Filed 9/5/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSIE JOSE RAMIREZ, Defendant and Appellant.	F050212 (Super. Ct. No. MCR021366) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. John W. DeGroot, Judge.

Joseph C. Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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Immediately after police announced themselves outside defendant Jessie Jose Ramirez's apartment and one officer knocked on a window, defendant fired a shotgun

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

through the window from inside. The blast narrowly missed the officer. A standoff ensued during which defendant fired through his windows several more times while his wife and child were in the apartment with him. Finally, he surrendered to police. He was convicted of numerous charges, including attempted deliberate and premeditated murder of a police officer, and was sentenced to 30 years and four months in prison, plus a consecutive term of 15 years to life.

Among other things, defendant argues on appeal that there was insufficient evidence of deliberation and premeditation and that the trial court improperly admitted evidence of his statement several years earlier that he would kill a police officer if necessary to avoid prison. We conclude there is no prejudicial error and affirm the judgment.

We publish our discussion of one issue: whether negligent discharge of a firearm (Pen. Code, § 246.3) is a lesser offense necessarily included in firing at an inhabited dwelling (Pen. Code, § 246). Disagreeing with *People v. Overman* (2005) 126 Cal.App.4th 1344, we hold that it is not.

FACTUAL AND PROCEDURAL HISTORIES

Several Chowchilla police officers responded to a call claiming that a man was holding a gun to a woman's head inside an apartment. Outside the apartment, Officer Brian Esteves yelled, "police department, occupants … please come out of the residence with your hands up." When no one responded, another officer, Sergeant David Noblett, knocked on a front window. Immediately, a shotgun blast came through the window on which the officer had knocked. The officer was not shot, but felt the compression of the blast, was sprinkled with the shattered glass, and fell backward. He got up and took cover behind a car. Between two and six more shots then came through the same window.

Defendant's wife emerged from the apartment carrying their five-year-old daughter. Officers asked her to come over to them, but she went back into the apartment

with the child. A second volley of shotgun blasts—two or three shots—then came through the same window. Some additional shots came out a back window.

The officers again ordered the occupants of the apartment to come out. Defendant's wife again emerged, set the child on the ground, told her to go to the officers, and went back inside. The Chowchilla police chief was on the scene; he left his position of cover, picked up the child, and ran back.

A third volley of two to five shots followed. Defendant's wife emerged from the apartment a third time and told the officers that defendant had put his gun down. Defendant then came out with his hands up. He followed the officers' order to lie on the ground and said, "I am your man, the gun's on the couch." The officers arrested him. At some point during these events police threw or fired tear gas canisters into the apartment.

The district attorney filed an 18-count information. The following table lists the charges and enhancement allegations:

COUNT	**OFFENSE**	**PEN. CODE §**	**ENHANCEMENT**	**PEN. CODE §**
1	Attempted deliberate and premeditated murder of Noblett, a police officer	187; 664, subds. (a) & (e)	Personal use of a firearm; personal and intentional discharge of a firearm; committing offense to benefit a criminal street gang	12022.5, subd. (a); 12022.53, subds. (b) & (c); 186.22, subd. (b)(1)
2	Assault with a firearm upon Noblett, a police officer	245, subd. (d)(1)	Personal use of a firearm; personal and intentional discharge of a firearm; committing offense to benefit a criminal street gang	12022.5, subds. (a) & (d); 12022.53, subds. (b) & (c); 186.22, subd. (b)(1)
3	Discharging a firearm	246	Committing	186.22, subd.

	at 131 Kings Avenue, an inhabited dwelling		offense to benefit a criminal street gang	(b)(1)
4	Discharging a firearm at 129 Kings Avenue, an inhabited dwelling	246	Committing offense to benefit a criminal street gang	186.22, subd. (b)(1)
5	Discharging a firearm at 130 Kings Avenue, an inhabited dwelling	246	Committing offense to benefit a criminal street gang	186.22, subd. (b)(1)
6-15	Grossly negligent discharge of a firearm	246.3	Committing offense to benefit a criminal street gang	186.22, subd. (b)(1)
16	Being a felon in possession of a firearm	12021, subd. (a)(1)	Committing offense to benefit a criminal street gang	186.22, subd. (b)(1)
17	Child endangerment	273a, subd. (a)		
18	Active participation in a criminal street gang	186.22, subd. (a)		

At trial, officers recalled details of the shot that narrowly missed Sergeant Noblett. Jay Varney, the police chief, testified that the blinds or curtains were closed behind the window on which Noblett knocked and he could not see inside. Varney said the shots came "almost directly out of the window where [Noblett] was knocking." Noblett himself said, "[T]he gunshots came out where I knocked and my face was about 12 inches to 18 inches from where the gunshots came out." Officer Esteves agreed that the shot "hit pretty much where [Noblett] knocked." He thought that the first volley of shots was directed at the officers because the broken glass flew toward them and the curtains came through the broken window in their direction.

There was some inconsistency in the police testimony about what Noblett did just before he knocked. Officer Esteves "believe[d]" Noblett "yelled police department"

before knocking. Officer Mandrell also "believe[d] [Noblett] said police department." Noblett's own account, however, did not include this detail:

> "Q Did anyone address the residen[ts] of that apartment in any way?
>
> "A Officer Esteves made an announcement for the occupants to come outside and advised we were the police.
>
> "Q Was there any reaction to that?
>
> "A No.
>
> "Q What, if anything, did you do once there's no reaction from the inside?
>
> "A I moved to the southwest corner of the front window and knocked on the window. And before I did anything else, gunshots came out the front window."

Defendant testified that, although he fired through the window after hearing the police announce themselves and after hearing the knock, he was not shooting at the officers and did not intend to harm them. He claimed he heard Noblett's voice "coming from the corner of the house" rather than from the front and that "to my knowledge, I thought no one was behind that window." He could not see the officers because the blinds were closed. He said he "lost [his] cool" and only fired "[t]o back them off, back them away." Defendant's wife testified that defendant stood in the hallway and fired toward the front of the house, not aiming at anything in particular.

To explain what motivated his behavior, defendant testified that he was depressed. His plan was to use all his shells but one and then kill himself with the last. His answer when asked why he needed to fire many shots before killing himself was that he "wanted time to get [his] family out" and "didn't want to see [his] wife." His wife testified that she walked out of the apartment at his instruction.

Defendant testified about two causes of his depression. First, he had just been laid off from a construction company job after seven or eight months, the longest he had ever continuously been employed. He had moved with his family from Madera to Chowchilla

to escape gang life and had obtained this job to start making an honest living; the loss of it caused him to feel inadequate as a provider. Second, he had a conflict with his wife that day. Two days earlier, which was defendant's birthday, he had left the house and stayed out for more than a day. Defendant's wife was angry and retaliated on the day of the incident by telling defendant she had been to the hospital and learned that her five-month pregnancy had miscarried. Defendant believed his disappearance on his birthday and his wife's resulting emotional state had caused the miscarriage. In reality, defendant's wife had been to the hospital, but had not miscarried. Defendant learned the truth from his mother by telephone during the standoff.

The prosecution presented evidence that pellets from the shotgun blasts struck neighboring apartments. The address of defendant's apartment was 139 Kings Avenue. It was in an apartment complex called Kings Court. Kenny Bishop lived with his wife, mother-in-law, sister-in-law, and eight-month-old daughter in the same complex in an apartment of which the address was 129 Kings Avenue; it was described at trial as catty-corner from defendant's apartment. Bishop heard the police arrive and then heard at least eight gunshots. A projectile or slug, described by a police witness as a one-ounce piece of metal fired from a shotgun shell, entered Bishop's apartment. It pierced three walls inside the apartment and ricocheted off a medicine cabinet and a bathroom door. One witness said the bedroom where the daughter was sleeping at the time was "right in the pathway" of the projectile.

Humberto Hernandez testified that he lived in the apartment at 131 Kings Avenue with his wife and brother-in-law. This apartment was described by a police witness as "directly across from" defendant's apartment. Hernandez heard the shots. Pellets from one of them broke through a window of his apartment and struck the living room wall. The three occupants took cover in the bathroom. The brother-in-law was struck near his eyebrow by a shotgun pellet or a fragment of a shotgun pellet. He was not seriously injured.

According to a police witness, the apartment at 130 North Second Street[1] was also damaged by one of the shotgun blasts. An officer testified that he evacuated the row of apartments in which this one was included, but did not get the names of those evacuated and did not know whether people were inside each individual apartment. The prosecution also presented evidence of damage from the shotgun blasts to the windows, front door, furniture, and appliances inside defendant's apartment. Nine spent buckshot shells, one spent slug shell, and four live shells were found on the floor.

The prosecution presented evidence that defendant had been a member of the Sureño gang Vatos Locos Mexicanos, which the police gang expert described as the most violent gang in Madera County. Defendant had gang tattoos on his hands. He had admitted to being a gang member on several occasions when he was taken into custody, beginning in 1996 or 1998 and continuing to the time of his booking on the current offenses. In the past he had worn gang clothing and associated with people known to be gang members. Defendant was "very well known" as a gang member to the Madera police and Madera County juvenile authorities, having been a gang member since he was 14 or 15 years old. His gang moniker was Bones. He once told a detective he would like to have a son become a member of his gang. He participated with other gang members in the flooding of jail cells and was involved in a gang meeting while in jail.

The police gang expert testified that the current offenses were committed for the benefit of or in association with the gang because gang members "gain respect" by "committing crimes[,] specifically violent acts." Killing a police officer would have given defendant "the highest status" within the gang. Further, the commission of violent crimes by members of a gang "gives that gang higher status" and causes witnesses to other gang crimes to be afraid to testify about them.

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[1]This is the apartment the information referred to as 130 Kings Avenue. It was in the Kings Court complex, facing the cross street.

Reading from a 1999 police report, the gang expert testified about an interview defendant gave Madera police in connection with a homicide. The report said defendant "stated that the only thing that protected law enforcement, protected police officers … was a bullet proof vest. He would—if it took—if it went down to going to jail, he would kill a police officer."

This statement was admitted over defendant's objection. The court overruled the objection and issued a limiting instruction, telling the jury that the statement was "not offered as evidence of the truth of the matter asserted" and that the jury should not "use it for any other purpose than [its] evaluation of the testimony of" the expert. The court later gave a similar instruction covering all the underlying conduct upon which the expert based his opinion about defendant's gang membership.

Defendant testified that he had been a gang member in Madera but had dropped out and not been a member since he moved to Chowchilla in 2003 or 2004. He said he "[f]igured that was the best choice for me and my wife to just move out of there. I went, told my friends well, I said you know what, that's it. I am moving away. I am going to start a new life with my family, my girl, little girl."

The jury found defendant guilty as charged on counts 1 through 17. It found him not guilty on count 18, the gang-membership charge. It found all the enhancement allegations true, except the gang-enhancement allegations, which it found not true.

On count 1, attempted deliberate and premeditated murder of a police officer, the trial court sentenced defendant to 15 years to life. It added a 20-year enhancement for personal and intentional discharge of a firearm. It imposed a consecutive sentence of seven years (the upper term) on count 3, discharging a firearm at 131 Kings Avenue, and two consecutive sentences of one year and eight months (one-third of the middle term) on counts 4 and 5, discharging a firearm at 129 Kings Avenue and 130 Kings Avenue. Upper terms for count 2, assault with a firearm on a police officer, and counts 6 through 9, grossly negligent discharge of a firearm, were imposed and stayed pursuant to Penal

Code section 654.[2] Concurrent upper terms were imposed for counts 10 through 15, grossly negligent discharge of a firearm, count 16, being a felon in possession of a firearm, and count 17, child endangerment.

DISCUSSION

I. Attempted deliberate and premeditated murder of a police officer

A. Sufficiency of evidence

Defendant argues that the conviction on count 1 should be reversed because insufficient evidence was presented at trial to show deliberation and premeditation. Similarly, he contends that the trial court erred in denying his motion for acquittal based on a claim of insufficient evidence in the prosecution's case in chief. "When an appellant asserts there is insufficient evidence to support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof." (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

Defendant argues:

> "Even assuming, *arguendo*, the evidence showed intent or willingness to kill, inferring premeditation and deliberation is unwarranted. There was no evidence of planning, only arming in one's home. The firearm apparently was brandished earlier and it certainly was present in the home already. There was no evidence [defendant] or his wife called police. This was hardly a planned ambush.
>
> "There was no preconceived motive to kill either. Jurors rejected reaching gang claims, and [defendant's] years-old youthful braggadocio about killing police was not admitted for substantive purposes. At sentencing, the court recognized this was an attempted suicide by cop. This

[2]Subsequent statutory references are to the Penal Code.

was brought on by a domestic dispute and probably job and depression issues."

We conclude that the evidence supported findings of deliberation and premeditation as those terms are defined in the law. The jury was instructed pursuant to CALCRIM No. 601, which sets forth the definitions. The written instruction given to the jury stated:

> "If you find the defendant guilty of attempted murder under Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation.
>
> "The defendant acted *willfully* if he intended to kill when he acted.
>
> "The defendant *deliberated* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill.
>
> "The defendant *premeditated* if he decided to kill before acting.
>
> "The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated.
>
> "The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances.
>
> "A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated.
>
> "On the other hand, a cold, calculated decision to kill can be reached quickly.
>
> "The test is the extent of the reflection, not the length of time.
>
> "The People have the burden of proving this allegation beyond a reasonable doubt.
>
> "If the People have not met this burden, you must find this allegation has not been proved."

This instruction has the same substance as CALJIC No. 8.67. CALJIC No. 8.67, in turn, is based on CALJIC No. 8.20, which defines deliberation and premeditation in the context of first degree murder, as opposed to attempted murder. (See Com. to CALJIC No. 8.67 (spring ed. 2007).) The definitions of deliberation and premeditation in CALJIC No. 8.20 have been upheld by our Supreme Court and by this and other Courts of Appeal. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1021; *People v. Fonville* (1973) 35 Cal.App.3d 693, 705; *People v. Goldbach* (1972) 27 Cal.App.3d 563, 569.) Defendant has not argued that the jury was instructed incorrectly.

The evidence was sufficient to show deliberation and premeditation. Officer Mendoza testified that he interviewed defendant's wife after defendant's arrest. According to Mendoza, it was she who first saw the officers arriving. She told defendant the police were surrounding the apartment. Defendant got up and reached for his gun. According to his own testimony, defendant heard the police announce themselves and fired after he heard their knock. The shot emerged from the window near the point at which Noblett knocked. Defendant followed up quickly with several more shots in the same direction, each of which required him to operate the pump action on the shotgun to eject the spent shell from the previous shot. From this evidence, the jury could reasonably infer that defendant armed himself because he was surrounded by police, and, when he heard the knock, considered the consequences and made up his mind to kill the officer who did the knocking by firing repeatedly at the place from which the sound had emanated. In considering the point of this behavior—defendant's motive—the jury reasonably could have drawn the same inference the trial judge drew at the sentencing hearing: "[T]here's no other explanation for what he did other than he was contemplating suicide … by cop. And he was going to take a cop with him." Deliberation and premeditation, as defined in the law, require no more than this.

Defendant relies on *People v. Anderson* (1968) 70 Cal.2d 15, 24-31, which examined some types of circumstances in which deliberation and premeditation properly

are found to exist. In *Anderson*, which involved first degree murder, the court described three types of evidence that are relevant to deliberation and premeditation: (1) facts about "'planning' activity," i.e., about the defendant's activities before the killing indicating an intention to kill later; (2) facts about the defendant's prior relationship with the victim from which a motive could be inferred; and (3) facts about the manner of the killing that indicate a preconceived design to kill. (*Id.* at pp. 26-27.) The court stated:

> "Analysis of the cases will show that this court sustains verdicts of first degree murder [requiring a finding of deliberation and premeditation] typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Anderson, supra*, 70 Cal.2d at p. 27.)

Defendant argues that the evidence in this case did not fit the pattern described in *Anderson*. There was no "extremely strong" evidence of planning, since events developed quickly; defendant had no prior relationship with the victim; and the manner of the attempted killing pointed to no design conceived earlier than the arrival of the police.

Our Supreme Court has made it clear, however, that the pattern described in *Anderson* is not a necessary condition for a finding of deliberation and premeditation.

> "The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] Nor did *Anderson* change the traditional standards of appellate review that we have set forth above. The *Anderson* guidelines are descriptive, not normative. [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.]
>
> "In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

Like the *Perez* court, we conclude that the evidence was sufficient without attempting to fit it precisely to the *Anderson* guidelines. Here, as there, "though the evidence is admittedly not overwhelming, it is sufficient to sustain the jury's finding." (*People v. Perez, supra*, 2 Cal.4th at p. 1127.)

B. Claimed prejudicial effect of gang evidence

1. Statement regarding willingness to kill police officer

As noted, the prosecution introduced evidence of defendant's 1999 statement in a police interview that he would kill a police officer if necessary to avoid going to jail. This statement was admitted to show a portion of the basis of the expert's opinions (which the jury rejected) that defendant was an active gang member and that the current offenses were committed for the benefit of his gang. The trial court overruled defendant's objection and gave a limiting instruction to the effect that the statement was not admitted for the truth of the matter asserted and could be used only to evaluate the officer's opinions. Defendant now argues that the statement was inadmissible under Evidence Code section 352. We disagree.

As a preliminary matter, we agree with the People's argument that defendant has forfeited his Evidence Code section 352 claim by failing to make an objection on the same basis at trial. In general, appellate courts need not consider erroneous rulings if objection could have been, but was not, made in the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1000.) This general rule applies to admission of inadmissible evidence. (*People v. Chain* (1971) 22 Cal.App.3d 493, 497.) An objection on one ground does not preserve for appeal an objection on a different ground. (*People v. Reid* (1982) 133 Cal.App.3d 354, 360-361 [relevance objection did not preserve claimed error under Evid. Code, § 352].)

No exception to the requirement of objection at trial applies here. As will be seen, we are not dealing with, for instance, "inadmissible matter [that] was so seriously prejudicial that an objection would have been ineffective to remedy the harm" or with

"admission of the inadmissible matter [that] … is considered a denial of due process; e.g., involuntary confession, involuntary admission, and evidence obtained by brutality." (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 397, pp. 487-488.)

When Officer Mendoza began reading the report, defense counsel said, "Objection to the witness just reading the report for the record." This was, in substance, a hearsay objection, and the court interpreted it that way. After the court overruled it and the statement came in, defense counsel did not make another objection or a motion to strike based on Evidence Code section 352 or anything else.

Defendant argues in his reply brief that the objection must have been based on Evidence Code section 352 because that was "the only apparent available ground for objection" and "clearly, the court understood as much …." The record does not support this account. An objection to reading from a report is an objection to the source of a statement, not an objection to its prejudicial effect. A ruling that evidence is not admitted for the truth of the matter asserted is a ruling on a hearsay objection, not a ruling regarding prejudicial effect. Defendant never before raised the objection he raises now and has failed to preserve the issue for appellate review. (See *People v. Montiel* (1993) 5 Cal.4th 877, 918-919 [trial court had no sua sponte duty to exclude hearsay evidence offered to support expert testimony and claimed to be prejudicial on appeal; trial counsel's failure to act waived claim of error].)

We would not hold that there was reversible error even if there had been an adequate objection at trial. Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Defendant's claim is that the danger of undue prejudice from his 1999 statement substantially outweighed its probative value. We review an admission of evidence

claimed to be inadmissible under Evidence Code section 352 for abuse of discretion. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)[3]

The probative value of the statement was the support it provided for the expert's view that defendant was an active gang member. In the end, the jury rejected the charge in count 18 that defendant was an active gang member, but of course the prosecution was entitled to present evidence to support that charge. We have no doubt that evidence of defendant's long-term, past gang membership was relevant to the claim that he was still an active gang member. The expert reasonably could conclude that defendant's boast that he was willing to kill a police officer was characteristic of gang behavior. He was entitled to rely on inadmissible hearsay if it was a type of evidence on which experts reasonably rely. (Evid. Code, § 801, subd. (b); *In re Fields* (1990) 51 Cal.3d 1063, 1070.) To satisfy the jury's need to know enough about the reasons for the expert's opinion to permit evaluation of that opinion, the prosecution properly could present the report and its contents to the jury through the expert's testimony. (*People v. Montiel, supra*, 5 Cal.4th at pp. 918-919.) Hearsay problems may arise under circumstances like these, but "[m]ost often, [these] problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth," like the instruction given here. (*Id*. at p. 919.)

The claimed prejudicial effect is that, because the statement asserted a willingness to do that which defendant was charged with attempting to do in the present case, the jury was encouraged to violate the rule against using character evidence as proof of conduct on a specific occasion. (Evid. Code, § 1101.) We acknowledge that there was a risk this could happen, but do not think that risk required the trial court to exclude the evidence.

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[3]Defendant concedes that this is the standard of review but then, in a footnote, inconsistently contends that we should review the issue de novo because the admission of the statement prejudiced him so seriously as to deprive him of a fair trial and violate his right to due process of law. As we will explain, an adequate showing of prejudice has not been made.

If the proper objection had been made, the question for the court would have been whether the danger of a prejudicial effect substantially outweighed the probative value of the statement. Without exceeding the bounds of reason, the court could have concluded that it did not. One reason why it could have done so is that it gave a limiting instruction. Jurors are generally presumed to follow instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Another reason is that the statement was not directly supportive of a character to act as defendant acted. There is little likelihood that he tried to kill the officer who knocked *as a means of avoiding prison*. He knew he was surrounded. He did not attempt, and likely did not contemplate, escape. His own account was that he wanted to die.

Contrary to defendant's argument, defense counsel's failure to make an Evidence Code section 352 objection was not ineffective assistance of counsel. Assuming that a reasonably professional level of performance would have included this objection, defendant cannot show that there was a reasonable probability of a better outcome for him if it had been made. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) First, as we have just said, the court would have acted within its discretion in overruling this objection.

Second, defendant cannot show a reasonable probability of a different outcome even if the objection had been made and sustained. The risk that the statement would have a prejudicial effect was not great, however, for the reasons we have just given. The verdict confirms this is true. Defendant was acquitted of being an active gang member and his conduct in committing the current offenses was found not to be for the benefit of a gang. This tends to show that the jury did not think defendant was acting from the gang mentality his 1999 statement evidenced and diminishes the likelihood that the jury relied on the statement in finding the necessary mental state.

Finally, the evidence of defendant's mental state was strong. Defendant heard the police announce themselves and knock on the window. He picked up his gun, pointed it

at the window they knocked on, and fired several times. This constituted ample support for the necessary inference regarding defendant's mental state. Relative to that, defendant's 1999 statement was not of great importance.

In sum: Defendant forfeited his Evidence Code section 352 objection to the admission of his 1999 statement by failing to make it at trial. On the merits, admission of the statement was not an abuse of discretion. Failure to make the objection did not constitute ineffective assistance of counsel.

2. Bifurcation and severance

Defendant contends that the trial court committed reversible error by failing to use a bifurcated proceeding to try the gang-enhancement allegations and by failing to sever the active-gang-membership charge for a separate trial. We disagree.

At trial, during discussion of motions in limine, defense counsel and the trial court had the following conversation on this subject:

> "MR. LINDAHL: I would move—ask the Court to bifurcate the portion which deals with the [section] 186.22 allegation [that the crimes were committed to benefit a criminal street gang] based primarily upon the Killabrew decision.[4] I just feel that the chance for prejudice in the jury weighing the underlying facts would outweigh its probative value. I would ask the Court—
>
> "THE COURT: All right. Well, I never thought about it because of the other charges here—these gang allegations are really basically insignificant and would not unduly prejudice Mr. Ramirez, considering what happened. And I heard the preliminary hearing. But in any event, it is charged as a special allegation [in] 16 counts and it's actually charged [as a substantive offense] in Count 18, so it would be—
>
> "MR. LINDAHL: Obviously, I won't ask the Court to bifurcate the stand alone count, just the allegations in the other—

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[4]We are unsure to what case counsel was referring. *People v. Killebrew* (May 10, 2005, F044707) is a decision of this court dealing with the issue of bifurcation of gang enhancements, but it was not published. *People v. Killebrew* (2002) 103 Cal.App.4th 644 deals with expert testimony on gang issues, but not with bifurcation.

"THE COURT: Right. So I don't see any undue prejudice to Mr. Ramirez in this case because we litigate those issues in one trial. Anything else?

"MR. LINDAHL: No."

In substance, this discussion touched on both bifurcation and severance. Bifurcation delays presentation to the jury of matters—such as prior convictions or gang-enhancement allegations—that may be inflammatory and that can be treated separately from guilt or innocence on substantive charges. In a bifurcated proceeding, evidence on these matters is presented to the same jury after it has found the defendant guilty of the charges. (*People v. Calderon* (1994) 9 Cal.4th 69, 74.) On the other hand, severance of charges involves ordering separate trials for different charges or groups of charges. (§ 954.)

Bifurcation of gang-enhancement allegations may be appropriate where the evidence supporting the allegations is highly inflammatory and not intertwined with the evidence of the charged offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Martin* (1994) 23 Cal.App.4th 76, 81-82.) We review the trial court's decision on a request to bifurcate for an abuse of discretion. (*People v. Calderon, supra*, 9 Cal.4th at pp. 69, 72, 77-78.) In this case, the evidence supporting the gang-enhancement allegations was virtually identical to the evidence supporting one of the charged offenses, namely the offense of being an active member of a criminal street gang as charged in count 18. The trial court's comments reflect that it denied the request for bifurcation for this reason. In doing so, it did not abuse its discretion.

Defendant argues that the court should have handled the matter by severing count 18 so there would be no connection between the evidence of the underlying offenses and the evidence supporting the gang-enhancement allegations. He asserts that if the severance claim is not preserved for appellate review because defense counsel did

not request severance at trial, then defense counsel rendered ineffective assistance by failing to request it.

We agree with the People's argument that defendant waived his severance claim by expressly disclaiming at trial any wish to separate count 18 from the rest of the trial. Failure to request severance waives the matter on appeal. (*People v. Hawkins* (1995) 10 Cal.4th 920, 939-940, overruled on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 110; *People v. Daly* (1992) 8 Cal.App.4th 47, 54, fn. 6.)

Defense counsel's decision not to make this request was not ineffective assistance. Assuming that a reasonably professional level of performance would have included this request, defendant cannot show that there was a reasonable probability of a better outcome for him if it had been made. (*Strickland v. Washington, supra,* 466 U.S. at pp. 688, 694.)

First, we review the denial of a request for severance of charges for abuse of discretion. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1318.) Defendant does not contend that count 18 improperly was joined with the other charges pursuant to section 954. As a result, the only question is whether the court would have abused its discretion by denying a request for severance. (*People v. Daly, supra*, 8 Cal.App.4th at p. 55.) The Supreme Court has described four factors that are significant in reviewing the denial of a request for severance: (1) whether evidence supporting one joined charge is cross-admissible with respect to another; (2) whether evidence supporting one joined charge is highly inflammatory as to another; (3) whether the prosecution has joined a weak charge with a stronger one in the hope of a spillover effect; and (4) whether the death penalty is sought. (*People v. Balderas* (1985) 41 Cal.3d 144, 173.) All the factors are relevant, and the fact that some may favor severance does not mean the trial court necessarily lacks discretion to deny severance based on others. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 641; *People v. Daly, supra*, 8 Cal.App.4th at p. 55.) In this case, there might not have been much evidence that was cross-admissible between count 18

and the other counts (except with respect to the gang enhancements to the other counts, which defendant claims also should have been tried separately); count 18 may have been weaker than the other counts; and the death penalty is not at issue. On the other hand, the gang evidence was not highly inflammatory with respect to the other charges.

Second, even if the trial court had granted severance and both the gang charge and the gang-enhancement allegations had been separated from the rest of the trial, there is no reasonable likelihood of a better result for defendant. Defendant argues that this was a "close intent case" with respect to counts 1 and 3 through 5, and that the gang evidence could have persuaded the jury of defendant's bad character and could have given the jury the push it needed to find the necessary mental state. We do not think so. As explained in the discussion about the 1999 statement above, it is not reasonably probable that defendant would have obtained a different result if that portion of the gang evidence had been excluded. The remaining gang evidence is no different in this regard. Further, because the jury found the gang allegations not true and found defendant not guilty of the gang charge, there is little likelihood that its exposure to the gang evidence significantly influenced its verdict and findings on the remainder of the information.

Finally, the evidence that defendant heard the police announce themselves and knock, then pointed his gun at the window they knocked on and fired repeatedly, provided strong support for the inference that he had the necessary mental state. In light of this, defendant cannot show that the jury's exposure to the gang evidence prejudiced him.

For these reasons, there was no reversible error in the court's decision not to bifurcate the gang-enhancement allegations or in the fact that it did not sever count 18 sua sponte; and trial counsel did not render ineffective assistance by failing to request severance.[5]

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[5]Defendant also contends that the trial court should have *bifurcated* the *substantive count* even if it need not have *severed* it. Defendant waived his claim about

II. Discharging a firearm at an inhabited dwelling

A. Sufficiency of evidence

Defendant argues that insufficient evidence was presented at trial to prove the mental state necessary for a violation of section 246, discharging a firearm at an inhabited dwelling. We disagree.

The offense requires that the perpetrator "maliciously and willfully" discharge a firearm at an inhabited dwelling. (§ 246.) It is a general-intent crime. The perpetrator need not have intended to strike an inhabited dwelling; instead, he only needs to shoot under circumstances showing a conscious disregard for the probability of striking one. (*People v. Overman, supra,* 126 Cal.App.4th at pp. 1356-1357; *People v. Watie* (2002) 100 Cal.App.4th 866, 879; *People v. Jischke* (1996) 51 Cal.App.4th 552, 556.)

The evidence that defendant fired with conscious disregard for the probability of striking inhabited dwellings was ample. He fired approximately 10 shotgun rounds through the windows of his apartment. Undoubtedly, he knew he lived in an apartment complex and that his neighbors' apartments were outside his windows. A reasonable jury easily could find beyond a reasonable doubt that defendant knew of the probability that shot from his shells would strike those apartments and that he fired in conscious disregard of this fact. The evidence did not limit the jury to findings of negligence or gross negligence, as defendant argues.

A sampling of defendant's argument reveals that he misunderstands what the required general intent involves:

> "[Defendant] probably did not even see the other units, much less consciously consider them. [¶] Moreover, aside from a slug, these were buckshots. Most people would not even consciously know, much less consciously disregard, how far such buckshot would travel under these

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this for the same reasons he waived his claim about severance; and his counsel did not provide ineffective assistance by failing to request it for the same reasons he did not render ineffective assistance by failing to request severance.

> circumstances. Unlike a gunshot from outside a building, trajectory and distance here could depend on the distance and angle of the shot from within the house, the dispersal from a sawed-off barrel, the size of the buckshot, the type of window, and the type of blinds."

The jury did not have to find that defendant knew any of these things. It only had to conclude that he knew he would probably hit his neighbors' apartments and consciously disregarded this when he fired. The fact that he could not see through his blinds to confirm that the apartments were still there and that he lacked detailed ballistic knowledge about his gun and ammunition did not prevent this finding.

The evidence supporting the mental-state element of the offenses charged in counts 3 through 5 was more than sufficient. Defendant's argument that the court erred in denying his motion for acquittal on these counts is incorrect for the same reason.

B. "Reopening" of evidence on count 5

After defendant made a motion for acquittal on count 5, the court permitted the prosecution to recall a witness to fill in a gap in its evidence. Defendant argues that the court's action constituted a reopening of the prosecution's case and that it was erroneous. We disagree. The decision whether to permit the reopening of evidence is subject to the trial court's discretion. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 792-793.) The court's action here was within its discretion.

The discussion among the court and counsel was as follows:

> "THE COURT: … Next witness, please.
>
> "MR. LICALSI: I have no further witnesses, Your Honor. I just have some exhibits.
>
> "THE COURT: Why don't we do this. Why don't we take a 15-minute recess and you and Mr. Lindahl can go over the exhibits together and stipulate those ones that are admissible.
>
> "MR. LINDAHL: All right."

The court then went into recess. According to defendant's reply brief, counsel agreed in an unreported discussion during the recess to stipulate to the admission of exhibits. The proceedings then resumed:

> "THE COURT: Very well. Back on the record. And for the record, the defendant is present in court with counsel. [¶] Mr. Lindahl, I understand you wish to make a 1118.1 Motion?
>
> "MR. LINDAHL: Yes.… [¶] With regards to Count 3, 4 and 5, the 246 counts, I would ask the Court to dismiss as a matter of law in that I don't believe there's any showing that—well, actually, let me take them separately.… [¶] [W]ith regard to Count 5, that is 130 Kings Avenue, Count 5 does allege that the discharge of a firearm was into an inhabited dwelling. There's no evidence that 130 was inhabited. I am asking [for acquittal on] all three of those counts … more specifically … Count 5.
>
> "THE COURT: Well, all 3 of the other apartments were inhabited.
>
> "MR. LINDAHL: Were they?
>
> "THE COURT: Yeah, we heard testimony to that.
>
> "MR. LINDAHL: I don't think we heard anything with regard to apartment 130, the one located in the back, as to whether it was inhabited. I know we heard testimony regarding the occupants of 131 and 129, but I didn't recall testimony about 130 being inhabited. [¶] … [¶]
>
> "MR. LICALSI: I haven't rested yet. I will address that.
>
> "THE COURT: All right.
>
> "MR. LINDAHL: I am sorry. I thought that the People had rested.
>
> "THE COURT: They were going to.
>
> "MR. LINDAHL: When is my motion timely then?…
>
> "THE COURT: All right. Then we will reserve that until Mr. LiCalsi rests."

Both counsel then informed the court of the stipulation they had reached regarding admission of exhibits. The exhibits were placed in evidence, the jury was brought back in, and the prosecutor called Sergeant Noblett back to the stand to testify about No. 130.

Defendant waited until after he presented his case to renew the acquittal motion. The court denied it.

The parties preliminarily dispute whether the People had rested and whether the court's action constituted a reopening of their case. The People argue that the prosecutor only said he had no more witnesses. Defendant asserts that the parties had already agreed on exhibits by the time he made his motion, so nothing remained but the prosecutor saying "we rest," a matter of form upon which defendant's rights should not depend. We do not need to resolve this dispute and assume that the court's action allowed the prosecutor to reopen his case. Instead, we turn to the merits of the question whether the reopening itself was an abuse of discretion.

Defendant first argues that the court's action contravened the acquittal motion statute, section 1118.1. That statute states:

> "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal."

Defendant's theory is that, because section 1118.1 says the court *shall* enter a judgment of acquittal if the evidence is insufficient when the motion is made, "the plain language of the statute" required the court to grant his motion. This argument is in conflict with established principles. As defendant is compelled to acknowledge, trial courts are empowered to allow reopening of evidence. "It is well settled that the trial court has broad discretion to order a case reopened and allow the introduction of additional evidence." (*People v. Goss* (1992) 7 Cal.App.4th 702, 706.) Also, the trial court's power to vary the usual order of presentation of evidence is codified in sections 1093 and 1094. To insist, as defendant does, that the court erred in this case because section 1118.1 is a "mandatory provision" ignores this discretion.

Defendant's next theory is that defense counsel was tricked into revealing his argument (that the prosecution never proved that No. 130 was inhabited) in a way that allowed the prosecution to get the better of him. He could have saved his argument for his closing statement to the jury, but instead he "detrimentally relied" on the appearance that the prosecution had rested and on section 1118.1. As a result, his opportunity to capitalize on the prosecution's omission was squandered. He asserts that section 1118.1 should not be combined with the court's discretion to reopen to create a device for allowing the prosecution to take advantage of the defense's proper effort to obtain acquittal based on a lack of evidence on a specific point.

This "detrimental reliance" argument is based on a false premise: that if defendant had saved his argument regarding insufficient evidence on count 5 for the jury, it would then have been too late for the court to allow reopening. There is no flat rule against reopening after closing arguments have commenced. If defense counsel had saved this argument for his closing statement, the trial court's discretion would still have encompassed permission to reopen to allow the prosecutor to question Noblett, so long as the defense was offered a fair opportunity to respond. (See *People v. Cuccia*, *supra*, 97 Cal.App.4th at pp. 792-795 [court erred by allowing reopening during closing argument to allow prosecutor to offer rebuttal evidence, but it could have acted properly by also granting defendant continuance to permit presentation of surrebuttal].)

Defendant makes a similar argument contending that to allow reopening under these circumstances empowers the prosecution to put on an inadequate case and still prevail by repairing deficiencies after unfairly relying on defense counsel to point them out. He cites a federal case applying the Federal Rules of Criminal Procedure and stating that "the government's case-in-chief should not be treated as an experiment that can be cured after defendant has, by motion, identified the failures." (*United States v. Hinderman* (10th Cir. 1980) 625 F.2d 994, 996.) There is, however, no general rule that requests to reopen must be denied to prevent the prosecution from learning how to shore

up its case from the arguments supporting an acquittal motion. Instead, two principles control: First, the prosecution's failure to present the evidence before must be a mistake, not a deliberate tactic. "The court always has discretion to allow the prosecution to reopen after a section 1118[6] motion so long as the court is convinced that the failure to present evidence on the issue was a result of 'inadvertence or mistake on the part of the prosecutor and not from an attempt to gain a tactical advantage over [the defendant].' [Citation.]" (*People v. Goss, supra*, 7 Cal.App.4th at p. 708.)[7] Second, because the decision is committed to the trial court's discretion, it will be undisturbed on appeal unless the court acted "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Defendant does not argue, and the record presents no reason to believe, that the prosecutor failed to ask Noblett the relevant questions earlier through anything but inadvertence. The court was guilty of no arbitrariness or absurdity; no miscarriage of justice resulted from its ruling. Count 5 was one of three similar counts; the prosecution established each element of each count except for the "inhabited" element of count 5. By allowing the prosecution to recall Noblett, the court merely permitted the prosecution to remedy its mistake in forgetting to question its witness about that element of that count. The evidence did not come from a surprise witness and was not newly acquired to meet the argument made in the motion. Defense counsel cross-examined Noblett when he was recalled and did not request an opportunity to do anything else by way of responding to his additional testimony. In sum, just as this court held in *People v. Ceja* (1988) 205

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[6]Section 1118 authorizes an acquittal motion in a court trial. Section 1118.1 authorizes it in a jury trial.

[7]"The court, in exercising its discretion, must also consider the diligence shown by the moving party in discovering the new evidence, the prospect the jury would accord it undue emphasis, and the significance of the evidence." (*People v. Goss, supra*, 7 Cal.App.4th at p. 708.) Defendant does not claim that any of these considerations weigh in favor of his position here.

Cal.App.3d 1296, 1304 and *People v. Goss*, *supra*, 7 Cal.App.4th 702, defendant here was not prejudiced by the ruling, "'other than being denied the benefit of the prosecutor's inadvertence.'" (*People v. Goss*, *supra*, at p. 707.)

Defendant also argues that there should be a sharp distinction between a general acquittal motion and an acquittal motion based on specific asserted gaps in the prosecution's proof. Reopening following a motion based on specific gaps, he argues, allows the prosecution to take unfair advantage of the motion. Defendant concedes, however, that the case law does not establish a bright-line rule of this kind, and we see no reason to create it. The important questions are whether the prosecution's omission was inadvertent and whether there was a miscarriage of justice. These do not point to a general prohibition on reopening after an acquittal motion based on specified deficiencies.

Finally, defendant mentions, without elaboration or argument, a host of constitutional considerations:

> "The error deprived [defendant] of his liberty interest created by section 1118.1, of his interest in an exercise of discretion accorded under state law, of fundamental fairness in state proceedings by virtue of his reliance on the section 1118.1 procedure, and, hence, of due process of law. (U.S. Const., amends. V, XIV; Cal. Const., art. 1, §§ 7, 15; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The error further deprived [defendant] of his constitutional rights under the state and federal double jeopardy clauses. (*People v. DeSimone* (1998) 62 Cal.App.4th 693, 700; *Jones v. Thomas* (1989) 491 U.S. 376, 381.)"

We do not see how this run-of-the mill exercise of the court's discretion to control the trial proceedings implicates any of these constitutional issues. As a general rule, a defendant has no constitutional right to prevent evidence of his guilt from reaching the jury just because the prosecutor forgot to ask a witness a question before resting. This case presents nothing out of the ordinary in that regard. In light of defendant's failure to provide any significant briefing on these issues, we need go no further into the matter. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

III. Cumulative error

Defendant argues that, even if none of the claims we have considered to this point establishes prejudicial error separately, they do so cumulatively. We already have stated that the convictions on counts 1, 3, 4, and 5 rested on substantial evidence and that the trial court acted within its discretion in making each of the rulings defendant challenges. There is no cumulative prejudicial error.

IV. Lesser-included offenses

Defendant points out that, while only 10 spent shells were found in his apartment, he was convicted of 10 counts of negligent discharge (counts 6 through 15) plus three counts of firing at an inhabited dwelling (counts 3 through 5). He claims that negligent discharge is a lesser offense necessarily included in firing at an inhabited dwelling. Multiple convictions of greater and necessarily included lesser offenses are not permitted. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) Defendant argues that the 10 shots constituted a maximum of 10 acts, so the maximum combined number of allowable convictions for negligent discharge and firing at an inhabited dwelling is 10. He concludes that three of the negligent-discharge convictions therefore must be reversed. We disagree. Negligent discharge is not necessarily included in firing at an inhabited dwelling.

California courts have employed two tests, the elements test and the accusatory pleading test, to identify necessarily included offenses. "[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser." (*People v. Birks* (1998) 19 Cal.4th 108, 117.) In *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1230, however, the Supreme Court held that only the elements test may be used in determining whether one offense is necessarily included in another for purposes of applying the *Pearson* rule against multiple convictions.

Section 246.3, subdivision (a), defines the offense of negligently discharging a firearm:

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

People v. Clem (2000) 78 Cal.App.4th 346, 350, enumerated the elements of this offense as follows: "'(1) the defendant unlawfully discharged a firearm; (2) the defendant did so intentionally; (3) the defendant did so in a grossly negligent manner which could result in the injury or death of a person.'"

Section 246 defines the offense of firing at an inhabited dwelling: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house … is guilty of a felony …. [¶] As used in this section, 'inhabited' means currently being used for dwelling purposes, whether occupied or not."

The crucial difference for purposes of the lesser-included-offense analysis is that firing at an inhabited dwelling does not require any possibility of causing the injury or death of a person. Unlike section 246, section 246.3 "'presupposes that there are people in harm's way ….'" (*People v. Robertson* (2004) 34 Cal.4th 156, 169.) Consequently, it is possible to commit the offense of firing at an inhabited dwelling without committing a grossly negligent discharge of a firearm. One element of the latter—the possibility of killing or injuring a person—is not required for the former. A perpetrator would be guilty of firing at an inhabited dwelling if he intentionally shot an inhabited house in an isolated area after ascertaining that no one was home and no one was nearby. By the same token, he or she might not under these same circumstances be guilty of negligent discharge of a firearm because there might be no possibility of injuring or killing a person.

Defendant relies on *People v. Overman*, *supra*, 126 Cal.App.4th 1344, which applied the elements test and held that negligent discharge of a firearm is necessarily included in firing at an inhabited dwelling. We conclude that *Overman* was wrongly decided and decline to follow it.

In *Overman*, the defendant argued that the trial court erred by refusing to instruct the jury on negligent discharge of a firearm as a lesser-included offense of firing at an inhabited dwelling. (*People v. Overman*, *supra*, 126 Cal.App.4th at p. 1358.) The Court of Appeal agreed. It noted that a possibility of killing or injuring a person is an element of negligent discharge, but believed that such a possibility is also generally involved in firing at an occupied dwelling.

> "When a defendant shoots at an inhabited dwelling house, occupied building, or other target listed in section 246, the defendant discharges a firearm in a manner that has the potential for culminating in personal injury or death. Shooting at an inhabited dwelling house, for example, whether occupied or not, necessarily poses a significant likelihood or 'high probability' that personal injury or death will result, because people '"are generally *in or around* the premises."' [Citation.] The same significant risk of personal injury or death is present when a defendant shoots at any other target listed in section 246." (*People v. Overman*, *supra*, 126 Cal.App.4th at pp. 1361-1362.)

We respectfully conclude that this reasoning is mistaken. It is true that people *generally* are in or around inhabited dwellings, but this does not mean that shooting at one *necessarily* poses a significant likelihood of injuring or killing a person. It is *possible* to shoot at an inhabited dwelling within the meaning of the statute without creating any likelihood of injuring or killing a person because sometimes people are not in or around a particular inhabited dwelling. This means that a chance of injuring or killing a person is not an element of the offense and, therefore, it is possible to shoot at an inhabited dwelling within the meaning of section 246 without negligently discharging a firearm within the meaning of section 246.3.

V. Sentencing issues

A. Section 654

1. Counts 3 through 5 and 10 through 15

Pursuant to section 654, the trial court stayed the sentences on counts 6 through 9 (negligent discharge of a firearm). It did not stay the sentences on counts 3 through 5 (firing at an inhabited dwelling) or 10 through 15 (negligent discharge of a firearm). Defendant contends that the court should have stayed the sentences for all these counts because he fired the shotgun pursuant to a single criminal objective, "namely attempted murder or assault on a peace officer." We disagree. Section 654 does not require a stay where multiple offenses arising from a course of conduct with a single criminal objective had separate victims.

Section 654 provides, in part, as follows:

> "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."

This statute bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) We review under the substantial-evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.) As always, we review the trial court's conclusions of law de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

In this case, we need not consider how many objectives defendant might have had in carrying out his shooting spree. There was no error even assuming the multiple convictions were based on a single objective because there were multiple victims. Section 654 does not bar multiple punishments where multiple crimes of violence arising from a single objective had separate victims. (*People v. Miller* (1977) 18 Cal.3d 873, 885-886, overruled on other grounds in *People v. Oates* (2004) 32 Cal.4th 1048, 1067-1068, fn. 8; *People v. Young* (1992) 11 Cal.App.4th 1299, 1311-1312.)

The victims of defendant's shooting offenses included all the occupants of the apartments he shot who were home at the time. These included Kenny Bishop and his daughter, mother-in-law, and sister-in-law. They included Humberto Hernandez, his wife, and his brother-in-law. Defendant's victims also included all others put in harm's way by his grossly negligent shotgun discharges. These victims included the officers who surrounded his apartment during the shooting spree. Among these, the record mentions at least Sergeant Noblett, Officers Esteves and Mandrell, and Chief Varney. Noblett, Esteves, and Varney were at the front of the apartment when the shooting started; Mandrell had gone with a police dog to the back. As noted earlier, defendant knew he was surrounded and shots emerged from both front and back windows. There was evidence of shotgun damage inside defendant's apartment as well, indicating that defendant's wife and daughter were also endangered by the shooting. The daughter was also outside the apartment with the police during part of the standoff. All told, there were at least 13 victims of defendant's shooting offenses. To these might be added the California Highway Patrol officers who came to the scene to provide support. The court imposed unstayed sentences on a total of 12 counts (1, 3 through 5, and 10 through 17). Assuming the acts on which all of these were based were undertaken pursuant to a single criminal objective, imposition of unstayed sentences for each was still proper.

Defendant apparently believes the multiple-victim doctrine only applies if multiple victims received bodily injuries. He argues:

> "[T]here were no separate human victims of violence alleged or found true as to Counts 3-5, as required for this exception, only apartment numbers. [Citations.] At a minimum, in applying this exception the courts consider the actual means employed in committing the offenses under the circumstances, as well as the existence of actual victims of violence to the person. [Citation.] Under this analysis, [defendant] submits this is very different than an intentional shooting at a car or the like. [Defendant] should not be held liable for discrete victims of violence for pellet strikes on these three apartments, based on what amounts to reckless conduct, any more than if ricochets had happened to hit a few more apartments; at best, the evidence would support one additional term under Count 3 for the ricochet wound suffered by Eloy Perea."

This argument represents a misunderstanding of the multiple-victim doctrine. *People v. Cruz* (1995) 38 Cal.App.4th 427 well illustrates a proper interpretation of this doctrine. Having been expelled by a security guard from a swap meet in a building, Cruz returned with a gun and fired four shots at the guard though a glass door. One shot missed by inches. Several other people were standing near the door. (*Id.* at pp. 430-431.) Cruz was convicted of, and received separate unstayed sentences for, assault with a firearm and firing at an occupied building. (*Id.* at pp. 430, 434.) The Court of Appeal held that there was no violation of section 654 because there were multiple victims. The guard, "although uninjured, was a victim of both crimes. He was not, however, the only victim of the second crime [firing at an occupied building]. The 'children and other people' standing near [the guard] … as the bullets shattered the glass front door, were at risk from bullets and flying glass. They too were 'victims.' Appellant was properly punished for his crime against them." (*People v. Cruz, supra,* at p. 434.) *Cruz* was correctly decided and is comparable to this case.

2. Count 16

Defendant received an unstayed sentence for count 16, being a felon in possession of a firearm. He argues that section 654 required staying this sentence because there was no evidence that he possessed the shotgun before the shooting spree. We disagree.

Defendant's position is based on the doctrine set forth in *People v. Venegas* (1970) 10 Cal.App.3d 814. There, the defendant was convicted of assault with a deadly weapon with intent to commit murder and possession of a firearm by a convicted felon. He received a prison sentence for each count. (*Id.* at p. 817.) The Court of Appeal held that there was only one act of possessing the weapon, so the felon-in-possession offense was not a "divisible transaction" from the assault. "[W]here the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved," the court stated. But "[h]ere the evidence shows a possession only at the time defendant shot" the victim. As a result, imposition of sentence on both counts "constituted multiple punishment proscribed by section 654." (*Id.* at p. 821.) The Supreme Court endorsed *Venegas* in *People v. Bradford* (1976) 17 Cal.3d 8, 22-23.

Questions under the doctrine of *Venegas* can be close. In *People v. Bradford, supra,* 17 Cal.3d 8, for instance, the defendant was convicted of and sentenced for assault with a deadly weapon and being a felon in possession of a firearm. He obtained the deadly weapon by wresting it from the victim, a police officer, and then proceeded to fire it at him. (*Id.* at p. 13.) The Supreme Court held that there was no possession antecedent to and separate from the assault, so section 654 required one of the sentences to be stayed. (*People v. Bradford, supra,* at pp. 22-23.) In *People v. Ratcliffe, supra,* 223 Cal.App.3d 1401, the opposite result was reached. The defendant committed two robberies about 90 minutes apart and was arrested 30 minutes after the second robbery. He received sentence enhancements for being armed with a firearm in the commission of each robbery. He was also convicted of and received an additional sentence for being a felon in possession of a firearm. (*Id.* at pp. 1404-1405, 1407-1408.) The Court of Appeal rejected his argument that imposing sentences for both being armed during the offenses and being a felon in possession of a firearm violated section 654. Noting that the crime of being a felon in possession of a firearm "is committed the instant the felon in any way has a firearm within his control" (*People v. Ratcliff, supra,* at p. 1410, italics

omitted), the court relied on the fact that the defendant possessed the gun during the 90 minutes after the first robbery ended and before the second began, as well as during the 30 minutes after the second robbery ended and before he was arrested. Consequently, "defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes. Section 654 therefore does not prohibit separate punishments." (*Id.* at p. 1413.)

In this case, there is evidence that defendant possessed the shotgun before he committed the remaining offenses. Defendant's wife testified that defendant grabbed the gun when she told him the police had arrived, and that defendant had it "just a little bit before" that. Defendant himself also testified that he possessed the gun before the police arrived:

> "Q Okay. Did you have access to that weapon before [the police] got there?
>
> "A Yes, I did have access to it.
>
> "Q Were you contemplating using that weapon for any reason?
>
> "A Just to take my life that night, that was it."

Defendant's own account then was that he possessed the gun before the police arrived and he began the shootings and that he had prior plans for it. In light of this, we have little hesitation in concluding that the conduct on which count 16 is based was antecedent to and separate from the conduct on which the remaining offenses was based. The court was not required to stay the sentence for count 16.

Finally, in a paragraph almost identical to the one quoted at the end of section II of this opinion, defendant mentions a host of constitutional provisions allegedly violated by the court's imposition of unstayed sentences. Among other things, defendant says the imposition of unstayed sentences violated the double-jeopardy clauses of the state and federal Constitutions because it was multiple punishment for the same conduct. We are aware of no authority for the notion that the double-jeopardy clauses mean a defendant

cannot receive several sentences for firing several shots and endangering several victims. In light of defendant's failure to provide any significant briefing on these issues, we need go no further into them. (See *Reyes v. Kosha, supra*, 65 Cal.App.4th at p. 466, fn. 6.)

B. Blakely/Cunningham

The court imposed an upper term for count 3, stayed upper terms for counts 6 through 9, and imposed concurrent upper terms for counts 10 through 17. Defendant argues that the imposition of these upper terms violated the Sixth Amendment as interpreted in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). Our Supreme Court's recent decision in *People v. Black* (July 19, 2007, S126182) ___ Cal.4th ___ (*Black II*) is dispositive of this issue and requires affirmance.

In *Blakely*, the United States Supreme Court held that a sentence for kidnapping imposed under the Washington sentencing scheme violated the defendant's Sixth Amendment right to a jury trial. (*Blakely*, *supra*, 542 U.S. at pp. 298, 304.) Under Washington law, the trial court could impose a sentence longer than 53 months only if it found substantial and compelling reasons to do so. (*Id.* at p. 299.) The judge found that the crime was committed with "deliberate cruelty" and imposed a sentence of 90 months. (*Id.* at p. 298.) The Supreme Court held that this violated the Sixth Amendment as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490: "'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely*, *supra*, 542 U.S. at p. 301.) It did not matter that the offense was a class B felony and that class B felonies carried a maximum sentence of 10 years; the state's sentencing law did not allow the sentence to exceed 53 months without judicial factfinding. "Our precedents make clear … that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Id.* at p. 303.) The court continued:

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

On January 22, 2007, the United States Supreme Court issued its decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), overruling *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*) and holding that *Blakely* applies to the imposition of upper terms under California law. (*Cunningham*, *supra*, 549 U.S. ___ [127 S.Ct. at pp. 860, 871].) The imposition of an upper term under California law as it stood then[8] was erroneous, therefore, unless it was supported by prior convictions, facts found by the jury, or facts admitted by the defendant.

The California Supreme Court filed its opinion in *Black II* on July 19, 2007. It held that the upper term imposed in that case was not erroneous under *Cunningham* because it was authorized by defendant's prior offenses and the jury's finding that the defendant committed the offense by means of force and fear. (*Black II*, *supra*, ___ Cal.4th ___ [at pp. 17-18, 20].) Whether the trial judge *would* have imposed the upper term based on these factors alone was irrelevant; the question was only whether it *could* have done so under the sentencing law. It could: California's determinate sentencing law allows the trial court to impose the upper term based on a single aggravating factor. Each of these two factors authorized the upper term independently under California law and each was independently established by means consistent with the Sixth Amendment as interpreted in *Blakely* and *Cunningham*. The presence of either one alone would have been sufficient to render the upper term constitutional. (*Id.* [at pp. 13, 15-16, 24].)

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[8]It has since been amended in response to *Cunningham*. (Stats. 2007, ch. 3 (Sen. Bill No. 40); see *Black II, supra*, ___ Cal.4th ___ [at p. 6, fn. 2].)

Black II makes clear that the trial court need not have relied expressly on one of the factors approved by *Blakely* and *Cunningham* so long as one of those factors was present in the record and the court was aware of it. The trial court in *Black* did not assert at sentencing that it was using the defendant's prior convictions as an aggravating factor in support of the upper term. Instead, it said it was imposing the upper term because of "'the nature, seriousness, and circumstances of the crime.'" (*Black II, supra*, ___ Cal.4th ___ [at p. 18].) It also stated that it considered "other aggravating circumstances set out in the district attorneys' sentencing brief." These included the defendant's criminal history. The probation report included the defendant's criminal history also. This was sufficient even though the trial court did not mention the defendant's criminal history explicitly. (*Id.* [at p. 20].)

Further, where a factor properly established under the Sixth Amendment is present, the court's reliance on other factors that would *not* satisfy the Sixth Amendment on their own does not undermine the sentence:

> "[S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Black II, supra*, ___ Cal.4th ___ [at p. 12].)

In light of all this, it is clear that there was no constitutional error in the imposition of upper terms in the present case. The court's findings in support of imposing upper terms were these:

> "With regard to circumstances in aggravation and mitigation, the Court finds the defendant has engaged in prior violent conduct which indicates a serious danger to society. The defendant's prior convictions and sustained petitions in juvenile delinquency proceedings are numerous. The defendant has served three prior prison terms. The defendant was on parole when the crimes were committed.

> "The defendant was deported from State Prison on July [23d] of 2003. His discharge date would have been May 19th of 2006. The defendant's prior performance on probation was unsatisfactory as evidenced by new law violations while—that occurred while serving grants of probation.
>
> "And with regard to circumstances in mitigation, the Court will find that the defendant suffered from a mental impairment or mental stress not amounting to a defense. I believe the circumstances of the offense are only explained by the defendant's suicidal thoughts during this action. However, that one circumstance in mitigation is slight, compared to those noted in aggravation. His mental impairment, his suicidal ideation is no excuse or no justification for what he did whatsoever."[9]

According to the probation report, defendant's adult record consisted of five offenses committed between 1999 and 2002. In 1999, defendant suffered a misdemeanor conviction of unlawful sexual intercourse with a person under 18. (§ 261.5.) In 2000, he committed a felony violation of section 12025, subdivision (a)(1), carrying a concealed weapon in a vehicle. In 2002, defendant committed a felony violation of section 273.5, willful infliction of corporal injury on a spouse or cohabitant. Later in 2002, he committed a felony violation of Health and Safety Code section 11377, subdivision (a), possessing a controlled substance, and a misdemeanor violation of Health and Safety Code section 11364, possessing drug paraphernalia. Defendant also violated the terms of his probation in 2001 and again in 2002.

Defendant's juvenile record consisted of three offenses. In 1995, he was found intoxicated in a public place. (§ 647, subd. (f).) In 1996, he drove a motor vehicle without a license. (Veh. Code, § 12500, subd. (a).) In 1997, he was guilty of being a

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[9]Defendant claims the court was mistaken in referring to "three prior prison terms"; he says there was only one. The reality is that three prison terms were imposed, but this was done at a single proceeding on May 6, 2002, and the counts were to run concurrently. The court's reference to defendant being "deported from State Prison" means he was released to the Immigration and Naturalization Service and deported to Mexico (of which he is a citizen) after being released from prison.

minor in possession of a handgun. (§ 12101, subd. (a)(1).) Defendant violated juvenile probation three times.

Under *Black II*, this record is amply sufficient to support the upper terms. All the aggravating factors the court relied on—prior violent conduct, numerous prior convictions, time in prison, being on parole at the time of the current offenses, and prior violations of probation—were related to defendant's recidivism. At least one of these—numerous prior convictions—cannot meaningfully be distinguished from *Blakely*'s formulation, approving the use of "'the fact of a prior conviction'" (*Blakely*, *supra*, 542 U.S. at p. 301) to increase a sentence. It would not make sense to say that the trial court is entitled to rely on one prior conviction but not on several. In fact, a report of numerous or increasingly serious prior convictions in the probation report and the prosecutor's brief was just what the Supreme Court found adequate in *Black II*, rejecting the argument that this is not the same thing as the simple fact of a prior conviction:

> "Defendant contends he was entitled to a jury trial on the aggravating circumstance of his prior criminal history because, even if the trial court properly may decide whether a defendant has suffered a prior conviction, a jury must determine whether such convictions are numerous or increasingly serious. Defendant, however, reads the 'prior conviction' exception too narrowly." (*Black II*, *supra*, ___ Cal.4th ___ [at p. 21].)

We need not decide whether defendant's juvenile record falls within the exception for prior convictions. His adult record does, and nothing else is needed to support affirmance of the upper terms.

In sum: Because upper terms were authorized by defendant's prior convictions, the court did not err under *Blakely* and *Cunningham* in imposing upper terms. We need not discuss the People's claim that defendant forfeited his claim by failing to assert it in the trial court.

DISPOSITION

The judgment is affirmed.

_____
Wiseman, Acting P.J.

WE CONCUR:

_____
Gomes, J.

_____
Hill, J.