Filed 9/23/14 P. v. Pearson CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. COLTRANE LARSHAN PEARSON, Defendant and Appellant.	B246219 (Los Angeles County Super. Ct. No. BA397111)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Christopher A. Darden for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In an amended information, the People charged defendant Coltrane Larshan Pearson with making a criminal threat (Pen. Code, § 422, subd. (a); count 1); unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 2); evading an officer with willful disregard for safety (*id*., § 2800.2, subd. (a); count 3); possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 4); two counts of misdemeanor hit and run driving (Veh. Code, § 20002, subd. (a); counts 6 & 7); and carjacking (Pen. Code, § 215, subd. (a); count 8).[1] The People also alleged various enhancements and prior convictions, including the allegation pursuant to Penal Code section 12022, subdivision (a)(1), that Pearson was armed with a firearm during the commission of the crimes charged in counts 2 and 3.

After the People rested, counsel for Pearson made a motion for acquittal pursuant to Penal Code section 1118.1. The trial court granted the motion as to count 6 and denied it as to the remaining counts.

The jury found Pearson guilty on counts 2, 3, 4, and 7 and found true the allegations in counts 2 and 3 that during the commission of the offenses Pearson was armed with a firearm. On counts 1 and 8 the jury found Pearson not guilty.

During a court trial on the allegations of Pearson's prior convictions, the trial court found true the allegation in counts 2, 3, and 4 that Pearson had suffered one strike within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), as well as the allegation that he had served two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced Pearson to state prison for an aggregate term of 12 years and 6 months.

Pearson makes five arguments on appeal: (1) the evidence is insufficient to support his conviction on count 4 for possession of a firearm by a felon or the jury's

---

[1] Prior to trial the court dismissed count 5, which alleged that Pearson committed a residential burglary (Pen. Code, § 459).

finding that he was armed during the commission of the crimes alleged in counts 2 and 3; (2) the trial court erroneously refused to allow him to impeach the victim with two misdemeanor petty theft convictions; (3) the trial court failed to discharge its sua sponte duty to give the jury a claim of right instruction; (4) he was denied the effective assistance of counsel because his attorney failed to request a claim of right instruction; and (5) the trial court made three sentencing errors under Penal Code section 654. We find no merit in any of Pearson's arguments, and affirm.

FACTUAL BACKGROUND

Charlzet Jamison[2] and her boyfriend Pearson lived together in an apartment on East Imperial Highway in Los Angeles. Jamison owned a gray Dodge Magnum. Both Jamison and Pearson drove the car and made car payments. Pearson had a set of keys to the car.

On April 28, 2012 Jamison and Pearson got into an argument in the apartment. Jamison believed Pearson had been unfaithful. Pearson denied the accusation and stated he did not want to argue and was leaving. Jamison, who did not want Pearson to leave, followed Pearson and continued to argue with him. Pearson took Jamison's car keys and went to leave in the car. Jamison told him to give the keys back and not to take her car. Pearson responded by telling Jamison "shut the fuck up" or he would beat her. Pearson had hit Jamison in the past, and she was afraid of Pearson and believed his threat.[3]

---

[2] Jamison was unavailable at the time of trial. Over counsel for Pearson's objection, the trial court allowed the prosecutor to read Jamison's preliminary hearing testimony to the jury. Pearson does not challenge that ruling on appeal.

[3] At the preliminary hearing Jamison denied telling the police that she and Pearson were arguing or that Pearson took her keys and drove off in her car. Jamison also denied telling the police that she asked Pearson to return the keys and not to take her car, and that he responded by telling her to shut up or he would beat her. She denied telling the police that she was afraid of Pearson because he hit her in the past and would hit her again.

Pearson drove away in Jamison's car, and Jamison called 911 and asked the police to come to her house.[4]

One of Jamison's friends came over and said she had seen Jamison's car at 92nd Street and Western Avenue and that she knew where Pearson was. Her friend drove Jamison to 92nd Street and Western Avenue, where Jamison saw her car. Jamison confronted Pearson in the parking lot of a liquor store and asked for her car back. Pearson said, "Get the fuck away from me or I will kill you."[5] Pearson then got into Jamison's car, drove away, and parked near a liquor store. Jamison again called 911.

Los Angeles Police Officer Jorge Martinez responded and went to 92nd Street and Western Avenue. Upon his arrival he saw a woman waving him down. The woman identified herself as Charlzet Jamison and yelled, "He took my car. He is down there." Jamison also told Officer Martinez that she had asked the individual who took her car to return it, he told her "to get the fuck away from him or he would kill her." Jamison asked the officer to retrieve her car.

Officer Martinez located Jamison's car parked in the middle of the block on the east side of the street pointing in a northerly direction. Officer Martinez's partner, Officer Jaramillo, drove northbound, parked directly behind Jamison's car, and activated his red light. The officers got out of their patrol car and approached the Dodge Magnum.

From his vantage point on the passenger side, Officer Martinez could only see Pearson seated in the driver's seat. Officer Jaramillo, who approached on the driver's side of the car, asked Pearson to get out of the car twice. Each time Pearson said he did

---

4 Defense witness Dorothy Stewart lived in an apartment above Jamison's. That morning Stewart heard Jamison arguing with Pearson. Stewart testified that Pearson was trying to leave, and Jamison was "yelling and she was fussing and she was cursing." Stewart also heard Jamison say, "I'm going to put you in jail if you leave." Stewart regularly saw Pearson drive the gray Magnum.

5 At the preliminary Jamison denied telling the police that when she asked Pearson for her car back he said to go away or he would kill her, or even that she saw Pearson in or near her car.

not do anything and he did not need to get out of the car. After the second request Pearson removed some keys from the center console and started the engine. The officers backed up toward their patrol car. Pearson then accelerated, colliding with the car parked in front of him. He reversed, and again accelerated forward, hitting the car in front of him. Pearson accelerated until he had enough room to maneuver out of his parking space and then drove northbound on Western. A high speed pursuit on surface streets ensued.

At one point during the pursuit, the officers lost sight of Pearson when he turned southbound onto St. Andrews Place from 89th Street. When the officers turned onto St. Andrews Place, Pearson was already at the end of the block. By the time the officers approached 91st Street and St. Andrews Place, Pearson turned southbound onto Van Ness. When the officers turned onto Van Ness, they again lost sight of Pearson. With the help of citizens who pointed in the direction Pearson had traveled, the officers continued their pursuit and eventually were able to observe the car a considerable distance away. When the officers turned onto Crenshaw Boulevard, Officer Martinez observed that the vehicle they were pursuing had collided with a wrought iron fence that surrounded an apartment complex, entered a parking lot, and collided with a parked car. The driver's door was open, and the driver was no longer inside.

Yausmenda Freeman, a woman in the yard area of the apartment complex, pointed westbound and told Officers Martinez and Jaramillo, "He went that way." The officers continued their pursuit on foot. The officers encountered a man who also pointed west. Eventually Officer Martinez came to another parking lot where he observed Pearson trying to get into a red SUV that was about to leave the parking lot. After the SUV drove off, Officer Martinez approached Pearson, and ordered him to the ground.

Los Angeles Police Officer Michael Estrada responded to a call regarding the pursuit. Officer Estrada arrived at a large apartment complex with multiple structures, sharing a common driveway and gated fence. Officer Estrada spoke to Freeman, who told him that she had been sitting in front of her residence when she saw a gray car crash into the gate. Freeman explained that she saw the driver get out of the car and run into the apartment complex. The driver yelled to Freeman something to the effect of "Let me

into your house." Freeman said no, and the man ran out of her sight. When she saw police officers she directed them to the area she last saw him running.

After taking Freeman's statement, Officer Estrada escorted Freeman to a field show-up to see if she could identify a person other officers had detained nearby. When Freeman first saw the individual, he had a "spit sock" covering his head because he had been combative with the officers. Freeman recognized his clothes, stating, "Well, . . . that's the clothes he was wearing." When the officers removed the spit sock, Freeman immediately said, "Yeah, that's him, that's him." At trial Officer Estrada identified Pearson as the person Freeman identified.[6]

Following Pearson's detention, the officers received information that a witness, Derek Haskell, had called and stated that he had observed someone throw an object from the car that the officers had pursued. Haskell told a responding officer that he had been standing in his driveway when he heard the sound of tires screeching near the corner of 89th Street and St. Andrews Place. When he looked in that direction, he saw a Dodge turning from 89th Street onto St. Andrews Place, followed by a police car. Both cars were traveling fast. Haskell only saw one person, a black male, in the Dodge.[7] As the Dodge passed Haskell, he saw a silver object flying in the air from the driver's side of the car.

After checking on family members who had been outside during the pursuit, Haskell crossed the street and walked toward the area where the driver of the Dodge had thrown the silver object. Haskell found a silver handgun lying on the front lawn of a vacant house, and called 911. When the police arrived, Haskell directed them to the

---

[6] Although Freeman testified at trial, she did not remember if the man who crashed through the fence and ran through her apartment complex had spoken to her. She also did not remember identifying Pearson during the field show up, and she did not identify Pearson in court. Freeman candidly stated that she did not want to testify out of concern for her safety and the safety of her family.

[7] Because he did not get a good look at the person driving the Dodge, Haskell was unable to identify the driver.

handgun. Los Angeles Police Officer Garrett Pascolla photographed the firearm before another officer collected it.

DISCUSSION

A. *Sufficiency of the Evidence*

Pearson challenges the sufficiency of the evidence supporting his conviction on count 4 of possession of a firearm by a felon. He similarly argues that the evidence was insufficient to support the jury's finding that he possessed a firearm while unlawfully taking or driving a vehicle (count 2) and evading a police officer (count 3).

"The applicable law is settled. '"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." [Citation.] 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." [Citation.] 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." [Citation.]' [Citation.] '"'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.]"' [Citation.]" (*People v. McCurdy* (2014) ___ Cal.4th ___, ___ [2014 WL 3953468, p. 27].) '"'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. . . ." [Citation.]' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1197.)

The jury found Pearson guilty on count 4 of violating Penal Code section 29800, subdivision (a)(1), which provides: "Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country . . . and who owns, purchases, receives, or has in possession or

under custody or control any firearm is guilty of a felony." "The elements of this [crime] are conviction of a felony and ownership or knowing possession, custody, or control of a firearm." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030.) "'A defendant possesses a weapon when it is under his dominion and control. [Citation.] A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others. [Citations.]' [Citation.] 'Implicitly, the crime is committed the instant the felon in any way has a firearm within his control.' [Citation.]" (*Id*. at pp. 1029-1030.)

Haskell's testimony that he saw a silver object thrown from the Dodge Magnum as it sped by and that he found a silver handgun in the area where the object landed, together with the officer's recovery of a loaded stainless steel handgun, is substantial evidence that Pearson, who stipulated that he was convicted of the felonies alleged in count 4, was a felon in possession of a firearm. The fact that Officer Martinez did not actually see Pearson discard the weapon does not mean that the jury's verdict is not supported by substantial evidence. This is particularly true in light of Officer Martinez's testimony that, by the time he and his partner turned onto St. Andrews Place, Pearson had gained some distance on them and was already at the end of the block. The jury reasonably could have concluded that Pearson discarded the gun before the officers turned onto St. Andrews Place and that Pearson, a felon, possessed a firearm. This same substantial evidence supports the jury's determination that Pearson was armed with a firearm when he evaded the police. (See *People v. Hajek and Vo*, *supra*, 58 Cal.4th at p. 1197.)

With regard to the armed enhancement alleged in count 2, Pearson argues that there is no evidence in the record that he possessed a firearm when he left the apartment in Jamison's car. The People can prove possession, however, by circumstantial evidence. (See *People v. Law* (2011) 195 Cal.App.4th 976, 978-979 [sentence enhancement can be established by circumstantial evidence]; cf. *People v. Busch* (2010) 187 Cal.App.4th 150, 162 ["'[t]he elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence'"].) From the

evidence establishing that Pearson was in possession of a firearm while parked on Western Avenue the jury reasonably could have inferred that he either brought the firearm with him when he left the apartment or that he already had the weapon in the car when he got into the car, and thus was armed with a firearm when he left the apartment in Jasmine's car. (See *Law, supra,* at p. 983 ["[c]ircumstantial evidence that establishes a defendant's personal use of a gun within the meaning of section 12022.53, subdivision (b), also suffices for personal use of a firearm for purposes of assault with a firearm (§ 245, subd. (a)(2)) and the personal use enhancement of section 12022.5, subdivision (a)"].) Substantial evidence supports the jury's true finding on the armed enhancement alleged in count 2.

B. *Impeachment*

Before the People commenced their case-in-chief, counsel for Pearson sought to impeach Jamison with two misdemeanor convictions for petty theft and one felony conviction for burglary. Although the People did not dispute that Jamison's crimes were crimes of moral turpitude, they objected to their admission pursuant to Evidence Code section 352. The court allowed Pearson to impeach Jamison with the felony conviction for burglary but not the misdemeanor convictions for petty theft.[8] Pearson challenges that portion of the trial court's ruling precluding him from impeaching Jamison with her misdemeanor petty theft convictions.

"A witness may be impeached with prior conduct that involves moral turpitude, whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion pursuant to Evidence Code section 352." (*People v. Carter* (2014) 227

---

[8] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Cal.App.4th 322, 329; accord, *People v. Wheeler* (1992) 4 Cal.4th 284, 295.)[9] However, "the *fact of conviction of a misdemeanor* remains inadmissible under traditional *hearsay* rules when offered to prove that the witness committed misconduct bearing on his or her truthfulness." (*Wheeler*, *supra,* at p. 288; see *People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24.) While evidence of the conviction is inadmissible, "if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as 'relevant' evidence under section 28(d) [of article I of the California Constitution]." (*Wheeler*, *supra*, at p. 295; see *People v. Clark* (2011) 52 Cal.4th 856, 931 [the "'admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude,'" and "'[b]eyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad'"].)

"When exercising its discretion under Evidence Code section 352, a court must always take into account, as applicable, those factors traditionally deemed pertinent in this area. [Citations.] But additional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 296-297, fn. omitted; see *People v. Contreras*, *supra*, 58 Cal.4th at p. 157, fn. 24 [misconduct amounting to a misdemeanor "carries less weight in proving

---

9 Petty theft is a crime of moral turpitude. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925; *People v. Waldecker* (1987) 195 Cal.App.3d 1152, 1156.)

lax moral character and dishonesty than does either an act or conviction involving a felony"].)

"We review a court's ruling under Evidence Code section 352 by applying an abuse of discretion standard. [Citation.] 'This discretion allows the trial court broad power to control the presentation of proposed impeachment evidence '"'"to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." [Citation.]'"' [Citation.]" (*People v. Lightsey* (2012) 54 Cal.4th 668, 714.)

The trial court initially excluded Jamison's misdemeanor petty theft convictions for impeachment purposes because the court had ruled that the prosecution could impeach Jamison with her prior felony conviction for burglary, which carries more weight in establishing immoral character or dishonesty than a misdemeanor. (See *People v. Contreras*, *supra*, 58 Cal.4th at p. 157.) Implicit in the trial court ruling is the court's determination that Jamison's felony burglary conviction was a stronger indication of dishonesty than misdemeanor conduct, that the felony conviction would sufficiently allow Pearson to impeach Jamison's credibility, and that the misdemeanor convictions would be cumulative. The trial court's ruling was not an abuse of discretion.[10]

---

10 Later in the trial, during the defense case, the prosecutor informed the trial court that Jamison's burglary conviction had been reduced to a misdemeanor, and renewed the objection to its use for impeachment. The trial court impliedly overruled the objection, stating it would take judicial notice of Jamison's "misdemeanor conduct of burglary leading to a conviction." In the presence of the jury, and at counsel for Pearson's request, the trial court took judicial notice of "misdemeanor conduct of burglary" for Jamison. Pearson does not argue that he renewed his request to impeach Jamison with her misdemeanor petty theft convictions after the prosecutor's revelation that Jamison's felony burglary conviction was actually a misdemeanor conviction, nor that these subsequent events have any bearing on the correctness of the trial court's initial ruling.

C. *Claim of Right Instruction*

Pearson contends that the trial court had a sua sponte duty to instruct the jury on the claim of right defense to count 2, taking or driving a vehicle without consent and with the intent to deprive the owner of possession of the vehicle. Pearson points to evidence that he contributed to paying for the car, had keys to the car, and often drove it. The People contend that a jury instruction for claim of right was a pinpoint instruction that the trial court had no duty to give because Pearson did not request it. The People are correct.

"Pinpoint instructions 'relate particular facts to a legal issue in the case or "pinpoint" the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory . . . .' [Citation.]" (*People v. Wilkins* (2013) 56 Cal.4th 333, 348-349.) In *People v. Anderson* (2011) 51 Cal.4th 989, the California Supreme Court held that "a trial court has no obligation to provide a sua sponte instruction on accident where . . . the defendant's theory of accident is an attempt to negate the intent element of the charged crime." (*Id*. at p. 992.) In the case of accident, the trial court's obligation "extend[s] no further than to provide an appropriate pinpoint instruction upon request by the defense." (*Id*. at p. 998, fn. omitted.) In *People v. Lawson* (2013) 215 Cal.App.4th 108 the court held that "the rationale of *Anderson* applies with equal force to the defense of mistake of fact, or any other defense that operates only to negate the mental state element of the crime." (*Id*. at p. 117.) The *Lawson* court held that "[e]ven if the evidence supported an instruction on mistake of fact, the trial court did not have a duty to instruct on the defense sua sponte." (*Ibid*.)

"The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938; see *People v. Fenderson* (2010) 188 Cal.App.4th 625, 642-643.) The defense of claim of right, like the defenses of accident and mistake of fact, negates a mental state element of the crime: intent to deprive the owner of possession without the owner's consent. (See *People v. Ledbetter* (2014) 222 Cal.App.4th 896, 901 ["'a claim-

of-right defense can negate the *animus furandi* element of robbery where the defendant is seeking to regain specific property in which he in good faith believes he has a bona fide claim of ownership or title'"].)[11] Thus, the defendant must request a pinpoint instruction on the defense of claim of right. Because counsel for Pearson did not ask the trial court to give a pinpoint instruction on the claim of right defense, the court had no duty to give it. (*People v. Anderson*, *supra*, 51 Cal.4th at p. 998; *People v. Lawson*, *supra*, 215 Cal.App.4th at p. 118.)[12]

D. *Ineffective Assistance of Counsel*

Pearson next contends that his trial counsel's failure to request a pinpoint instruction on the defense of claim of right deprived him of the effective assistance of counsel. "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citations.] Prejudice is shown when 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.]' [Citation.]" (*People v. Goldman* (2014) 225 Cal.App.4th 950, 957; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

---

[11] "[*A*]*nimus furandi*" means "intent to steal." (*People v. Tufunga*, *supra*, 21 Cal.4th at p. 938; see *People v. Hawkins* (1991) 1 Cal.App.4th 880, 884-885 ["[t]he terms *animo* or *animus furandi* are the common law phrases for the intent to permanently deprive a person of their property"].)

[12] We do not decide whether the claim of right defense applies to the crime of unlawful taking of a vehicle. (See *People v. Montoya* (2004) 33 Cal.4th 1031, 1035, fn. 3 [declining to decide whether the claim of right defense applies to the carjacking statute].)

"It is not necessary for us to consider the performance prong of the test before considering whether the defendant suffered prejudice as a result of counsel's alleged deficiencies. [Citation.] 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.' [Citation.]" (*People v. Goldman*, *supra*, 225 Cal.App.4th at pp. 957-958; see *People v. Lucas* (2014) ___ Cal.4th ___, ___ [2014 WL 4099374, p. 100] ["[i]f petitioner fails to show prejudice, a reviewing court may reject the claim without determining whether counsel's performance was adequate"].) We follow that course here.

The trial court instructed the jury that in order to prove that Pearson violated Vehicle Code section 10851, the People had to prove following elements: "One, a person took or drove a vehicle belonging to another person; two, the other person had not consented to the taking or driving of her vehicle; and three, when the person took or drove the vehicle, he had the specific intent to deprive the owner either permanently or temporarily of her title to or possession of the vehicle." The trial court also instructed the jury that "[t]o consent to an act or a transaction a person must: one, act freely and voluntarily and not under the influence of threats, force or duress; two, must have knowledge of the true nature of the act or transaction involved; and three, must possess the mental capacity to make an intelligent choice whether or not to do something proposed by another person. Merely being passive does not amount to consent. Consent requires a free will and positive cooperation in act or attitude."

Pearson's defense to count 2 was that he did not take Jamison's vehicle unlawfully. In his closing argument to the jury counsel for Pearson argued: "There was no taking, ladies and gentlemen, because she said there was no taking. They shared this car. They shared this car. He paid the note on occasion. [A neighbor] told you that she had seen him regularly in that car coming and going." Pearson adequately apprised the jury of his defense within the context of the instructions given by the trial court.

The jury rejected Pearson's version of the events and his claim that he did not take Jamison's car unlawfully because she regularly allowed him to drive the car and thus consented to his taking and driving the car on April 28, 2012. Thus, it is not reasonably

probable that the jury would have acquitted Pearson of unlawfully taking or driving Jamison's vehicle if the trial court had given an instruction on the defense of claim of right. Because the "misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome" (*People v. Breverman* (1998) 19 Cal.4th 142, 165; see *People v. Hanna* (2013) 218 Cal.App.4th 455, 462, 463 ["[e]rror in failing to instruct on the mistake-of-fact defense" was harmless where "it was not reasonably probable defendant would have obtained a more favorable outcome had the court instructed on the mistake-of-fact defense"]), and because Pearson has not shown such a probability in this case, counsel for Pearson's failure to request an instruction on claim of right was not prejudicial. Therefore, Pearson has not demonstrated that he was denied the effective assistance of counsel.

E. *Penal Code Section 654*

The court sentenced Pearson to state prison for a total term of 12 years on counts 2, 3, and 4 and to county jail for six months on count 7. On count 2 the trial court imposed a term of seven years, consisting of the upper term of three years doubled to six years pursuant to the three strikes law, plus one year for the armed allegation. On count 3 the court imposed a consecutive term of one year and eight months, consisting of one-third of the middle term of two years, or eight months, doubled to 16 months under the three strikes law, plus one-third of the one-year armed allegation, or four months. On count 4 the court imposed a consecutive term of one year and four months, consisting of one-third of the middle term of two years, or eight months, doubled to 16 months. On count 7, the court imposed a consecutive term of six months in county jail. Finally, the court imposed two, 1-year prior prison term enhancements pursuant to Penal Code section 667.5, subdivision (b).

Pearson argues that the trial court violated Penal Code section 654 (section 654) (1) by sentencing him to consecutive terms of imprisonment on counts 2 and 3, (2) imposing one year for each of the armed allegations in counts 2 and 3, and

(3) sentencing him to state prison on count 4 after having imposed sentences on the armed allegations in counts 2 and 3. We find no error in Pearson's sentence.

Subdivision (a) of section 654 provides that "'[a]n 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.' [Citation.] '"Whether 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."' [Citation.]" (*People v. Capistrano* (2014) 59 Cal.4th 830, 885.) "But '"a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment." [Citation.] "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken."' [Citation.]" (*People v. Petronella* (2013) 218 Cal.App.4th 945, 964.)

"'[T]he purpose of section 654 "is to insure that a defendant's punishment will be commensurate with his culpability."' [Citation.] 'It is [the] defendant's intent and objective, not temporal proximity of his offenses, which determine whether the transaction is indivisible.' [Citation.] '"The defendant's intent and objectives are factual questions for the trial court; [to permit multiple punishments,] there must be evidence to support [the] finding the defendant formed a separate intent and objective for each offense for which he was sentenced."' [Citation.]" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 886, fn. omitted.)

Pearson contends that the trial court violated section 654 when it imposed consecutive sentences on count 2, unlawful taking or driving of a vehicle, and count 3, evading an officer with willful disregard for safety, because his "conduct in counts 2 and 3 constitutes a single criminal course of conduct with a single criminal objective." This

contention is based on the erroneous premise that Pearson did not commit the crime of unlawful taking or driving of a vehicle until he had led Officers Martinez and Jaramillo on a high speed chase. Pearson completed the unlawful taking of Jamison's car when he drove it from the apartment on East Imperial Highway. The crime of evading occurred later when Pearson refused to cooperate with Officers Martinez and Jaramillo and then drove off in the car, leading the officers on a high speed chase. Because counts 2 and 3 were not part of a single indivisible course of conduct with a single criminal objective, section 654 did not prevent the trial court from imposing consecutive sentences on these counts.

The trial court also did not err by imposing consecutive armed enhancements on counts 2 and 3. Pearson argues that he "was allegedly in possession of a single firearm when he threw a gun from a fleeing vehicle. One gun. One toss. One indivisible act." The contention is also based on the erroneous premise that counts 2 and 3 were part of an indivisible course of conduct. "[I]f section 654 does not bar punishment for two crimes, then it cannot bar punishment for the same enhancements attached to those separate substantive offenses. This is true even if the same *type* of sentence enhancement is applied to the underlying offenses." (*People v. Wooten* (2013) 214 Cal.App.4th 121, 130.) As noted, Pearson had unlawfully taken and driven Jamison's car before Pearson began to evade the police. The two substantive offenses constituted separate criminal acts with separate criminal objectives. Because Pearson was armed with a firearm during the commission of both crimes, and because section 654 does not bar the imposition of consecutive terms for the underlying substantive offenses, section 654 does not preclude imposition of consecutive enhancements on counts 2 and 3.

Finally, Pearson contends that the trial court erred in sentencing him to 16 months in state prison on count 4, felon in possession of a firearm, after imposing consecutive armed enhancements on counts 2 and 3. This assertion of sentencing error, like the others, is based on a faulty premise. Pearson argues that "because he was a convicted felon at that very same moment wherein he was allegedly armed with a firearm during the commission of the acts described in counts 2 and 3," he "was sentenced to three

separate prison terms, to be served consecutively, on the basis of a single indivisible act." California law does not support Pearson's argument.

"[W]hen an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime. Therefore, section 654 will not bar punishment for both firearm possession by a felon [citation] and for the primary crime of which the defendant is convicted." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1141; see *People v. Vang* (2010) 184 Cal.App.4th 912, 916 [*Jones* holds that "section 654 did not preclude the defendant's separate punishment for shooting at an inhabited dwelling [citation] and possession of a firearm by a convicted felon [citation] because the defendant must have possessed the firearm before he drove to the victim's house and fired into it"]; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1413 [where "defendant used a handgun to perpetrate two robberies" and "had the gun in his possession when he was arrested," it is "[a] justifiable inference . . . that defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes"].) Here, "the evidence shows a possession distinctly antecedent and separate from the primary offense[s] . . . ." (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) Therefore, the trial court did not violate section 654 by sentencing Pearson to a consecutive sentence on count 4 after having imposed armed enhancements on counts 2 and 3.

DISPOSITION

The judgment is affirmed.

SEGAL, J.*

We concur:

WOODS, Acting P. J.

ZELON, J.

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