SUPREME COURT COPY

In the Supreme Court of the State of California

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THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **AMIR A. AHMED,** **Defendant and Appellant.**

Case No. E049932

Appellate District Division Two, Case No. RIF145548
Riverside County Superior Court, Case No.
The Honorable Sharon J. Waters, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

COURT RULES

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.500 of the California Rules of Court, Petitioner, the People of the State of California, respectfully requests this Court grant review of the published decision of the Court of Appeal, Fourth Appellate District, Division Two, in this matter. The panel's published opinion reversing the judgment of the Riverside County Superior Court, filed January 21, 2011, is attached to this Petition.

QUESTIONS PRESENTED

1. Does the multiple punishment bar of Penal Code section 654 apply to sentence enhancements generally?[1]

3. Even if section 654 does apply to sentence enhancements, does section 1170.1 evidence the legislative intent that section 654 not prohibit imposition of sentence enhancements for both personal use of a firearm and for infliction of great bodily injury?

STATEMENT OF FACTS AND CASE

Appellant and his girlfriend were arguing inside appellant's apartment. During the argument, appellant shot his girlfriend in the stomach, causing serious injury to her. (1RT 47, 51.)

On January 28, 2009, a jury found appellant guilty of assault with a firearm, in violation of section 245, subdivision (a). (1 CT 172.) The jury also found it true that appellant personally used a firearm, within the meaning of section 12022.5, subdivision (a), and that appellant personally inflicted great bodily injury under circumstances involving domestic violence, within the meaning of section 12022.7, subdivision (e). Appellant

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

admitted two prior prison terms within the meaning of section 667.5, subdivision (b). (1 CT 173-174.)

On March 20, 2009, the court sentenced appellant to a 13-year prison for a term, consisting of the upper term of 4 years for the substantive crime; 3 years for the gun-use enhancement; 4 years for the great bodily injury enhancement; and 2 years for the two prior prison terms (1 CT 211.)

Appellant appealed, contending, among other things, that the imposition of both a firearm use enhancement and a great bodily injury enhancement violated sections 1170.1 and 654.

The Court of Appeal found no error affecting the conviction. It held, however, in the published portion of its opinion, that the imposition of separate and unstayed sentences on the firearm use enhancement and the great bodily injury enhancement violated section 654. In so holding, the Court reasoned that section 654 can apply to an enhancement, at least under some circumstances. (Slip Opinion at p. 17.) The Court of Appeal also rejected the People's argument that section 1170.1, subdivisions (f) and (g) permit imposition of both enhancements notwithstanding section 654. Consequently, the Court of Appeal directed the trial court to modify the judgment with respect to the sentence by staying execution of the consecutive three-year term imposed on the personal firearm use enhancement.

REASONS FOR GRANTING REVIEW

Review is necessary to resolve the question of whether section 654 applies to sentence enhancements, a question of law left unresolved by this Court, most recently in *People v. Rodriguez* (2009) 47 Cal.4th 501, and to secure uniformity of decision. (Cal. Rules of Court, rule 8.500(b)(1).) There is a split of authority and an unreconcilable conflict among the California appellate courts as to whether section 654 applies to sentence enhancements. (See generally *People v. Coronado* (1995) 12 Cal.4th 145,

157, and cases cited therein.) Further, the Court of Appeal's holding renders section 12022.7 basically meaningless, undermining the legislative intent behind the statute. Resolution of this conflict will provide necessary guidance to trial courts in deciding the proper application of multiple enhancements at sentencing, and the combination of great bodily injury and firearm enhancements in particular.

I. REVIEW IS NECESSARY TO RESOLVE THE ISSUE OF WHETHER SECTION 654 APPLIES TO SENTENCE ENHANCEMENTS

Section 654, subdivision (a), states in relevant part: "An act or omission that is punishable in different ways by different provision of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The Court of Appeal recognized the conflict in the law in its opinion, stating "Cases sometimes ask whether section 654 applies to enhancements. However, there is not necessarily a single yes or no answer to this question. As the law now stands, section 654 may apply to some enhancements under some circumstances." (Slip opinion at p. 15.) The Court of Appeal's opinion does not resolve this conflict, but it clearly does contribute to it. Only this Court can settle the dispute that continues to surround conduct based on enhancements.

This Court has already recognized the issue presented in this petition as an important question of law, but has repeatedly declined to resolve it. (See, e.g., *People v. Palacios* (2007) 41 Cal.4th 720, 727-728; *People v. Oates* (2004) 32 Cal.4th 1048; *People v. Coronado, supra*, 12 Cal.4th at p. 157; *People v. Jones* (1993) 5 Cal.4th 1142, 1152; *People v. King* (1993) 5 Cal.4th 59, 78.) Accordingly, review is necessary under Rule 8.500(b)(1) to resolve a significant recurring sentencing question which has left trial

courts attempting to deal with diametrically opposed authority for several years.

Respondent submits that section 654 does not apply to sentencing enhancements "because they individually do not define a crime or offense but relate to the penalty to be imposed under certain circumstances. [Citations.]" (*People v. Boerner* (1981) 120 Cal.App.3d 506, 511, internal quotation marks omitted; see also *People v. Rodriguez* (1988) 206 Cal.App.3d 517, 519; *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1355; *People v. Parrish* (1985) 170 Cal.App.3d 336, 344; *People v. Le* (1984) 154 Cal.App.3d 1, 12, fn. 11; *People v. Stiltner* (1982) 132 Cal.App.3d 216, 229.)

While ultimately declining to decide the issue, the Court of Appeal reasoned that "arguably, these cases have been undercut by the famous trilogy of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531], and *Cunningham v. California* (2007) 549 U.S. 270." (Slip opinion at p. 17.) However, as this Court has recognized, *Apprendi* dictates only that a defendant is entitled to have a jury determine whether facts supporting an increased sentence have been proven beyond a reasonable doubt. *Apprendi* did not alter state law procedures that have no bearing on the jury trial right. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 137.) Moreover, the United States Supreme Court has clarified that *Apprendi* does not govern the decision whether to impose concurrent or consecutive sentences, and that it explicitly recognized states' sovereign interest in administering their own criminal justice systems. (*Oregon v. Ice* (2009) 555 U.S. 711, 718-719 [172 L.Ed.2d 517, 129 S.Ct. 711, 718–719].) Thus, whether section 654 applies to sentence enhancements remains unaffected by *Apprendi* and its progeny.

The effect of section 654 on conduct based on enhancements is an issue that routinely affects trial courts, and should be decided by this court.

II. ASSUMING ARGUENDO THAT SECTION 654 APPLIES TO SENTENCE ENHANCEMENTS, REVIEW IS NECESSARY TO DETERMINE WHETHER SECTION 1170.1 DEMONSTRATES A LEGISLATIVE INTENT THAT SECTION 654 NOT PRECLUDE IMPOSITION OF PUNISHMENT FOR A GUN USE ENHANCEMENT AND AN INFLICTION OF GREAT BODILY INJURY ENHANCEMENT

Even if section 654 applies to sentence enhancements, it should not specifically apply in this case because section 1170.1 demonstrates a legislative intent that section 654 not preclude imposition of punishment under both sections 12022.5 and 12022.7.

Section 1170.1 prescribes in pertinent part:

> (f) When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury.
>
> (g) When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for being armed with or using a dangerous or deadly weapon or firearm.

(Pen. Code, § 1170.1, subds. (f) and (g).)

The language of section 1170.1, subdivision (f), reflects the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for the infliction of great bodily injury. Likewise, the

language of section 1170.1, subdivision (g), establishes that the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for being armed with or using a dangerous or deadly weapon or firearm. Therefore, section 654 does not bar the imposition of both a deadly-weapon-use enhancement under section 12022, subdivision (b)(1), and an infliction-of-great-bodily-injury enhancement under section 12022.7, subdivision (a), in the instant case.

The Court of Appeal rejected this argument, holding that section 1170.1, subdivision (h) is the only subdivision in section 1170.1 that is not subject to section 654. Section 1170.1, subdivision (h) provides:

> For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term.

By "negative implication," held the Court of Appeal, "section 654 does limit the enhancements that may be imposed on a defendant convicted of any other offense." (Slip opinion pp. 18-19.) The Court of Appeal's interpretation essentially renders section 1170.1, subdivision (h) a nullity.

There is no other published decision with regard to whether the imposition of the firearm use enhancement pursuant to section 12022.5, and the great bodily injury enhancement, pursuant to section 12022.7, are subject to section 654. The terms of sections 12022 and 12022.7 do not shed light on the issue of whether section 654 should bar punishment for both enhancements when the defendant engages in an indivisible course of conduct. However, section 1170.1, subdivisions (f) and (g), contain explicit statements reflecting the legislative intent that imposition of

enhancements for both deadly weapon use and infliction of great bodily injury during a single offense is proper.

The clear and unambiguous language of sections 1170.1, subdivisions (f) and (g), expressly authorizes the imposition of enhancements for both the use of a firearm and the infliction of great bodily injury based on the same course of conduct. Under subdivision (f), a sentencing court may impose an enhancement for the infliction of great bodily injury even where a firearm use enhancement is authorized for the same offense. Under subdivision (g), a sentencing court may impose an enhancement for the use of a firearm even where a great bodily injury enhancement is authorized for the same offense. By authorizing the imposition of such enhanced penalties based on the same offense, the Legislature plainly stated its intent to impose additional punishment where the use of a firearm causes the infliction of great bodily injury.

Further, that the Legislature intended to permit imposition of sentence for both the firearm use and great bodily injury enhancements in sections 1170.1, subdivisions (f) and (g), notwithstanding section 654, cannot be mistaken where the Legislature specifically rendered another subdivision of section 1170.1 subject to section 654. Section 1170.1, subdivision (a), prescribes in pertinent part:

> (a) Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. . . .

While the Legislature made clear that the terms of subdivision (a) are subject to the prohibition against double punishment, the Legislature specified that subdivisions (f) and (g) "shall not limit the imposition of any other enhancements that are applicable to [the] offense."

Moreover, the intent behind section 12022.5 is to "deter persons from creating a potential for death or injury resulting from the very presence of a firearm at the scene of a crime . . . and to deter the use of firearms in the commission of violent crimes by prescribing additional punishment for each use." (*In re Tameka C.* (2000) 22 Cal.4th 190, 196, internal quotation marks omitted.) Where the defendant is convicted of assault with a firearm (§ 245, subd. (a)(2)), as in this case, the Legislature has deemed that an enhancement pursuant to section 12022.5, if pled and proven, must be imposed. (§ 12022.5, subd. (d).) "Section 12022.7 is a legislative attempt to punish more severely those crimes that actually result in great bodily injury. It applies except where serious bodily injury is already an element of the substantive offense charged." (*People v. Guzman* (2000) 77 Cal.App.4th 761, 765, internal citations omitted.) Likewise, section 12022.7 requires an additional and consecutive term of imprisonment when a defendant personally inflicts great bodily injury during the commission of a felony. (§ 12022.7, subd. (a).)

The immediate effect of the Court of Appeal's opinion here is to largely render the great bodily injury enhancement statute superfluous, because a defendant who shoots and injures his victim would not be subject to more punishment than one who shoots at his victim but misses.

In addition, application of section 654 to the enhancements in this case would frustrate "[t]he purpose of the protection against multiple punishment [which] is to insure that the defendant's punishment will be commensurate with his criminal liability." (*Neal v. State of California* (1960) 55 Cal.2d 11, 20.) Section 12022.5 serves to punish gun use while

section 12022.7 serves to punish infliction of great bodily injury. Imposing punishment for enhancements under both of the statutes fulfills the clear legislative purpose of punishing more severely those crimes which involve gun use, as well as those crimes that inflict great bodily injury. Applying section 654 to prohibit punishment under both statutes thus undermines legislative intent. Because the purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability, the distinct legislative purposes of sections 12022.5 and 12022.7 clearly show that the Legislature did not intend to exempt a defendant from punishment when enhancements under the two statutes are pled and proven.

In sum, the Legislature has provided in clear and unambiguous language in section 1170.1, subdivisions (f) and (g), that a sentencing court may impose enhancements for both personal deadly weapon or firearm use and personal infliction of great bodily injury for the same course of conduct. The language of section 1170.1, subdivision (f), reflects the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for the infliction of great bodily injury. Likewise, the language of section 1170.1, subdivision (g), establishes that the Legislature did not intend for section 654 to prohibit the imposition of any other enhancement that is applicable to the underlying offense, including an enhancement for being armed with or using a dangerous or deadly weapon or firearm. The Court of Appeal's rejection of the People's argument in this regard contravenes the intent of the Legislature. On this basis, as well, review is necessary.

CONCLUSION

For the stated reasons, respondent respectfully urges this Court to grant this petition for review, and, upon review, to reverse the decision of the Court of Appeal.

Dated: March 1, 2011

Respectfully submitted,

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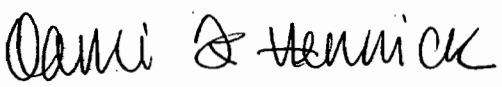

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 2,662 words.

Dated: March 1, 2011

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APPENDIX A

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

AMIR A. AHMED,

Defendant and Appellant.

E049932

(Super.Ct.No. RIF145548)

OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed as modified.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez, Vincent P. LaPietra, and Andrew S. Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.

Defendant Amir A. Ahmed shot his girlfriend once in the abdomen. According to the girlfriend, this occurred during an argument, shortly after defendant said, "Bitch, I'll shoot you." Defendant testified in his own behalf (although he contends in this appeal that he was forced to do so, because the girlfriend volunteered prejudicial information about him, and the trial court erroneously refused to grant a mistrial). According to defendant, there was no argument; the shooting occurred by accident, as he was trying to unload the gun.

A jury found defendant not guilty of either attempted murder (Pen. Code, §§ 187, subd. (a), 664) or attempted voluntary manslaughter (Pen. Code, §§ 192, subd. (a), 664), but guilty of assault with a firearm (Pen. Code, § 245, subd. (a)(2)). An enhancement for the personal use of a firearm (Pen. Code, § 12022.5, subd. (a)) and an enhancement for the personal infliction of great bodily injury under circumstances involving domestic violence (Pen. Code, § 12022.7, subd. (e)) were both found true. Defendant admitted two 1-year prior prison term enhancements. The trial court sentenced defendant to a total of 13 years in prison.

We find no error affecting the conviction. However, we do agree with defendant that the imposition of separate and unstayed sentences on both the firearm use enhancement and the great bodily injury enhancement violated Penal Code section 654 (section 654). Hence, we will stay the firearm use enhancement.

I

FACTUAL BACKGROUND

A. *The Prosecution's Case.*

Defendant and victim Larin Romo lived together "[o]ff and on." They had a daughter together. The relationship was always "rocky"; they "fought all the time . . . ." During the relationship, they both used methamphetamine.

On August 7, 2006, defendant called Romo and asked her to come over to his apartment. At that point, they had been broken up for about a month.

Around 1:00 a.m. on August 8, Romo arrived with two friends, Mike McPeak and Christina Solares. Defendant was just getting home himself; he entered the apartment with them. Defendant and Romo started arguing. After 10 or 15 minutes, Solares and McPeak left.

Defendant and Romo continued to argue about their relationship. Romo called defendant "names." Romo was sitting on the kitchen floor; she was taking "stuff" out of bags and putting it away. Defendant was sitting at a table about 10 feet away. He had a gun. Romo saw him put it away in a bag. This was "normal"; she had known him to carry a gun before. He "might have" said "something like, [']Bitch, I'll shoot you.[']"

Suddenly, Romo was shot in the stomach. She heard the shot, but she was not looking at defendant when it was fired. Defendant carried her into the bedroom and laid her on the bed. He was upset and crying. At first, he did not want to call for help. In Romo's opinion, "he was more worried about himself getting in trouble than he was

about me dying." She promised him "if he called the cops, that [she] wouldn't tell them that he did it." Defendant then called 911.

When police officers arrived, defendant let them in. Romo told them she had been out on the balcony when she was shot by an unknown person. Defendant consented to a search of the apartment. In a desk drawer in defendant's bedroom, inside a box of staples, the officers found a .38-caliber handgun magazine.[1] They did not find any gun or any shell casings.

Romo had been struck by a single bullet, which entered her lower front abdomen, broke her pelvis, and lodged in her hip. It perforated her colon twice and her small intestine seven times. These wounds would have been fatal if not promptly treated.

The next day, August 9, the police interviewed defendant. He said he did not know who shot Romo. The police also searched his apartment again. This time, they found a single live .38-caliber bullet. It was in a ring box, under the cardboard supporting a ring.

Also on August 9, the police interviewed Romo at the hospital. She said again that she had been out on the balcony when she was shot, and she did not know who shot her. However, she also said, "I'm afraid to tell you who shot me."

On August 15, the police interviewed Romo again at the hospital. They told her they knew that defendant was the one who shot her, and it was time for her to be honest.

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[1] The officer who found the magazine described it as .22-caliber. A demonstration at trial, however, showed that it would hold .38-caliber bullets.

This time, Romo said that defendant shot her. She added, "[H]e was mad at me and he just shot me, like nonchalantly, like whatever." Her statement was consistent with her testimony at trial.

While Romo was in the hospital, she told a friend, "Blur[2] shot me." She added, "[I]f he hadn't been afraid, he would have let me die." During a CAT scan, Romo told the technician, "My baby's daddy shot me." She likewise told the discharge nurse that she had been shot by the father of her child.

As of February 2007, Romo was in jail.[3] She realized that the bullet was coming to the surface, because her "hip was starting to swell and the skin was turning black . . . ." At first, she ignored it, because she did not want "them" to have the bullet to use as evidence against defendant. Once the wound started bleeding, however, she sought medical attention. The bullet was removed and found to be .38 caliber. It was tarnished and corroded, which made it impossible to determine what kind of gun it had been fired from.

In February 2007, at the preliminary hearing, Romo testified that she was out on the balcony and did not know who shot her. At trial, she explained that she lied because she was "afraid" — not of defendant, but of some people who knew defendant and who had told her "to keep [her] mouth shut." She was also afraid because she was going to be

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2 Defendant's nickname was "Blur."

3 Romo admitted two prior felony convictions, for burglary and for identity theft.

in custody, where "[t]hey don't like snitches." In addition, she wanted to protect defendant.

In May 2007, the police interviewed Romo one more time. She admitted that, during the argument, she called defendant a "sand nigger." Otherwise, her statement was consistent with her testimony at trial.

B. *Defense Evidence.*

Defendant admitted shooting Romo, but he denied doing so intentionally.

Defendant testified that it was Romo who asked to come over and visit him. When she called, he was at the home of his friend Darrin. Darrin owed defendant $100 but did not have the money, so he gave defendant a .38-caliber semiautomatic instead. He told defendant there was one bullet in it.

Defendant got back to his apartment just as Romo, McPeak, and Solares were arriving. All four of them were "on" methamphetamine. Defendant had been up for a couple of days and was not thinking straight. He denied that he had any argument with Romo or that she called him any names.

Defendant testified that he asked McPeak to take the gun, because he (defendant) was on parole. Defendant then proceeded to unload the gun. He racked the slide twice — once to move the bullet into the chamber, and once to "pop" the bullet out of the gun. This left the hammer cocked. Defendant then pulled the trigger to release the hammer. Actually, however, there was a second bullet in the gun, so the gun went off. It fell out of defendant's hand and onto the floor.

When defendant realized that Romo had been hit, he carried her into the bedroom. By the time he went back out, McPeak and Solares were gone. The gun and the empty shell casing were also gone; he assumed that McPeak and Solares had taken them. The live bullet and the empty magazine were still on the floor. Defendant hid the live bullet in the ring box and the magazine in the staple box. Meanwhile, he called 911.

Defendant claimed it was Romo who suggested telling the police that she had been shot on the balcony. He thought that Romo was testifying falsely because she "is the kind of person if she can't have me nobody can."

Defendant admitted that he and Romo used methamphetamine "[a]ll the time." He also admitted having prior convictions for possession of marijuana for sale, possession of methamphetamine for sale, transportation of methamphetamine, unlawful possession of a firearm, and possession of a fictitious check.

Security videos showed that Romo arrived at defendant's apartment building, with McPeak and Solares, at 1:07 a.m.; McPeak and Solares left at 1:27 a.m. Police officers were dispatched to the scene around 1:30 a.m. McPeak was not carrying a bag when he arrived, but he was when he left.

The manager of defendant's apartment building testified that she saw defendant on the morning after the shooting. He was sobbing and his head was bowed.

II

ROMO'S VOLUNTEERED TESTIMONY THAT DEFENDANT HAD BEEN IN PRISON AND "BEAT THE SHIT OUT OF" HER

Defendant contends that the trial court erred by denying his motion for a mistrial, which was based on Romo's misconduct in volunteering prejudicial information.

A. *Additional Factual and Procedural Background.*

On defendant's motion, the trial court bifurcated the trial of the prior prison term enhancement allegations.

When Romo was on the stand, on direct, she testified:

"Q And do you know when [defendant] started living there?

"A I guess *when he paroled* in March of [2006], I think." (Italics added.)

She also testified:

"Q Did you know the defendant to be using drugs when you first started your relationship with him?

"A I don't — he wasn't — *he had just got out of prison.*" (Italics added.)

Then, on cross-examination, she testified:

"Q You didn't come around to see your daughter because you were at the time using a lot of methamphetamine?

"A And so was Amir. *Amir used to beat the shit out of me*, okay. You really want to know what kind of person he is.

"Q I didn't ask you what kind of person he was[.]

"A I don't see anything what you're saying has to do with anything." (Italics added.)

At the next opportunity, defense counsel moved for a mistrial, based on these three instances of volunteered testimony by Romo. He argued, "I made a motion for bifurcated trial on . . . the priors . . . so that the jury wouldn't know that my client is a convicted felon. . . . [N]ow that they know that, . . . it's impossible for him to get a fair trial . . . ." He also argued: "If the motion is denied, it might . . . force me to put my client on the stand, since really the only reason to keep him off the stand is to keep his status as a convicted felon away from the jury. . . . I may be forced into a tactical position that I would not otherwise have made." He added, "I make that motion [on] [f]ederal due process . . . grounds, as well." He specifically noted that his motion was based on witness misconduct, not prosecutorial misconduct.

The trial court continued the hearing on the motion, telling the prosecutor, "[S]how me why this isn't prejudicial . . . ." In response, the prosecution filed a written opposition. After hearing further argument, the trial court denied the motion. It explained, "I can't . . . conclude . . . that it's incurable by admonition."

Defense counsel had previously declared, " . . . I would not be requesting an admonition . . . because I don't believe an admonition will cure the prejudice, it will only highlight the prejudice . . . ." Later, however, he did request an admonition, which the trial court gave, to disregard Romo's testimony about "other acts of alleged domestic violence by the defendant."

B. *Analysis.*

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 198-199.) "In reviewing rulings on motions for mistrial, we apply the deferential abuse of discretion standard. [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.)

"'Although most cases involve prosecutorial or juror misconduct as the basis for [a mistrial] motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 211, brackets in original.)

Here, the trial court could reasonably find that any prejudice was not incurable, for several reasons.

First, when a witness volunteers the fact that the defendant has a criminal record, we generally presume that an admonition will be effective to cure any potential prejudice. (E.g., *People v. Curtis* (1965) 232 Cal.App.2d 859, 867.)

Second, it would have been obvious to the jury that Romo had an ax to grind — that she was volunteering prejudicial information to try to smear defendant. Indeed, she admitted:

"Q You just said Amir used to beat the shit out of you, right?

"A Yes. [¶] . . . [¶]

"Q Is that something you just wanted to throw in there even though I didn't ask you?

"A Yes."

Third, the jury did not learn the nature of defendant's prior conviction. If it even speculated, it most likely would have assumed that it was related to his use of methamphetamine. The fact that defendant used methamphetamine had already come in, without any objection by defense counsel.[4] Thus, the jury already knew that defendant had committed prior felonies, regardless of whether he had been convicted of them.

Fourth — and most importantly — we have the benefit of knowing the verdict that the jury ultimately returned. It *acquitted* defendant of both attempted murder and attempted voluntary manslaughter, convicting him merely of assault with a firearm. Obviously, the jury was not inflamed or acting out of passion and prejudice; it was able to reach a verdict based on an impartial assessment of the evidence under the law.

Defendant's key claim of prejudice is that he was supposedly forced to take the stand. We cannot see, however, how this was prejudicial to him. Indeed, it is almost inconceivable that he would not have taken the stand in any event. He was faced with a charge of attempted murder. Romo's testimony included evidence of an intent to kill:

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[4] Defendant complains that Romo volunteered the fact that he used drugs, but this was already in evidence. Moreover, as he himself notes, this evidence had an exculpatory tendency — "the defense theory [was] an accidental shooting resulting from a lack of sleep and the use of methamphetamine."

There was an argument; defendant waited until any potential witnesses left, then armed himself with a gun; he said something like, "Bitch, I'll shoot you"; and after Romo was shot, he was reluctant to call 911. By taking the stand, however, defendant was able to assert that the shooting was an accident. He was also able to deny key portions of Romo's testimony and to ascribe to her a motive for lying. Indeed, his testimony was in some ways more consistent with the physical evidence — including the videos showing McPeak and Solares leaving just three minutes before the police were called, the absence of the gun, and the presence of the single .38 bullet. The jury's verdict acquitting him of attempted murder and attempted voluntary manslaughter indicates that his strategy was effective.

Defendant also complains about Romo's testimony that she had known him to carry a gun before. This testimony, however, was not volunteered. The prosecutor asked, "[D]uring the course of your relationship, did you know Amir to carry a gun?," and Romo answered, "Yes . . . ." Defense counsel did not object. And for good reason — this evidence was relevant and admissible. It tended to confirm that defendant was, in fact, in possession of a gun. Moreover, it anticipatorily rebutted defendant's eventual testimony that he just fortuitously happened to be in possession of a gun that he had accepted as repayment of a debt.

Defendant argues, alternatively, that the prosecutor committed misconduct by failing to caution Romo not to testify about his charged or uncharged bad conduct. At

trial, however, defense counsel specifically disclaimed prosecutorial misconduct as a ground for his motion for mistrial. Hence, this contention has not been preserved.

In any event, there was no showing that the prosecutor knew or should have known that Romo would volunteer this information. None of the prosecutor's questions were designed to elicit it; Romo just blurted it out. (Cf. *People v. Schiers* (1971) 19 Cal.App.3d 102, 112-113 [from officer's testimony about lie detector test at preliminary hearing, prosecutor should have known officer would volunteer similar testimony at trial].) The trial court specifically found: " . . . I see absolutely nothing here to suggest that either [c]ounsel engaged in misconduct or in any way tried to elicit this testimony. And clearly neither one of you knew precisely how she was going to testify. So I'm sure both of you were somewhat startled . . . . I'm not criticizing anyone . . . ." Thus, no misconduct appears.

Finally, because the trial court could properly find that Romo's volunteered testimony was not incurably prejudicial, defendant's due process right to a fair trial was not violated.

III

THE APPLICATION OF SECTION 654 TO THE FIREARM USE ENHANCEMENT AND THE GREAT BODILY INJURY/DOMESTIC VIOLENCE ENHANCEMENT

Defendant contends that the imposition of unstayed terms on both the firearm use enhancement (Pen. Code, § 12022.5, subd. (a)) and the great bodily injury/domestic

violence enhancement (Pen. Code, § 12022.7, subd. (e)) constituted multiple punishment in violation of section 654.

Section 654, subdivision (a), as relevant here, provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

" . . . '"Section 654 has been applied not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654." [Citation.] [¶] Whether *a course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)

"'"A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." [Citation.]' [Citation.]" (*People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1310 [Fourth Dist., Div. Two].)

Cases sometimes ask whether section 654 applies to enhancements. However, there is not necessarily a single yes or no answer to this question. As the law now stands, section 654 may apply to some enhancements under some circumstances.

For example, in *People v. Douglas* (1995) 39 Cal.App.4th 1385 [Fourth Dist., Div. Two], this court held that section 654 *can* preclude punishment for both (1) kidnapping and (2) a kidnapping enhancement (Pen. Code, § 667.8) attached to a different underlying offense. (*Douglas*, at pp. 1392-1395.)

On the other hand, in *People v. Coronado* (1995) 12 Cal.4th 145, the Supreme Court held that section 654 does not apply to an enhancement (such as a prior prison term enhancement) that is based on the defendant's *status*, as opposed to the defendant's *conduct*. (*Coronado*, at pp. 156-159.) It explained that section 654, by its terms, prohibits multiple punishment for a single "act or omission." Because a status-based enhancement "does not implicate multiple punishment of an act or omission, section 654 is inapplicable." (*Coronado*, at pp. 156-158.)

In *People v. Palacios* (2007) 41 Cal.4th 720, the Supreme Court held that section 654 does not bar punishment for more than one firearm use enhancement under Penal Code section 12022.53. (*Palacios*, at pp. 725-733.) It reasoned that the Legislature's use of the words "[n]otwithstanding any other provision of law" in Penal Code section 12022.53 make that section an express exception to the application of section 654. (*Palacios*, at pp. 728-730.)

In *People v. Chaffer* (2003) 111 Cal.App.4th 1037, the court held that section 654 does not bar punishment for both (1) an offense and (2) a great bodily injury enhancement (Pen. Code, § 12022.7) when attached to that offense. (*Chaffer*, at pp. 1044-1046.) It reasoned, in part, that "If we were to apply the general provisions of section 654 to the more specific [great bodily injury] enhancement, it would nullify section 12022.7, because the enhancement and underlying offense *always* involve the same act." (*Id.* at p. 1045.)

Alas, none of these cases addressed the precise situation here.

This is, at bottom, an issue of statutory interpretation. Therefore, we begin with the wording of section 654. Defendant both personally used a firearm under Penal Code section 12022.5 (section 12022.5) and personally inflicted great bodily injury during domestic violence under Penal Code section 12022.7 (section 12022.7) by a single "act" — pulling the trigger. Moreover, this act is made "punishable" by these two different statutes (at least when performed in the course of the commission of an underlying offense). Hence, it would seem that section 654 would apply.

Having so concluded, we can find no exception or other reason why section 654 would *not* apply. Under *Coronado*, these enhancements, unlike a prior prison term enhancement, are based on the defendant's conduct, not on his or her status. (*People v. Coronado*, *supra*, 12 Cal.4th at p. 157) Unlike in *Palacios*, section 12022.5 and section 12022.7 do not purport to apply notwithstanding any other law. And unlike in *Chaffer*, applying section 654 here would not nullify either section 12022.5 or section 12022.7.

Finally, the multiple victim exception to section 654 (see generally *People v. Oates* (2004) 32 Cal.4th 1048, 1063) does not apply here, because defendant had only a single victim.

The People argue that section 654 should *never* apply to an enhancement, because an enhancement does not define a crime or offense; rather, it specifies the punishment to be imposed. There is some case law that supports this position. (E.g., *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1355 [Second Dist., Div. Six]; *People v. Parrish* (1985) 170 Cal.App.3d 336, 344 [Fifth Dist.]; *People v. Boerner* (1981) 120 Cal.App.3d 506, 511 [Fourth Dist., Div. One]; but see *People v. Dobson* (1988) 205 Cal.App.3d 496, 501 [Fourth Dist., Div. One].) Arguably, these cases have been undercut by the famous trilogy of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].) We need not decide if this is so, however, because this court is already committed to the position that section 654 *can* apply to an enhancement, at least under some circumstances. (*People v. Douglas*, *supra*, 39 Cal.App.4th at pp. 1392-1395; accord, *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817-819 [Fourth Dist., Div. Two].) If only as a matter of stare decisis, we adhere to this view.

The People also argue that Penal Code section 1170.1 (section 1170.1), subdivisions (f) and (g) create an express statutory exception to section 654. Section 1170.1, subdivision (f) provides: "When two or more enhancements may be imposed for

being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense*, including an enhancement for the infliction of great bodily injury." (Italics added.) Similarly, section 1170.1, subdivision (g) provides: "When two or more enhancements may be imposed for the infliction of great bodily injury on the same victim in the commission of a single offense, only the greatest of those enhancements shall be imposed for that offense. *This subdivision shall not limit the imposition of any other enhancements applicable to that offense*, including an enhancement for being armed with or using a dangerous or deadly weapon or a firearm." (Italics added.) Thus, it is only "[t]h[ese] subdivision[s]" that do not limit the imposition of other enhancements. Other statutes — including section 654 — may still limit the imposition of other enhancements.

Penal Code section 1170.1 does contain one express statutory exception to section 654, but it is in subdivision (h), and it does not apply here. Penal Code section 1170.1, subdivision (h) provides: "For any violation of an offense specified in Section 667.6, the number of enhancements that may be imposed shall not be limited, regardless of whether the enhancements are pursuant to this section, Section 667.6, or some other provision of law. Each of the enhancements shall be a full and separately served term." This means that section 654 does not limit the enhancements that may be applied to a defendant who is convicted of one of the sexual offenses specified in Penal Code section 667.6. (See

People v. Boerner (1981) 120 Cal.App.3d 506, 510-511 [dealing with former Pen. Code, § 1170.1, subd. (d), the statutory predecessor of current Pen. Code, § 1170.1, subd. (h)].) By negative implication, section 654 does limit the enhancements that may be imposed on a defendant convicted of any other offense.

Finally, the People argue that, because the act of using a firearm is not the same as the act of inflicting great bodily injury, these two enhancements do not punish the same act. The cases they cite in support of this argument, however, are inapposite. *People v. Davis* (1995) 41 Cal.App.4th 367, involved the application of *In re Culbreth* (1976) 17 Cal.3d 330 (since overruled), not section 654. (*Davis*, at pp. 372-375.) *People v. Alvarez* (1992) 9 Cal.App.4th 121 likewise involved *Culbreth*. (*Alvarez*, at pp. 125-128.) Although it also considered section 654 briefly, it held that the multiple victim exception applied. (*Alvarez*, at pp. 126, 128.) It is clear that under section 654, the test is not whether the elements of the relevant statutes are the same; rather, it is whether the defendant violated them with the same intent and objective.

Here, defendant both used a firearm and inflicted great bodily injury by means of a single act. Almost by definition, he incurred both enhancements while acting with a single intent and objective. We therefore conclude that the sentence violates section 654. The appropriate appellate remedy is to stay the sentence on the lesser of the two enhancements. (*People v. Norrell* (1996) 13 Cal.4th 1, 9.) We will do so.

IV

DISPOSITION

The judgment with respect to the conviction is affirmed. The trial court is directed to modify the judgment with respect to the sentence by staying execution of the consecutive three-year term imposed on the personal firearm use enhancement. As a result, the total sentence will be reduced to 10 years in prison. This stay will become permanent once defendant has served the remainder of his sentence. The superior court clerk is directed to prepare a new sentencing minute order and a new abstract of judgment and to forward a certified copy of the amended abstract to the Director of the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, 1216.)

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
Acting P.J.

We concur:

KING
J.

MILLER
J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Amir Ahmed**
No.: **E049932**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 1, 2011, I served the attached by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on March 1, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 1, 2011, at San Diego, California.

Arlene M. Ryan
Declarant

Arlene M. Ryan
Signature

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