Filed 7/20/06

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH WAYNE CHANCE, Defendant and Appellant.	C048825 (Super. Ct. No. P03CRF0664)

APPEAL from a judgment of the Superior Court of El Dorado County, Eddie T. Keller, J. Reversed in part and affirmed in part.

Appeals Unlimited and Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson and Mary Jo Graves, Assistant Attorneys General, Harry J. Columbo and Peter W. Thompson, Deputy Attorneys General, for Plaintiff and Respondent.

On November 29, 2003, three sheriff's deputies approached the El Dorado County home of defendant Kenneth Wayne Chance to serve felony arrest warrants on him. The deputies were dressed in black tactical vests with gold badges and insignia with the word "Sheriff."

Defendant apparently noticed the deputies and ran away from the house. He was pursued on foot by Sergeant Tom Murdoch.

When Sergeant Murdoch reached the base of a hill, defendant was ahead by 40 to 50 feet. Murdoch twice yelled, "Sheriff's Department, stop." Defendant glanced back, dropped a portable phone, pulled out a nine-millimeter semi-automatic handgun, and continued running with the gun in his right hand. Murdoch continued to chase defendant up a driveway to a residence. Defendant ran around the front of a travel trailer parked in the yard.

Not wanting to get shot, Sergeant Murdoch did not follow defendant's path around the front of the trailer but went to the back of the trailer from the opposite side, with his gun drawn. Murdoch "pie[d] off" the corner of the trailer (slowly moved around the corner, gradually increasing his range of vision). Murdoch peered around the *back* of the trailer and saw defendant standing with his chest pressed against the side of the trailer, looking toward the *front* of the trailer, right arm extended holding the handgun in a shooting position, pointed toward the front of the trailer, left hand supporting the right hand. As Murdoch approached with his handgun drawn and pointed at defendant, defendant turned and looked over his right shoulder

at him. Defendant initially ignored Murdoch's repeated demands to drop the gun. Murdoch did not shoot because he knew defendant would have to move before he could turn the gun and fire at Murdoch. After what seemed like a long time to Murdoch, defendant moved the gun to the center of his body, between his body and the trailer, and then flipped the gun onto the ground behind him. Defendant started to run. Murdoch chased him. Defendant fell, was tackled, and offered no further resistance.

When Deputy Bears recovered defendant's gun, it was discovered that the safety was not on and the magazine contained 15 rounds, but there was no round in the chamber. Sergeant Murdoch was unaware of the absence of a round in the chamber until after the gun was recovered by Deputy Bears. If defendant had pulled the trigger, nothing would have happened. Defendant would have had to pull back the slide and then pull the trigger in order to fire the gun. The slide is spring-loaded; once the slide is pulled back and let go, it will pick up the top bullet and feed it right into the chamber. It can be done with one hand. Murdoch never saw defendant attempt to pull back the slide. Murdoch was not aware of defendant ever pointing the gun at him. Murdoch testified it would be speculation to say what would have happened had he followed defendant's path, but Murdoch believed defendant's stance indicated defendant was going to shoot him.

Following a trial by jury, defendant was convicted of attempted murder (Pen. Code, §§ 187, 664[1]; count I). In connection with this conviction, the jury made special findings that defendant knew or reasonably should have known the victim of the attempted murder was a peace officer and that the attempted murder was willful, deliberate, and premeditated. The jury found true allegations that defendant personally used a firearm (§§ 12022.5, subd. (a)(1) & 12022.53, subd. (b)). The jury further convicted defendant of assault with a firearm on a peace officer (§ 245, subd. (d)(1); count II), possession of a firearm by a felon (§ 12021, subd. (a)(1); count III), and possession of ammunition by a person prohibited from possessing a gun (§ 12316, subd. (b)(1); count IV). The trial court found defendant had been convicted of prior serious or violent felonies (§ 667, subds. (b)-(i)).

The trial court sentenced defendant to a total term of 70 years to life.

On appeal, defendant claims, among other things, that no substantial evidence supports his convictions for assault with a firearm and attempted murder.

We agree with defendant that substantial evidence does not support his assault conviction. However, we find substantial evidence supports his conviction for attempted murder. We shall therefore reverse defendant's assault conviction and otherwise

---

[1] Undesignated statutory references are to the Penal Code.

affirm defendant's convictions. We shall also explain why we remand for resentencing.

DISCUSSION

I. Assault - Substantial Evidence

Defendant asserts he does not dispute the facts but challenges the legal conclusions to be drawn from the facts.

In substantial evidence review, we review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence, i.e., evidence that is reasonable, credible, and of solid value, from which a reasonable trier of fact could find defendant guilty beyond a reasonable doubt. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

Section 245, subdivision (d)(1), provides: "Any person who commits an assault with a firearm upon the person of a peace officer or firefighter, and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years." (§ 245, subd. (d)(1).)

Section 240 provides, "An assault is an unlawful attempt, *coupled with a present ability*, to commit a violent injury on the person of another." (§ 240; italics added.)

In *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*), our Supreme Court clarified the crime of assault in pertinent part as follows:

"In determining which meaning of 'attempt' the Legislature intended to use in section 240, we must look to the historical 'common law definition' of assault. (Code commrs. note foll. Ann. Pen. Code, § 240 (1st ed. 1872, Haymond & Burch, commrs.-annotators) pp. 104-105.) '"The original concept of criminal assault developed at an earlier day than the doctrine of criminal attempt in general. . . ."' (*Colantuono, supra,* 7 Cal.4th at p. 216, quoting Perkins on Criminal Law (2d ed. 1969) ch. 2, § 2, pp. 118-119.) Assault 'is not simply an adjunct of some underlying offense [like criminal attempt], but an independent crime statutorily delineated in terms of certain unlawful conduct *immediately antecedent to battery*.' (*Colantuono*, at p. 216.) Unlike criminal attempt where the '"act constituting an attempt to commit a felony may be more remote,"' '"[a]n assault is an act done toward the commission of a battery"' and *must '"immediately"' precede the battery.* (Perkins & Boyce, Criminal Law (3d ed. 1982) p. 164 (Perkins).)" (*Williams, supra,* 26 Cal.4th 779, 786; italics added.)

The *Williams* court continued, "a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Williams, supra,* 26 Cal.4th at p. 788.)

In this case, defendant's act of pointing his firearm was not "immediately antecedent to battery" and did not "'immediately precede the battery.'" (*Williams, supra,* 26 Cal.4th 779, 786.) The record shows that defendant was not

pointing a gun at Sergeant Murdoch or even at a place he thought the officer was, but at a place where the defendant thought the officer would appear. In fact the officer was behind the defendant and defendant had to look over his shoulder to see him. Sergeant Murdoch testified that he did not shoot because he knew defendant would have to move before he could turn the gun and fire at him. He further testified that it would be speculation to say what would have happened had he followed defendant's path so that he was in front of the defendant.

On this evidence, a reasonable person could not conclude that a battery would "directly" and "immediately" result from defendant's conduct. (*Williams, supra,* 26 Cal.4th 779, 788.) Defendant did not have the "present ability[] to commit a violent injury on the person of another." (§ 240.)

The cases cited and relied on by the People are distinguishable.

The facts in *People v. McMakin* (1857) 8 Cal. 547 (*McMakin*) are described by the court as follows: "John L. Green, the person alleged to have been assaulted, was riding on horseback, on his way to San Francisco, along a trail that ran through certain lands in dispute between the parties, when he was intercepted by the prisoner, who threatened to shoot the prosecutor if he did not leave the land, at the same time drawing a Colt's revolver, which he held in a perpendicular line with the body of Green, but with the instrument so pointed that the ball would strike the ground before it reached the witness,

had the pistol been discharged. The prosecutor turned his horse and rode off, and the prisoner did not pursue him." (*Ibid.*)

Affirming a conviction for assault with a deadly weapon, our Supreme Court said, "If the prisoner did not intend to use the pistol at all, except for the sole purpose of intimidation, then, it is apprehended, the offense would not have been complete. But when the intent is to go further, if necessary, to accomplish the purpose intended, and preparations are actually made, and weapons drawn, and placed in a position to be instantly used offensively, and with effect, against another, and not in self defense, it would seem to be clear that the offense would be complete. Suppose, in this case, the prosecutor had instantly killed the prisoner, would it have been justifiable homicide? The prisoner put himself in a position to use the weapon in an instant, having only to elevate the pistol and fire, at the same time declaring his intention to do so, unless the prosecutor would leave the ground." (*McMakin, supra,* 8 Cal. 547, 548.)

The court continued, "The drawing of a weapon is generally evidence of an intention to use it. Though the drawing itself is evidence of the intent, yet that evidence may be rebutted when the act is accompanied with a declaration, or circumstances, showing no intention to use it. But when the party draws the weapon, although he does not *directly* point it at the other, but holds it in such a position as enables him to use it before the other party could defend himself, at the same time declaring his determination to use it against the other,

the jury are fully warranted in finding that such was his intention." (*McMakin, supra,* 8 Cal. 547, 549.)

McMakin, supra, 8 Cal. 547, is distinguished from the instant case on two grounds: (1) there the pistol was aimed in the direction of the victim, so that the weapon could "be instantly used," and (2) there the victim could not defend himself, whereas in the instant case Sergeant Murdoch, who was behind defendant, was capable of, and in fact did, defend himself quite competently, thank goodness.

In *People v. Hunter* (1925) 71 Cal.App. 315 (*Hunter*), defendant's wife had commenced divorce proceedings against him. Defendant went to her apartment and began drinking. After an altercation with her, defendant said, "I am going to kill you" and began to pull a gun out of his sock. The wife jumped out the window to avoid being shot. (*Id.* at pp. 317-318.)

On these facts, the court concluded: "The evidence is ample to show that the defendant had the intention and the present ability to kill his wife. The only question remaining is whether he attempted to carry his purpose into execution. To accomplish that purpose, it was necessary for him to take the gun from his sock, to point it at his wife, and to pull the trigger. Any one of these would constitute an overt act toward the immediate accomplishment of the intended crime. He was endeavoring to take the gun from his sock when his wife thwarted the attempt to kill her by jumping out of the window. Naturally she did not wait to see whether he succeeded in getting hold of the gun or whether he pointed it at her, and it is immaterial

whether he did either. The actual transaction had commenced which would have ended in murder if it had not been interrupted. In *People v. Stites*[(1888)] 75 Cal. 570 [(*Stites*)], the defendant approached a railroad track with an explosive in his possession which he intended immediately to place upon the track but, because of the presence of police officers, he retreated without accomplishing his purpose. It was held that he was guilty of an attempt to place an obstruction upon the track. (See, also, *People v. Mayen*[(1922)] 188 Cal. 237, 256 [(*Mayen*)], and cases there cited.) The facts in the instant case are not essentially different in principle from those in [] *McMakin,* [*supra,*] 8 Cal. 547, and *People v. Piercy*[(1911)] 16 Cal.App. 13 [(*Piercy*)], where like judgments were affirmed." (*Hunter, supra,* 71 Cal.App. 315, 319.)

We doubt that *Hunter*'s analysis (*Hunter, supra,* 71 Cal.App. 315) remains sound in light of the discussion by our Supreme Court in *Williams, supra,* 26 Cal.4th 779. The two cases relied on primarily in *Hunter--Stites, supra,* 75 Cal. 570 and *Mayen, supra,* 188 Cal. 237--did not involve assaults but rather involved *attempts* to commit crimes. We have recounted above how *Williams* distinguishes between assaults and attempts, and expressly states, "the '"act constituting an attempt . . . may be more remote."'" (*Williams, supra,* 26 Cal.4th at p. 786.)[2]

---

[2] We have already distinguished *McMakin, supra,* 8 Cal. 547. With respect to the other authority relied on by *Hunter--Piercy, supra,* 16 Cal.App.13--it, too, is distinguishable from the instant case. There the intoxicated defendant pulled out a

But even assuming *Hunter* remains good law it is distinguishable. Reading the entire scenario between defendant and victim, it is apparent the defendant would have drawn the gun from his sock in the next instant and shot the victim, who was saved only by jumping out the window. There, the prospect of violent injury was "immediate"; here, it was not.

In *People v. Thompson* (1949) 93 Cal.App.2d 780, defendant pointed a gun toward two sheriff's deputies, although the gun was pointed at the ground. Affirming a conviction for two counts of assault with a deadly weapon, the court said the gun "was in a position to be used instantly." This case is distinguishable for the same reasons as *McMakin, supra,* 8 Cal. 547, discussed above, where a gun was also pointed at the ground but in the direction of the victim.

Finally, in *People v. Raviart* (2001) 93 Cal.App.4th 258, the defendant's shooting of a peace officer was averted when the officers shot him. The officers were in pursuit of defendant around a building. "As Officer Keller came around the corner [of the building], he saw defendant pointing a chrome handgun directly at him. At the same time, he heard Officer Wagstaff yell 'Gun.' Both officers fired at defendant," who was hit and on the ground. (*Id*. at p. 265.) This court said, "As for defendant's contention that he did not have the present ability to injure Officer Wagstaff because Wagstaff was in a 'protected

---

loaded gun in the immediate presence of the victim and would have shot the victim if he had not been disarmed. (*Id.* at p. 15.)

position' behind the corner of the building when the shooting occurred, that argument fails on the facts and on the law. First, as noted above, Agent Moutinho testified that Wagstaff actually stepped into the open and directed a command at defendant before yelling 'Gun' and diving for cover. The jury could have found beyond a reasonable doubt that defendant had the ability to shoot Officer Wagstaff before he dove for cover. Furthermore, both Agent Moutinho and Officer Keller testified that Officer Wagstaff fired at defendant from around the corner, which means, at the very least, part of Wagstaff's body was still exposed to injury from defendant's gun as the shooting occurred. Second, the fact that Officer Wagstaff may have been sheltered, in whole or in part, by the building did not preclude the jury from finding defendant had the present ability to injure him. 'Once a defendant has attained the means and location to strike immediately he has the "present ability to injure." The fact an intended victim takes effective steps to avoid injury has never been held to negate this "present ability."' (*People v. Valdez* (1985) 175 Cal.App.3d 103, 113 [(*Valdez*)].)" (*People v. Raviart, supra,* 93 Cal.App.4th at p. 267.)

Raviart is distinguished from this case in that there the two officers were directly in the line of fire. The same goes for *Valdez, supra*, 175 Cal.App.3d 103, where the defendant fired a shot at a gas station cashier, but the shot was deflected by bullet-proof glass. In the instant case, the victim, Sergeant Murdoch, was at a distance behind defendant and never in the

line of fire. Nor was the likely path of defendant's bullet, aimed at a victim, stymied by a physical barrier such as a wall or pane of bullet-proof glass.

We conclude that no substantial evidence supports defendant's conviction for assault with a firearm on a peace officer.

II. Attempted Murder - Substantial Evidence

Defendant next contends the evidence was insufficient to show he committed an attempted murder. We disagree.

Here, in connection with its verdict finding defendant guilty of attempted murder, the jury made a special finding that defendant or knew reasonably should have known the victim was a peace officer. These verdicts put in play section 664, former subdivision (e), which provided as relevant at the time of defendant's offense in 2003: "[I]f attempted murder is committed upon a peace officer or firefighter, . . . and the person who commits the offense knows or reasonably should know that the victim is such a peace officer or firefighter engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.

"This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and

declares that this paragraph is declaratory of existing law." (Stats. 1997, ch. 412, § 1.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623, quoted in *People v. Smith* (2005) 37 Cal.4th 733, 739.) The evidence must show express malice, i.e., a deliberate intention to kill a human being unlawfully. (§ 188; *People v. Bland* (2002) 28 Cal.4th 313, 327; *People v. Carpenter* (1997) 15 Cal.4th 312, 391.) Intent may be proven through circumstantial evidence, including the defendant's words and actions. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Defendant argues there was no evidence of a direct but ineffectual act in furtherance of an intent to kill. We disagree.

The fact that no substantial evidence supports defendant's conviction for assault with a firearm does not suggest there is a lack of substantial evidence of attempted murder. Thus, in *Valdez, supra*, 175 Cal.App.3d 103, the court said, "The real function of this 'present ability' element in common law assault as incorporated in the California statute is to require the perpetrator to have gone beyond the minimal steps involved in an attempt. That is, he must have come closer to inflicting injury than he would have to in order to satisfy the elements of an attempt. 'The emphasis . . . was upon the very strict interpretation of "proximity" in the law of assault. . . . (I)t

has been said: "This is a clear recognition of the principle that an attempt, or the overt act which is the initial stage thereof, does not require a physical act in the way of an assault or advance upon the person of the intended victim." Therefore, since one may be guilty of an attempt to commit murder or rape, for example, without coming close enough to his intended victim to commit an assault, it follows that the attempt is a lesser included offense in a prosecution for an aggravated assault of that nature.' (Perkins on Criminal Law [(1969)] p. 119.)

"Thus, because of the 'present ability' element of the offense, to be guilty of assault a defendant must have maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim. (Thus, the emphasis is on the word 'present' as much as the word 'ability.') The policy justification is apparent. When someone has gone this far he is a greater and more imminent threat to his victim and to the public peace than if he is at an earlier stage of an attempted crime. In contrast, a defendant can be found guilty of an ordinary attempt even if intercepted on his way to a location which would be within striking distance of his intended victim (e.g., [*Stites, supra,*] 75 Cal. 570) or while assembling the means to attack this target (e.g., *People v. Lanzit* (1925) 70 Cal.App. 498.)" (*Valdez, supra*, 175 Cal.App.3d at p. 112.)

In our case, the jury could conclude that defendant was poised to kill the deputy with a loaded firearm and was

prevented from doing so only because the deputy came up behind him by surprise. This is a direct but ineffectual act sufficient for attempted murder. The fact that no bullet was in the chamber (but a fully-loaded magazine was in the gun) is not sufficient to deflect the jury's finding that defendant acted with intent to kill, with malice and premeditation. Because defendant was in a firing position, we reject defendant's arguments that waiting with the gun did not show intent to kill and showed, at most, a desire to scare the deputy so defendant could escape.

Defendant also argues he was not interrupted by anyone because no one stopped him from killing the deputy; defendant stopped himself by not arming the weapon. Defendant argues that, since the circumstances stopping the shooting were not independent of the will of the alleged attempter, the facts do not qualify as attempted murder. Defendant cites *People v. Memro* (1985) 38 Cal.3d 658, 698, for the proposition that "'to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances.'"

However, defendant's actions *were* frustrated by extraneous circumstances, i.e., Sergeant Murdoch chose to go around the back of the trailer instead of following defendant's path around the front of the trailer. That defendant had not yet made the simple movement to place a bullet in the chamber does not save him from a conviction for attempted murder.

We conclude there was substantial evidence of attempted murder.

III. Premeditation - Substantial Evidence

Defendant argues the evidence was insufficient to show the attempted murder was willful, deliberate and premeditated. We disagree.

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time. . . . [¶] Appellate courts typically rely on three kinds of evidence in resolving the question [of sufficiency of evidence of premeditation/deliberation]: motive, planning activity, and manner of killing. [Citations.] These factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation. [Citation.] However, 'when the record discloses evidence in all three categories, the verdict generally will be sustained.' [Citation.] In conducting this analysis, we draw all reasonable inferences necessary to support the judgment. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

Here, there was ample evidence the attempted murder was willful, deliberate, and premeditated. From the facts recounted above (defendant pulling out the gun, taking cover and assuming a firing stance with the gun aimed at the spot where defendant expected Sergeant Murdoch to appear), a reasonable jury could conclude defendant had a motive to kill Sergeant Murdoch to

escape capture, and that defendant formed a plan to ambush Murdoch and intended to shoot him at close range with a gun.

We conclude substantial evidence supports the finding that defendant acted with premeditation and deliberation.

IV. The Need for Resentencing

As we shall explain, the case must be remanded for resentencing because the trial court imposed the firearm use enhancement on the wrong count.

The information charged defendant with attempted murder in count I and with assault with a firearm upon a peace officer or firefighter in count II.

The information also alleged an enhancement for use of a firearm, without tying the enhancement to any particular count, as follows: "It is further alleged that said KENNETH WAYNE CHANCE personally used a firearm, to wit, a pistol, within the meaning of . . . section 12022.5(a)(1) and 12022.53(b)."

The trial court instructed the jury, "It is alleged in Count I [attempted murder] that the defendant personally used a firearm during the commission of the crime charged. [¶] If you find the defendant guilty of the crime charged, you must determine whether the defendant personally used a firearm in the commission of that felony."

When it returned its verdicts, the jury found true the personal use of a firearm enhancement *following* its verdict of guilty of attempted murder but *before* its verdict of guilty of assault with a firearm. This shows the enhancement was tied to the attempted murder conviction.

The trial court's instructions, and the sequence of the jury's verdicts, leave no doubt that the jury imposed the firearm-use enhancements on count I -- attempted murder.

Nonetheless, at sentencing, the trial court erroneously imposed the section 12022.53, subdivision (b), enhancement on count II (the assault) and erroneously stayed the enhancement as follows:

"The law requires a mandatory state prison sentence as to Count I, the attempted murder conviction. By application of the Three Strikes Law, the sentence for that, Counsel, will be 45 years to life.

"For Count II, the assault with a firearm conviction, I find that . . . Section 654 does apply, that in the course of the attempted murder you also assaulted the peace officer in question.

"And by virtue of application of [section] 654 to a course of conduct that violates more than one code section, I will impose the 25 years to life, the ten-year enhancement pursuant to . . . Section 12022.53(b). Those sentences are stayed pending successful completion on Count I."

We will remand for resentencing. On remand, the trial court shall consider our reversal of count II and shall impose the section 12022.53, subdivision (b), enhancement on count I, as the jury found.[3]

---

[3] The trial court correctly declined to impose the section 12022.5 enhancement. Section 12022.53, subdivision (f),

In a supplemental brief, defendant contends resentencing would deny him due process. According to defendant, the information alleged the firearm use enhancement was appended to count II. We do not so read the information. Moreover, there can be no violation of due process notice. There was only one use of a firearm, whether in count I (the attempted murder) or in count II (the assault). The same act constituted the attempt and the assault, which is why the trial court stayed sentence on count II. Defendant was clearly put on notice that his personal use of a firearm was at issue in both counts. There was no violation of due process.

In another supplemental brief filed with our permission after oral argument in this court, defendant contends that "shifting" the firearm enhancement to count I (attempted murder) would violate section 654,[4] by punishing the same act, conduct, or course of conduct being punished in count III (possession of a firearm by a felon). He argues the firearm enhancement must be stayed. We disagree.

---

provides in pertinent part: "An enhancement involving a firearm specified in Section . . . 12022.5 . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this section."

[4] Section 654 provides in part: "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 12022.53, subdivision (b), provides as pertinent: "*Notwithstanding any other provision of law*, any person who, in the commission of a felony specified in subdivision (a),[5] personally uses a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 10 years." (Italics added.)

"Elsewhere the same statute specifically provides that '[*n*]*otwithstanding any other provision of law,*' a trial court '*shall not*' suspend execution or imposition of sentence for any person found to come within the provisions of this enhancement statute, or strike any allegation or finding that brings a person within the provisions of this section. (§ 12022.53, subds. (g), (h), italics added.)[6] [¶] Clearly, in enacting this provision the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes, including [attempted murder], was committed by the use of a firearm. In so doing, the express language of the

---

5 Attempted murder is a felony specified in subdivision (a). (See § 12022.53, subds. (a)(1), (a)(18).)

6 "Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person found to come within the provisions of this section." (§ 12022.53, subd. (g).)

"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).)

statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313.)

Defendant relies on *People v. Manila* (2006) 139 Cal.App.4th 589 (*Manila*),[7] which applied section 654 to stay a sentence for possession of a firearm by a felon (§ 12021, subd. (a)(1)), where the defendant was also sentenced for possession of drugs for sale plus an enhancement for being armed in the commission of the drug offenses (§ 12022, subd. (c)). The prosecution arose when the police conducted a search pursuant to a search warrant and found the gun under the defendant's mattress and drugs in the defendant's bedroom and elsewhere in the house. (*Id*. at p. 593.)

Even assuming finality of *Manila*, *supra,* 139 Cal.App.4th 589, it is distinguishable because it did not authorize the stay of an enhancement and it did not involve a section 12022.53 enhancement.

---

[7] In his supplemental brief filed in this court on June 22, 2006, defendant cites the original opinion in *Manila*, filed on April 28, 2006, and published at 138 Cal.App.4th 1459. However, the Fifth District modified the opinion on May 30, 2006, and changed the disposition from a remand for resentencing to a modification of the judgment to stay the sentence on the firearm possession. (*Manila, supra,* 139 Cal.App.4th 589.)

We conclude there is no legal basis upon which the trial court could stay the section 12022.53 enhancement appended to the attempted murder conviction.

DISPOSITION

Defendant's conviction for assault with a firearm on a peace officer is reversed. In all other respects, defendant's convictions are affirmed. The sentence is vacated, and the case is remanded for resentencing as explained in the opinion.

SIMS, J.

I concur:

BLEASE, Acting P.J.

ROBIE, J.

I concur in parts II, III, and IV of the Discussion, but respectfully dissent from part I.

This case presents the difficult question of how close a person has to come to completing a battery before he is guilty of assault. There is no easy answer to that question in the abstract. However, because I believe (for the reasons set forth below) that defendant came close enough here, I disagree with my colleagues that his conviction for assault with a firearm on a peace officer is not supported by substantial evidence.

Penal Code section 240 provides that "[a]n assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." If the word "attempt" were not adorned with the additional requirement of "a present ability," this case would present no difficulty. Generally, an "attempt" to commit a crime requires only "an overt, ineffectual act which is beyond 'mere preparation' yet short of actual commission of the crime." (P*eople v. Valdez* (1985) 175 Cal.App.3d 103, 108; see also Pen. Code, § 21a.) Here, defendant was standing in a partially protected position at the corner of a trailer, with his right arm extended, holding a loaded semiautomatic handgun in his right hand, which was supported by his left hand, pointing the gun at a place where he had reason to believe Sergeant Murdoch would momentarily appear. In short, defendant was set up to shoot Sergeant Murdoch when the officer appeared around the corner of the trailer in pursuit

of him. These facts were more than sufficient for a jury to conclude beyond a reasonable doubt that defendant engaged in an overt act beyond mere preparation yet short of actually shooting Sergeant Murdoch. The fact that defendant had not yet moved a bullet from the magazine into the chamber makes no difference to this analysis.

Because assault requires "a present ability . . . to commit a violent injury on the person of another," however, and not just "an unlawful attempt" to do so, this case is not that simple. Why? Because (1) there was no bullet in the chamber and (2) Sergeant Murdoch perspicaciously decided to approach defendant from the other side of the trailer, bringing him into a position *behind* defendant. Both of these facts raise the question of whether defendant had the "present ability" to shoot Sergeant Murdoch.[1]

In P*eople v. Valdez*, *supra*, 175 Cal.App.3d at page 112, the appellate court explained that "[t]he real function of th[e] 'present ability' element in common law assault as incorporated in the California statute is to require the perpetrator to have gone beyond the minimal steps involved in an attempt." Thus, while assault lies on a factual and definitional "continuum of

---

[1] It is interesting to note that in arguing in his opening brief "there was no present ability to commit a battery on the deputy with the firearm," defendant gave no significance to the fact that Sergeant Murdoch was behind him. Instead, he argued only, "There was no round in the chamber. The weapon wasn't armed. It wasn't ready to fire. [Defendant] made no attempt to arm it."

conduct that describes its essential relation to battery" as "an incipient or inchoate battery" (*People v. Colantuono* (1994) 7 Cal.4th 206, 216), the question is just *how* incipient does the battery have to be for the act to constitute an assault? Stated another way, how close does a person have to come to committing a battery before he can be deemed to have the present ability necessary to commit an assault?

As my colleagues observe, the Supreme Court apparently answered that question in *People v. Williams* (2001) 26 Cal.4th 779, where the court explained that to constitute an assault, the act must precede a completed battery "'"'"immediately,"'"'" such that "'"[t]he next movement would, at least to all appearance, complete the battery."'" (*Id.* at p. 786, italics omitted.) (Actually, our Supreme Court first used this language seven years earlier, in *People v. Colantuono* (1994) 7 Cal.4th 206, 216.) It is this concept of "immediacy" on which my colleagues rely to conclude that defendant did not come close enough to shooting Sergeant Murdoch to be guilty of assaulting him. They conclude that "defendant's act of pointing his firearm was 'not immediately antecedent to battery' and did not '"immediately precede the battery"'" because Sergeant Murdoch was behind defendant. To determine the validity of this conclusion, however, it is important to examine the pedigree of this concept of "immediacy" and how it has been applied in case law.

Unfortunately, on that point neither *Williams* nor *Colantuono* is of any assistance, because both of those cases

involved the mental state required for assault, not the present ability element of the crime. Thus, while those cases purport to define the present ability element in terms of immediacy, they do not help us in understanding the meaning of immediacy in this context.

"Immediately" can mean "without interval of time," but it can also mean "in direct connection or relation." (Merriam-Webster's Collegiate Dict. (10th ed. 2000) p. 578, col. 2.) Thus, an act may "immediately" precede a battery if there is a direct connection between the act and the battery, or an act may "immediately" precede a battery if there is (essentially) no interval of time between the act and the battery. It is not apparent from *Williams* or *Colantuono* which of these meanings should apply. Accordingly, further analysis is necessary. I begin that analysis by seeking the origin of the immediacy language the Supreme Court quoted in those cases.

In both cases, the court drew the concept of immediacy from a criminal law textbook. (See *People v. Williams*, *supra*, 26 Cal.4th at p. 786, quoting Perkins & Boyce, Criminal Law (3d ed. 1982) p. 164; *People v. Colantuono*, *supra*, 7 Cal.4th at p. 216, quoting Perkins on Criminal Law (2d ed. 1969) ch. 2, § 2, pp. 118-119.) In turn, those textbooks drew on an Ohio case -- *Fox v. State* (1878) 34 Ohio St. 377, 380. *Fox* actually involved the question of whether a verdict finding the defendant guilty of attempted rape (not then a crime under Ohio law) would support a conviction for assault with intent to commit rape (which *was* a crime). (*Id.* at p. 378.) In explaining why the answer to that

question was "no," the Supreme Court of Ohio made the statement Perkins first quoted 90 years later, which our Supreme Court adopted in *Colantuono* and *Williams*: "An assault is an act done toward the commission of a battery; it must precede the battery, but it does so immediately. The next movement would, at least to all appearance, complete the battery." (*Fox v. State*, *supra*, 34 Ohio St. at p. 380.)

Unfortunately, *Fox* is where the pedigree of this rule ends (or begins), because the Ohio court did not cite a single authority in support of the proposition of law it set forth. Moreover, the *Fox* court did not have occasion to apply the rule it announced because the court resolved the case before it by concluding that "under many conceivable circumstances, all the essential elements of an attempt may be present, and yet no assault, within the meaning of the statute, committed." (*Fox v. State*, *supra*, 34 Ohio St. at p. 380.) Thus, the facts supporting a conviction for attempted rape will not necessarily support a conviction for assault with attempt to commit rape.

As true as this observation is, it offers us no assistance in determining how close a defendant must come to committing battery before he is guilty of assault, and therefore is of no help in determining whether defendant came close enough to shooting Sergeant Murdoch to be guilty of assault here.

If we look for an answer to that question closer to home than Ohio, that search leads us to our Supreme Court's decision

in *People v. McMakin* (1857) 8 Cal. 547.[2] My colleagues have set forth the facts of *McMakin*, so I will not repeat them. Suffice it to say that the defendant drew a Colt revolver and pointed it toward, but not directly at, his victim.[3] The primary question in *McMakin* was whether there was evidence that the defendant had the requisite intent to commit assault, because he threatened to shoot his victim, but the threat was conditional. (*Id.* at p. 548.) As for the defendant's "present ability" to shoot the victim, the Supreme Court stated, "The ability to commit the offense was clear. Holding up a fist in a menacing manner, drawing a sword or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault." (*Ibid.*)

Significantly, our Supreme Court went on to use the word "immediate" in *McMakin*, noting that "[t]he intention must be to commit a present, and not a future injury, upon a different

---

[2] *McMakin* predates the enactment of Penal Code section 240 as part of the Penal Code in 1872, but section 240 was itself drawn from an earlier California statute defining assault in the same terms. (See *People v. McMakin*, *supra*, 8 Cal. at p. 548 ["An assault is defined by our statute to be an 'unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another'"].)

[3] The Supreme Court specifically noted that "the ball would strike the ground before it reached the witness, had the pistol been discharged." (*People v. McMakin*, *supra*, 8 Cal. at p. 547.)

occasion. The acts done must be in preparation for an *immediate* injury."[4] (*People v. McMakin*, *supra*, 8 Cal. at p. 548, italics added.) So the court recognized that assault requires an act or acts in preparation for an "immediate" injury, but also found it "clear" that pointing a gun in the direction of, but not directly at, another person who is within range to be shot, constitutes such an act. If it was "clear" in *McMakin* that the defendant had the present ability to shoot the victim, even though he did not actually point the gun *at* the victim, then certainly our Supreme Court was indicating that temporal distinctions about what act "immediately" precedes a battery should not be drawn too finely. At the very least, to complete the battery of his victim, the defendant in *McMakin* would have had to (1) raise the gun to point it at the victim *and* (2) pull the trigger to fire it. (See *ibid.* ["The prisoner put himself in a position to use the weapon in an instant, having only to elevate the pistol and fire . . . ."].) Thus, in the Supreme Court's view, the defendant was prepared to inflict an *immediate* injury even though more than one movement would have been necessary for him to shoot his victim.

Actually, another act -- cocking the hammer -- might have been necessary as well. A revolver can be either single-action

---

[4] Later, the Supreme Court used similar language, stating that "it would seem to be clear that the offense [of assault] would be complete" when "preparations are actually made, and weapons drawn, and placed in a position to be *instantly* used offensively." (*People v. McMakin*, *supra*, 8 Cal. at p. 548, italics added.)

or double-action. (See <http://en.wikipedia.org/wiki/Revolver> [as of July 20, 2006].) A double-action revolver is one in which pulling the trigger "first cocks the hammer (thus advancing the cylinder counterclockwise) and then releases the hammer at the rear of its travel, firing the round in the chamber." (*Ibid.*) A single-action revolver requires the hammer to be manually cocked, "usually with the thumb of the firing or supporting hand," before the trigger is pulled to fire the gun. (*Ibid.*)

Colt did not begin making double-action revolvers until the late 1870's. (<http://www.armchairgunshow.com/ColtDA-info.html> [as of July 20, 2006].) Thus, unless the defendant in *McMakin* had already cocked the hammer on his revolver, to shoot his victim he would have had to (1) point the gun at his victim, (2) cock the hammer, and (3) pull the trigger. The Supreme Court's failure to address whether the hammer was cocked on the gun the defendant was pointing at the ground only tends to further confirm that one must not parse the acts preceding a battery too finely in attempting to determine whether an assault has been committed.

What, then, does *McMakin* tell us about whether defendant came close enough to shooting Sergeant Murdoch to be guilty of assault? Before we try to answer that question, we must investigate another passage from *McMakin*. After noting the various acts that would be considered an assault (e.g., "presenting a gun at a person who is within its range"), the court noted, with apparent approval, as follows: "In the case

of *Hays v. The People*, 1 Hill, 351, it was held that it was not essential to constitute an assault that there should be a direct attempt at violence." (*People v. McMakin*, *supra*, 8 Cal. at p. 548.) In *Hays*, which was out of New York, the defendant enticed a girl under the age of 10 "into the loft of a building, for the purpose of ravishing her; and was detected, while standing within five feet of her in a state of indecent exposure. There was no evidence that he touched her at any time." (*Hays v. The People* (N.Y.Sup. 1841) 1 Hill 351.) The court explained that "the only question is, whether he had proceeded in it so far as to warrant the court in submitting to the jury whether he was guilty of an assault." (*Ibid.*) In concluding the conviction was proper, the court wrote as follows: "This is clearly an assault within all the authorities. An assault is defined by these, to be an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person. [¶] There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient." (*Ibid.*)

McMakin's reference to *Hays* only tends to further support the conclusion that the acts preceding a battery should not be parsed too finely in determining whether an assault has been

committed. If “laying one’s hand upon his sword” can be an assault, even though that act would have to be followed by (1) drawing the sword, (2) approaching the victim, and (3) striking him with it to complete a battery, then the immediacy element of “present ability” is not one that is to be construed too strictly.

Here, defendant took up a shooting stance and pointed a loaded firearm with the safety off at a place he had reason to believe Sergeant Murdoch would momentarily appear. On these facts, the jury was justified in concluding that defendant had taken sufficient steps toward shooting Sergeant Murdoch that he was guilty of assault. That it turned out defendant still had to move a bullet from the magazine into the chamber, and would have had to turn around to complete the shooting (because Sergeant Murdoch unexpectedly appeared behind him), does not render defendant’s conduct so far distant from a completed battery that he could not, as a matter of law, be found guilty of assault. How many seconds would it have taken to complete these acts? Again, I think *McMakin* teaches us that we are not to parse these things too finely. Though he still had to draw the slide, turn around, and pull the trigger, defendant had advanced far enough toward his ultimate goal of shooting Sergeant Murdoch that he had the “present ability” to do so, as that term has been understood for the last 150 years in California.

Further support for this conclusion is found in *People v. Yslas* (1865) 27 Cal. 630. There, the defendant was found guilty

of assault where he "seized a hatchet and started towards [his victim], having it raised in a threatening attitude." (*Id.* at p. 631.) "[W]hen the defendant had approached within seven or eight feet of her," however, she "fled through the door into an adjoining room, and locked the door after her." (*Ibid.*)

The Supreme Court had no difficulty in concluding the defendant's conviction was proper. As the court explained, "In order to constitute an assault there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete. . . . It is not indispensable to the commission of an assault that the assailant should be at any time within striking distance. If he is advancing with intent to strike his adversary and comes sufficiently near to induce a man of ordinary firmness to believe, in view of all the circumstances, that he will instantly receive a blow unless he strike in self defense or retreat, the assault is complete. In such a case the attempt has been made coupled with a present ability to commit a violent injury within the meaning of the statute." (*People v. Yslas*, *supra*, 27 Cal. at pp. 633-634.)

Here, the jury could reasonably find that defendant had begun to execute violence against Sergeant Murdoch by setting up to shoot him. That his violent actions were interrupted by Sergeant Murdoch unexpectedly appearing behind him (and his own decision not to complete the shooting given that circumstance)

does not render his actions any less an assault. That defendant would have had to draw the slide, turn around, and pull the trigger to complete a battery on Sergeant Murdoch is no different than the fact that the defendant in *Yslas* would have had to close the distance between himself and his victim and then strike her with the axe. If the victim in *Yslas* was justified in believing that she would "instantly" receive a blow from the defendant, who was not even yet within "striking distance," then by the same reasoning Sergeant Murdoch was justified in believing that he would "instantly" be shot by defendant, even though defendant still had to turn around to fire at him.

Further guidance on this point is found in *People v. Lee Kong* (1892) 95 Cal. 666. There, the Supreme Court upheld an assault conviction where the defendant fired a gun through the roof of a building at a place where he thought a policeman was located. As it turned out, the officer was at another place on the roof, and he was not struck. (*Id.* at pp. 667-668.) On these "novel" facts, the court found no difficulty in concluding the defendant "had the present ability to inflict the injury" necessary to commit assault. (*Id.* at pp. 667, 670.) The court explained as follows: "He knew the officer was upon the roof, and knowing that fact he fired through the roof with the full determination of killing him. The fact that he was mistaken in judgment as to the exact spot where his intended victim was located is immaterial. . . . Appellant's mistake as to the policeman's exact location upon the roof affords no excuse for

his act, and causes the act to be no less an assault. . . . [¶] The fact of itself that the policeman was two feet or ten feet from the spot where the fire was directed, or that he was at the right hand or at the left hand or *behind* the defendant at the time the shot was fired, is immaterial upon this question. That element of the case does not go to the question of present ability, but pertains to the unlawful attempt." (*Id.* at pp. 670-671, italics added.)

This case is comparable to *Lee Kong* in that defendant knew Sergeant Murdoch was following him, just as the defendant in *Lee Kong* knew the police officer was on the roof. With that knowledge, both men took substantial steps toward killing the officers. The only difference is that the defendant in *Lee Kong* went further and actually fired his gun. This distinction, however, is of no significance. As we have seen from *McMakin*, a person does not even have to point the gun at his victim, let alone pull the trigger, to be guilty of assault. If, as *Lee Kong* suggests, firing a gun at a person you think is in front of you but who is actually behind you constitutes assault, then there is no reason that pointing a gun (with the intent to fire it) under the same circumstances should not constitute assault as well. As the court explained in *Lee Kong*, the position of the victim -- so long as he is in range of being shot -- "does not go to the question of present ability." (*People v. Lee Kong*, *supra*, 95 Cal. at p. 671.)

The decision in *People v. Ranson* (1974) 40 Cal.App.3d 317 is also pertinent here. In *Ranson*, when a sheriff's deputy

(Pendergist) drove into a service station, "he saw [the defendant] take a rifle and assume a 'combat-stance position.' [The defendant's] right hand was tightening around the trigger portion of the rifle; the gun was pointing directly toward the officer. [The defendant] did not comply with Pendergist's direction to drop the gun; the deputy drew his service revolver and fired two quick shots. [The defendant] jumped behind the gasoline pump, rose, and aimed the rifle toward the radio car. Deputy Wertz (Pendergist's partner) fired one shot but missed [the defendant], who again ducked. Deputy Pendergist observed some movement on the rifle, similar to the movement made if someone were cocking or operating a bolt on a rifle. A gas station patron saw [the defendant] 'messing with the gun' and 'fooling with it somewhere around the firing mechanism' before the gunshots started.

"[The defendant] again aimed the rifle in the direction of the police vehicle. Deputy Pendergist fired one shot, striking [the defendant] in the left knee. [The defendant] fell, and the rifle skidded away from him. Pendergist retrieved the rifle, removed the magazine or clip, and placed them in the trunk of his vehicle.

"[¶] . . . [¶]

"Upon examining the rifle, Deputy Pendergist found there was no round in the chamber of the rifle. In examining the magazine clip he observed that the top round was pointed with its nose in a downward angle into the clip. He also observed longitudinal scratch marks across the casing of the top bullet,

indicating that the rifle jammed when [the defendant] was attempting to shoot." (*People v. Ranson*, *supra*, 40 Cal.App.3d at pp. 319-320.)

The appellate court readily concluded that the defendant had the present ability necessary to commit assault, even though his rifle had jammed. The court explained that "[t]here was evidence from which the trial court could infer that [the defendant] knew how to take off and rapidly reinsert the clip. [¶] Time is a continuum of which 'present' is a part. 'Present' can denote 'immediate' or a point near 'immediate.' . . . We are slightly . . . removed from 'immediate' in the instant case; however, we hold that the conduct of [the defendant] is near enough to constitute 'present' ability for the purpose of an assault. [¶] We hold that it was not an abuse of discretion under these facts for the trial court to find that [the defendant] had the present ability to commit a violent injury in that he could have adjusted the misplaced cartridge and fired very quickly." (*People v. Ranson*, *supra*, 40 Cal.App.3d at p. 321.)

Here, defendant similarly could have moved a bullet from the magazine into the chamber "very quickly" -- at least quickly enough to give him the "present ability" to shoot Sergeant Murdoch, as that term historically has been understood and applied in California. Given that turning around, when Sergeant Murdoch unexpectedly appeared behind him, also could have been accomplished very quickly, I conclude that defendant had come close enough to completing a battery on Sergeant Murdoch that he

could be found guilty of assault. Accordingly, I would affirm his conviction of assault with a firearm on a peace officer.

ROBIE, J.