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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. PETER WILLIAM KRAMER, Defendant and Appellant.	G027217 (Super. Ct. No. 98SF0113) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Christopher W. Strople, Judge. Affirmed in part, reversed in part and remanded for resentencing.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janelle Boustany and Arlene Aquintey Sevidal, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Peter Kramer was convicted of discharging a firearm into a moving vehicle and assault with a firearm. The jury made a true finding he used a firearm during the assault. He appeals the judgment as follows: (1) The court failed to instruct the jury regarding lesser included offenses with CALJIC No. 17.49; (2) he was prejudiced when testimony was read back to the jury outside of his presence; and (3) the court imposed an unauthorized sentence for an enhancement related to a count stayed pursuant to Penal Code section 654, subdivision (a). The court erred by imposing the sentence for the enhancement and therefore we remand for resentencing.

FACTS

Evelyn and Juan Le Clair returned to their house from a trip between 6:30 and 7:00 p.m. Juan parked the car on the street in front of their house. He went to pick up their mail and Evelyn stayed behind to take items from the car. They both then heard defendant yell to them, "'Go back to Nicaragua and take your son.'" Concerned, the Le Clairs decided to report the incident to the police. But they wanted to call from a local convenience store instead of from their house so that defendant "couldn't see that [they] called the police." As they drove off, Evelyn saw defendant walking toward the car with a gun in his hand. Juan saw defendant pointing something at the car, but could not identify what it was. Evelyn said to Juan "'Hurry up! Hurry up! He's coming with a gun.'" Juan stopped at a stop sign and hesitated. At that moment the Le Clairs heard something like a loud pop or a firecracker, and Evelyn heard something strike the car. As the Le Clairs drove off, defendant yelled at them "'Get out! Get out!'"

The Le Clairs drove to a fast food restaurant and called the police. When they inspected their car, they noticed a small hole in its rear left side; the hole had not been there when they returned from their trip. A police officer arrived and escorted the Le Clairs to their house.

The police arrested defendant and searched his house and the surrounding street. While officers were searching the street for evidence, Evelyn found a spent shell casing where she had earlier seen defendant pointing the gun. The police did not find a weapon or other shells in the neighborhood. In defendant's dresser, the police found seven cartridges and a reassembled bullet and shell casing that had been fired. Defendant's father told the police defendant gave him a Browning nine-millimeter semi-automatic handgun as collateral for a loan and that he returned the weapon to defendant.

The court concluded the charged offense of assault with a firearm necessarily includes the lesser offense of simple assault, and counsel for both sides concurred that the jury should be instructed with CALJIC No. 17.10. During deliberations, the jury sent a note to the judge seeking clarification on the instruction for personal use of a firearm (CALJIC No. 17.19) and requested a transcript of Evelyn Le Clair's testimony about seeing defendant holding a gun. Counsel for both sides concurred in the court's proposed instruction to the jury regarding the first question. As for the request for the transcript, the court stated: "I think the court reporter can probably find that testimony pretty quickly. Do you want to stipulate to just send her in and read that portion of the testimony?" After receiving assurances that both direct and cross-examination would be read back, defense counsel agreed. These proceedings occurred in chambers outside of defendant's presence.

The jury returned guilty verdicts on both counts and made a true finding that defendant personally used a firearm during the assault alleged in the second count. On the first count of discharging a firearm into an occupied vehicle (Pen. Code, § 246), the court sentenced defendant to the middle term of five years. It stayed the sentence on the second count for assault with a firearm (Pen. Code, § 245, subd. (a)(1)), pursuant to Penal Code section 654, subdivision (a), and imposed the middle term of four years for the personal use of a firearm enhancement (Pen. Code, § 12022.5, subd. (a)).

DISCUSSION

The Court Was Not Required to Instruct the Jury With CALJIC No. 17.49

The court instructed the jury on the lesser included offense of assault with respect to the charged offense of assault with a firearm. It also instructed with CALJIC No. 9.00 for the standard definition of assault, CALJIC No. 9.01 for the requirement of a present ability to commit injury, and CALJIC No. 9.02 for the definition of the charged offense of assault with a firearm. To guide the jury in its deliberation of the charged count of assault with a firearm and the lesser included offense, the court instructed the jury with CALJIC No. 17.10. Defendant contends the court had a sua sponte duty to further instruct the jury with CALJIC No. 17.49, and the failure to do so prejudiced him because the jury was left with the impression it could not consider the lesser included offense until after considering the charged offense. We disagree.

"In a criminal case, a trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation.] Therefore, even without a request, the court must instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. [Citation.]" (*People v. Earp* (1999) 20 Cal.4th 826, 885.) Here, the trial court properly concluded the evidence supported an instruction on the lesser included offense of simple assault and correctly instructed the jury with CALJIC Nos. 9.00 and 9.10.

Defendant maintains that when instructing the jury on lesser included offenses the court must give both CALJIC Nos. 17.10 and 17.49. Yet the authority he relies on is inapposite. Citing *People v. Kurtzman* (1988) 46 Cal.3d 322, defendant makes the absolute statement, "When a court gives CALJIC [No.] 17.10, it also must give CALJIC [No.] 17.49." But that was not the holding in *People v. Kurtzman*. Rather, the court concluded a trial court may not instruct the jury that it must first consider the charged offense before considering any lesser included offenses, but may instruct the jury

that an acquittal on the charged offense is a required condition precedent to rendering a verdict on the lesser included offense. (*People v. Kurtzman*, *supra*, 46 Cal.3d at pp. 324-325, 330-331.) Defendant also points to the use note following CALJIC No. 17.10 as support for the proposition that CALJIC No. 17.49 must also be given. CALJIC instructions are not authority for legal principles. (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) Moreover, the use note merely states that CALJIC No. 17.10 "should be accompanied by CALJIC No. 17.49 . . . ." (Use Note to CALJIC No. 17.10 (6th ed. 1996) p. 570.)

As read to the jury, the modified CALJIC No. 17.10 stated: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of assault is lesser to that of assault with a firearm charged in Count 2. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crimes charged in Counts 1 and 2 or of any lesser crime. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. [¶] You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdicts. However, the court cannot accept a guilty verdict on a lesser included crime unless you have unanimously found the defendant not guilty of the charged or greater crime." Defendant argues the court erred by modifying the instruction because the jury was told, at least by implication, it must first consider the charged offense of assault with a firearm before it could consider the lesser included offense. Not so. Besides the insertion of the charged and lesser included offenses and count numbers, the instruction included no substantive modification. (Compare with CALJIC No. 17.10 (6th ed. 1996), pp. 568-569.)

The instruction did not improperly direct the jury in which order it had to deliberate. It specifically told the jury it had "discretion to choose the order" in which it

evaluated the charged and lesser included offenses. We presume the jury understood and followed the instruction. (*People v. Holt* (1997) 15 Cal.4th 619, 662.) Furthermore, the language defendant contends was erroneously added by the trial court was actually added to CALJIC No. 17.10 in response to *People v. Kurtzman*. (Compare former CALJIC No. 17.10 (5th ed. 1988) with CALJIC No. 17.10 (1989 re-rev.) (5th ed. 1988); see also Use Note to CALJIC No. 17.10 (1989 re-rev.) (5th ed. 1988) p. 220.)

The court also instructed the jury to "decide each Count . . . separately," and that the verdict "as to each Count must be stated in a separate verdict." (CALJIC No. 17.02.) We disagree with defendant's contention this instruction told the jury it must consider the charged offense first. A reasonable jury would not understand this instruction to apply to its deliberation between the charged offense of assault with a firearm and the lesser included offense of assault, but would rather understand it as applicable to its separate deliberations of the charged offenses of discharging a firearm into an occupied vehicle and assault with a firearm.

Defendant's Absence During Rereading of Testimony Was Not Error

Defendant contends his absence during the rereading of Evelyn Le Clair's testimony, and the court's failure to obtain his personal waiver, violated his rights under the Fifth and Sixth Amendments to the United States Constitution. We disagree.

It is now well settled that "the right to personal presence at all critical stages of the trial . . . [is a] fundamental right[] of each criminal defendant." (*Rushen v. Spain* (1983) 464 U.S. 114, 117, fn. omitted (*per curiam*).) Whether a defendant's absence violates this cardinal rule turns on the stage of the trial and whether that stage is a "critical" one. A "defendant has a due process right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. . . . [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence,

and to that extent only.' [Citations.]" (*United States v. Gagnon* (1985) 470 U.S. 522, 526.)

The United States Supreme Court has not had occasion to decide whether the rereading of testimony is a "critical stage" in a criminal trial. (See *La Crosse v. Kernan* (9th Cir. 2001) 244 F.3d 702, 708.) But our Supreme Court has and concluded in the negative. "The rereading of testimony ordinarily would not be an event which bears a substantial relation to the defendant's opportunity to defend [himself] . . . ." (*People v. Hovey* (1988) 44 Cal.3d 543, 585.) The court has consistently rejected the argument that absence during a rereading violates a defendant's right to a fair trial. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1120-1121; *People v. Medina* (1990) 51 Cal.3d 870, 902-903; *People v. Douglas* (1990) 50 Cal.3d 468, 517-518, disapproved on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4; *People v. Bloyd* (1987) 43 Cal.3d 333, 359-360.) Therefore, we do not assume prejudice, and the defendant bears the burden "'to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial.' [Citations.]" (*People v. Horton*, *supra*, 11 Cal.4th at p. 1121.)

Defendant maintains he was prejudiced because the court did not instruct the jury to draw no "negative inferences from the court reporter's facial expressions, tone of voice or demeanor," or that its members could not "speak[] to the court reporter, bailiff, or anyone else during the readback." Implicit in this argument is the assertion that defendant's presence would have prevented this potential parade of horribles. However, our Supreme Court rejected a similar argument in *People v. Horton*, *supra*, 11 Cal.4th 1068: "The lack of replication of the witnesses' original intonations and presentation . . . would not have been altered by defendant's presence, and his suggestion that the jury might have been favorably influenced by defendant's reactions to the reading back of testimony is entirely speculative." (*Id.* at p. 1121; see also *People v. Bloyd*, *supra*, 43 Cal.3d at p. 360 [rejecting the defendant's argument "he could have been particularly helpful in assuring that the rereading [of testimony] was accurate"].)

Defendant also cites two opinions of the United States Court of Appeal for the Ninth Circuit for the proposition that the trial court was required to obtain a personal waiver of his presence during the rereading and that the error must be analyzed under the harmless error standard from *Chapman v. California* (1967) 386 U.S. 18, 24. (*United States v. Kupau* (9th Cir. 1986) 781 F.2d 740, 743; *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1476-1477.) As discussed above, defendant did not have a right under the United States Constitution to be present during the rereading; failure to obtain a personal waiver was not an error. Moreover, in an opinion filed after this case was briefed, a panel of the Ninth Circuit questioned the validity of the two opinions cited by defendant. "Given the divergence of opinion on this issue [whether the rereading of testimony is a critical stage in the trial,] and the lack of clear guidance from the United States Supreme Court, we cannot say that the California court's determination here was contrary to or an unreasonable application of clearly established federal law." (*La Crosse v. Kernan*, *supra*, 244 F.3d at p. 708, fn. omitted.)

The Court Erred During Sentencing

The court stayed sentence on the assault with a firearm conviction in the second count pursuant to Penal Code section 654, subdivision (a) (section 654), but then imposed a four-year sentence for the personal use of a firearm enhancement (Pen. Code, § 12022.5, subd. (a)) associated with that count. Defendant contends the court erred because a sentence enhancement may not be imposed on a count stayed pursuant to section 654, subdivision (a). The attorney general's office concedes the court erred, but asks that we remand to the trial court for resentencing. We remand to stay defendant's sentence on the enhancement and to allow the trial court to exercise its discretion in choosing an appropriate term for the conviction on the first count.

The trial court erred by imposing sentence based on an enhancement to a count stayed pursuant to section 654. (*People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 726

[application of firearm use enhancement is stayed while execution of sentence for underlying robbery conviction is stayed], disapproved on another ground in *People v. Green* (1980) 27 Cal.3d 1, 34.) An enhancement for personal use of a firearm pursuant to Penal Code section 12022.5, subdivision (a) "specifically attach[es] to the term of imprisonment imposed for an underlying offense" and is therefore "in addition [to] and consecutive to the punishment for the specific felony of which the defendant has been convicted." (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310.) When, as here, the sentence on the underlying offense is stayed, by necessity there is no "punishment" to which the enhancement may attach. (Pen. Code, § 12022.5, subd. (a).) Unless the court would have the authority on remand to lift the stay on the second count and stay the sentence for the first count instead, the sentence imposed for the firearm use enhancement must be stayed. As we conclude below, the court does not have such authority.

On its own motion, this court asked the parties to discuss the effect of section 654 on the court's sentencing discretion and granted a request to submit further briefing. In relevant part, section 654, subdivision (a) states: "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." The plain import of this language is that, although the court may not impose sentence on two or more convictions arising out of one act or omission with the same "'intent or objective'" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267), it must sentence the defendant under the provision which provides for the longest sentence. In the context of this case, does the statute mean the trial court must impose sentence on the count that provides for the longest possible base term? Or does it mean the trial court must sentence the defendant under the count which, when its enhancements are added, results in the "longest term of imprisonment"? A plain reading of section 654 convinces us the former is the more reasonable interpretation.

In *People v. Norrell* (1996) 13 Cal.4th 1, the Supreme Court interpreted section 654 to grant the trial court discretion to choose a lesser count that provides for a shorter term of imprisonment over a greater count. (*Id*. at p. 8.) In a dissenting opinion, Retired Justice Arabian, sitting by assignment, faulted the majority for its reading of section 654 and invited the Legislature to amend section 654 so that a sentencing court may not "impose a lower overall sentence than the *minimum* the Legislature has decreed for any of those crimes." (*People v. Norrell, supra,* 13 Cal.4th at pp. 23-24 (conc. & dis. opn. of Arabian, J.).) The Legislature responded the following year and amended the statute. (Stats. 1997, ch. 410, § 1; see also *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088, fn. 4.)

As amended, section 654 expressly removes from the sentencing court the discretion recognized by the majority in *People v. Norrell*; the court "shall" impose sentence under "the provision" resulting in the longest possible term of imprisonment. (§ 654, subd. (a).) Moreover, section 654 specifically states "in no case shall the act or omission be punished under more than *one* provision." (§ 654, subd. (a.), italics added.) As such, the "provision that provides for the longest potential term of imprisonment" must refer to one of two or more statutes, either substantive counts or enhancements when multiple enhancements are proven, under which a defendant may be punished for a single act, not to a combination of a substantive crime with an enhancement. (See *People v. Coronado* (1995) 12 Cal.4th 145, 156 ["By its own terms, section 654 applies only to an 'act or omission' made punishable in different ways by different statutes"].)

Here, defendant was convicted under two "provisions of law": Penal Code sections 246 and 245, subdivision (a)(1). A conviction under the first count for discharging a firearm into an occupied vehicle carries a term of imprisonment of three, five, or seven years. (Pen. Code, § 246.) The second count of assault with a firearm carries a term of imprisonment of two, three, or four years. (Pen. Code, § 245, subd. (a)(1).) Thus, the court properly sentenced defendant under the first count because that conviction has the "longest potential term of imprisonment . . . ." (§ 654, subd. (a).)

Having concluded the court properly sentenced defendant for the conviction on the first count and properly stayed the sentence on the conviction for the second, the sentence for the firearm use enhancement regarding the second count must also be stayed. Nor could the court impose the firearm use enhancement on the first count. Because the prosecution specifically sought the true finding of firearm use allegation *solely* as to the second count, and the jury's finding was limited to that count, application of the enhancement to the first count would potentially raise serious due process problems. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [enhancement "for a crime" must be found by jury beyond a reasonable doubt].)

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. On remand, the trial court shall stay the sentence on the second count and on the firearm use enhancement. The trial court may otherwise exercise its discretion in resentencing defendant on the first count.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.