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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **VINCENT REED,** **Defendant and Appellant.**	**A107999** **(San Francisco County Super. Ct. No. 192303)**

Appellant Vincent Reed was convicted of three related felonious firearms possession offenses: (1) being an ex-felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1))[1]; (2) carrying a concealed firearm (§ 12025, subd. (a)(2)), and (3) carrying a loaded firearm while in a public place (§ 12031, subd. (a)(2)(A)). Appellant was also convicted of several misdemeanor offenses, and received a total prison sentence of three years. He contends: (1) his conviction of three firearms offenses arising out of one incident violated his due process rights, and the rule against double jeopardy; (2) the prosecution failed to properly prove that one of the firearms offenses occurred in an incorporated city; and (3) one of the offenses of which he was convicted was in fact a lesser included offense, under the "accusatory pleading test." We reject these contentions and affirm.

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

I. FACTS AND PROCEDURAL HISTORY

On January 24, 2004, around 10:15 a.m., San Francisco Police Sergeant Jason Fox and Officer Jim Mullins were patrolling the "south of Market area" of the City of San Francisco, especially including certain areas known for criminal activity. They drove to a location near the corner of Sixth Street and Berry Street. This area, which Fox testified is located within the City and County of San Francisco, had become an area where homeless encampments would "pop up" and prostitution-related offenses were occurring.

As Fox drove his patrol car on Berry Street near Sixth Street, he noticed a green Lexus parked next to a cyclone fence. Fox drove closer, and saw a person's head going up and down near the passenger seat. Fox parked the patrol car 15 to 20 feet from the Lexus, and both officers walked towards the Lexus. They saw appellant in the passenger seat, and the driver, Franklin Goldberg, leaning over towards appellant, with his head "bobbing up and down" in appellant's lap. It appeared that Goldberg was "engaged in fellatio." Officer Mullins saw that appellant had a condom on his exposed penis.

Fox and Mullins detained both men for further investigation of what appeared to be a lewd act in public. Goldberg cooperated when Sergeant Fox pat-searched him. The search did not find anything remarkable. When Mullins began to pat-search appellant, however, appellant pulled his hands free and swung his elbow at the officer. Appellant then tried to run away, but Mullins caught his jacket, preventing his escape. As Fox went to assist his fellow officer, appellant flailed his arms with balled fists, hitting the sergeant in the face. The two officers continued to struggle to control appellant, and eventually forced him onto the ground.

Appellant continued resisting while on the ground, kicking his legs, pulling his arms under his body, and attempting to get up. Sergeant Fox was particularly concerned over his inability to see appellant's hands, because appellant had not yet been pat-searched, and Fox feared appellant might retrieve a weapon hidden in his

clothing. In the struggle, appellant grabbed and pulled at the handle of Fox's gun, which was secured in his holster. Meanwhile, Mullins managed to pry appellant's hand off the sergeant's gun, and the two officers subdued appellant and secured him in handcuffs.

Mullins searched appellant, recovering a .25-caliber automatic pistol in his left jacket pocket. The gun was loaded with a round in the chamber. At the police station, Fox examined the pistol, unloading one bullet from the chamber and six rounds from the magazine. Fox also discovered that appellant had actually ripped his holster during the melee, and that his lip was swollen, bruised, and bleeding from appellant's attack.

At trial, the parties stipulated that appellant had suffered a prior felony conviction.

Both Goldberg and appellant testified. According to Goldberg, on the date of his arrest he was just "conversating" with appellant in Goldberg's Lexus. Goldberg explained that he had been trading messages with appellant on a telephone chat line, and they decided to meet. Although Goldberg admitted that he met with appellant for the purpose of performing oral sex, Goldberg maintained that once the two men saw each other and realized they had met before, their time together was spent just talking. He acknowledged having condoms in the car and in his pocket. Goldberg further testified that appellant did not ever open his pants or expose his penis, and he denied having oral sex with appellant or bobbing his head up and down in appellant's lap.

Goldberg claimed the struggle between Officer Mullins and appellant began when the officer started twisting appellant's arm, and appellant started "hollering." He denied seeing appellant grab the officer's gun, punch the officer, or flail his arms. Goldberg did however hear one of the officers say, "You're trying to grab my gun," during the struggle. He admitted having been convicted of robbery in 1993, and that he had also recently been convicted of receiving stolen property.

Appellant testified that he worked in some informal capacity as a security guard at Sixth and Berry. He was bored, so he started leaving and receiving messages on a telephone chat line with a person he believed to be a woman. Appellant told the person where to find him, but never thought the person would show up. He denied that this was a sexual assignation. When Goldberg arrived in his Lexus, appellant recognized him from an encounter five or six months before, and got into the vehicle. Appellant stated that he and Goldberg were just talking when the police arrived. Appellant denied ever having his pants open or exposing his penis.

Appellant said that Officer Mullins searched him, after which he had to sit on the ground for about 10 minutes. Mullins then got him up off the ground and took him to the side of the car, where he was ordered to place his hands on his head. Although appellant complied, the officer twisted his arm. After that, appellant only tried to talk to the officer about what was taking place, but the officer tackled him from behind and took him to the ground. Fox then placed appellant in a control hold to the point where he could not move at all. Nevertheless, he heard the officer yelling, "You're trying to grab my gun." Appellant denied trying to remove Fox's gun from its holster or otherwise grabbing it. He also denied being searched after being handcuffed, or that he ever saw or possessed the gun produced by Mullins.

San Francisco Police Lieutenant Kurt Bruneman interviewed Goldberg following his arrest. Goldberg told Bruneman that he met appellant for the purpose of having oral sex. Goldberg never complained about the conduct of the arresting officers.

Appellant was charged in an amended information with being an ex-felon in possession of a firearm (§ 12021, subd. (a)(1)), carrying a concealed firearm (§ 12025, subd. (a)(2)), carrying a loaded firearm while in a public place (§ 12031, subd. (a)(2)(A)), resisting arrest by trying to remove a police officer's firearm (§ 148, subd. (d)), misdemeanor assault on a police officer (§ 243, subd. (b)), and

misdemeanor resisting arrest (§ 148, subd. (a)(1)). The amended information also contained two prison term priors (§ 667.5, subd. (b)).

On September 3, 2004, the jury found appellant guilty of being an ex-felon in possession of a firearm, carrying a concealed firearm, carrying a loaded firearm while in a public place, misdemeanor assault on a police officer, and two counts of misdemeanor resisting arrest. In the bifurcated trial, the court found the second prison prior to be true. Appellant was sentenced to three years in state prison: the midterm of two years for the principal offense, section 12021, subdivision (a)(1), and one consecutive year for the prison prior. The remaining felony counts were stayed and one-year concurrent jail terms were imposed for the three misdemeanor offenses.

I. DISCUSSION

A. APPELLANT'S DUE PROCESS AND DOUBLE JEOPARDY CLAIMS ARE WITHOUT MERIT.

Appellant first argues that his convictions of three different firearms offenses arising from one act, possession of the same firearm, violated his right to due process and the constitutional prohibition against double jeopardy.

1. Waiver

The Attorney General points out that appellant neglected to raise this due process and double jeopardy claim in the lower court. Appellant's failure to preserve any due process or double jeopardy claims below arguably bars him from raising them for the first time on appeal. Nevertheless, when only pure issues of constitutional law are involved, we may exercise our discretion to reach the merits.

2. Due Process was not Violated.

In *People v. Ortega* (1998) 19 Cal.4th 686, 692 (*Ortega*), our high court addressed the issue of whether "a defendant may receive multiple *convictions* for offenses arising out of a single act or course of conduct. This issue must be distinguished from the related question of when a defendant may receive multiple *sentences* based upon a single act or course of conduct." (Italics in original.)

Ortega held that multiple convictions, as opposed to multiple sentences, may be imposed, unless one offense was necessarily included within the other. (*Ibid*.)[2]

In general, section 954 allows the prosecution to charge "different statements of the same offense" and a defendant to be "convicted of any number of the offenses charged." (§ 954.) A judicially-created exception to this rule prohibits multiple convictions based on necessarily included offenses. (*Ortega, supra*, 19 Cal.4th at p. 692, citing *People v. Pearson* (1986) 42 Cal.3d 351, 355 (*Pearson*).) The reason for this exception is "unclear." (*Pearson, supra,* at p. 355.) Whatever the reason for the rule, however, "the rule appears to have nothing to do with due process . . . ." (*People v. Scheidt* (1991) 231 Cal.App.3d 162, 168 (*Scheidt*).)

Appellant fails to convincingly support his argument that multiple convictions of these firearm offenses violated his right to due process of law. He fails to bring to our attention any case which stands for the proposition that multiple convictions of crimes arising from the same incident constitute a violation of a defendant's due process rights. Indeed, the California Supreme Court has observed that such multiple convictions are generally permissible. (See *Ortega, supra,* 19 Cal.4th 686, 692.)

3. <u>There was no Double Jeopardy Violation.</u>

Appellant's related argument is that multiple convictions violate the double jeopardy clause. This argument is also misplaced, because appellant has not been exposed to more than one prosecution or punishment for the same statutory offenses.

The double jeopardy clause "'protects against a second prosecution for the same offense after acquittal. It also protects against a second prosecution for the same offense following conviction. And it protects against multiple punishments for the same offense.'" (*Brown v. Ohio* (1977) 432 U.S. 161, 165, quoting *North*

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[2] We will address and reject appellant's related claims regarding the issue of necessarily included offenses, in the final section of this opinion.

Carolina v. Pearce (1969) 395 U.S. 711, 717, overruled on other grounds in *Alabama v. Smith* (1989) 490 U.S. 794, 795-796.) But the double jeopardy bar does not apply to multiple convictions in a single trial. (*Ohio v. Johnson* (1984) 467 U.S. 493, 500; *People v. Tideman* (1962) 57 Cal.2d 574, 578.)

The authority cited by appellant addresses double jeopardy prohibition against splitting crimes and prosecuting them on separate occasions. (See *People v. Mendoza* (1942) 55 Cal.App.2d 625; *People v. McDaniels* (1902) 137 Cal. 192; *People v. Preciado* (1916) 31 Cal.App. 519; *Schiro v. Farley* (1994) 510 U.S. 222; *People v. Greer* (1947) 30 Cal.2d 589, overruled on other grounds in *People v. Fields* (1996) 13 Cal.4th 289.) This however did not occur in the present case. Appellant was prosecuted for multiple offenses at the same trial. Other cases cited by appellant are also distinguishable, since they involve the concept of multiple punishment, rather than multiple convictions. (See *In re Johnson* (1966) 65 Cal.2d 393; *U.S. v. Conley* (7th Cir. 2002) 291 F.3d 464.) Appellant concedes his case does not raise a question based upon multiple punishment.

Several other decisions cited by appellant in his brief fail to address double jeopardy claims at all. For instance, in *People v. Chapman* (1968) 261 Cal.App.2d 149 (*Chapman*), the quotation cited by appellant ("Any attempt to split this continuing course of conduct into separately conceived crimes would be quite artificial") arose in the context of a felony-murder jury instruction. (*Chapman, supra*, at pp. 175-176.) There, the appellate court found that the robbery and murder were one "continuing, indivisible transaction," thus rejecting a proposed jury instruction to the contrary. (*Ibid.*)

The partial quotation cited by appellant from *Bell v. United States* (1955) 349 U.S. 81 (*Bell*) (". . . doubt will be resolved against turning a single transaction into multiple offenses . . .") does not include the necessary context. (*Bell, supra,* at pp. 82-84.) Bell was convicted of two counts of transporting women for immoral purposes in violation of the Mann Act, title 18 United States Code section 2421, and sentenced to two consecutive prison terms. (*Bell, supra,* at pp. 81-82.)

The *Bell* court held that the simultaneous transportation of two women constituted only one violation of the Mann Act, because Congress had not chosen to permit multiple prosecutions for a single transaction. (*Bell*, *supra*, at p. 84.)

Two other federal cases cited by appellant, *U.S. v. Verrecchia* (1st Cir. 1999) 196 F.3d 294 (*Verrecchia*), and *U.S. v. Dunford* (4th Cir. 1998) 148 F.3d 385 (*Dunford*), are not determinative, nor are they binding authority for that matter, even if they were relevant. (See *People v. Zapien* (1993) 4 Cal.4th 929, 989.) Neither case contains a relevant discussion of double jeopardy. *Verrecchia* merely held that a felon in simultaneous possession of multiple firearms cannot be charged with a separate count for *each gun*, inasmuch as the Legislature did not intend to allow multiple prosecutions in such instances. (*Verrecchia, supra*, at p. 298.) That is not an issue raised in this appeal. On the other hand, *Dunford* held that a defendant who is prohibited from possessing firearms, *for more than one reason*, may not be subjected to a separate charge of illegally possessing a firearm for each separate reason that makes it illegal for him to possess a firearm. (*Dunford, supra,* at p. 389.) Here, appellant's ex-felon status was the reason it was illegal for him to possess a firearm under section 12021, subdivision (a)(1).

Finally, appellant refers to *U.S. v. Becker* (3rd Cir. 1989) 892 F.2d 265, 268 (*Becker*) to support his argument that the double jeopardy clause prohibits *splitting* one single crime into several prosecutions. *Becker* is factually distinguishable. It involved two charged conspiracies to smuggle marijuana, which were assertedly split off from what was actually a single conspiracy. Even though Becker's convictions were reversed, the court rejected the proposition that such multiple convictions were necessarily improper, since a defendant's illegal conduct might still constitute separate crimes, and a separate conspiracy, in those instances where the conspiracy involves different agreements with different conspirators. (*Ibid*.)

Appellant was convicted of committing separate crimes, not of multiple duplicative versions of the same indivisible crime, and we thus conclude that his multiple convictions did not violate due process or double jeopardy principles.

B. SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICT FOR CARRYING A LOADED FIREARM IN A PUBLIC PLACE IN AN INCORPORATED CITY.

Appellant contends there is insufficient evidence to uphold his conviction for carrying a loaded firearm in a public place, because the prosecution presented no evidence that the City of San Francisco is an incorporated city, an element of the crime of possessing a firearm in a public place under section 12031, subdivision (a)(2)(A).

More accurately, appellant's argument is that the evidence was insufficient to prove that the public place at issue was one of the statute's prohibited locations. The locations where one may not carry a loaded firearm on one's person or in a vehicle are: (1) any public place within an incorporated city; (2) any public street within an incorporated city; (3) any public place in a prohibited area of an unincorporated territory; and (4) any public street in a prohibited area of an unincorporated territory. (See *People v. Knight* (2004) 121 Cal.App.4th 1568, 1576.)

At trial, there was no dispute that the crime occurred in a public place on a street within the city limits of San Francisco. Sergeant Fox testified that the area of Sixth Street and Berry Street, where Goldberg's car was parked, is within the city limits of San Francisco.

Nevertheless, appellant points out that there was no additional evidence offered to prove that San Francisco is an *incorporated* city. But, in the State of California, every city is by definition incorporated, as a municipal corporation. (See Gov. Code, §§ 20, 21, 56043; *Torres v. Board of Commissioners* (1979) 89 Cal.App.3d 545, 549-550.) "A city is a municipal corporation." (45 Cal.Jur.3d (2000) Municipalities, § 2, p. 16.) As mentioned, appellant does not claim a lack of evidence that San Francisco is a city, nor does he actually claim that the city is unincorporated. His narrow point is that there was no proof of incorporation presented at trial. Although that is true, it nonetheless is not determinative. To be

a city in California is, by definition, to be incorporated, and thus no such further proof of incorporation was required.

Pursuant to respondent's request, we have also taken judicial notice of the fact that San Francisco is an incorporated city. (Order of this court dated May 5, 2005.) In any event, there cannot conceivably be any factual dispute that San Francisco is an incorporated city, and has been so for over one hundred and fifty years. An act of the California Legislature incorporated San Francisco as a city on April 15, 1850. (See *Martin v. Election Commissioners* (1899) 126 Cal. 404, 407.)

We reject appellant's claims in this regard.

C. SECTION 12021, SUBDIVISION (A)(1), IS NOT A NECESSARILY INCLUDED OFFENSE OF THE OTHER CHARGED OFFENSES.

Lastly, appellant maintains he could not be convicted of being a felon in possession of a firearm in violation of section 12021, because this is a lesser included offense within the other charged crimes of possession of a concealed firearm and possession of a loaded firearm in public.

Section 12021 reads, "Any person who has been convicted of a felony under the laws of the United States, of the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony." (§ 12021, subd. (a)(1).)

The law that prohibits carrying a *concealed* firearm is violated when a person "[c]arries concealed upon his or her person any pistol, revolver, or other firearm capable of being concealed upon the person." (§ 12025, subd. (a)(2).)

The *loaded* firearm statute provides: "A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or

in any public place or on any public street in a prohibited area of unincorporated territory." (§ 12031, subd. (a)(1).)

As we have pointed out, section 954 sets forth the general rule that the information may charge the same offense in the alternative, even if the multiple charges stem from the same act: "An accusatory pleading may charge . . . different statements of the same offense . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . ." (§ 954.) The issue of multiple convictions is thus separate and distinct from the prohibition on multiple punishment embodied in section 654. The result of the interaction of these statutes is that the courts have decided "in general, to permit multiple convictions on counts that arise from a single act or course of conduct—but to avoid multiple punishment, by staying execution of sentence on all but one of those convictions." (*Ortega*, *supra*, 19 Cal.4th at p. 692.) Appellant agrees that multiple punishment is not at issue, since all but one of the firearms offense sentences was stayed.

Despite the language of section 954 allowing for multiple convictions, a judicially-created exception to the general rule prohibits multiple convictions of necessarily included offenses. (*Ortega*, *supra*, 19 Cal.4th at p. 692, citing *Pearson, supra,* 42 Cal.3d at p. 355.) California has applied two different tests, in other contexts, to determine whether an offense is necessarily included in another offense: the "elements" test and the "accusatory pleading" test. (See *People v. Birks* (1998) 19 Cal.4th 108, 117.) Appellant makes no claim that section 12021, subdivision (a)(1), is a necessarily included offense of section 12025, subdivision (b)(2), or of section 12031, subdivision (a)(2)(A), under the elements test. He instead relies solely on the accusatory pleading test.[3]

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[3] Therefore we do not address this question under the statutory elements test, as appellant has not raised or briefed that issue.

Under the accusatory pleading test, a lesser offense is only included within the greater offense "'"if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed."'" (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) The accusatory pleading test therefore compares the language of the pleading for the greater offense, and the statutory definition of the lesser offense. (*Ibid*.)

The Attorney General questions whether use of the accusatory pleading test is proper in this instance, since this test was developed to ensure that a defendant has notice of the charges, not to define the elements of charged offenses. In this context, our high court has recently observed that the "primary function" of the accusatory pleading test is "to determine whether to instruct a jury on an uncharged lesser offense." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 (*Montoya*).)

Our Supreme Court has also questioned whether the accusatory pleading test should be used in any other situation, noting, "there appears little reason to enlarge the meaning of the same phrase as it is used in other situations." (*Pearson, supra,* 42 Cal.3d at p. 356, fn.2.) Although dicta in some earlier California Supreme Court decisions had apparently assumed the applicability of the accusatory pleading test to determine whether an offense is lesser included (see *Ortega, supra*, 19 Cal.4th at p. 698; *People v. Sanchez* (2001) 24 Cal.4th 983, 988), *Montoya* brings into question the validity of that argument.

Montoya recognized that a number of Court of Appeal decisions reached the conclusion that the accusatory pleading test should not apply in determining whether a particular crime is a lesser included offense, but the court did not rule on that point, as it was not necessary to do so in that particular case. (*Montoya, supra*, 33 Cal.4th at pp. 1035-1036.) Nevertheless, we find Justice Chin's concurring opinion in *Montoya* instructive insofar as it "emphasize[s] the force of the argument against applying the accusatory pleading test in deciding whether

conviction of two *charged* offenses is proper." (*Id.* at pp. 1038-1039, conc. opn. Chin, J., italics in original.)

In the words of Justice Chin: "Because a defendant is entitled to notice of the charges, it makes sense to look to the accusatory pleading (as well as the elements of the crimes) in deciding whether a defendant had adequate notice of an uncharged lesser offense so as to permit conviction of that uncharged offense. 'As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense.' [Citation.] But it makes no sense to look to the pleading, rather than just the legal elements, in deciding whether conviction of two charged offenses is proper. Concerns about notice are irrelevant when both offenses are separately charged, so there 'appears little reason' to apply the pleading test to charged offenses. [Citation.]" (*Montoya*, *supra*, 33 Cal.4th at p. 1039 (conc. opn. Chin, J.).)

The contrary view appellant would have us adopt relies, in part, on dicta in a recent decision from the Fourth Appellate District, Division Two. (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1360 (*Overman*).) This decision is not on point, however, because *Overman* actually applied the statutory elements test, rather than the accusatory pleading test. (*Ibid*.) There, the court ruled that the jury should have been instructed on an uncharged lesser included offense, discharging a firearm in a grossly negligent manner in violation of section 246.3, where the charged offense was the intentional discharge of a firearm into an inhabited dwelling, under section 246. *Overman* reached this conclusion because a comparison of the statutory *elements* of the two crimes required this result, and not because of the language of the accusatory pleading. (*Ibid*.) The present case by contrast does not concern the question of whether the jury should have been instructed on an uncharged lesser offense.

Here, the issue before us concerns multiple convictions of *charged* greater and lesser offenses, rather than a trial court's duty to instruct on *uncharged* lesser

included offenses. As several cases have explained, multiple convictions are expressly allowed by statute (§ 954), the primary concern being multiple punishment; the accusatory pleading test only applies at trial, to address due process concerns unique to that situation; and peripheral double jeopardy concerns do not arise when multiple offenses are charged in a single trial. (See *Scheidt, supra*, 231 Cal.App.3d at pp. 166-171; *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1093-1095; *People v. Miranda* (1994) 21 Cal.App.4th 1464, 1467 & fn. 1.)

We therefore reject appellant's contention that section 12021, subdivision(a)(1), is a necessarily included offense of sections 12025, subdivision (a)(2), and 12031, subdivision (a)(2)(A).

III. DISPOSITION

The judgment of conviction is affirmed.

STEVENS, Acting P.J.

We concur.

SIMONS, J.

GEMELLO, J.