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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JERMONE JAMES,

Defendant and Appellant.

B292238

Los Angeles County

Super. Ct. No. BA455600

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed in part and remanded with directions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

## INTRODUCTION

Appellant and defendant Anthony Jerome James was tried twice. In his first trial, he was charged with five counts, and the jury convicted him on one of those counts, acquitted him of two, and could not reach a verdict on the last two. James was tried a second time on the two counts for which the jury at the first trial could not reach a verdict, and the jury at the second trial convicted him on both counts. The jury and trial court at the second trial also found several enhancements true.

On appeal, James raises seven arguments: (1) trial counsel was prejudicially ineffective by not objecting during his second trial to the introduction of evidence, requesting limiting instructions, or objecting to the prosecution's argument, which supposedly resulted in the second jury convicting James of attempted murder based on the same conduct for which he was previously acquitted of attempted murder in the first trial; (2) his attempted murder conviction must be reversed because the prosecution presented it on three alternate theories, only one of which was legally valid, and it cannot be determined on which theory the guilty verdict rested; (3) the trial court prejudicially erred by failing to properly instruct the jury on the requirement that it reach unanimous verdicts; (4) Penal Code<sup>1</sup> section 654 precluded the imposition of sentence on his attempted robbery conviction because it and his attempted murder conviction were part of an indivisible transaction; (5) the trial court abused its discretion by not dismissing allegations of his prior strike convictions; (6) his case should be remanded in light of Senate

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

Bill No. 1393 so the trial court can exercise its discretion whether to dismiss his five-year prior serious felony enhancements (§ 667, subd. (a)); and (7) the trial court should have struck instead of stayed his section 12022.53, subdivision (b) gun enhancements. We agree with James's sixth and seventh contentions. We remand so the trial court can strike the gun enhancements and exercise its discretion whether to dismiss his prior serious felony enhancements. In all other respects, we affirm.

### **PROCEDURAL BACKGROUND**

An information filed June 13, 2017 charged James with attempted murder of Miguel Nunez (§§ 187, subd. (a), 664; count one), attempted premeditated murder of Miguel Nunez (§§ 187, subd. (a), 664; count two), two counts of attempted second-degree robbery (§§ 211, 664; counts three [victim Miguel Nunez] and four [victim Luis Juarez]), and felon in possession of a firearm (§ 29800, subd. (a)(1); count five). With respect to counts one, three, and four, the information alleged James personally discharged a firearm (§ 12022.53, subd. (c)). With respect to counts two and four, the information alleged James personally used a firearm (§ 12022.53, subd. (b)). The information also alleged James previously sustained two prior serious felony convictions (§ 667, subd. (a)) and two prior strikes (§§ 667, subds. (b)-(i), 1170.12).

The jury found James guilty of count five (felon in possession) and not guilty of counts one (attempted murder of Miguel Nunez) and four (attempted robbery of Luis Juarez). The jury was unable to reach a verdict on counts two (attempted premeditated murder of Miguel Nunez) and three (attempted robbery of Miguel Nunez). The court declared a mistrial on counts two and three.

A second trial was held on counts two and three, which were renumbered as counts one (attempted premeditated murder of Miguel Nunez) and two (attempted robbery of Miguel Nunez). The court granted James's motion to bifurcate the priors, and James waived his right to a jury trial on the priors.

The jury found James guilty of both counts. On count one, it returned true findings on the premeditation (§ 664, subd. (a)) and personal use of a firearm (§ 12022.53, subd. (b)) allegations. On count two, it found true the allegation that James personally discharged a firearm (§ 12022.53, subd. (c)). The trial court found the prior strike and serious felony allegations true.

The court denied James's *Romero* motion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) It sentenced him to a total term of 22 years plus 50 years to life. On count one (count two in the first trial), the court sentenced James to a term of 25 years to life pursuant to the Three Strikes law, plus 10 years (two five-year enhancements) pursuant to section 667, subdivision (a)(1).<sup>2</sup> On count two (count three in the first trial), it imposed a consecutive term of 25 years to life pursuant to the Three Strike law, plus ten years (two five-year enhancements) pursuant to section 667, subdivision (a)(1).<sup>3</sup> The court sentenced James to a consecutive mid-term of two years on count five.

James timely appealed.

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<sup>2</sup> The court stayed the imposition of the 10-year gun enhancement (§ 12022.53, subdivision (b)) pursuant to section 1385.

<sup>3</sup> The court reduced the jury's section 12022.53, subdivision (c) finding to a section 12022.53, subdivision (b) finding, then stayed the imposition of the 10-year enhancement pursuant to section 1385.

## **FACTUAL BACKGROUND**

On November 29, 2016, Miguel Nunez worked as a messenger for an armored car company. He wore a guard uniform and carried a firearm. Nunez was scheduled to drop off and retrieve cash at Financial Cash Services, located at 1890 S. Western Avenue in Los Angeles.

Nunez and his partner Luis Juarez arrived at the location at 1:15 p.m. Juarez was driving. Nunez was in the back. Nunez exited the truck and conducted his regular drop off and pick up of cash.

When Nunez left the store, someone behind him said, "Give me your money." Nunez turned to see James pointing a nine-millimeter gun at his chest. Nunez threw himself at James in an attempt to save his life. In his left hand, Nunez held the money. Nunez grabbed James's gun-hand with his right hand. The two wrestled while the gun was pointed on Nunez's chest. Nunez heard and saw a gunshot; Juarez heard the shot as well. James dropped the gun and ran.

Nunez had dropped the money. He went to retrieve it. Meanwhile, James returned for his gun. Nunez used the armored truck as a shield. Nunez positioned himself inside the truck behind a plastic divider. James pointed the gun towards Nunez and the driver (Juarez) through the front window of the truck. Nunez had been informed that the windows were bulletproof, but he was not sure if that was true. James fired, but the gun jammed. The bullet dropped from the chamber.

James reloaded. He tried to shoot again in Nunez's direction. No bullet fired, however, and James ran.

James did not testify or present evidence on his behalf.

## DISCUSSION

### 1. Trial Counsel Was Not Ineffective

James contends his attempted premeditated murder conviction must be reversed based on principles of double jeopardy and collateral estoppel.<sup>4</sup> He notes that in his first trial, the jury acquitted him of attempted murder related to the first shot he fired at Nunez during their scuffle. He argues trial counsel was prejudicially ineffective in his second trial by not objecting to “the introduction of evidence, request[ing] limiting instructions or object[ing] to the prosecution’s argument related to convicting appellant of attempted murder based on the act for which appellant was previously acquitted.” The Attorney General argues we should reject this contention because the record shows James was tried the second time not based on the act for which he was acquitted in the first trial, but rather for attempting to shoot Nunez later through the bulletproof window of the truck. We agree with the Attorney General.

Contrary to James’s argument, the record shows that during closing argument, the prosecutor discussed the shot James fired during the initial scuffle only in reference to the

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<sup>4</sup> The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb . . . .” (See also Cal. Const., art. I, § 15 [“Persons may not twice be put in jeopardy for the same offense . . . .”].) Collateral estoppel “. . . means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” (*People v. Santamaria* (1994) 8 Cal.4th 903, 912.)

attempted robbery count and the gun enhancement attached to that count. The record also reveals the prosecutor, when discussing the attempted murder count, made no mention of the shot fired during the initial scuffle, and instead explained to the jury that the conduct giving rise to the attempted murder count was James returning to the truck and twice attempting to shoot Nunez through the bulletproof window. Since the jury was correctly told which conduct to consider when deciding the attempted murder count, we reject James's argument that his conviction was barred by principles of double jeopardy or collateral estoppel. We also reject his argument that counsel was ineffective by not objecting to the introduction of evidence of the initial scuffle and gunshot or requesting a limiting instruction. The evidence was admissible because it was relevant to prove the elements of the attempted robbery count, and to provide the jury with the full context of the events that led up to the attempted murder count. (Evid. Code, §§ 351, 210.) No limiting instruction was necessary because the prosecution, when discussing the attempted murder count with the jury, relied only on James's attempt to shoot Nunez *after* returning to the truck. For these reasons, James has not shown counsel's performance was deficient or that there was a reasonable probability that, but for counsel's lack of objection or request for a limiting instruction, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-695.)

**2. James's Attempted Premeditated Murder Conviction Was Based on A Valid Legal Theory**

James next argues his attempted premeditated murder conviction must be reversed because the prosecution presented its case to the jury on three alternate theories, one of which was

legally correct (that the attempted murder occurred when James twice attempted to shoot Nunez through the bulletproof window) and two of which were not (that the attempted murder occurred when James shot his gun during the scuffle, or alternatively, that it occurred based on a combination of the shot fired during the scuffle and the two attempts to shoot Nunez through the bulletproof window), and it cannot be determined on which theory the guilty verdict rested. (*People v. Green* (1980) 27 Cal.3d 1, 69, disapproved on another ground in *People v. Aledamat* 8 Cal.5th 1, 13; *People v. Guiton* (1993) 4 Cal.4th 1116, 1121-1122.) We disagree for the same reason we reject James's ineffective assistance of counsel argument. The record shows the prosecution presented its case to the jury on one legally valid theory – that James committed attempted murder when he returned to the truck and twice tried to shoot Nunez through the bulletproof window.

### **3. The Jury Was Properly Instructed on Unanimity**

James argues the trial court deprived him of his constitutional right to be convicted by a unanimous verdict because it erroneously instructed the jury that it needed to conduct the unanimity analysis only once instead of separately for each count. We are unpersuaded. The court instructed the jury on unanimity as follows using CALCRIM 3500: “The defendant is charged with attempted murder and attempted robbery. The People have presented evidence of more than one act to prove that the defendant has committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts, and you all agree on which act he committed.” This standard instruction adequately explained the unanimity



requirement to the jury. (See *People v. Pearson* (2013) 56 Cal.4th 393, 476.) In addition to instructing on unanimity using CALCRIM 3500, the court also instructed the jury to consider each count separately using CALCRIM 3515. That instruction stated: “Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one.” This instruction provided additional clarification to the jury that it had to reach a unanimous verdict for each count. Because CALCRIM 3500 properly explained the unanimity requirement, and because CALCRIM 3515 further clarified that each count should be considered separately, we conclude it is not reasonably likely the jury applied the unanimity instruction in a manner that violated James’s rights. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191, superseded by statute on another ground as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096 [in assessing whether jury instructions correctly convey the law, the reviewing court looks to the instructions as a whole to see whether there is a reasonable likelihood the jury understood the instructions in a manner that violated the defendant’s rights]; see also *People v. Sattiewhite* (2014) 59 Cal.4th 446, 475 [we presume jurors are capable of understanding and correlating all instructions that are given].)<sup>5</sup>

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<sup>5</sup> Because the jury was instructed correctly, it follows logically that James suffered no prejudice from the instructions given.

**4. Penal Code Section 654 Did Not Preclude the Imposition of Sentence on the Attempted Robbery Count**

James next argues section 654 required the trial court to stay the attempted robbery count because the conduct associated with that count was indivisible from the attempted murder count. Section 654, subdivision (a) provides in pertinent part: “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 . . . .” “[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction.” (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Multiple criminal acts constitute a single “indivisible transaction” when the defendant commits the offenses pursuant to a single objective or intent; it does not apply when the defendant entertained multiple criminal objectives or intents. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) Because of the virtually infinite variability of criminal conduct, there can be no universal construction that directs the application of section 654 in every instance. (*Id.* at p. 636.) The question whether a defendant harbored multiple objectives is generally a question of fact for the trial court, and the trial court’s decision will be upheld on appeal if it is supported by substantial evidence. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713.) We review the trial court’s findings in the light most favorable to respondent, and we presume in support of the trial court’s findings the existence of every fact the court could

reasonably deduce from the evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

The trial court here imposed consecutive terms for the separate counts based on its conclusion that James harbored independent criminal objectives for each count. The court explained: “[T]he crimes and their objectives in my view were predominantly independent of each other, the robbery to obtain money and the attempted murder to eliminate a potential witness.”

We conclude substantial evidence supports the trial court’s determination that James engaged in divisible transactions with separate criminal objectives. First, James pointed his gun at Nunez and demanded the money bag. Nunez threw himself at James in an attempt to save his life, and the two struggled. Nunez was able to get the gun away from his chest, and James fired the gun. James dropped the gun and ran away. At this point, the attempted robbery was complete. When James returned, he did not demand the money. Rather, he aimed the gun at Nunez and attempted to shoot him twice. Substantial evidence supports the trial court’s conclusion that when James returned and attempted to shoot Nunez, he engaged in a distinct act that had a separate criminal objective.<sup>6</sup>

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<sup>6</sup> James also argues the firearm enhancement attached to the attempted robbery conviction must be stayed under section 654. We reject this argument for the same reasons we reject his argument that the attempted robbery conviction should be stayed. As discussed below in relation to James’s seventh contention, however, we agree the firearm enhancement should be stricken.

**5. The Trial Court Did Not Abuse its Discretion By Denying James’s Motion to Dismiss His Prior Strike Convictions**

We reject James’s contention that the trial court abused its discretion by not dismissing allegations of his prior strike convictions. Section 1385, subdivision (a) authorizes a sentencing court, in its discretion, to dismiss an allegation or vacate a finding that a prior serious or violent felony conviction constitutes a strike under the Three Strikes law. (*People v. Williams* (1998) 17 Cal.4th 148, 151, citing *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 504.)<sup>7</sup> A trial court’s decision to deny a defendant’s motion to dismiss prior strike convictions under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).) There is a strong presumption on appeal that a trial court properly exercised its discretion in refusing to strike a prior conviction allegation. (*In re Large* (2007) 41 Cal.4th 538, 551.) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

In deciding to deny James’s *Romero* motion, the trial court issued a well-reasoned three-page memorandum discussing James’s criminal history, the fact that he put victim Nunez at risk of grievous injury or death (that thankfully did not materialize only because James’s gun malfunctioned), and that

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<sup>7</sup> Section 1385, subdivision (a) provides in pertinent part: “The judge or magistrate may . . . of his or her own motion . . . , and in furtherance of justice, order an action to be dismissed . . . .”

James's prior criminal history and current offenses show he is a danger to society. We find no abuse of discretion.

**6. Remand For Reconsideration under Senate Bill No. 1393 is Warranted**

Effective January 1, 2019, Senate Bill No. 1393 amended Penal Code sections 667 and 1385 to give the trial court discretion to dismiss, in the interest of justice, five-year prior serious felony enhancements under section 667, subdivision (a)(1). (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Under the versions of those statutes applicable when the court sentenced James, the court had no such discretion, but instead was required to impose an additional five-year consecutive term for any person convicted of a serious felony who previously had been convicted of a serious felony. (*Ibid.*)

“[I]t is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019.” (*Garcia, supra*, 28 Cal.App.5th at p. 973.) The Attorney General concedes S.B. 1393 applies retroactively to James's nonfinal case.

“[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) A remand is not required, however, if “the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have

stricken [the previously mandatory] enhancement.” (*Ibid.*) We find no such indication here. The parties agree, as do we, that remand is warranted to permit the trial court to exercise its discretion whether to strike the prior serious felony enhancements.

## **7. The Gun Enhancements Should Be Stricken**

James lastly argues the two gun enhancements (§ 12022.53, subd. (b)) should have been stricken instead of stayed. We agree. (See *People v. Eberhardt* (1986) 186 Cal.App.3d 1112, 1121-1122; § 1385; § 12022.53, subd. (h).) On remand, we order the trial court to clarify that it intended to strike rather than stay the gun enhancements and orally state its reasons for doing so. (See § 1385, subd. (a).)

## **DISPOSITION**

The convictions are affirmed. The case is remanded with directions to the superior court to decide whether to exercise its discretion to strike the prior serious felony enhancements pursuant to S.B. 1393. If the court elects to exercise its discretion, James shall be resentenced and the abstract of judgment amended accordingly. The court is also ordered to strike the gun enhancements, orally state its reasons for doing so, and amend the abstract of judgment accordingly.

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

CURREY, J.

WE CONCUR:

MANELLA, P. J.

COLLINS, J.