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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ELDER WALLER, Defendant and Appellant.	E038456 (Super.Ct.No. FVA017512) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti, Judge. Affirmed as modified.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., and Lilia E. Garcia, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant of two counts of attempted premeditated murder (counts 1 and 2); two counts of assault with a firearm (counts 3 and 4); first degree burglary (count 5); and carjacking (count 6). The jury also found true various firearm and weapon allegations on all counts. The court sentenced defendant to 68 years to life.

Defendant argues he could not be convicted of counts 3 and 4, because they were lesser included offenses of counts 1 and 2. He also claims the court made several sentencing errors. We conclude the court should have stayed execution of the term for count 4 pursuant to Penal Code section 654. Otherwise, we affirm.

I

FACTS

A. *Counts 1-5 (Attempted Murder, Assault With a Firearm, Burglary)*

Defendant and Antina Gilmore began dating in 2000. The relationship eventually developed into a boyfriend/girlfriend relationship but began to falter later in 2000 because Gilmore believed defendant was seeing other women. Gilmore stopped seeing defendant in February 2002, after he became violent with her on several occasions.

Gilmore reported the most recent violent incident to the police and received a subpoena to appear in court on May 21, 2002. On that date, about 7:00 a.m., defendant entered Gilmore's house with a sawed-off shotgun. Gilmore's six children; her sister, Midia Wright; and her nephew were in the house at the time.

Defendant went to Gilmore's bedroom, kicked in the locked door, and entered the room. Gilmore was standing in front of the bed. Defendant said, "Yeah, yeah, bitch" and shot her in the shoulder with the shotgun. He walked out and down the hall toward Wright's bedroom.

Wright heard the noise, ran to the hallway, and saw defendant. Defendant turned the shotgun on Wright and said, "It is your turn now, bitch." She ran to the bathroom and locked the door. Defendant kicked the door in and told her to get in the bathtub.

Wright turned away from defendant and heard the trigger click, but nothing happened. Wright saw that defendant was reloading the gun. She hit the gun, and the shell fell to the floor. Defendant started beating Wright over the head with the gun, and she fell to the floor. He hit her a few more times and walked out of the bathroom.

Wright followed defendant out of the bathroom with blood all over her shirt, coming from her head. Gilmore came out of her bedroom, also bleeding. Defendant hit Gilmore in the back of her head with the shotgun, knocking her to the ground, and ran out of the house with the gun.

B. *Count 6 (Carjacking)*

As defendant was leaving Gilmore's house, Tony Pruitt was driving down a street in the vicinity of Gilmore's house to drop off his brother and sister at a babysitter's house. As he pulled up to the babysitter's and parked, he saw a man running out of the house ahead with a shotgun.

The man with the shotgun ran up to Pruitt's car, put the gun through the open window to Pruitt's head, and said, "Get your ass out of the car." Everyone got out of the car, and the man got in and drove off.

Pruitt could not identify his assailant. However, when he was shown a shotgun that Gilmore and Wright had identified as the one used by defendant, Pruitt recognized it as the weapon his assailant had used.

Police later found Pruitt's car parked across the street from a house. In the backyard of the house, they found a shortened shotgun under a sweatshirt, covered with dirt and leaves. Inside the sweatshirt was a set of keys to Pruitt's car.

C. *Defense*

Defendant testified and admitted shooting Gilmore and beating Wright over the head with the shotgun. However, he denied beating Gilmore with the shotgun. Defendant also denied pointing the gun at Wright or trying to shoot her with it. He admitted he "probably" took Pruitt's car.

Defendant further testified that when he dated Gilmore in 2002, he was taking medication for depression and was under the care of a psychotherapist. Defendant said he went to Gilmore's house on May 21, 2002, because a message was left on his answering machine from Gilmore's brother and sister saying they were going to harm his children. Defendant only intended to scare Gilmore and Wright, not harm them.

Dr. Kania, a defense psychologist, testified that defendant showed symptoms of a severe depressive disorder, which had begun years earlier, when defendant's wife died and he learned he had contracted HIV from her. Defendant suffered from that disorder, with psychotic symptoms, in or around May 2002. Defendant had a delusion at that time that Gilmore's brother was calling him and threatening to kill him and his sons.

A week before the offenses, defendant told a registered nurse from the Inland AIDS Project that he suffered from depression and anxiety, was suicidal, and heard voices telling him the world would be better if he killed himself. However, defendant did not say anything about having been threatened.

II

DISCUSSION

A. *Multiple Conviction*

Defendant argues he could not be convicted of both count 1, attempted murder of Gilmore, and count 3, assault with a firearm on Gilmore, because the assault was a necessarily included offense of the attempted murder. He similarly contends count 4, assault with a firearm on Wright, was a necessarily included offense of count 2, attempted murder of Wright. He bases this claim on the fact that the information alleged firearm use enhancements in all four counts, so that as *alleged in the accusatory pleading*, the attempted murder counts included all of the elements of the assault counts.

This claim fails because the California Supreme Court has held that only the "statutory elements" test, and not the "accusatory pleading" test, is to be used in deciding whether multiple convictions are proper. Under the statutory elements test, the assaults were not necessarily included offenses of the attempted murders.

1. *The test for necessarily included offenses in multiple conviction cases*

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*); see Pen. Code, § 954.)[1] However, "[a] judicially created exception to the general rule permitting multiple conviction 'prohibits multiple

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

convictions based on necessarily included offenses.' [Citation.]" (*Reed*, at p. 1227; see also *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

Ordinarily, one offense may be necessarily included in another under either of two tests. "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former. [Citation.]" (*Reed*, *supra*, 38 Cal.4th at pp. 1227-1228.)

In *Reed*, however, the Supreme Court held that where the validity of multiple convictions is in issue, *only* the statutory elements test is to be used in determining whether an offense is necessarily included in another.[2] The court explained: "The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime. . . . But this purpose has no relevance to deciding whether a defendant may be convicted of multiple charged offenses." (*Reed*, *supra*, 38 Cal.4th at p. 1229.)

Accordingly, the *Reed* court concluded: ". . . Courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*Reed*,

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[2] Neither party cites or discusses *Reed*, which was issued more than a month before the People's brief was filed and more than two months before defendant's reply brief was filed.

supra, 38 Cal.4th at p. 1231.) Under the statutory elements test, the court held, the defendant properly was convicted of possession of a firearm by a felon, carrying a concealed firearm, and carrying a loaded firearm while in a public place, all based on the same act of carrying a handgun. Although the information alleged the defendant's prior felony conviction in all three counts, so that under the accusatory pleading test the two carrying counts would have been necessarily included offenses, being a felon was not a *statutory* element of the carrying counts. (*Id*. at pp. 1228, 1230-1231.)

Here, similarly, use of a firearm is not a statutory element of attempted murder. Therefore, "[u]nder the statutory elements test, assault with a firearm is not included within attempted murder. [Citation.]" (*People v. Parks* (2004) 118 Cal.App.4th 1, 6; see also *People v. Cook* (2001) 91 Cal.App.4th 910, 918-919 [assault with a firearm not necessarily included in murder under statutory elements test].) *Reed* thus requires rejection of defendant's claim of improper multiple conviction.[3]

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[3] As *Reed* controls the disposition of this case, it is unnecessary to consider *People v. Wolcott* (1983) 34 Cal.3d 92, which the People cite as controlling. The Supreme Court in *Wolcott* held that an firearm use enhancement allegation should not be considered in determining whether a crime is a lesser included offense of the crime in which the firearm was used. (*Id*. at p. 101.) In *Wolcott*, however, the issue was whether the trial court had to instruct sua sponte on the alleged lesser included offense, not whether the defendant could be convicted of multiple offenses for the same conduct. (*Id*. at p. 102.) *Reed* makes clear that the test to be used in deciding whether one offense is necessarily included in another varies depending on the context in which the issue arises. (*Reed*, *supra*, 38 Cal.4th at p. 1231 ["it is logically consistent to apply the accusatory pleading test when it is logical to do so . . . but not when it is illogical to do so"].) Consequently, *Wolcott* may or may not apply to multiple conviction cases.

2. *Grant of review in Sloan*

As defendant notes, the California Supreme Court is currently reviewing the following question: "For purposes of the ban on conviction of necessarily included offenses (see *People v. Pearson*[, *supra*,] 42 Cal.3d 351), should enhancement allegations be considered in determining when a lesser offense is necessarily included in a charged offense as pled in the information or indictment?" (*People v. Sloan*, review granted June 8, 2005, S132605, Supreme Ct. Mins., June 8, 2005; see also *People v. Izaguirre*, review granted June 8, 2005, S132980.) If the court were to hold enhancements should be considered, it would require reversal here since the firearm use enhancement allegations would make counts 3 and 4 lesser included offenses of counts 1 and 2.

However, the issue posed in *Sloan* would appear to have been effectively settled by *Reed*. If, as *Reed* holds, a court *cannot consider* how a crime is pled in the accusatory pleading in determining whether the crime is an included offense for purposes of multiple conviction, then the issue of whether an offense is included in another "as pled in the information or indictment" should not arise. At any rate, as we find *Reed* controlling we simply rely on that decision pending further guidance from the Supreme Court in *Sloan*.

3. *Apprendi and Seel*

While as stated defendant does not discuss *Reed*, he does make an argument that, if meritorious, would call into question *Reed*'s validity under the federal Constitution in cases like this one. The argument is based on *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and *People v. Seel* (2004) 34 Cal.4th 535, 548 (*Seel*).

In *Apprendi*, the United States Supreme Court held: "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." (*Apprendi*, *supra*, 530 U.S. at p. 490.) The court further stated that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id*. at p. 494, fn. 19.)

In *Seel*, the California Supreme Court applied *Apprendi*'s reasoning in holding that the federal double jeopardy clause barred the state from retrying the defendant on an allegation that an attempted murder was premeditated, after a Court of Appeal ruling that the evidence was insufficient to prove premeditation. (*Seel*, *supra*, 34 Cal.4th at p. 550.) The court reasoned that since a finding of premeditation exposes the defendant to a greater punishment than the usual statutory maximum for attempted murder, under *Apprendi* premeditation must be treated as "'the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' [Citation.]" (*Seel*, at p. 548.)

Focusing on the "functional equivalent" language in *Apprendi* and *Seel*, defendant argues that firearm use must be treated as the functional equivalent of an element of any offense in which it is alleged for the purpose of seeking an enhanced sentence. Therefore, in the context of multiple conviction, a court must determine the elements of an offense by considering not only the statutory definition but also any enhancement allegations. Thus, the court would have to use the accusatory pleading test -- just what *Reed* forbids.

Apprendi and *Seel* do not support defendant's argument. To say that an enhancement or premeditation allegation is the functional equivalent of an element of the

underlying crime for one purpose is not to say that it is for all purposes. Neither *Apprendi* nor *Seel* involved the propriety of multiple convictions for included offenses in a single proceeding. In *Apprendi*, the issue was whether enhancement allegations must be proved to a jury beyond a reasonable doubt, a matter not in issue here. *Seel* concerned retrial of a premeditation allegation in a second proceeding, also not in issue here.

Moreover, *Seel* was based on the federal double jeopardy clause.[4] That clause "'"protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."' [Citation.]" (*Ohio v. Johnson* (1984) 467 U.S. 493, 498.)

Defendant cannot invoke either of the first two protections, because he was not subjected to a second prosecution after acquittal or conviction. Defendant also cannot invoke the third protection, against multiple punishments. The United States Supreme Court has consistently held that the multiple punishment bar does not prohibit a state from charging, prosecuting, or punishing a defendant for included offenses, as long as it does so in a single proceeding.

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[4] Defendant did not assert in the trial court that the federal double jeopardy clause barred conviction on counts 3 and 4 and cannot do so for the first time on appeal. (*People v. Scott* (1997) 15 Cal.4th 1188, 1201; *People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1.) However, we consider the application of the double jeopardy clause anyway, because if defendant's argument is correct on the merits and would have been a crucial defense at trial, failure to assert it in the trial court would be ineffective assistance of counsel. (*Marshall*, at p. 824, fn. 1.)

Thus, in *Ohio v. Johnson*, *supra*, 467 U.S. 493, the court said that "the State is not prohibited by the Double Jeopardy Clause from charging [a defendant] with greater and lesser included offenses and prosecuting those offenses in a single trial." (*Id*. at p. 500.) In *Missouri v. Hunter* (1983) 459 U.S. 359, the court said that "simply because two criminal statutes may be construed to proscribe the same conduct . . . does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." (*Id*. at p. 368.) Most recently, in *Hudson v. United States* (1997) 522 U.S. 93, the court said that the double jeopardy clause protects against imposition of multiple punishments "only when such occurs in successive proceedings . . . ." (*Id*. at p. 99.)

If the double jeopardy clause does not bar charging, prosecuting, or punishing a defendant for included offenses in a single proceeding, then a fortiori it does not bar multiple conviction. In fact, the *only* effect of the clause in a single proceeding is to "prevent the sentencing court from prescribing greater punishment than the legislature intended." (*Missouri v. Hunter*, *supra*, 459 U.S. at p. 366.) Therefore, "if it is evident that a state legislature intended to authorize cumulative punishments, a court's inquiry is at an end." (*Ohio v. Johnson*, *supra*, 467 U.S. at p. 499, fn. 8.) By parity of reasoning, if it is evident that the Legislature intended to authorize multiple convictions for included offenses, the double jeopardy clause does not bar a court from imposing such convictions.

Our Supreme Court found in *Reed* that "[t]he Legislature has made clear that a defendant may be convicted of more than one offense even if they arise out of the same act or course of conduct. [Citation.]" (*Reed*, *supra*, 38 Cal.4th at p. 1230.) Thus, there is

no basis for applying the double jeopardy bar in this case, and *Seel* does not undermine *Reed*. *Reed* therefore controls and requires affirmance of counts 3 and 4.

B. *Section 654*

Defendant next argues that even if multiple conviction on counts 1 and 3 and counts 2 and 4 was proper, separate punishment for all four counts violated section 654. Therefore, the separate consecutive terms imposed on defendant for counts 3 and 4 must be stayed.

Section 654 prohibits punishing a defendant "under more than one provision" of law for an "act or omission . . . ." (§ 654, subd. (a).) Despite section 654's use of the singular "act or omission," it precludes multiple punishment not only for "a single act or omission," but also for "an indivisible course of conduct" comprising more than one act. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) " . . . 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.)

Therefore, for a defendant to be punished under more than one statute, the evidence must show he committed (1) more than one criminal act, pursuant to (2) more than one criminal objective. (See *People v. Latimer* (1993) 5 Cal.4th 1203, 1216 [multiple punishment improper where evidence showed "separate acts," but not separate objectives]; *People v. Arndt* (1999) 76 Cal.App.4th 387, 397 [multiple punishment proper where crimes "involved not only separate objectives, but separate acts as well"].)

Defendant asserts counts 1 and 3 were based on the same act (shooting Gilmore) pursuant to a single intent (disabling her). He likewise asserts counts 2 and 4 were based on the same course of conduct (pointing the shotgun at Wright, trying to shoot her, and then hitting her over the head with it) pursuant to a single intent (disabling her).

1. *Counts 1 and 3*

The evidence amply showed counts 1 and 3 involved separate criminal acts. Defendant errs in assuming the only act supporting counts 1 and 3 was his shooting of Gilmore. After shooting Gilmore, defendant left her and pursued Wright into the bathroom, where he bludgeoned her. He then came out of the bathroom, encountered Gilmore, and hit over the head with the shotgun, a wholly separate act from his earlier attempt to murder her.

The prosecutor thus argued hitting Gilmore was a separate assault with a firearm. Besides being supported by the facts, the argument was legally correct. Using a firearm as a bludgeon constitutes an assault with the firearm. (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6.)

The evidence also showed counts 1 and 3 involved separate objectives. When a court imposes separate terms on two counts, it implicitly finds that the crimes for those two counts "involved more than one objective, a factual determination that must be sustained on appeal if supported by substantial evidence [citation]." (*People v. Osband* (1996) 13 Cal.4th 622, 730.) In reviewing the implicit finding, an appellate court must view the evidence most favorably to the judgment and presume in support of the sentencing order the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.)

The court's implicit finding of separate objectives was supported here. As the Supreme Court has noted, if the defendant's objectives were "consecutive even if similar," courts have found separate punishment to be justified. (*People v. Britt*, *supra*, 32 Cal.4th at p. 952.) In *People v. Latimer*, *supra*, 5 Cal.4th 1203, the court expressly stated, "[W]e do not intend to question the validity of decisions finding consecutive, and therefore separate, intents . . . ." (*Id*. at p. 1216.)

In *People v. Coleman* (1989) 48 Cal.3d 112, the Supreme Court found consecutive, separate intents supported separate punishment for robbing the victim and later assaulting her by stabbing her. Between the robbery and the assault, the defendant had murdered a second victim in the same house. The court noted that "[p]rior to the assault, defendant had essentially completed the robbery," and therefore the trial court could find he assaulted the victim for a different purpose, to keep her from reporting the murder. (*Id*. at pp. 162-163.)

Court of Appeal decisions reach the same conclusion as in *Coleman* where, as in *Coleman*, a period of time has intervened between one act of violence and a later one against the same victim. In *People v. Trotter* (1992) 7 Cal.App.4th 363, the intervening period was only a minute. The defendant, while driving, fired a shot at a pursuing officer, resumed driving, paused for about a minute, turned back, and shot again. (*Id*. at p. 366.)

The court held each shot was a separately punishable assault. "Each shot required a separate trigger pull." (*People v. Trotter*, *supra*, 7 Cal.App.4th at p. 368.) Further, there was "time prior to each shot for defendant to reflect and consider his next action." (*Ibid*.) Therefore, "each shot evinced a separate intent to do violence . . . ." (*Ibid*.)

In *People v. Surdi* (1995) 35 Cal.App.4th 685, the court cited *Trotter* in holding separate punishment was proper where gang members stabbed the victim while traveling in a van, stopped at a school to consider their next actions, and then took turns stabbing the victim again. The court said: "The fact Surdi assisted *multiple* stabbing episodes, each of which evinced a *separate intent* to do violence, precludes application of section 654 with respect to the offenses encompassed within the episodes." (*Surdi*, at pp.689-690.)

Trotter was also followed in *People v. Braz* (1997) 57 Cal.App.4th 1, where the court held the defendant could be separately punished for two counts of child endangerment for first physically abusing her son and then leaving him without summoning assistance. The court stated: "A separate and distinct harm to Anthony occurred when, after his injury, he was left to suffer until he lost consciousness." (*Id*. at p. 11.)

Here, defendant first tried to murder Gilmore, broke off that attack and tried to murder Wright, and then returned to find Gilmore had come out of her bedroom. Consequently, a substantial period elapsed between the shooting and the assault on Gilmore, during which defendant had time to form a separate objective of inflicting a separate injury. The attempted murder of Gilmore was not just "essentially completed" (*People v. Coleman, supra*, 48 Cal.3d at p. 162) by the time defendant assaulted Gilmore by hitting her with the shotgun, it was fully completed.

Moreover, defendant hit Gilmore only once, as opposed to Wright, whom he hit repeatedly. That fact suggested his objective in hitting Gilmore was not to murder her as before, but to keep her from interfering with his escape as in *Coleman*, or simply to inflict

a new injury when he found, probably unexpectedly, she had managed to come out of her bedroom. (See *People v. Beamon* (1973) 8 Cal.3d 625, 639, fn. 12 [stating, in dictum, that a defendant may be punished separately where his additional act of violence against the same victim "was not part of defendant's original objective but was subsequently conceived in response to an unexpected event occurring during commission of the underlying crime"].)[5]

Finally, defendant's assertion that there was only one objective, to "disable" Gilmore, is unpersuasive. First, when defendant hit Gilmore with the shotgun, he had already disabled her by shooting her in the shoulder. In any event, an objective to disable a victim is too general to application of section 654. Under analogous circumstances, the Supreme Court in *People v. Perez* (1979) 23 Cal.3d 545 rejected the defendant's contention that his multiple sex crimes were motivated by a single intent and objective of obtaining sexual gratification, stating: "To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be commensurate with his culpability. [Citation.]" (*Id*. at p. 552.)

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[5] Supreme Court dictum "'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic. [Citations.]' [Citation.]" (*People v. Smith* (2002) 95 Cal.App.4th 283, 300.) *Beamon*'s dictum came at the end of a thorough analysis of the criteria for finding separate objectives under section 654 and therefore should be followed here. (*People v. Beamon*, *supra*, 8 Cal.3d at pp. 636-640.)

Defendant's act of assaulting Gilmore after earlier trying to murder her increased his culpability and justified separate punishment. Substantial evidence supported the court's imposition of consecutive terms for counts 1 and 3.

2. *Counts 2 and 4*

Counts 2 and 4, unlike counts 1 and 3, did not involve separate criminal acts of attempted murder and assault. The People's theory that the assault consisted of pointing the shotgun at Wright and the attempted murder consisted of bludgeoning her with the shotgun was legally untenable.

"[T]o constitute an assault, the defendant must not only intend to commit a battery [citation]; he must also have the present ability to do so." (*People v. Wolcott*, *supra*, 34 Cal.3d at p. 99.) For that reason, "[t]he threat to shoot with an unloaded gun is not an assault, since the defendant lacks the present ability to commit violent injury. [Citations.]" (*People v. Fain*, *supra*, 34 Cal.3d at p. 357, fn. 6.) This is true "'regardless of the fact whether the party holding the gun thought it was loaded, or whether the party at whom it was menacingly pointed was thereby placed in great fear.' [Citation.]" (*Wolcott*, at p. 99.)

Defendant testified, without contradiction, that the shotgun was a single-barrel weapon that had to be reloaded to be fired again. When defendant pointed the gun at Wright, he had already fired a shot, striking Gilmore. Wright testified defendant tried to reload the gun, but she interfered, and he used it to bludgeon her instead. Therefore, the evidence supported only one inference, that the gun was not loaded when defendant pointed it at Wright, as Wright surmised.

Pointing an unloaded gun with the threat or intent to use it *as a club or bludgeon* is an assault with the gun. (See *People v. Wolcott*, *supra*, 34 Cal.3d at p. 99 ["'if a person points an unloaded gun at another, without any intent or threat to use it as a club or bludgeon, he does not commit . . . assault under Penal Code section 240'"].) In *Fain*, the Supreme Court held there was sufficient evidence of assault where even if the jury believed the gun was not loaded, the defendant struck two of the victims with the gun and was near enough to the remaining victim to strike him as well. (*People v. Fain*, *supra*, 34 Cal.3d at pp. 357, fn. 6.)

Here, though, there was no evidence that defendant struck or threatened to strike anyone with the shotgun before he began, evidently on the spur of the moment, to beat Wright with it. Therefore, there is no basis for finding the previous pointing of the gun at Wright to be an assault.

Accordingly, the only assault defendant committed against Wright was beating her with the gun. That assault, as stated, was the same act on which the prosecutor relied to prove attempted murder. Although defendant hit Wright with the gun numerous times, there was no evidence he paused or reflected in between the blows, such as might bring the case within *Trotter*.

Consequently, the attempted murder and assault both had to be based on the beating. Both crimes therefore arose from a single "act or omission" that was punishable "under more than one provision" of law (§ 654, subd. (a)), and separate punishment was prohibited. (*People v. Parks* (1971) 4 Cal.3d 955, 961, fn. 3 [§ 654 precluded

punishment for both attempted murder and assault with a deadly weapon for shooting victim one time].) The court should have stayed execution of the term for count 4.[6]

C. *Imposition of Firearm and Weapon Enhancements Under Sections 12022.5 and 12022*

When defendant committed the present offenses, as now, section 12022.53 imposed enhancements for personal firearm use (subd. (b)), discharge (subd. (c)), or discharge causing great bodily injury or death (subd. (d)). Section 12022.53 further provided that only the longest applicable enhancement under section 12022.53 was to be imposed, and that no additional firearm enhancements were to be imposed under section 12022.5 or section 12022. (§ 12022.53, subd. (f).)

Section 12022.53 also provided: "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (§ 12022.53, subd. (h).)

At the time defendant committed the present offenses, as now, section 12022.5, subdivision (a) imposed an enhancement for personal use of a firearm.

Finally, when defendant committed the present offenses, as now, section 12022, subdivision (b)(2) imposed an enhancement for personally using a deadly or dangerous weapon in the commission of a carjacking.

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[6] Pointing the unloaded gun at Wright may have constituted a crime other than assault, but that issue has not been raised or argued and hence is not properly before us.

The jury in this case found true firearm use allegations on count 1, for attempted murder, under section 12022.53, subdivisions (b), (c), (d), and section 12022.5, subdivision (a). The jury found true firearm use allegations on count 2, for attempted murder, under section 12022.53, subdivision (b) and section 12022.5, subdivision (a). The jury also found true firearm use allegations on count 6, for carjacking, under section 12022.53, subdivision (b) and section 12022.5, subdivision (a) and found true a weapon use allegation under section 12022, subdivision (b)(2) on that count.

Pursuant to section 12022.53, subdivision (f), the court stayed all of the above enhancements except the longest applicable one for each count, which in each case came from section 12022.53. Defendant contends the court should have struck, not merely stayed, the enhancements imposed under sections 12022.5 and 12022.

1. *Bracamonte*

People v. Bracamonte (2003) 106 Cal.App.4th 704 supports defendant's position. The court in that case held that where multiple enhancements are applicable under the various subdivisions of section 12022.53 and under section 12022.5, the court for each count must (1) impose but *stay* all of the section 12022.53 enhancements except the longest one, and (2) *not* impose, but *strike* the section 12022.5 enhancements. (*Bracamonte*, at pp. 711, 714.) The court in this case complied with holding (1), but not with holding (2).

The *Bracamonte* court supported its determination that unused section 12022.53 enhancements need only be stayed, but extra section 12022.5 enhancements must be struck, with this reasoning:

(1) Section 12022.53, subdivision (f) specifically states that if an enhancement under section 12022.53 is imposed, a section 12022.5 enhancement "shall not be imposed . . . ." (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 712.) "Such directive is mandatory." (*Id*. at p. 712, fn. 5.)

(2) The trial court "must either impose an enhancement or strike the underlying finding . . . . It is without authority simply to stay the enhancement. [Citations.]" (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 711.)

(3) Since a section 12022.5 enhancement "shall not be imposed," and the court "is without authority" to stay the enhancement, the only alternative is to strike the enhancement. (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at pp. 711-712.)

(4) Although section 12022.53, subdivision (f) says that unused enhancements under section 12022.53, as well as under section 12022.5, "shall not be imposed," this language cannot be read in isolation. Instead, it must be harmonized with the proviso in section 12022.53, subdivision (h) that "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." (See *People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 713.)

The *Bracamonte* court acknowledged that section 12022.5, subdivision (c) was amended in 2003 to provide, like section 12022.53, subdivision (h), that "[n]otwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section." The court also acknowledged that the legislation enacting the amendment stated that the amendment was declarative of existing law. (See Stats. 2002, ch. 126,

§ 13.) However, the court held, without any real explanation why, that section 12022.5, subdivision (c) was trumped by section 12022.53, subdivision (f)'s proviso that unused section 12022.5 enhancements "shall not be imposed." (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 713, fn. 5.)

Bracamonte's holding that section 12022.53, subdivision (f) only requires that unused enhancements under section 12022.53 be stayed, but unused section 12022.5 enhancements must be struck, is illogical. The court's reliance on the statement in section 12022.53, subdivision (f) that unused section 12022.5 enhancements "shall not be imposed" is not a persuasive reason for distinguishing between unused section 12022.53 and section 12022.5 enhancements. Section 12022.53, subdivision (f) specifically provides that "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime." If only one section 12022.53 enhancement "shall be imposed," then it follows that the remaining section 12022.53 enhancements shall *not* be imposed, just like an unused section 12022.5 enhancement.

In addition, there is no apparent reason the Legislature would intend that section 12022.53, subdivision (f) trump section 12022.5, subdivision (c) but not section 12022.53, subdivision (h). Section 12022.5, subdivision (c) and section 12022.53, subdivision (h) use exactly the same language: "Notwithstanding Section 1385 or any other provision of law, the court *shall not strike* an allegation under this section or a finding bringing a person within the provisions of this section." (Italics added.)

"'To understand the intended meaning of a statutory phrase, we may consider use of the same or similar language in other statutes, because similar words or phrases in statutes in pari materia [that is, dealing with the same subject matter] ordinarily will be

given the same interpretation.' [Citations.]" (*In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 589.) Accordingly, we can see no basis for concluding that section 12022.53, subdivision (h) overrides section 12022.53, subdivision (f), but the identical language in section 12022. 5, subdivision (c) does not.

Moreover, the *Bracamonte* court held that a court *may*, and in fact must, stay -- not strike -- an enhancement if the term for the underlying crime is stayed pursuant to section 654. (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 711.) Section 654, unlike section 12022.5, subdivision (c), contains no provision prohibiting the striking of unimposed terms, and it contains no provision authorizing a court to stay an unimposed term instead. The *Bracamonte* court did not explain why, then, section 654 could confer the authority to stay an unused term but section 12022.5, subdivision (c) could not.

Finally, the *Bracamonte* court itself acknowledged that "the word 'impose' encompasses both situations where an enhancement is imposed and then executed and imposed and then stayed." (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 711.) That being the case, it is just as reasonable to conclude that when the Legislature in section 12022.53, subdivision (f) said that unused section 12022.5 enhancements "shall not be imposed," it meant that such enhancements shall not be *executed*, but instead may be "imposed and then stayed," as it is to conclude the Legislature meant the enhancements must be struck and not stayed.

2. *Rule 4.447*

California Rules of Court, rule 4.447 (rule 4.447) provided in relevant part at the time of the present offenses: "No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds . . .

limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit."

The *Bracamonte* court summarily dismissed the People's contention that rule 4.447 authorized staying rather than striking unused section 12022.5 enhancements, stating: "No case has expressly applied this rule to a situation involving an indeterminate life term and the Advisory Committee Comment refers to enhancements only in the context of the Determinate Sentencing Act (DSA). [Citations.]" (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at p. 710.)

The *Bracamonte* court's limitation of rule 4.447 to determinate sentencing situations is unpersuasive. First, it is difficult to discern any logical reason why the Judicial Council would intend that a court have the authority to stay unused enhancements in a determinate sentencing situation but not where, as in *Bracamonte*, some of the terms are determinate and some are indeterminate. The authorities the *Bracamonte* court cited in support of its conclusion were section 1170.1 and *People v. Felix* (2000) 22 Cal.4th 651, 659. Those authorities do establish that the determinate sentencing rules only apply to determinate sentences.

However, the unused section 12022.5 enhancement terms in *Bracamonte were* determinate sentences. (*People v. Bracamonte*, *supra*, 106 Cal.App.4th at pp. 709-710.) Only the *imposed* enhancement, under section 12022.53, subdivision (d), was indeterminate. Therefore it made no sense for the court to say that rule 4.447 does not

permit a court to stay enhancements made applicable by section 12022.5, subdivision (a) because the rule only applies to determinate sentences.

In addition, developments since *Bracamonte* was decided undermine its reasoning and conclusion. First, the 2004 Advisory Committee Comment to rule 4.447 specifically states that the rule "applies both to determinate and indeterminate terms." (Advisory Com. com., 23 pt. 3 West's Ann. Codes, Rules (2005) foll. rule 4.447, p. 141.)

Second, this court in *People v. Lopez* (2004) 119 Cal.App.4th 355, in the context of the habitual sexual offender law (§ 667.71) and the one strike law (§ 667.61), extensively discussed the problem of whether to stay or strike an enhancement that cannot be imposed because the court has imposed a mutually exclusive alternative enhancement. The *Lopez* court acknowledged that "[o]rdinarily, an enhancement must be either imposed or stricken . . . . The trial court has no authority to stay an enhancement, rather than strike it -- not, at least, when the only basis for doing either is its own discretionary sense of justice. [Citations.]" (*Lopez*, at p. 364.)

However, the *Lopez* court held that when a statute *prohibits* striking an enhancement that cannot be imposed, the correct procedure is "to impose a sentence on the barred enhancement, but then stay execution of that sentence." (*People v. Lopez*, *supra,* 119 Cal.App.4th at p. 364.) The court cited rule 4.447 in support of its holding. The court acknowledged there is no *statutory* provision authorizing, as rule 4.447 does, staying and not striking an unused enhancement. However, it pointed out there also is no statute expressly authorizing a court to stay a term that cannot be imposed due to section 654. Yet it is well established that such a term is to be stayed, not struck. (*Lopez*, at p. 365.)

In the case of *both* rule 4.447 and section 654, the *Lopez* court held, the power to stay rather than strike the enhancement "is implied, so that a defendant who is subject to one of two alternative punishments will not be wrongly subjected to the other; if, however, one of the two punishments is invalidated, the defendant will still be subject to the remaining one." (*People v. Lopez*, *supra*, 119 Cal.App.4th at p. 365.)

The *Lopez* court recognized that even if an unused enhancement were struck, it could still be revived later by operation of law if the imposed enhancement were invalidated. However, the court concluded the Judicial Council in rule 4.447 specified that an unused enhancement should be stayed rather than struck because "a stay makes the trial court's intention clear -- it is staying part of the sentence only because it thinks it must. If, on the other hand, the trial court were to strike or dismiss the prohibited portion of the sentence, it might be misunderstood as exercising its discretionary power under Penal Code section 1385." (*People v. Lopez*, *supra*, 119 Cal.App.4th at p. 365.)

Lopez's reasoning is more persuasive, in our view, than *Bracamonte*'s. We conclude the court had the authority to stay rather than strike the unused section 12022.5 enhancements and properly did so. For the same reasons, we reach the same conclusion as to the unused section 12022 enhancement on count 6.

D. *Blakely Error*

Defendant contends the court's imposition of consecutive terms for all counts was unconstitutional under *Blakely v. Washington* (2004) 542 U.S. 296, because the factual findings supporting consecutive terms were made by the court and not the jury. The California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238 held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term

sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial," and therefore does not violate *Blakely*. (*Black*, at p. 1244.) In the meantime, the United States Supreme Court granted certiorari in *Cunningham v. California* (Feb. 21, 2006) ___ U.S. ___ [126 S.Ct. 1329], which involves the same issue as *Black* and was argued on October 11, 2006.

Pending a decision of the United States Supreme Court, we remain bound by *Black*. (See *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 242, fn. 3.)

III

DISPOSITION

The judgment is modified to provide that execution of the term for count 4 is stayed pursuant to section 654. In all other respects, the judgment is affirmed. The trial court is directed to prepare a modified abstract of judgment incorporating this modification and to forward a copy of the amended abstract to the Department of Corrections.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

MILLER
J.