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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OTIS LEE RODGERS, Defendant and Appellant.	E034205 (Super.Ct.No. RIF98234) O P I N I O N

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks, Judge. Affirmed.

Mark S. Devore, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gill P. Gonzalez, Supervising Deputy Attorney General, and Stacy A. Tyler, Deputy Attorney General, for Plaintiff and Respondent

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

I. INTRODUCTION

Defendant was convicted by a jury of assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 1),[1] possession of a firearm by a convicted felon (§ 12021, subd. (a)(1); count 2), possession of ammunition by a convicted felon (§ 12316, subd. (b)(1); count 3), and making criminal threats (§ 422; count 4). The jury also found true certain enhancement allegations and the court found true two prison priors allegations. (§§ 667.5, 12022.5, subd. (a)(1), 1192.7, subd. (c)(8) & 12022.1.) Defendant was sentenced to a total of 16 years in prison.

In the published portion of this opinion, we consider whether police, acting on information provided by an anonymous tipster, were justified in stopping defendant as he was driving out of an apartment complex at 3:45 a.m. We hold that the stop was justified. While the officer made no observation that an occupant of the car was involved in criminal activity, he did make observations consistent with the anonymous tip. This consistency, in conjunction with an anonymous tip that concerned ongoing criminal conduct posing an imminent serious threat to human life, was sufficient to justify the present stop. In the unpublished portion of the opinion, we reject defendant's other contentions. We affirm the judgment.

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

II. MOTION TO SUPPRESS EVIDENCE

A. *Facts Presented at Motion to Suppress Hearing*

Prior to trial, defendant moved to suppress evidence obtained in a search of his car. At the hearing on the motion to suppress, Riverside County Sheriff's Deputy Gary Bowen testified that he was on patrol at approximately 3:41 a.m. in the Rubidoux area of Riverside County. He received a call from dispatch indicating that a Black male and Black female were in a red sedan in the driveway area of the Garden Estates Apartments. The dispatcher told Bowen that the caller stated that she heard the male say that he was going to shoot and kill the female.

Neither the recordings nor transcripts of the dispatch communication or the 911 call were submitted into evidence at the suppression hearing. Although testimony *at trial* indicated that the police were able to identify the anonymous caller from her cell phone number, there was no evidence introduced at the suppression hearing that the caller had been, or could have been, identified. According to the court, the caller was "an anonymous informant."

Bowen arrived at the apartment complex in a marked patrol unit about four minutes after he received the call. As he entered the driveway going southbound, a red sedan was being driven northbound out of the driveway. When asked how he got the sedan to stop, Bowen testified: "I don't recall if my lights were on or not, but I did make contact with the driver. [¶] . . . [¶] . . . I most likely indicated that I needed to -- to talk with him. I don't know if I ordered him to stop or if my lights were on at that point. . . . [¶] . . . [¶] . . . My vehicle was next to him facing the opposite direction. I most likely

had my spotlight on the vehicle." Bowen pulled just past the driver's door of the red sedan, stopped, and exited his vehicle.

Bowen saw a male driving the car and a female in the front passenger seat. The female was crying. Bowen did not notice any marks on her. He informed the driver that he had been called to the location in reference to a disturbance. Upon inquiring whether the occupants of the car were having a fight, the driver stated that they were having an argument. Bowen had the driver step out of the car and patted him down for weapons; none were found. On cross-examination, when questioned as to why he asked defendant to get out of the car, Bowen stated: "I was there to investigate a threat of life, and for officer safety protection[,] and to fully investigate, I would need to talk to the driver."

Defendant was subsequently placed in the backseat of Bowen's patrol car. Bowen questioned Mrs. Rodgers, who gave consent to search the car. The search yielded a gun and ammunition in the sedan's trunk.

B. *Analysis of Stop and Detention*

Defendant contends that the trial court erred in denying his motion to suppress evidence. Relying primarily on *Florida v. J. L.* (2000) 529 U.S. 266 [120 S.Ct. 1375, 146 L.Ed.2d 254] (*J.L.*), defendant argues that Bowen, acting on an anonymous tip, did not have a justifiable basis for the initial stop of the defendant's car prior to Bowen's observation of the occupants of the car.[2] He contends that the anonymous tip received by

[2] Defendant does not challenge the actions the police took after Bowen observed that the occupants of the car were a Black male and a Black female, and that the female

[footnote continued on next page]

dispatch and communicated to Bowen was not sufficiently corroborated prior to the stop so as to provide a "reasonable suspicion" to stop and detain defendant. He asserts that the stop violated the Fourth Amendment and, therefore, all subsequently seized evidence should have been suppressed. (See, e.g., *Wong Sun v. United States* (1963) 371 U.S. 471, 484 [83 S.Ct. 407, 9 L.Ed.2d 441].)

The Fourth Amendment protects against "*unreasonable* searches and seizures." (*United States v. Sharpe* (1985) 470 U.S. 675, 682 [105 S.Ct. 1568, 84 L.Ed.2d 605].) An investigatory stop of a motor vehicle implicates the Fourth Amendment "even though the purpose of the stop is limited and the resulting detention quite brief. [Citations.] The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order '"to safeguard the privacy and security of individuals against arbitrary invasions. . . ."' [Citation.] Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." (*Delaware v. Prouse* (1979) 440 U.S. 648, 653-654 [99 S.Ct. 1391, 59 L.Ed.2d 660]; see also *United States v. Terry-Crespo* (9th Cir. 2004) 356 F.3d 1170, 1176.) Whether law enforcement conduct is reasonable depends upon the totality of the circumstances

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[footnote continued from previous page]
was crying, except to the extent that these actions followed the initial, allegedly unjustified, stop.

surrounding the search and seizure. (*United States v. Drayton* (2002) 536 U.S. 194, 207 [122 S.Ct. 2105, 153 L.Ed.2d 242]; *People v. Reyes* (1998) 19 Cal.4th 743, 750.)

In reviewing a trial court's ruling on a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

In *J.L.*, the Supreme Court held that an uncorroborated anonymous tip alleging the illegal possession of a firearm, lacking moderate indicia of reliability, will not justify a stop and frisk by police. (*J.L., supra,* 529 U.S. at p. 274.) There, police received an anonymous call which reported that a young Black male wearing a plaid shirt was at a particular bus stop and that he was carrying a gun. From the record before the court, nothing was known about the informant. Officers arrived at the bus stop about six minutes later. The officers observed three Black males, one wearing a plaid shirt. "Apart from the tip, the officers had no reason to suspect any of the three of illegal conduct." (*Id.* at p. 268.) One of the officers approached J.L. -- the male wearing the plaid shirt -- and told him to put his hands up on the bus stop. A frisk yielded a gun in J.L.'s pocket. He was subsequently charged with carrying a concealed weapon and possessing a firearm while under the age of 18. (*Id*. at pp. 268-269.)

In affirming the state court's suppression of the gun, the Supreme Court stated: "In the instant case, the officers' suspicion that J.L. was carrying a weapon arose not from any observations of their own but solely from a call made from an unknown

location by an unknown caller. Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, [citation] 'an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity' [citation]." (*J.L.*, *supra*, 529 U.S. at p. 270.) The court recognized, however, that "there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.' [Citation.]" (*Ibid*.)

The State of Florida argued that the tipster's accurate description of the location and the defendant's clothes provided sufficient indicia of reliability. The court disagreed, stating: "An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*J.L.*, *supra*, 529 U.S. at p. 272.)

In discussing the need for corroboration, the *J.L.* court distinguished *Alabama v. White* (1990) 496 U.S. 325 [110 S.Ct. 2412, 110 L.Ed.2d 301] (*White*), which upheld a stop and detention following an anonymous tip. In *White*, an anonymous informant told police that a woman carrying cocaine would leave an apartment building at a specific time and drive a described vehicle to a named motel. (*Id*. at p. 327.) The police saw a woman leave the apartment building and enter a vehicle matching the informant's description, which then drove straight to the named motel. (*Ibid*.) The *J.L.* court

explained that in *White,* after the officers observed that the informant had accurately predicted the woman's movements, "it bec[a]me reasonable to think the tipster had inside knowledge about the suspect and therefore to credit his assertion about the cocaine." (*J.L., supra,* 529 U.S. at p. 270.) In *J.L.*, by contrast, "[t]he tip . . . lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case. The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. . . . All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." (*Id.* at p. 271.)

In his concurring opinion, Justice Kennedy further addressed the need for indicia of reliability for anonymous tips. "If the telephone call is truly anonymous," he noted, "the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable." (*J.L., supra,* 529 U.S. at p. 275 (conc. opn. of Kennedy, J.).) While the predictive information provided by a tipster, such as in *White,* was one means of corroborating a tip, Justice Kennedy pointed out that "there are many indicia of reliability respecting anonymous tips . . . ." (*J.L., supra,* at p. 274.) He explained further, "a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action." (*Id.* at p. 275.) In *J.L.*, however, there were no such features. (*Id*. at pp. 275-276.)

Here, Bowen observed a red car at the location identified by the tipster. Although Bowen had not, at that point, observed any criminal activity, the fact that the caller correctly identified the location of the red car and overheard the man's threatening words indicates that the anonymous caller was close enough to have first-hand knowledge of the reported criminal conduct just prior to the officer's arrival. This is a feature that "narrow[s] the likely class of informants" to someone in or near the parking lot (*J.L., supra,* 529 U.S. at p. 275 (conc. opn. of Kennedy, J.)), and "demonstrates the informant's basis of knowledge or veracity" (*id.* at p. 270; see also *Lowry v. Gutierrez* (2005) 129 Cal.App.4th 926, 941 [the caller's information demonstrated that he had been an eye witness to the accused's unlawful activity].) Moreover, the short time interval between the tip and the officer's appearance on the scene supports the reliability of the tip. (See *United States v. Wheat* (8th Cir. 2001) 278 F.3d 722, 731 (*Wheat*).) These facts provide some foundation as to the tipster's credibility and reduces the "risk of fabrication." (*J.L., supra,* at p. 275 (conc. opn. of Kennedy, J.).) Nevertheless, such facts indicate little more than the tip that was at issue in *J.L.* As we explain, however, *J.L.* is distinguishable because, unlike the possessor of the gun in *J.L.*, the alleged wrongdoer here had threatened to shoot and kill someone and was apparently leaving the scene in a moving vehicle.

Significantly, the facts in *J.L.* did not present an ongoing emergency situation or any immediate endangerment to life. According to the tip, the boy in the plaid shirt was allegedly carrying a gun; there was no allegation that he had threatened to kill someone or otherwise presented an imminent danger to anyone. The *J.L.* court stated that it would

not "speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability." (*J.L.*, *supra*, 529 U.S. at p. 273.)[3]

In *United States v. Holloway* (11th Cir. 2002) 290 F.3d 1331 (*Holloway*), the court was faced with the kind of dangerous allegations by an anonymous tipster the *J.L.* court declined to "speculate about." In *Holloway*, an anonymous 911 caller reported gunshots and arguing emanating from a certain residence. (*Id*. at p. 1332.) Two officers arrived at the residence shortly afterward and observed the appellant and his wife on the front porch of the home. (*Ibid*.) There is nothing in the description of the facts that indicates the police observed the couple arguing or other activity that would confirm the tipster's information. Nevertheless, upon arriving, one officer illuminated the house with his headlights and spotlight, drew his service weapon, and instructed the couple to raise their hands into view. (*Ibid*.) Defendant complied, but his wife did not. (*Ibid*.) The officer threatened to use pepper spray against the wife. Eventually, another officer placed the wife under his control. (*Id*. at pp. 1332-1333.) After placing defendant into his patrol car, the officer noticed a shotgun and shotgun shells near where defendant had been standing when the police arrived. (*Id*. at p. 1333.) After the defendant was indicted for

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[3] Similarly, two published California Court of Appeal decisions that relied upon *J.L.* to reverse trial court orders denying motions to suppress did not involve any exigent circumstances. (See *People v. Jordan* (2004) 121 Cal.App.4th 544; *People v. Saldana* (2002) 101 Cal.App.4th 170.) In both cases, the courts found the facts presented to be essentially indistinguishable from *J.L.* (*Jordan, supra,* at p. 562; *Saldana, supra*, at p. 175.)

possession of a firearm by a convicted felon, he moved to suppress the shotgun and other evidence.

Rejecting the appellant's reliance on *J.L.*, the *Holloway* court stated: "A crucial distinction between *J.L.* and this case is the fact that the investigatory stop in *J.L.* was not based on an emergency situation. . . . [W]hen an *emergency* is reported by an anonymous caller, the need for immediate action may outweigh the need to verify the reliability of the caller." (*Holloway, supra,* 290 F.3d at pp. 1338-1339.) The court further explained: "Once presented with an emergency situation, the police must act quickly, based on hurried and incomplete information. Their actions, therefore, should be evaluated 'by reference to the circumstances then confronting the officer, including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences.' [Citation.]" (*Id*. at p. 1339.)

The *Holloway* court found that the seizure and subsequent search of the residence was lawful: "[T]he warrantless search of Appellant's residence was based largely on information provided by an anonymous caller. However, the information given by the caller involved a serious threat to human life. Furthermore, the information concerned an on-going emergency requiring immediate action. In light of the nature of the 911 call, a lesser showing of reliability than demanded in *J.L.* was appropriate in order to justify the search of Appellant's home. Because the police had no reason to doubt the veracity of the 911 call, particularly in light of the personal observations of the officers once they arrived on the scene, their warrantless search for victims was constitutional." (*Holloway, supra,* 290 F.3d at p. 1339, fn. omitted.) As for the initial actions taken to obtain control

over the defendant and his wife upon their arrival, the anonymous reports of gunshots gave the officers "reasonable cause to believe they were entering a volatile and potentially dangerous situation." (*Id*. at p. 1340.) Their actions to "temporarily secure[]" the individuals were therefore justified. (*Id*. at pp. 1340-1341.)

A dangerous situation also distinguished *J.L.* from the facts in *People v. Coulombe* (2000) 86 Cal.App.4th 52. There, two unidentified citizens, 5 to 10 seconds apart, approached deputies about 11:00 p.m. on New Year's Eve; each indicated that a man wearing a white hat had a gun in a nearby restaurant. The deputies approached the location and observed a man in a white hat seated in a wheelchair. Both deputies approached simultaneously. One of them explained why they were there. About this time, the man in the white hat reached toward his pant's side pocket. A deputy placed his hand over the man's hand, and extracted a small revolver from his pocket. The trial court granted defendant's motion to suppress based on *J.L.* (*People v. Coulombe, supra,* at pp. 54-55.) The appellate court reversed. In distinguishing *J.L.*, the court stated: "The circumstances under which defendant was alleged to possess a firearm were markedly different than those in [*J.L.*]—the possession occurred not at a bus stop with only two of the suspect's friends present, but rather in a throng of thousands of New Year's Eve celebrants. The danger presented was thus much increased." (*People v. Coulombe,*

supra, at p. 58.) Under these circumstances, the situation was "sufficiently dangerous so as to require less reliability than that required in [*J.L.*]." (*Id.* at p. 59.)[4]

The applicability of *J.L.* to a situation involving a moving vehicle was addressed in *Wheat, supra,* 278 F.3d 722. *Wheat* involved an anonymous cell phone call to police about the dangerous operation of a vehicle and an investigatory stop by an officer who did not observe any erratic driving or unlawful activity. (*Id.* at p. 729.) The *Wheat* court distinguished the gun possession situation presented in *J.L.* from its facts, explaining: "An erratic and possibly drunk driver poses an imminent threat to public safety. [Citation.] Of course, arguably so too does a citizen armed with a gun, yet the Supreme Court firmly declined to adopt an automatic firearm exception to the reliability requirement on that basis. *J.L.*, [*supra,*] 529 U.S. at [page] 272. However, there is a critical distinction between gun possession cases and potential drunk driving cases. In the possessory offense cases, law enforcement officers have two less invasive options not

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[4] We note that the California Supreme Court has granted review of *People v. Wells* (2004) 122 Cal.App.4th 155, review granted December 15, 2004, S128640, and *People v. Dolly* (2005) 128 Cal.App.4th 1354, review granted August 10, 2005, S134505. The *People v. Wells, supra,* case presents the following issue: "Does an anonymous tip that a driver of a motor vehicle appears to be driving under the influence afford reasonable suspicion to support a police officer's stopping of the vehicle, where the information given by the anonymous informant cannot be corroborated except as to facts (e.g., the description of the vehicle at the designated location) that do not themselves point to any criminal activity?" (Supreme Court Summary of Cases Accepted During the Week of Dec. 13, 2004.) In *People v. Dolly, supra,* the issue presented for review is whether "an anonymous tip to police that a specific suspect possesses a gun [can] provide reasonable suspicion for a felony stop, where the police corroborate the innocent details of the tip, but do not corroborate the assertion of illegality." (Supreme Court Summary of Cases Accepted During the Week of Aug. 8, 2005.)

available to officers responding to a tip about a drunk driver. First, they may initiate a simple consensual encounter, for which no articulable suspicion is required. [Citation.] Needless to say, that is not possible when the suspect is driving a moving vehicle. [¶] Alternatively, officers responding to a tip about a possessory violation may quietly observe the suspect for a considerable length of time, watching for other indications of incipient criminality that would give them reasonable suspicion to make an investigatory stop . . . . By contrast, where an anonymous tip alleges erratic and possibly drunk driving, a responding officer faces a stark choice. . . . [H]e can intercept the vehicle immediately and ascertain whether its driver is operating under the influence of drugs or alcohol. [Citation.] Or he can follow and observe, with three possible outcomes: the suspect drives without incident for several miles; the suspect drifts harmlessly onto the shoulder, providing corroboration of the tip and probable cause for an arrest; or the suspect veers into oncoming traffic, or fails to stop at a light, or otherwise causes a sudden and potentially devastating accident. [Citation.] In contradistinction to *J.L.*, where the suspect was merely standing at the bus stop, in this context the suspect is extremely mobile, and potentially highly dangerous. [Citation.] Thus, we think that there is a substantial government interest in effecting a stop as quickly as possible." (*Wheat, supra,* 278 F.3d at pp. 736-737, fn. omitted.)[5]

[5] *Wheat* was recently followed by the Second District Court of Appeal in *Lowry v. Gutierrez, supra,* 129 Cal.App.4th at pp. 936-941.)

The present case is distinguishable from *J.L.* for reasons similar to those in *Holloway*, *People v. Coulumbe*, and *Wheat.* Like the possible drunk driver in *Wheat*, the suspect here was "extremely mobile, and potentially highly dangerous." (*Wheat, supra*, 278 F.3d at pp. 737.) Like the officer in *Holloway*, Bowen had no reason to doubt the veracity of the tipster (who had correctly described the location of the red sedan and was within earshot of the alleged threats) and could reasonably believe he was "entering a volatile and potentially dangerous situation." (*Holloway, supra*, 290 F.3d at p. 1340.) Not only was the situation potentially far more dangerous than the situation in *J.L.*, but Bowen could not engage in a consensual encounter with the suspect prior to the stop -- an option that was available to the police in *J.L.*

Bowen, like an officer responding to a tip about erratic driving, "face[d] a stark choice" as he pulled up to the moving red sedan. He could stop the vehicle long enough to determine whether there were facts corroborating the tipster's report of criminal activity; or he could decline to stop the vehicle, allowing it to proceed out of the parking lot. If Bowen had not stopped the vehicle, the driver may well have carried out the alleged threat once he was safely away from the police. The danger presented by the tipster's report and the fact that the potential perpetrator was then driving the vehicle away from the scene not only distinguishes the present case from *J.L.* but gives rise to a strong governmental interest in effecting an investigatory stop of the vehicle. Further distinguishing this case from *J.L.*, the brief stop of defendant's vehicle and observation of the occupants in this case was less of an interference with defendant's Fourth Amendment interests than the frisk on the public street that was at issue in *J.L.*

In sum, the exigent circumstances here distinguish this case from *J.L.* The government's interest in effecting a brief investigatory stop was outweighed the intrusion on the defendant's Fourth Amendment interest. Based upon our review of the totality of the circumstances presented at the suppression hearing, we conclude that Bowen was justified in making the initial stop to determine whether additional facts existed to further corroborate the anonymous caller's tip that defendant was involved in criminal conduct that posed an imminent threat to safety. Accordingly, the motion to suppress evidence was properly denied.

III. SUMMARY OF FACTS PERTAINING TO REMAINING ISSUES

Witness Sandra Rodriguez testified at trial that she was awakened in the early morning of July 15, 2001, by sounds of arguing and screaming coming from the parking lot of the Garden Estates Apartments near her house. She looked through her window and saw a Black man and a Black woman outside of a small red car in the parking lot. The man was yelling at the woman, calling her a prostitute and saying he was going to kill her. He hit the woman in the head with his fist. The man told the woman, "[g]ive me the fucking gun." The woman retrieved a gun from the car and gave it to the man. He put the gun to the temple area of the woman's head and said he was going to kill her. The woman was "crying strongly."

Rodriguez's 11-year-old daughter testified that she also heard the argument outside her window. She saw a man and woman next to a red car in the parking lot. The man was pointing a gun at the temple area of the woman's head and telling her he was going to kill her. The woman was crying.

Rodriquez called 911 on her cell phone, but hung up. A 911 operator called her back on her cell phone. While she was on the phone, she saw the police pass by and she told the operator to tell the police to "come back" and to go into the entrance to the apartments. As she was talking with the 911 operator, she saw the police make contact with the couple outside the red car. While she was certain that the police had made contact with the man she had seen arguing and holding the gun, she could identify the man only as "almost six feet" and Black.

Bowen responded to the call from dispatch at approximately 3:41 a.m. He was told that a male and female were in a red sedan in the parking area of the Garden Estates Apartments. The dispatcher told Bowen that the caller stated she had heard the male say he was going to shoot and kill the female. Bowen was not told that the caller saw a gun.

As Bowen entered the driveway of the apartment complex going southbound, a red sedan was heading northbound out of the driveway. When the two cars came close to each other, Bowen shined his spotlight into the vehicle. Defendant was driving the car and a woman was in the passenger seat. The woman was defendant's wife, Joyce Rodgers. When the defendant's car stopped, Bowen got out of his car and approached. Mrs. Rodgers was visibly shaken, upset, and crying. Upon inquiring whether they were having a fight, defendant stated that they were having an argument over financial problems. Mrs. Rodgers told Bowen she was upset because they had been arguing, but that defendant had not threatened or assaulted her.

Deputy Nathan Padilla responded to the scene to provide backup for Bowen. Padilla observed several cuts on both sides of Mrs. Rodgers's shoulders, with fresh blood.

The injuries appeared to be gouge marks from nails as if somebody was attempting to restrain her around the shoulders. Mrs. Rodgers told Padilla that she and defendant had been arguing about finances and marital problems. The stop and detention ultimately led to a search of the couple's car, wherein a gun and ammunition were found in the trunk.

Defendant represented himself at trial. He called five witnesses, including himself. Susan Hinkle testified that she was an investigator who had interviewed Rodriguez. Rodriquez told her that she saw a man with a gun in his hand holding a woman by the neck, and that they were about 100 feet away and she would not be able to recognize the man. Michael Robitzer worked for a private investigator for Rodgers, and testified as to photographs taken of Mrs. Rodgers. James Potts, a forensic technician with the county, analyzed the .357-caliber rounds found in defendant's car for fingerprints. He found no latent prints on the rounds. Barbara Lang was the dispatcher who received the 911 call. The caller told Lang that she did not see any weapons. The dispatcher had the woman stay on the line so that the deputies could confirm they were at the correct place.

Defendant testified that he and his wife lived about four blocks from where the incident took place. Mrs. Rodgers, who works at Cheers in Moreno Valley, picked him up about 11:00 p.m., after she got off work. They then went out partying at a club called "Metro." They left the club about 2:00 to 2:30 a.m. and went to a friend's home at the Garden Estates Apartments. They were in the parking lot for about one-half hour or 45 minutes. Also in the parking lot was a gray car and a red car; other Black males and females were present. He and his wife were not fighting or arguing; indeed, they were "very romantically inclined" at the time. At some point, they saw that the other cars had

left and that there were "police cars . . . zooming around." They had just begun to leave when Bowen pulled next to his car. When the two looked at each other, he stopped. Bowen told him that he was investigating a threat of violence. After asking him some questions, the officer placed him in the backseat of the police unit. The deputy then took a plastic bag out of the police car. It contained a dark object. The deputy then went to the defendant's vehicle, popped the trunk open, and came out of the trunk with the bag that had previously been in the police vehicle. After he pulled out the bag, he laid the contents on the trunk.

IV. ANALYSIS OF REMAINING ISSUES

A. *Motion for a Lineup*

Prior to trial, defendant filed a motion to be placed in a lineup before witnesses. According to defendant, "[t]he purpose of the line-up motion was not to challenge Deputy Bowen's identification of [defendant] as the driver of the red sedan that he pulled over. The purpose of the line-up motion was to examine Rodriguez'[s] ability to identify [defendant] as the [B]lack male in the parking lot, who she claimed assaulted a [B]lack female with a firearm." The court denied the motion. Defendant contends the denial constitutes an abuse of discretion. We disagree.

In *Evans v. Superior Court* (1974) 11 Cal.3d 617, the court held that "due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which

a lineup would tend to resolve." (*Id*. at p. 625.) Here, the record fails to demonstrate either that the eyewitness identification by Rodriguez was a material issue or that there was any evidence to suggest a reasonable likelihood of a mistaken identification by Rodriguez that could be resolved by a lineup.

In his motion, defendant relied upon evidence that Rodriguez slept through some of the arguing that occurred in the parking lot and that she viewed the incident "from a distance between [2:00] [and] [3:00] a.m." It is clear from our review of the entire record that whether Rodriguez could identify defendant as the man in the parking lot was not an issue in the case. Rodriquez testified before the jury that she lived in a house at 5598 Tilton Avenue. She was asleep when she heard persons arguing. She looked through the window and saw a man and a woman outside of a red car. The red car was small. Rodriquez testified that she called the police on her cell phone and then hung up. She got a call back from 911. As she was on the phone with 911, she saw the police pass by and she told them to come back because they had passed the place. She saw the police make contact with the people in the red car. She is sure the individuals that the police stopped were the persons in the red car, because she was on the phone giving the police directions until they made contact with the red car. Bowen testified that he responded to a call at approximately 3:41 a.m. He was dispatched to a parking area of the Garden Estates Apartments located at 5618 Tilton Avenue. He stopped a red car and made contact with the defendant, who Bowen identified at trial.

In that Bowen identified defendant in court as the individual he contacted in the driveway area of the apartment complex, and Rodriquez had the red car and its occupants

within her view up to and including Bowen's contact with them, an *Evan*'s lineup would have been useless. Identification of defendant was simply not a material issue.

While Rodriquez did testify on redirect that she was 100 percent sure that the defendant was the man that she saw that night, she previously testified that she would be unable to identify the individuals that she observed by the red car, save and except that they were Black. If she were to see the man among other persons, she would be unable to identify him; and she does recall telling an investigator that she would not be able to identify the individual she observed. Her role in the identification of defendant was limited to testifying that she saw the deputies make contact with the person that had threatened the woman. The identification of defendant as the perpetrator was completed by Bowen, who testified that the person he made contact with in the parking lot was defendant. Whether *Rodriguez* could make out the physical features of the person in the parking lot was immaterial so long as she could see that the same person who threatened the woman -- however imprecisely perceived -- was the same person that Bowen contacted in the parking lot. Asking her to identify the defendant in a lineup would, therefore, have served no purpose. Based on this record, there was no error in denying defendant's motion for a pretrial lineup.

B. *Admonishment During Juror Voir Dire*

During voir dire, defendant asked a prospective juror: "If I were to testify and you found out that the defendant had a criminal record, would that affect your --." The court cut the question short, stating: "No, Mr. Rodgers. You can't give the jury a situation in which they might in fact encounter and ask them to prejudge the evidence." Defendant

argues that this deprived him of his Sixth Amendment right to an impartial jury. Because defendant's failure to object has prevented effective appellate review, we hold that he has forfeited this issue on appeal.

"'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the [C]onstitution.' [Citation.] 'Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" (*People v. Earp* (1999) 20 Cal.4th 826, 852.) "[T]he scope of the inquiry permitted during voir dire is committed to the discretion of the court. Absent a timely objection to questions that arguably exceed the proper scope, any claim of abuse of discretion is deemed to have been waived." (*People v. Visciotti* (1992) 2 Cal.4th 1, 48, fn. omitted.) "The trial court's exercise of its discretion in the manner in which voir dire is conducted . . . shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution." (Code Civ. Proc., § 223.)

Initially, we note that it is not entirely clear what defendant would have asked if he had finished his question. It appears from the portion of the question shown in the record that defendant was merely attempting to elicit whether the prospective juror would be biased against him because of his "criminal record." Determining bias, of course, is a proper aim of juror voir dire. (*People v. Earp, supra,* 20 Cal.4th at p. 852; see also Code

Civ. Proc., § 223 [voir dire in criminal cases is conducted "only in aid of the exercise of challenges for cause"].) However, the defendant might have been, as the trial court indicated, asking the prospective juror to prejudge evidence that he had been previously convicted. If so, the trial court properly disallowed the question. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1178.) Here, reasonable minds could differ.

Defendant did not object to the court's admonition, ask to be heard, rephrase his question, or otherwise attempt to make a record concerning the scope of his question. Because of this failure, the trial court was not afforded the opportunity to correct what may have been an erroneous ruling. Additionally, on the record before us, it is impossible for the reviewing court to determine whether the question would or would not have concluded in an objectionable manner. Any claimed error is therefore waived.

Defendant relies on *People v. Chapman* (1993) 15 Cal.App.4th 136, for the proposition that precluding a defendant from probing prospective jurors as to prejudices against individuals convicted of felonies prevents the defendant from being tried by a fair and impartial jury. *Chapman* is not on point. There, the trial court stated it would not allow *any* questions concerning prejudice jurors might have toward the defendant because of his felony conviction. (*Id*. at p. 140.) As explained above, because of the inadequate record on the matter before us, it is not clear that defendant was denied the opportunity to inquire as to juror prejudice even as to the one question he did not finish. Even if that question was erroneously disallowed, the court did not preclude defendant from inquiring into the area generally. It is evident from the court's comments that the court perceived the question as seeking from the prospective juror an opinion on, or a

prejudgment of, certain evidence; the court was not prohibiting any or all inquiry on the question of prejudice because of defendant's prior convictions. Furthermore, defendant, after being rebuffed once, moved on. He did not attempt to reenter the area, taking into consideration the court's legitimate concern.

C. *Boykin-Tahl*[6] *Waivers Concerning the Prison Priors*

In counts 2 and 3 of the information, defendant was charged with being a felon in possession of a firearm having suffered a prior felony conviction, and being in possession of ammunition while prohibited from possessing a firearm because of a prior felony conviction. (See §§ 12021, subd. (a)(1) & 12316, subd. (b)(1).) The People further alleged two enhancements based upon prior prison terms and defendant's failure to remain free from custody for a period of five years. (See § 667.5, subd. (b).)

Prior to trial, defendant admitted two prior convictions. Defendant contends that he was never specifically advised of his constitutional rights concerning self-incrimination, confrontation, and jury trial with regard to the effect of his admissions on the section 667.5, subdivision (b), sentence enhancements. (See *In re Yurko* (1974) 10 Cal.3d 857, 863-864; *Boykin, supra,* 395 U.S. at p. 243; *Tahl, supra,* 1 Cal.3d at p. 132.) While we agree with defendant's characterization of the record, we find that the error does not require reversal, because the record demonstrates that the admissions were made

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[6] *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274] (*Boykin*); *In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*).

voluntarily and intelligently. (See *People v. Mosby* (2004) 33 Cal.4th 353, 361; *People v. Howard* (1992) 1 Cal.4th 1132, 1178.)

Defendant filed a "motion in limine" stating that he intended "to stipulate to his priors" because evidence of his convictions "will only unnecessarily inflame and prejudice the jury against the defendant." At a hearing prior to trial, the following colloquy occurred:

"THE COURT: [Defendant] had written something some time ago indicating that he intended to admit the prison priors; is that correct?

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

"THE COURT: Okay. And we also have -- you have two prison priors alleged, then, in [c]ounts [3] and [4] -- [2] and [3]?

"[PROSECUTOR]: Yes, correct.

"THE COURT: [Two] and [3]. It's alleged that you suffered prior felony convictions making you a person who can't possess a gun or ammunition. How did you want to handle those?

"[DEFENDANT]: Stipulate to that, Your honor.

"THE COURT: Okay. So --

"[PROSECUTOR]: I think that pretty much takes care of it."

The court thereafter received "admissions" from the defendant as to the underlying prior felonies alleged in counts 2 and 3. The court then turned to the section 667.5, subdivision (b), enhancements:

"THE COURT: Okay. Then we have the prior offenses. One of them is alleged that on June 9th of 1983, and again Ohio, and Cuyahoga County, you were convicted of the crime of kidnapping and you served a term in state prison and did not remain free of custody for five years thereafter, within the meaning of . . . [s]ection 667.5. That's your first prior, is that true.

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

"THE COURT: The second one is January 4th -- January 9th, 1984, in Superior Court . . . , State of Arizona, County of Maricopa. You were convicted of receiving the earnings of a prostitute, a felony, served a term in state prison, didn't remain free of custody for five years thereafter, again within the meaning of . . . [s]ection 667.5, is that also true . . . ?

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

Prior to taking defendant's admissions of the section 667.5, subdivision (b), enhancements, the record demonstrates that the court did not advise nor obtain an express waiver of defendant's *Boykin-Tahl* rights, contrary to *In re Yurko, supra,* 10 Cal.3d at pp. 863-864. This error, however, does not require automatic reversal. (See *People v. Howard, supra,* 1 Cal.4th at p. 1178.) "[I]f the transcript does not reveal complete advisements and waivers, the reviewing court must examine the record of 'the entire proceeding' to assess whether the defendant's admission . . . was intelligent and voluntary in light of the totality of circumstances." (*People v. Mosby, supra,* 33 Cal.4th at p. 361.)

Here, the record as a whole demonstrates that prior to admitting the truth of the section 667.5, subdivision (b), enhancements, defendant understood each of his *Boykin-Tahl* rights. Defendant represented himself. He voir dired prospective jurors and cross-examined witnesses called by the prosecution. During defendant's case-in-chief, not only did he testify, but he called several witnesses to testify on his behalf. Prior to trial, defendant filed approximately 23 written motions. Among them were motions to proceed in propria persona, suppress evidence, appoint an investigator, set aside the information, strike certain counts, appoint counsel for witness Joyce Rodgers, compel discovery, and conduct a pretrial lineup. Each was prepared by the defendant. Immediately prior to jury selection defendant stipulated to the alleged prior felonies, so that the jury would not be inflamed and prejudiced against him. Within the motion he stated, "[d]efendant will not be testifying and intends to stipulate to his priors." (Underlining omitted.)

From an examination of the entire record, it is apparent that defendant understood his rights to a jury trial, be represented by counsel, confront witnesses against him, and testify on his own behalf, as well as the right against self-incrimination. Based upon the totality of the circumstances, we conclude that defendant's admissions of his prior convictions as to the section 667.5, subdivision (b), enhancements was made knowingly, intelligently, and voluntarily.

D. *Substantial Evidence of Sustained Fear for Purposes of Making Criminal Threats*

Defendant contends there was insufficient evidence to support his conviction of count 4, making criminal threats under section 422.[7] More specifically, he argues that the evidence does not support the allegation that the victim was "reasonably . . . in sustained fear for her own safety." We disagree.

In reviewing a claim that the evidence is insufficient to support a conviction, "[w]e review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense." (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 859, citing *People v. Johnson* (1980) 26 Cal.3d 557, 578.) "'Reversal on this ground is unwarranted unless it appears "that upon no hypotheses whatever is there sufficient substantial evidence to support [the conviction]."' [Citation.]" (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430.)

[7] Section 422 provides: "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

Alleged criminal threats must be judged within their context, taking into consideration the surrounding circumstances. (*People v. Bolin* (1998) 18 Cal.4th 297, 340.) "Section 422 . . . requires that the threat be such as to cause a reasonable person to be in *sustained fear* for his personal safety. . . . The phrase to 'cause[] that person reasonably to be in sustained fear for his or her own safety' has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.)

Here, ample evidence supports the conclusion that defendant's threats caused the victim to reasonably be in sustained fear. Rodriquez heard defendant call the victim a prostitute and saw him strike her in the head with his fist. Rodriquez also heard the defendant tell the woman, "[g]ive me the fucking gun." After receiving the gun, defendant held it to the victim's head and said, "I am going to kill you, fucking bitch." Throughout this time the victim was crying. Rodriquez's daughter testified that she saw a man pointing a gun at the victim's temple and that the woman was crying. The police arrived about three minutes after Rodriquez called 911. When Bowen approached the car he saw the victim in the front passenger seat "crying, upset, visibly shaken." The evidence surrounding the making of the threat, the nature of the threat, the defendant's contemporaneous conduct, and the reaction of the victim during and after the threat, constitute substantial evidence to support the element of "sustained fear" under section 422.

E. *Failure to Instruct on Juror Unanimity*

During closing argument regarding the charge of assault with a deadly weapon, the prosecutor stated: "But what happened in this particular case? Well, not only did he -- he really actually committed a battery in this particular case, because the gun is actually pressed up against her head. But, yeah, he takes the gun, he points it at her head, threatening to kill her. That's assault with a deadly weapon. He had the gun. He had every opportunity to complete the act, so i.e., an assault has been committed, with a firearm." Defendant contends that by making this argument the prosecutor asserted two separate factual theories by which the jury could convict him for assault with a deadly weapon. We disagree and conclude that a unanimity instruction was not required.

"When a defendant is charged with a single criminal act but the evidence reveals more than one such act, the prosecution must either select the particular act upon which it relies to prove the charge or the jury must be instructed that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act." (*People v. Brown* (1996) 42 Cal.App.4th 1493, 1499.) When such an instruction is proper, the court must give it sua sponte. (*People v. Riel*, *supra*, 22 Cal.4th at p. 1199.)

It appears from our review of the record that the prosecution is not referring to two separate acts of assault or arguing different legal theories, but is pointing to a single event described slightly differently by two witnesses. Rodriguez described only one event: the defendant "put [the gun] to her head here" (indicating her temple) and saying he was going to kill her. The other witness, Rodriguez's daughter, testified that the man was "pointing [the gun] at her head right here" (indicating the temple area of her head) and

"saying that he was going to kill her." She could not remember whether the gun was placed against the victim's head. The record therefore appears to support only one act of assault with a deadly weapon, which was described as either *putting the gun to*, or *pointing the gun at*, the temple of the victim's head. Although the prosecutor referred to the gun being "pressed against" the victim's head, we do not view his argument as suggesting two separate acts of assault.

Even if the evidence suggests more than one act of assault with a gun, the unanimity instruction was still not required. Such an instruction is not required "when the two offenses are so closely connected in time that they form part of one transaction or when the offense consists of a continuous course of conduct." (*People v. Winkle* (1988) 206 Cal.App.3d 822, 826; see also *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) Here, if Rodriguez saw one assault (in which defendant put the gun to the victim's head) and her daughter saw a different assault (in which defendant pointed the gun at the victim's head), it is clear that the two actions occurred close in time and were part of a continuous course of conduct. A unanimity instruction was not required.

Defendant contends, however, that the discrepancy between the two descriptions does not merely reflect minor variations in witnesses' perceptions, but rather two different crimes. In Rodriguez's description, in which the gun is "put to" the victim's head, a battery has occurred because the gun touched the victim. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 541 [battery includes "slightest unlawful touching"]; *People v. Rocha* (1971) 3 Cal.3d 893, 899, fn. 12 [the "least touching"].) Defendant contends that if the jury believed the daughter's description, in which the gun is merely

pointed at the victim, there was insufficient evidence to provide that the crime of assault with a firearm was committed, because there was no evidence that the gun was loaded. (See, e.g., *People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.) We reject this contention. Although merely pointing an unloaded gun at another does not necessarily constitute assault, using an unloaded gun as a bludgeon does constitute assault with a firearm. (See, e.g., *People v. Miceli* (2002) 104 Cal.App.4th 256, 268, 270.) Here, according to Rodriguez's daughter, the defendant was pointing the gun at the victim's temple, threatening to kill her. The jury could infer from the reference to the victim's temple in her description that the gun was close enough to the victim to be used as a bludgeon. Moreover, even in the absence of direct evidence that a gun is loaded, a jury is permitted to find that it is loaded from "'[t]he acts and language used by an accused person while carrying a gun . . . .' [Citations.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 13.) Here, the defendant told the victim to get a gun from the car after hitting her and threatening her; the victim handed the gun to defendant, who pointed it at the victim's temple and threatened to kill her. All the while, the victim is crying. The jury could easily conclude from such facts that the gun was loaded. (See *ibid.*; *People v. Mearse* (1949) 93 Cal.App.2d 834, 836-838; *People v. Montgomery* (1911) 15 Cal.App. 315, 317-319.)

F. *Sixth Amendment Right to Counsel Regarding Motion for New Trial and Sentencing*

Following the return of the jury verdict on June 27, 2003, the following exchange took place between defendant and the court:

"[DEFENDANT]: Your Honor.

"THE COURT: Yes, Mr. Rodgers?

"[DEFENDANT]: I would like to file a motion for new trial.

"THE COURT: You can do that, sir, when we come back here on the 25th of July.

"[DEFENDANT]: I would like for you to also appoint Mr. Belter to prepare that for me. He was my --

"THE COURT: Who?

"[DEFENDANT]: I think his name is Belter. He was my former -- he was assigned to represent me at one time, the last one that was assigned.

"THE COURT: We aren't doing anything like that right now, Mr. Rodgers. If you have some request that you want to make a motion for something, I expect that you will do that . . . , we will take it up at that time."

On July 16, 2003, defendant filed a "Motion for Appointment of Counsel to File a Motion for a New Trial . . . ." Substantively, the document states in its entirety: "Defendant moves this Court to reassign defendant's former counsel Michael Belter to perfect and file defendant's Motion for a New Trial. [¶] Failing that, defendant moves this Court for the production of the trial transcript, whereupon he may have a copy to perfect [and] file his motion for new trial." (Underlining omitted.) The document did not set forth any reasons in support of the request for counsel.

On July 25, 2003, the court acknowledged receipt of defendant's motion and asked if he wanted "to be heard any further on that." Defendant said he did not. The court denied the motion, stating: "You are not going to get counsel, Mr. Rogers [*sic*]. You made this election to represent yourself. Everybody tried to talk you out of it at the time.

You insisted you wanted to do it. You are doing it. We aren't going to substitute in an attorney at this time." Sentencing was continued to July 30, 2003. In the intervening time, defendant filed a four-page motion for new trial, setting forth seven separate grounds.

Defendant contends that the denial of his motion for appointment of counsel was error. When, as here, a defendant has exercised his right to represent himself at trial and later seeks to have counsel appointed, the court's decision to deny counsel is reviewed for an abuse of discretion. (*People v. Gallego* (1990) 52 Cal.3d 115, 164-165; *People v. Ngaue* (1991) 229 Cal.App.3d 1115, 1126-1127.) In determining whether the court abused its discretion, we consider the "totality of the facts and circumstances." (*People v. Gallego, supra,* at p. 164.)

In ruling on defendant's motion, the trial court may consider defendant's prior history in the substitution of counsel, his desire to change from self-representation to counsel-representation, and the reasons given in support of the motion. (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993-994.)[8] Here, it appears from the record that defendant

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[8] Other factors include the length and stage of the trial proceedings, the reasonably expected disruption or delay that would ensue from the granting of such motion, and the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. (*People v. Elliott, supra,* 70 Cal.App.3d at pp. 993-994.) In *People* v. *Smith* (1980) 109 Cal.App.3d 476, the court stated: "While the consideration of all of these criteria is obviously relevant and helpful to a trial court in resolving the issue, they are not absolutes, and in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial." (*Id.* at p. 484, cited with approval in *People v. Gallego, supra,* 52 Cal.3d at p. 164.)

had switched between representing himself and being represented by counsel at various times throughout the case. From July 2001 until December 2001, defendant represented himself during his arraignment and hearings on various motions that he prepared; for the next few months, he was represented by counsel; in March 2002, the court granted defendant's motion to represent himself; two months later, defendant requested the appointment of counsel, which the court granted; defendant again sought to represent himself in September 2002, but the court rejected the request; and a renewed request was granted in February 2003, after which he represented himself at trial.

Significantly, the subject motion to appoint counsel did not include any facts or reasons to support it. "A motion must specify the grounds on which it is made." (4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Criminal Procedure § 8, p. 13; cf. *People v. Williams* (1999) 20 Cal.4th 119, 130.) Defendant did not explain to the trial court, and offers no justification on appeal, for the failure to set forth any grounds for the motion. The complete absence of any support cannot be attributed to defendant's lack of legal training or the lack of access to a law library. As discussed in part D. above, defendant filed numerous written motions throughout the case, often supported by extensive discussion of facts, argument, and citation to legal authority. Like the defendant in *People v. Gallego, supra*, defendant had, by this time, "exhibited considerable knowledge of both trial tactics and trial procedure." (*People v. Gallego, supra,* 52 Cal.3d at p. 164.) Nor can the motion's deficiencies or brevity be the result of insufficient preparation time. Defendant indicated his desire for counsel immediately following the verdicts on June 27, 2003, and filed his one-page motion almost three

weeks later. Moreover, when asked at the hearing whether he wished to be heard on the motion, he declined to provide any reasons or argument. At the same hearing, defendant discussed his plan for his motion for new trial. He informed the court that he intended to support the new trial motion with an affidavit from the victim, who did not testify at trial. Defendant did not, however, claim he needed counsel to assist him with the affidavit or the motion, telling the court: "I can do the motion myself. I just need time to perfect it."

From our review of the record, it is clear that if there were legitimate reasons for the change from self-representation to counsel-representation, defendant was abundantly capable of expressing one. He nevertheless failed to do so. Because the court was not given any reason to grant the defendant's motion, we cannot find that the court abused its discretion in declining to do so. (Cf. *People v. Jackson* (1980) 28 Cal.3d 264, 287 [summary denial of motion for additional counsel proper when defendant "failed to furnish any specific, compelling reasons"], disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

Defendant relies upon *Menefield v. Borg* (9th Cir. 1989) 881 F.2d 696, which held that "in the absence of extraordinary circumstances, an accused who requests an attorney at the time of a motion for a new trial is entitled to have one appointed, unless the government can show that the request is made for a bad faith purpose." (*Id*. at p. 701.) This holding has been rejected by the California Court of Appeal in *People v. Ngaue, supra,* 229 Cal.App.3d at page 1124, and rejected as contrary to federal authorities in *United States v. Tajeddini* (1st Cir. 1991) 945 F.2d 458, 469-470, overruled on other grounds in *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 478 [120 S.Ct. 1029, 145 L.Ed.2d

985]. To the extent *Menefield v. Borg, supra,* has any persuasive weight, it is distinguishable. In that case, unlike here, the accused expressed his reasons for seeking the appointment of counsel. Although the case does not set forth the details of the grounds for the motion, we are told that the "request concentrated upon the intricacies of the California statute governing new trials. 'I've studied it, [the accused told the trial court,] but I just can't grasp it. I see what they're saying, but I just can't get deep off [*sic*] into it, like the other studies I did.'" (*Menefield v. Borg, supra,* at p. 697.) Here, by contrast, defendant expressed no difficulty with California's requirements for a new trial motion; indeed, he assured the court that he could "do the motion" himself.

Defendant also contends that he was entitled to have counsel appointed for the sentencing hearing. However, defendant never requested the appointment of counsel for his sentencing hearing. Following his waiver of right to counsel in February 2003, after which he represented himself throughout the trial and thereafter, the only request he made for counsel was his July 16, 2003, motion for counsel which was expressly "to perfect and file defendant's Motion for a New Trial." On appeal, defendant claims this motion "necessarily implied a request to be represented at sentencing." Even if such an implication could be made, the court implicitly denied that request when it denied his express motion for counsel. We affirm this implied denial for the same reasons we affirm the denial of the express motion for counsel.

G. *Sentencing Issues*

The trial court imposed the upper term sentence of four years on count 1, assault with a firearm. (§ 245, subd. (a)(2).) In doing so, the court relied upon three aggravating

factors: (1) that the crime involved violence and a threat of great bodily harm (see Cal. Rules of Court, rule 4.421(a)(1));[9] (2) that defendant's prior convictions are numerous and of increasing seriousness (see rule 4.421(b)(2)); and (3) that defendant has served a prior prison term (see rule 4.421(b)(3)). The court found no mitigating circumstances.[10]

The court also imposed an upper term of 10 years for the firearm enhancement under section 12022.5, to be served consecutively. The choice of the upper term was based upon two aggravating factors: (1) defendant was engaged in violent conduct that indicates a serious danger to society (see rule 4.421(b)(1)); and (2) his prior performance on parole was unsatisfactory (see rule 4.421(b)(5)).

The court further imposed consecutive one-year sentences for each of the allegations that he served a prior prison term and did not remain free of custody for five years. (§ 667.5, subd. (b).)

Defendant contends that the court erred by using defendant's prior prison terms to support the imposition of the upper term on count 1, while imposing consecutive sentences for the enhancements under section 667.5, subdivision (b). (See § 1170, subd. (b) ["The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law"]; rule 4.420(c) [a fact found as an

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[9] All further references to rules are to the California Rules of Court.

[10] At the sentencing hearing, defendant asserted that mitigating factors included that the victim was not injured and that there was no evidence that the gun was loaded. On appeal, defendant does not contend that the court's finding of no mitigating circumstances was erroneous.

enhancement may be used to support an "upper term only if the court has discretion to strike the punishment for the enhancement and does so"].) Defendant did not object to this alleged "double counting" error at trial and, therefore, forfeited his right to assert it on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353; *People v. Steele* (2000) 83 Cal.App.4th 212, 226.)

Even if the argument was not forfeited, we would reject it. In addition to the fact of the prior prison terms, the court also relied upon two other aggravating factors -- the involvement of violence and a threat of great bodily harm and the number and increasing seriousness of defendant's prior convictions. Only one aggravating factor is necessary to support an upper term sentence. (See *People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.)

Defendant contends that the involvement of violence and threat of great bodily harm cannot be used to impose the upper term because "all violations of section 245, subdivision (a)(2), necessarily involve 'violence or threat of great bodily harm.'" (See rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term"].) We disagree. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "Violence," for purposes of assault is "synonymous with 'physical force.'" (*People v. Whalen* (1954) 124 Cal.App.2d 713, 720.) Because assault is "an *attempt* to commit a battery" (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, italics added), one may commit an assault without actually striking another or even being "'at any time within striking distance'" of the victim. (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the

Person, § 8, pp. 643-644, quoting *People v. Yslas* (1865) 27 Cal. 630, 633; *People v. McCaffrey* (1953) 118 Cal.App.2d 611, 619.) Here, defendant's actions far exceed a mere assault with a firearm, but included putting the gun to the woman's head, hitting her in the face with his fist, and (the court could have concluded) causing the fresh wounds found on the victim's shoulders. The court's conclusion that the assault involved violence or the threat of great bodily injury is thus well supported.

"When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.) Here, in light of the absence of mitigating factors and the violence involved in the assaults, we conclude that it is not reasonably probable that the court would have imposed a lesser sentence.

Defendant further contends that there is no evidence to support the imposition of the aggravated term for the firearm enhancement under section 12022.5. Here, the court found that defendant is "a serious danger to society" and his prior performance on parole was unsatisfactory. Defendant contends that there is insufficient evidence to support the latter finding. Even if this were so, the conduct of defendant of hitting and threatening to kill his wife at gunpoint provides sufficient evidence from which the court could conclude that defendant was a serious danger to society, an aggravating factor under rule 4.421(b)(1). As with the base term, it is not reasonably probable that a different sentence would have been imposed if only this factor was considered.

H. *Upper Term Under Blakely*[11]

Defendant contends that the imposition of the upper term sentence on count 1 and the related enhancement violates his Sixth Amendment right to a jury trial under *Blakely*. Because our state Supreme Court has recently rejected a similar argument in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*), we reject defendant's argument.

In *Blakely*, the high court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490; *Blakely, supra*, 124 S.Ct. at p. 2536.) The *Blakely* court further stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra*, at p. 2537.)

Following the filing of defendant's opening brief, the California Supreme Court decided *Black*. In *Black*, the court expressly addressed the effect of *Blakely* on California's determinate sentencing law and "the specific questions whether a defendant is constitutionally entitled to a jury trial on the aggravating factors that justify an upper term sentence or a consecutive sentence." (*Black, supra,* 35 Cal.4th at p. 1244.) As to the imposition of an upper term under California's determinate sentencing law, the court

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11 *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*).

stated: "The jury's verdict of guilty on an offense authorizes the judge to sentence a defendant to any of the three terms specified by statute as the potential punishments for that offense, as long as the judge exercises his or her discretion in a reasonable manner that is consistent with the requirements and guidelines contained in statutes and court rules. The judicial factfinding that occurs during that selection process is the same type of judicial factfinding that traditionally has been a part of the sentencing process. Therefore, the upper term is the 'maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*. . . .'" (*Id*. at pp. 1257-1258, quoting *Blakely*, *supra*, 124 S.Ct. at p. 2537.)

Black controls the issues presented by defendant in this case and we are, of course, bound by it. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.) Because *Black* holds that the Sixth Amendment does not provide a right to a jury trial as to aggravating factors that justify the imposition of upper term sentences under California's determinate sentencing law, we reject defendant's argument.

V. DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

/s/ King
J.

We concur:

/s/ Richli
Acting P.J.

/s/ Gaut
J.