Your Honor.

"[Defense Counsel]: No, Your Honor."

The jury found defendant guilty on count 3 and found true the allegation that he personally discharged a firearm which caused great bodily injury to Jauregui, within the meaning of section 12022.53, subdivision (d).

B. Application of Relevant Principles

Due process requires the prosecution to give a criminal defendant fair notice of sentence enhancements to allow the defendant to prepare a defense and avoid unfair surprise at trial. (*People v. Dixon* (2007) 153 Cal.App.4th 985, 1001.) However, "it has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither

objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions. [Citation.] The risk of unfair surprise to the defendant is the same in either case, as is the potential benefit to the defendant of affording the jury a wider range of verdict options. To prevent speculation on a favorable verdict, a reasonable and fair rule in both situations is that a failure to promptly object will be regarded as a consent to the new charge and a waiver of any objection based on lack of notice." (*People v. Toro* (1989) 47 Cal.3d 966, 976, fn. omitted, disapproved on another point in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

The Attorney General "acknowledges that the amended information did not initially allege a section 12022.53, subdivision (d) enhancement as to Count 3." She argues, inter alia, however, that "when defense counsel was advised of this amendment, no objection was made." Defendant's failure to object to the addition of the section 12022.53, subdivision (d) allegation to the verdict forms with respect to count 3 forfeited his challenge on appeal. (*People v. Toro, supra,* 47 Cal.3d at p. 976.)

VIII. Section 654

We asked the parties to submit letter briefs addressing whether the trial court made certain sentencing errors under section 654, as set forth above. The parties agree, as do we, that: the trial court should have stayed the section 12022.7, subdivision (a) enhancement as to defendant's attempted murder

offense pursuant to section 654 because the trial court also imposed a section 12022.53, subdivision (d) enhancement as to that offense (§ 12022.53, subd. (f); *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129-1130); the trial court erroneously stayed the term on the assault with a firearm offense pursuant to section 654 because defendant inflicted injury on different victims in committing that offense and the attempted murder (*People v. Deloza* (1998) 18 Cal.4th 585, 592; *People v. Young* (1992) 11 Cal.App.4th 1299, 1311-1312); and the identification of Jauregui as the victim of both shooting at an occupied motor vehicle and attempted murder required the trial court to impose and stay the term for shooting at an occupied motor vehicle because a term was imposed on the attempted murder offense and the multiple victims exception to section 654 permits only one unstayed sentence per victim of all the violent crimes a defendant commits incidental to a single criminal intent (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784-1785). Accordingly, we reverse defendant's sentence and remand for resentencing.

DISPOSITION

Defendant's sentencing is reversed and the matter is remanded for resentencing; the judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KUMAR, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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