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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. THOMAS JOE SHADDEN, Defendant and Appellant.	F048765 (Super. Ct. No. BF108307A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Laura P. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine G. Tennant, Deputy Attorneys General, for Plaintiff and Respondent.

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Angry at the mother of his children, defendant Thomas Joe Shadden produced a gun and opened fire on her unoccupied car as bystanders looked on. He also stuck an ice

*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts I, II.B, III, IV, and V.B.

pick in one of the tires. He was convicted of grossly negligent discharge of a firearm, discharging a firearm at an unoccupied motor vehicle, and being a felon in possession of a firearm. The 16-year prison sentence he received includes 10 years of recidivism-based enhancements.

He now (1) challenges several aspects of the grossly-negligent-discharge and discharging-at-an-unoccupied-motor-vehicle convictions; (2) argues that evidence of threats to a witness was inadmissible; (3) requests review of the disposition of his *Pitchess* motion; and (4) challenges his sentence pursuant to recent United States Supreme Court decisions. We conclude there was no reversible error and affirm the judgment.

We publish our holding that the owner-consent provision of the firing-at-an-unoccupied-vehicle statute requires the consent of all owners, not just that of the shooter, where the shooter is one of several co-owners. The statute does not allow one co-owner to shoot up a car without the consent of the other owners.

We also publish a portion of our discussion of defendant's sentencing claim under *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*) and *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856] (*Cunningham*). Since the trial court here had discretion to impose a three-strikes sentence of 25 years to life, its imposition of upper term sentences, which were shorter, did not contravene the Supreme Court's precedents.

FACTUAL AND PROCEDURAL HISTORIES

Vanessa Ortiz considered herself defendant's wife, although they were not legally married and not living together. They had three children. Vanessa lived with the children and her brother, Jason Ortiz. According to Vanessa, defendant did not approve of Jason living in Vanessa's apartment with the children because Jason used methamphetamine. According to witnesses, Vanessa, Jason, and defendant all regularly used methamphetamine.

One night, Jason and his friend Ruben Navarrete drove to Vanessa's apartment and parked in the carport. Vanessa drove up shortly afterward. After the three of them got out of their cars, defendant and his friend Arturo Morales drove up. Defendant was angry and began arguing with Vanessa. During the argument, defendant punctured one of the rear tires of Vanessa's car with an ice pick. Vanessa walked into the apartment building.

Defendant punched Vanessa's car with his fist. Then he drew a gun and, from a distance of about six feet, fired at least four shots, shattering the window in the driver's door and making a number of bullet holes in the metal. Jason and Ruben stood nearby as defendant did these things. Other people were also nearby. When defendant was through, he and Arturo got back in the truck and drove off.

The District Attorney filed a four-count information. Count 1 was discharging a firearm in a grossly negligent manner. (Pen. Code, § 246.3.)[1] Count 2 was discharging a firearm at an unoccupied motor vehicle. (§ 247, subd. (b).) Count 3 was being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) An additional count of being a felon in possession of a firearm, relating to a separate incident, was dismissed before trial at the prosecutor's request.

For sentence-enhancement purposes, in connection with each count, the information included special allegations regarding two prior offenses. These were 1997 convictions for arson (§ 451, subd. (d)) and making criminal threats (§ 422). The information alleged (1) that these were strikes, i.e., prior felony convictions within the meaning of section 667, subdivisions (c) through (j), and section 1170.12, subdivisions (a) through (e); (2) that the felonies were serious within the meaning of section 667, subdivision (a); and (3) that defendant served a prison term for the prior offenses within the meaning of section 667.5, subdivision (b).

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

At trial, the witnesses to the shooting refused to identify defendant as the shooter. Jason testified that he saw defendant punch the car and puncture the tire; he heard the shots and saw the smoke, but "wasn't paying attention" when the shots were fired and therefore did not see who fired them, although he was standing 20 feet away. Before yielding even this much information, Jason was evasive:

"Q. What do you recall about what he said or did that day?

"A. Nothing. [¶] … [¶]

"Q. What did Thomas Shadden do when he was there that day?

"A. What did Thomas Shadden do?

"Q. Yeah.

"A. What do you mean?

"Q. I'm asking what Thomas Shadden did when he was there that day in the alley?

"A. I'm not understanding the question."

He explained that, because he was an ex-felon, he would be regarded in a negative light by some if he testified against a criminal defendant. "When you go to prison, it's a whole different world. It's different rules. Nobody can help you. You have to basically do what you got to do and that's just the way it is." When confronted with his statement to police that defendant shot the car, Jason admitted he said something of that kind.

Ruben described the shooting in detail, but said he could not identify defendant as the shooter. As we will explain in more detail later, someone fired five shots at Ruben's parents' house, while Ruben was sleeping there, a few weeks after defendant shot Vanessa's car.

Vanessa testified that she saw defendant puncture the tire but was inside the building by the time the shots were fired and did not see who fired them. Arturo testified

that he, not defendant, fired the shots. He claimed he did this because he shared defendant's objection to Jason living with Vanessa and the children.

The jury heard recordings of seven telephone calls defendant placed to Vanessa and other family members from jail. During these calls, defendant made many incriminating statements which are detailed in the unpublished portion of this opinion.

The jury found defendant guilty of counts 1 through 3. He waived his right to a jury trial on the prior-offense allegations; the court found them to be true.

Defendant filed a petition requesting that the court exercise its discretion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 and section 1385, subdivision (a), to dismiss the prior-offense allegations and avoid imposing a three-strikes sentence. The court granted the motion in part, striking, with respect to all three counts, the allegation regarding the conviction of making criminal threats. It also struck the prior prison term allegation with respect to counts 1 and 2.

The court imposed an aggregate sentence of 16 years in prison. This consisted of a doubled six-year upper term for grossly negligent discharge of a firearm plus two consecutive five-year enhancements pursuant to section 667, subdivision (a). An identical sentence was imposed for count 2 and stayed pursuant to section 654. A doubled six-year upper term was also imposed for count 3 and stayed pursuant to section 654.

DISCUSSION

I. Grossly negligent discharge of a firearm

Section 246.3, subdivision (a), provides:

> "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison."

Defendant argues that the evidence presented at trial was insufficient to support his conviction under this statute. He also argues that the statute is unconstitutionally vague and that the jury was instructed erroneously with respect to this crime.

A. Sufficiency of evidence

"When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

Defendant's argument here is that the evidence was insufficient to prove the gross-negligence element of the crime. "Gross negligence, as used in section 246.3, 'requires a showing that the defendant's act was "'such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life ….'"'" (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1361.) Defendant cites legislative history indicating that the Legislature was concerned about guns being fired into the air during holiday celebrations; he also cites cases involving shots fired in the general direction of a person or group of people. Here, by contrast, he says, the shots were fired "downward and away from those present," so there was "no likelihood of injury to or death of another," and defendant's behavior could not reasonably be found to be grossly negligent. He asserts that because he did not fire toward the bystanders, his "actions demonstrated a specific intent to avoid danger to human life."

The evidence amply showed that defendant's actions were incompatible with a proper regard for human life. Two bystanders, Jason and Ruben, were near Vanessa's car as defendant fired; both testified that they were 20 feet away, about the length of a car. Other people were in the carport or the alley beside it and in a car that was parking

nearby. Arturo was also present in the carport. We have no hesitation in concluding that the evidence—showing defendant fired shots into a car parked in the carport of an inhabited apartment building in the presence of numerous bystanders—was sufficient to support a finding of gross negligence. The fact that the gun was not actually aimed at a person makes no difference under these circumstances. A bullet could easily have struck a person after passing through the car or ricocheting off the car or off the carport's floor.

In his reply brief, defendant insists that "[t]he fact that appellant took care to fire downward into the vehicle and away from all those present at the scene removes this case from the realm of gross negligence." The standard of appellate review bears emphasizing here. The question is not whether a jury could reasonably find gross negligence absent on the basis of facts like these. It is whether every reasonable jury must necessarily fail to find it present beyond a reasonable doubt given this evidence. Here the jury found it present beyond a reasonable doubt, and we cannot say its finding was unreasonable.

B. Alleged statutory vagueness

Defendant argues that section 246.3 violated his constitutional right to due process of law because its prohibition on "willfully discharg[ing] a firearm in a grossly negligent manner which could result in injury or death to a person" was too vague to give him notice of the conduct in which he was forbidden to engage. This argument has no merit.

A criminal statute is unconstitutionally vague if it fails to give adequate notice to ordinary people of the conduct it prohibits or if it authorizes arbitrary or discriminatory enforcement. (*Kolender v. Lawson* (1983) 461 U.S. 352, 357; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115-1116.) Defendant's claim, then, is that the statute did not sufficiently notify him that he must not fire a gun into a car in the carport of an inhabited apartment building in the presence of bystanders, or perhaps that a statute allowing enforcement based on those facts authorizes arbitrary punishment. He says he could not know what the prohibited behavior was because the statute only says not to fire in a grossly negligent manner that "could" result in injury or death, not a manner that was

likely to result in injury or death. To state the claim is to refute it. That the statute forbids the conduct proved by the evidence in this case is obvious; enforcement of the statute under these circumstances is reasonable, not arbitrary.

Defendant also appears to argue that the statute must be invalid because the mental state it requires is gross negligence rather than requiring an intent. He says, "[t]rue crimes (as distinguished from 'regulatory' or 'public welfare' offenses) require a general criminal intent or 'mens rea.'" Immediately after this, defendant quotes a statute that refutes his claim, section 20: "In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence." California criminal law includes offenses based on criminal negligence, like the one at issue here, and no constitutional principle makes this improper.

Defendant repeats, in this context, his claim that he is being punished for gross negligence even though his behavior evinced an intent to avoid harming anyone. His notion is that pointing the gun at the car instead of at the bystanders constituted a measure of care he took to protect persons' safety. He makes this the basis of a contention that, even if the statute is not invalid on its face, it is invalid as applied to the facts of this case. Defendant's behavior did not evince an intent to avoid harming anyone. If he had an intent to avoid harming anyone, he would not have shot up a car parked in a carport beside an apartment building with people standing around. The statute was valid as applied to defendant as well as valid on its face.

C. Jury instruction

The court instructed the jury pursuant to CALJIC No. 3.36, stating as follows:

> "Gross negligence means conduct which is more than ordinarily negligent. Ordinar[y] negligence is the failure to exercise ordinary or reasonable care. [Gross negligence] refer[s] to a negligent act which is aggravated, reckless or flagrant, which is such a departure from the conduct of an ordinarily prudent[,] careful person under the same circumstances [a]s to be contrary to a proper regard for danger to human life or to constitute indifference to the consequences of those acts. [The facts must be such that] [t]he consequences of the negligent acts could reasonably have been foreseen

> and [it] must appear that [the danger] to human life was not the result of inattention, mistake[n] judgment or misad[venture] but [the] natural and probable [result of an] aggravated, reckless or flagrantly … negligent act."[2]

Defendant contends that the instruction was erroneous because it referred to "indifference to the consequences" rather than *conscious* indifference to the consequences. He relies on the proposition, set forth in *People v. Bennett* (1991) 54 Cal.3d 1032, 1036, and other cases, that "[g]ross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences."

Some other cases omit the word "conscious" from the definition of gross negligence. For instance, in *People v. Pike* (1988) 197 Cal.App.3d 732, 742, we approved a jury instruction that defined gross negligence as "'the failure to exercise any care or the exercise of so little care that you are justified in believing that the person whose conduct was involved was wholly indifferent to the consequences of his conduct to the welfare of others.'" This is not, however, a split of authority. We agree with the People's view that the phrases "indifference to the consequences" and "conscious indifference to the consequences" are not materially different in meaning. As the People argue, "one cannot be indifferent to something unless one is conscious of it. The common meaning of 'indifferent to the consequences,' therefore, is that a person knows there may be consequences, but does not care." In other words, because there is no such thing as being *unconsciously* indifferent to the consequences of one's actions, the omission of the word "conscious" could not have misled the jury and does not render CALJIC No. 3.36 erroneous.

In an attempt in his reply brief to salvage the claim of instructional error, defendant says a properly instructed jury could not have found him consciously

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[2]As set forth in the reporter's transcript, parts of the instruction are garbled. Defendant does not claim any error on this account. The written version of the instruction contained in the clerk's transcript does not contain the mistakes.

indifferent to the consequences of his actions; he resorts here again to the idea that he "took specific precautions to avoid causing injury or death to another" by pointing the gun at the car instead of at the bystanders. To what we have already said about this idea, we only add, in light of the instruction, that the jury found defendant *was* indifferent to the consequences of his actions and consequently did *not* care and did *not* take precautions. The omission of the word "conscious" makes no difference for the reasons we have stated.

We conclude that the instruction was correct. There is no need to address the People's argument that defendant waived this issue by failing to object to the instruction.

II. Discharging firearm at an unoccupied motor vehicle

Section 247, subdivision (b), provides:

> "Any person who discharges a firearm at an unoccupied motor vehicle or an uninhabited building or dwelling house is guilty of a public offense punishable by imprisonment in the county jail for not more than one year or in the state prison. This subdivision does not apply to shooting at an abandoned vehicle, unoccupied vehicle, uninhabited building, or dwelling house with the permission of the owner."

Vanessa and Jason testified that the car was registered in the names of both Vanessa and defendant. Defendant argues that in light of this, there was insufficient evidence to prove a violation, since he was an owner and necessarily had his own consent. He also contends that the court erroneously omitted a jury instruction on owner consent.

A. Consent of one co-owner

Defendant's interpretation of the statute—that one of several owners is not guilty if he shoots at the unoccupied vehicle with his own consent but not that of the other owners—is mistaken. In interpreting a statute, our objective is "to ascertain and effectuate legislative intent." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) "In the end, we '"must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general

purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]'" (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.) To relieve a co-owner of criminal responsibility because he gives himself permission to shoot at the car, without regard for the wishes of the other co-owner(s), would be an absurd consequence. The point of the owner-consent provision is to avoid liability for shots fired at property the owners did not want to preserve, not to provide a loophole for a co-owner who damages the property without another co-owner's permission.

Defendant's own phrasing of his argument reveals the absurdity of the consequences it entails: He "was entirely within his rights to discharge a firearm at his own vehicle." Persons are not within their rights when they destroy property they co-own without consent of the other owner or owners. This point was illustrated in *People v. Kahanic* (1987) 196 Cal.App.3d 461. There, a wife threw a beer bottle through the rear window of a car she co-owned as community property with her husband. Convicted of vandalism, she argued on appeal that she could not be guilty of vandalizing her own property. (*Id*. at pp. 462-463.) The vandalism statute, section 594, then punished every person who vandalized property "'not his own.'" (*Id.* at p. 463.) We held that the statute protected each owner against crimes against his or her interest in the property and did not make an exception for one owner's assault on the interest of the other. (*Id.* at p. 466.) We relied in part on case law holding that parties to a partnership were not immune from criminal liability for stealing partnership property from each other just because they each hold an undivided interest in the partnership property: "'Fundamentally, stealing that portion of the partners' shares which does not belong to the thief is no different from stealing the property of any other person.'" (*Id.* at p. 464.) (See also *People v. Wallace* (2004) 123 Cal.App.4th 144, 147-150 [*Kahanic* applies to vandalism of community property inside marital home as well as community property elsewhere].) The same reasoning applies here. Shooting at a car in which one has an undivided part interest

affects other owners' part interest in exactly the same way that shooting by a third party would do.

Defendant argues that interpreting the statute to require consent of all owners is not "logical" and would render it unconstitutionally vague; he says he "had no way to know shooting at his own unoccupied vehicle was a crime …." This is no more persuasive than his claim that he had no way of knowing it was grossly negligent to shoot at a car in the carport of an occupied apartment building with people standing around. A reasonable person knows that if he has only a part interest in property, he cannot shoot that property up without asking those who own the remaining interest for permission.

In his reply brief, defendant argues for the first time that there was insufficient evidence to support the conviction because there was evidence that Vanessa gave "implied consent." This evidence was her testimony that she did not call the police. In an attempt to support this notion, defendant improperly cites an unpublished Court of Appeal case dealing with police searches of premises with the consent of one co-occupant. Defendant also claims that it is evidence of Vanessa's consent to the discharge of the firearm that she said she did not call the police *before* he fired because "'he just stabbed the tire.'" We do not see how this testimony supports defendant's position.

In any event, failing to call the police is not evidence of consent, but even if it were, it would not show that there was insufficient evidence to support the conviction. A reasonable jury could find beyond a reasonable doubt that defendant acted without Vanessa's consent even though she did not call the police.

B. Jury instruction

Defendant argues that the jury should have been instructed on owner consent. The People cite *People v. Lam* (2004) 122 Cal.App.4th 1297, 1303 for the proposition that lack of owner consent is not an element of the crime and they did not have the burden of proving it. Defendant does not deny this, but replies that the instruction was required even if owner consent is an affirmative defense.

In a criminal trial, the court must give an instruction requested by a party if the instruction correctly states the law and relates to a material question upon which there is evidence substantial enough to merit consideration by the jury. (*People v. Avena* (1996) 13 Cal.4th 394, 424; *People v. Wickersham* (1982) 32 Cal.3d 307, 324, overruled on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 201.) The court must also give some instructions sua sponte:

> "'[E]ven in the absence of a request, a trial court must instruct on the general principles of law governing the case, i.e., those principles relevant to the issues raised by the evidence, but need not instruct on specific points developed at trial. "The most rational interpretation of the phrase 'general principles of law governing the case' would seem to be as those principles of law *commonly* or closely and openly connected with the facts of the case before the court." [Citations.]'" (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.)

Here, the evidence did not support giving the instruction. Defendant presumably consented, but Vanessa did not. For the reasons we have stated, one co-owner's consent is not enough.

Defendant argues in his reply brief that there was evidence that Vanessa gave "implied consent" because she testified that she did not call the police. He contends that the instruction was required because of this evidence. We disagree. A jury instruction is required if there is enough evidence to warrant the jury's consideration. Vanessa's failure to call the police could imply many things—that she knew others in the building would do so, or that she did not want defendant to be arrested, for instance—or nothing at all. There was no reason to think it implied she had given defendant her consent to the shooting of her car.

Based on our conclusion, we need not address defendant's contention that if he waived this issue by failing to object to the instructions given for this offense or to request different ones, the waiver was due to ineffective assistance of counsel.

III. Shooting at home of witness

The jury heard a recording of a conversation between Vanessa and defendant at the jail. Defendant asked Vanessa to find out Ruben's address, give it to defendant's nephew, and make sure the nephew went to Ruben's house and "knock[ed] on the MF-ing door." Vanessa testified that she obtained a copy of a police report containing the address of Ruben's parents' house, where Ruben lived, but never gave the address to anyone.

The shooting of the car took place on November 5, 2004. Ruben testified that, on the Sunday after Thanksgiving, five shots were fired at his parents' house. The shots made holes in a wall and broke windows. This took place while defendant was in jail. Ruben contacted the district attorney's office and was placed in the witness protection program.

Ruben's testimony about this was admitted over defendant's in limine objection. The court ruled:

> "I think it appears to the Court as it is relevant information with respect to the witness testifying and any fear that the witness may have which may go to the credibility of that particular witness among other things. I do believe that it is relevant. I believe it has probative value. I believe there's not undue prejudice so long as the Court instructs the jury they must not consider this as having—the fact the house was shot up; they may not assume nor speculate that [it] came from the defendant because there is no evidence that it came from the defendant."

As Ruben was being questioned about this, the court interrupted and instructed the jury:

> "And let me just advise the jury with respect to this. There's no evidence before this jury, nor may the jury speculate that the defendant had anything to do with that. It only goes to the issue of the state of mind of this witness with respect to testifying in this court because you are evaluating the testimony of this witness, so you can't in any way associate this against the defendant in this case."

The instructions given at the end of the case included this one pursuant to CALJIC No. 2.06, addressing witness intimidation:

> "If you find that a defendant attempted to suppress evidence against himself in any manner[,] such as by intimidation of a witness, this [attempt may be considered by you as] a circumstance tending to show consciousness of guilt; however, this conduct is not sufficient by itself to prove guilt[,] and [its] weight and significance, if any, are for you to decide."[3]

Defendant argues that the evidence of the shooting at Ruben's parents' house was irrelevant or, if relevant, should have been excluded pursuant to Evidence Code section 352 as unduly prejudicial. The People argue that the evidence was admissible not only for the purpose for which the court allowed it—to show Ruben's fearful state of mind—but also to show, in conjunction with the recorded jail conversation between defendant and Vanessa, that defendant was responsible for the shooting at Ruben's parents' house. This position is consistent with that taken by the prosecutor, who in closing argument described "the last call where [defendant] instructs Vanessa to find out where the other dude lives. She says she knows he lives with his mother and sure enough within a week, Ruben Navarrete's mother's house is shot up after this defendant is yelling at Vanessa to make sure that his nephew gets out there and knocks on the f-ing door. These are not the words of an innocent man." We review the trial court's decision for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 955.)

We agree with the People's view. First, the testimony was admissible for the reason the court originally admitted it, to show Ruben's fearful state of mind. In *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1367-1368, the appellate court held that evidence of third-party threats against a witness are admissible. "'Evidence a witness is afraid to

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[3]Again, parts of the instruction are garbled as set forth in the reporter's transcript. The written version in the clerk's transcript does not contain the mistakes and defendant makes no claims on this basis.

testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.'" (*Id.* at p. 1368.) Ruben's testimony that his residence was fired upon and that he entered a witness protection program was relevant to show that he had reason to be afraid when he testified. Among other things, the evidence could help the jury evaluate Ruben's claim that he was unable to identify the shooter.

The evidence was also admissible to show that defendant attempted to suppress evidence, revealing his consciousness of guilt. *Olguin* observed that "California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to a defendant." (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1368.) Here, however, there was evidence connecting defendant with the shooting at Ruben's residence. The telephone calls defendant placed from jail made the evidence relevant, despite the judge's ruling to the contrary. To see why, it is helpful to consider the entire record of the statements defendant made during telephone calls he placed from the jail.

The prosecutor played recordings of seven telephone calls defendant placed from jail to Vanessa and others. One subject defendant and Vanessa discussed was a plan where Vanessa and Jason were to contact the police and retract statements that defendant was the shooter. This is mentioned in the first call:

"[DEFENDANT]: Did you call ev—have you even called yet?

"VANESSA: We're going to get the police report tomorrow and—

"[DEFENDANT]: Why? I told you what you got to do the fuckin' first day.

"VANESSA: Oh, I'm, I'm gonna do it and I even … told Jason already too.

"[DEFENDANT]: Why didn't you just call already and say, and we would've avoided all of this. The second day you could of called and said it.

"VANESSA: Cause I needed to speak to Jason first to make sure that he was going to go with it and he said yeah too.

"[DEFENDANT]: You talked to him already?

"VANESSA: Yeah he said—

"[DEFENDANT]: Why haven't you called then? All you have to do is call.

"VANESSA: I tried, I tried to (inaudible) I talked to him yesterday Tommy. He told me right off the bat 'I'm not testifying.'

"[DEFENDANT]: Why don't you just fuckin' call and say what I told you?

"VANESSA: I, I, I will. I'll call tomorrow morning if you want me to.

"[DEFENDANT]: You fuckin' should of did it the next morning when I told you.

"VANESSA: I told you I had wait till I get a hold of Jason and I got a hold of him yesterday."

In the same call, defendant insisted to his father that either Vanessa, Jason, or defendant's mother called the police on him. "One of those three tipped them off," he asserted. The father denied this occurred. Defendant's father also thought the plan to have Vanessa and Jason deny defendant was the shooter would fail:

"[DEFENDANT]: Vanessa needs to just call tomorrow and tell the truth, that what happened.

"FATHER: Tommy they have other witnesses.

"[DEFENDANT]: No they don't.

"FATHER: Yes they do. The people next door they were partying saw you. [¶] … [¶]

"[DEFENDANT]: Mom is the one who fuckin told those people who I was."

Later in the call, defendant told Vanessa the story she was to give the police:

"[DEFENDANT]: You need to fuckin call. I don't give a fuck if you call right now. First thing in the fuckin morning.

"VANESSA: Okay.

"[DEFENDANT]: You call em and tell them what you did.

"VANESSA: Okay.

"[DEFENDANT]: What did you do? You got mad cause you heard I was there and I broke that fuckin baby thing …

"VANESSA: Uh-huh.

"[DEFENDANT]: … and you fuckin went out and you fucking had your fuckin friend do it. What friend? Who cares? I'm letting you know what happened.

"VANESSA: Okay.

"[DEFENDANT]: They don't want to believe you, who cares? Tell em.

"VANESSA: Okay."

He repeated these instructions a few minutes later: "Tell 'em you were fuckin' mad cause I was there half hour previous and you heard I smashed the fucking thing like I did, you know, I was going to fuckin lie, I broke the baby's (inaudible) fuck it. Dang, you fuckin had your friend shoot it up hey."

Later the same evening, defendant called back to ask Vanessa if she had made the call yet. She had not, but said she had discussed it with defendant's father and determined the call should be to the Bakersfield Police Department.

Defendant called again the next day and continued demanding in abusive terms that Vanessa carry out his plan:

"[DEFENDANT]: Are you drinking?

"VANESSA: Yeah. I'm drinking now.

"[DEFENDANT]: Your little bitch ass couldn't fuckin, instead of pick up a beer, fuckin call a person? Is this a game to you? [¶] … [¶]

"VANESSA: I told you I'll call and I'm going to call.

"[DEFENDANT]: Then fucking, you've been telling me since the fuckin day it happened. Call fuckin not now but fuckin right now stupid.

"VANESSA: All right stupid.

"[DEFENDANT]: "What, what? Hello?

"VANESSA: Yeah?

"[DEFENDANT]: What do you mean you fuckin bitch? What are you going to do?

"VANESSA: Don't talk to me like that. Don't talk to me like that.

"[DEFENDANT]: What are you going to do?

"VANESSA: I told you already.

"[DEFENDANT]: If not, fuckin leave and we'll deal with it another way. What are you going to do?

"VANESSA: I already told you.

"[DEFENDANT]: When?

"VANESSA: Right now."

Defendant then asked Vanessa to put his mother on the line. Defendant told his mother to make sure Vanessa made the call.

A few minutes later, defendant called back to ask how it went:

"[DEFENDANT]: What happened?

"VANESSA: They laughed at me.

"[DEFENDANT]: What do you mean?

"VANESSA: They said they'll see my ass in court.

"[DEFENDANT]: Who?

"VANESSA: So, they want me to testify against you and I'm not testifying against you.

"[DEFENDANT]: I didn't hear you.

"VANESSA: They want me to testify against you …

"[DEFENDANT]: Who?

"VANESSA: … and I told them I wasn't going to testify. The—the sergeant.

"[DEFENDANT]: What do you mean?

"VANESSA: He thought it was a joke.

"[DEFENDANT]: What …

"VANESSA: He started laughing.

"[DEFENDANT]: What do you mean a joke?

"VANESSA: He said[,] 'You['re] trying to change the story up now huh?' I said change the story, I'm just letting you know it was a false, a false report. It was out of jealousy. And he says well, w-w-will have, we'll have to see you in court. I'm not going to testify. I'm not gonna go to court.

"[DEFENDANT]: What do you mean you['re] not gonna … testify and you['re] not going to go to court?

"VANESSA: Well I, w-w-what can I say, wha- if I don't go, if I don't show up.

"[DEFENDANT]: They'll arrest you guys.

"VANESSA: Or if I- well then they can arrest me then.

"[DEFENDANT]: Why the fuck you can't…

"VANESSA: Or if I, for, if I just go and say look, I didn't see nothin'. The story got all twisted. It was out of anger."

They returned to this subject a few moments later:

> "[DEFENDANT]: I want to know what happened right now before you fuckin got a hold, who'd you get—who'd you talk to?
>
> "VANESSA: It's the sergeant. It's the, I guess it's the sergeant that's, that's there twenty-four hours a day.
>
> "[DEFENDANT]: W-w-what what did you talk to him about?
>
> "VANESSA: I just told him, I said I made a false report and I said and I need to talk to you about it, and I gave him your name and he started laughing and he goes 'oh it was … a false report' and I said 'yes it was sir, it was done out of jealousy.' I said you know, 'I—I set it up to where it was made out of jealousy cause I can't stand him. I hate him' and he started laughing. He goes well then we'll have to see you in court when you testify, and I said I'm not testifying anything. He goes 'Well we'll see you in court.'
>
> "[DEFENDANT]: You didn't ask if you could talk to his supervisor?
>
> "VANESSA: No. I didn't know to do all that."

Defendant and Vanessa then proceeded to discuss ways in which she could help him if compelled to testify. They compared their situation to another case they knew of in which a witness testified contrary to her statement to police:

> "VANESSA: So when they mean I'm going to have to go testify, they're going to try to get me on the stand and sit there and tell—say all kinds of shit?
>
> "[DEFENDANT]: Yeah, they're just going to say, look, she testified that night, like they did for the hyna Denise, but now she's changed her story because uh-[¶] … [¶] she changed her story now because a, cause her husband a, because a, um, you know, this is what she did say but now she's saying this because of family or this or that. You know what I mean?
>
> "VANESSA: Uh huh. [¶] … [¶]
>
> "[DEFENDANT]: So, yeah, same old shit they're going to do to you."

Vanessa expressed her willingness to do her best for defendant on the stand, but he quickly saw that she was not adhering to the story he meant her to tell. She, in turn,

judged that his favored version departed too radically from the story previously told to the police:

> "VANESSA: So if I go up on the stand and I say I didn't see anything. I was, I did it out of jealousy. I tried calling to say that to them but they laughed at me, and I'm telling you right now, I didn't see nothing. I never saw no gun on him.
>
> "[DEFENDANT]: On him you fuckin bitch, I wasn't even there. See what I mean?
>
> "VANESSA: Yeah. Well, you, you see, you don't understand what was said to the cops that day. But me and you need to talk about that at another time. Maybe I'll go visit you and we could talk about it."

The following day, defendant called again and spoke to his mother, Lulu. Lulu was distraught about defendant's situation. Defendant responded with a confession:

> "[DEFENDANT]: Hello?
>
> "LULU: (Crying)
>
> "[DEFENDANT]: What's wrong?
>
> "LULU: Your dad said they raised your bail to a million dollars.
>
> "[DEFENDANT]: Yeah.
>
> "LULU: And you have two strikes already.
>
> "[DEFENDANT]: Yeah. I told you guys. I told you guys.
>
> "LULU: I (Crying)
>
> "[DEFENDANT]: Yeah. I'm gone already. (Inaudible) Who's there?
>
> "LULU: (Crying) Tommy.
>
> "[DEFENDANT]: Wait. What are you crying for? Huh?
>
> "LULU: You're only 26.
>
> "[DEFENDANT]: And my life's over.
>
> "LULU: (Inaudible)

"[DEFENDANT]: My life's gone. All right?

"LULU: (Crying)

"[DEFENDANT]: I told you that I did what I did for a reason.

"LULU: (Crying)

"[DEFENDANT]: And I'd do it over again if I had [to]. My children are at risk with Jason around them."

He repeated this a few moments later to his father, but still blamed Vanessa:

"FATHER: How you doing?

"[DEFENDANT]: I'm fine. I told you, I'll do it over again.

"FATHER: Huh?

"[DEFENDANT]: If I had a chance I'll do it over again. I told you.

"FATHER: You'll do what over?

"[DEFENDANT]: Whatever it takes. When Jason is a risk to my children.

"FATHER: Like I told you (inaudible) yourself.

"[DEFENDANT]: If there's no way, if there's a way—what?

"FATHER: You can't protect nobody if you don't protect yourself.

"[DEFENDANT]: Okay look. It's, it's too late now.

"FATHER: I know it's too late now." [¶] … [¶] Man I wish you wouldn't have done this stuff but it's too late.

"[DEFENDANT]: It's not me! Vanessa! Vanessa.

"FATHER: God almighty.

"[DEFENDANT]: Vanessa.

"FATHER: You can say what you're doing! You're the one that put the gun down, you're the one that pulled the god damn trigger Tommy!"

In another call defendant told Vanessa to persuade her family to hire a lawyer for him. She should do this, he said, by giving them his reasons for his actions: "You tell them what's going on. You tell them what I was doing it for, what it was for. I was trying to scare that motherfucker away from the house because I know what's going to happen to him." He also told her, "You guys need to stay away from the courts, you understand?" and directed her to "[h]ide out."

Finally, defendant had a plan for the remaining witness, Ruben. He would send someone to his house:

"[DEFENDANT]: And what about the other dude?

"VANESSA: I don't know about him. I asked Jason if he can get a hold of him and he said that they weren't, that I guess they're not talking, and I said well, can you get me his …

"[DEFENDANT]: Does the mother fuckin' dude have his own place?

"VANESSA: He lives with his mom, yeah. Not his own place, he lives with his mom.

"[DEFENDANT]: Do you know where his mom lives?

"VANESSA: Na uh.

"[DEFENDANT]: You fuckin' liar…

"VANESSA: I don't, I don't know.

"[DEFENDANT]: Okay, look, okay, okay.

"VANESSA: But I'm, I can find out.

"[DEFENDANT]: It, it better, look, is anybody to do it? You find out if Pink or Arturo are over there.

"VANESSA: Okay.

"[DEFENDANT]: Do you know what that is?

"VANESSA; Yes, Tommy.

"[DEFENDANT]: You make sure that my nephew gets to that mother fuckin' house, knocks on the mother fuckin' door.

"VANESSA: All right."

Defendant and Vanessa then discussed other people named in the police report. Defendant thought he knew of someone who could "find out how to get to" one of them. Defendant was particularly interested to learn that one of the people named was a father:

"VANESSA: Well, it actually, it was, it was a father, he said he was helping his son move his stuff and, and he …

"[DEFENDANT]: It's a dad?

"VANESSA: Yeah.

"[DEFENDANT]: It's a guy's dad?

"VANESSA: Older man, yeah."

The phone calls constitute very extensive evidence of a plan on defendant's part to suppress evidence and manipulate witnesses in order to conceal the guilt to which he admitted. The final call reveals defendant plotting or trying to plot with Vanessa to intimidate Ruben. Defendant could not have fired the shots at Ruben's residence personally because he was in jail, but he could have authorized this action. When a defendant authorizes a third person's attempt to suppress evidence, evidence of the attempt is admissible to show consciousness of guilt on the defendant's part. (*People v. Hannon* (1977) 19 Cal.3d 588, 599.) In this case there was more than enough evidence to justify allowing the jury to decide whether defendant was responsible for the shots fired at Ruben's parents' house.

For these reasons, we reject defendant's argument that the evidence should have been excluded under Evidence Code section 352 because of the likelihood that the jury would put it to the improper prejudicial use of showing his consciousness of guilt. Under the circumstances of this case, that was a proper use of it.

IV. Pitchess motion

Before trial, defendant filed a discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code sections 1043-1045. He requested documentation of citizen complaints against one of the police officers involved in the investigation. The motion alleged that the officer falsified a report of a warrantless search of defendant's apartment by stating that he went into certain areas with consent, found certain evidence in plain sight, and took an incriminating statement from defendant. Defendant also filed a motion to suppress evidence derived from the search. The motion to suppress was unopposed and the court granted it. Then it conducted an in camera review of documents outside the presence of defendant and his counsel. It found that there was no discoverable information. The parties agree that we should review the sealed records of the in camera proceedings and decide whether the court acted within its discretion.

A court deciding a properly noticed *Pitchess* motion must first determine whether the motion shows good cause for production of any of an officer's confidential personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) Next, the court must obtain potentially relevant personnel records from their custodian and review them for relevance at a hearing in camera. The court is then to order disclosure to the moving party any information relevant to the pending litigation. (*Ibid.*) We review the trial court's ruling for abuse of discretion. (*Id.* at p. 1228.)

In this case, a Bakersfield Police Department detective testified in camera as the custodian of records. He stated under oath that the department's records contained no citizen complaints against the officer. He also said he searched for all records "that would go to the issue of dishonesty, false fabrication, reports, and things of that nature" and found nothing relevant. The custodian brought the officer's personnel file. The court reviewed it and found no relevant material. The court was not able to confirm independently that there were no citizen complaints against the officer because, as the

custodian testified, the Bakersfield Police Department has a policy of keeping citizen complaints in a file separate from the personnel file, which the custodian did not bring to court.

We conclude that the trial court did not abuse its discretion. The trial court is not required to review all of an officer's records; it may rely on the custodian's selection of portions of the file that are "'potentially relevant'" and omission of portions that are "clearly irrelevant" or "otherwise nonresponsive," combined with the custodian's in camera testimony. (*People v. Mooc, supra,* 26 Cal.4th at p. 1229.) These procedures were followed here. With respect to citizen complaints, the court had discretion to rely on the custodian's testimony that there were none; it did not have to demand that the custodian present an empty file folder to prove it.

V. Blakely/Cunningham claim

Defendant's sentence included a doubled upper term for the grossly negligent-discharge count. Doubled upper terms for the other counts were imposed and stayed. Defendant argues that the imposition of these upper terms violated the Sixth Amendment as interpreted in *Blakely, supra*, 542 U.S. 296.

In *Blakely,* the Supreme Court held that a sentence for kidnapping imposed under the Washington sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. (*Blakely, supra,* 542 U.S. at pp. 298, 304.) Under Washington law, the trial court could impose a sentence longer than 53 months only if it found substantial and compelling reasons to do so. (*Id.* at p. 299.) The judge found that the crime was committed with "'deliberate cruelty,'" and imposed a sentence of 90 months. (*Id.* at p. 298.) The Supreme Court held that this violated the Sixth Amendment as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490: "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." (*Blakely, supra,* 542 U.S. at p. 301.) It did not matter that the offense was a class B felony, and

that class B felonies carried a maximum sentence of 10 years, because the state's sentencing law did not allow the sentence to exceed 53 months without judicial factfinding. "Our precedents make clear … 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.*" (*Id.* at p. 303.) The court continued:

> "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely, supra*, 542 U.S. at pp. 303-304.)

After briefing was completed in this case, the United States Supreme Court issued its decision in *Cunningham, supra*, ___ U.S.___ [127 S.Ct. 856], overruling *People v. Black* (2005) 35 Cal.4th 1238 and holding that *Blakely* applies to the imposition of upper terms under California law. (*Cunningham, supra*, ___ U.S. ___ [127 S.Ct. at pp. 860, 871].) The imposition of an upper term under California law is unconstitutional, therefore, unless it is based on prior convictions, facts found by the jury, or facts admitted by the defendant.

A. Effect of three-strikes findings

We hold that the imposition of upper terms did not run afoul of the Supreme Court's precedents in this case. The heart of the analysis of a sentence under *Blakely* is the determination of the maximum sentence. The maximum sentence within the meaning of *Blakely* is the greatest sentence the judge can impose based on the facts reflected in the jury verdict or admitted by the defendant, plus the fact of the defendant's prior convictions, if any. The sentences imposed in this case did not exceed the maximum sentence within the meaning of *Blakely* because this was a three-strikes case. Defendant waived the right to a jury trial on the prior convictions alleged in the information and the

court found those allegations true. No further findings were necessary before a three-strikes sentence of 25 years to life could be imposed. The court's decision on defendant's *Romero* request was discretionary and could have been denied without any findings of fact. In other words, the maximum sentence available within the discretion of the sentencing court without any further factual findings, based on prior convictions to which defendant had waived a statutory right to a jury trial, was 25 years to life. The lesser sentence the court imposed was, therefore, permissible under *Blakely* and *Cunningham*.

B. Error, if any, was harmless

Even if this had not been a three-strikes case, any error in imposing the upper term would have been harmless. The court's findings in support of imposing the upper term were these:

> "The Court finds that there are no circumstances in mitigation.
>
> "In aggravation, the defendant's prior convictions as an adult and sustained petitions in juvenile delinquency proceedings are numerous.
>
> "The defendant's performance on probation prior to 2001 and parole was unsatisfactory due to term violations.
>
> "And the defendant has engaged in violent conduct, which indicates he's a serious danger to society, in that he previously served a prison commitment involving arson and terrorist threats and was convicted of spousal battery in another case."

In making these findings, the court applied four of the five offender-related aggravating factors set forth in California Rules of Court, rule 4.421: "[t]he defendant has engaged in violent conduct that indicates a serious danger to society" (rule 4.421(b)(1)); "[t]he defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness" (rule 4.421(b)(2)); "[t]he defendant has served a prior prison term" (rule 4.421(b)(3));

and "[t]he defendant's prior performance on probation or parole was unsatisfactory" (rule 4.421(b)(5)).

Several of the court's findings presupposed prior convictions: his prior convictions were numerous; his performance on probation and parole was unsatisfactory; he was a danger to society because of his prior convictions of violent crimes; and he served a prior prison term. At least one of these—"the defendant's prior convictions as an adult … are numerous"—cannot meaningfully be distinguished from *Blakely's* formulation, approving the use of "'the fact of a prior conviction'" (*Blakely*, *supra*, 542 U.S. at p. 301) to increase a sentence. It would not make sense to say that the trial court is entitled to rely on one prior conviction but not on several.

Assuming, without deciding, that in a non-three-strikes case it would be error to rely on other factors in addition to defendant's prior convictions, we are confident that the error would be harmless beyond a reasonable doubt under the circumstances of this case. (*People v. Chapman* (1967) 386 U.S. 18.) Given that defendant's criminal history was the dominant fact in the background of all the aggravating factors the court found, there is no likelihood that the court would have imposed a different sentence if it had been directed that it could rely only on "'the fact of a prior conviction'" (*Blakely*, *supra*, 542 U.S. at p. 301) in imposing the upper term.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Hill, J.