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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RONALD EUGENE ROBERTS, JR., Defendant and Appellant.	B188942 (Los Angeles County Super. Ct. No. BA268489)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael S. Luros, Judge. Affirmed in part, reversed in part, and remanded.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell, Lawrence M. Daniels and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Ronald Eugene Roberts, Jr., appeals from the judgment entered following his conviction, by jury trial, for attempted premeditated murder and robbery, with firearm use and gang enhancement findings (Pen. Code, §§ 664/187, 211, 12022.53, 186.22, subd. (b)).[1] Sentenced to state prison for a term of 46 years and 6 months to life, Roberts contends there was trial and sentencing error. The Attorney General contends there was sentencing error.

The judgment is affirmed in part, reversed in part, and remanded to the trial court.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, we find the evidence established the following.

1. *Prosecution evidence*.

a. *The robbery and shooting*.

Shortly after 6:00 p.m. on May 15, 2005, 60-year-old R.J. was working at his job as a caretaker at National Auto Sales, a car parts junkyard. R.J., who earned $200 a week, had just been paid that day in cash. Defendant Roberts came into the junkyard, but R.J. told him the business was closed. Roberts asked R.J. for help with his bicycle because a tire was leaking. While R.J. was inspecting the bike, Roberts took out a gun, pointed it at R.J. and told him to go into the office.

Inside the office, Roberts had R.J. empty his pockets. R.J. put his cash, eyeglasses and keys onto a table. Roberts took the cash. Then he asked for more money, for weapons and for a phone. R.J. told him there wasn't anything else. Roberts didn't believe him and made R.J. open up various drawers. Finding

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

nothing he wanted, Roberts again asked for money and weapons. When R.J. again said there were no weapons or any more money, Roberts got angry. He pointed the gun at R.J.'s head and fired. R.J. demonstrated how Roberts held the gun with the barrel just touching R.J.'s temple before he fired: "He didn't hit me with . . . the weapon. He just touched me with it. I felt that he touched my head with it, and he fired." R.J. heard the gun go off and he felt the impact of the bullet. He put his hand up to his head and felt warm blood flowing from the wound.

R.J. testified it appeared the bullet Roberts fired at him had somehow ended up hitting Roberts's belt buckle and then his hand, which was now bleeding. R.J. directed Roberts to a first aid kit. Roberts kept his gun pointed at R.J. and told him not to move or he would shoot him again. When R.J. saw Roberts leaving on his bike, he called 911.

About 10 minutes later, R.J. saw Roberts back at the junkyard, trying to open the warehouse door. He had on a different shirt and his hand was bandaged. The police arrived shortly thereafter and took Roberts into custody. They found R.J.'s money and a gun in Roberts's pants pocket. The gun was a small caliber, semi-automatic handgun. There was a live round in the chamber and three more live rounds in the magazine.

Officer Todd Bracht testified R.J. said Roberts had shot him. Bracht had seen many grazing wounds and this appeared to be one; he could see a half-inch abrasion on the right side of R.J.'s head. Bracht's partner found a spent shell casing and a spent round on the floor of the office. Bracht and his partner concluded that, after hitting R.J., the bullet had possibly ricocheted off a wall, hit Roberts and ended up on the floor near where he had been standing.

Detective James Vena interviewed Roberts that same evening. Roberts initially denied any involvement in the robbery, but then gave the following story. Earlier that day he had met with "G," a member of the Bloodstone Villains gang. G gave Roberts a gun and told him to "do some business." This meant Roberts should go rob someone. Roberts admitted pulling the gun on R.J. and forcing him

to hand over his money. Then, as Roberts was putting the gun back into his pocket, it accidentally went off. He had not intended to shoot R.J. After leaving the scene, Roberts met up with G, who told him to go back and see what happened. When Roberts returned, he was arrested. Roberts denied being a member of the Pueblo Bishop gang.

b. *The gang evidence.*

Officer Michael Mitchell testified he worked with the Newton Division gang detail. The Newton area was controlled by the Pueblo Bishop Blood gang. On February 27, 2004, Mitchell had gone to the Pueblo Del Rio housing project in response to a call about an armed man. Although Roberts was not the suspect, Mitchell spoke to him. Roberts was wearing a red shirt, a Pueblo Bishop color. Roberts said he had been a member of the Pueblo Bishops for two months. On March 26, 2004, at the same housing project, Mitchell arrested Roberts on a vandalism charge for writing Pueblo Bishop gang graffiti on a park bench. Roberts again admitted membership in the Pueblo Bishops. The Cal Gangs data base listed Roberts as belonging to both the Pueblo Bishops gang and the Bloodstone Villains gang. Mitchell testified a person might claim membership in both gangs, who were enemies, in order to confuse the police.

Another officer who worked in the Newton gang detail testified that on March 27, 2004, he pursued a car being driven by someone he knew to be a Pueblo Bishops member. When the car stopped, an apparently armed passenger fled. Roberts, who was detained, again admitted being a member of the Pueblo Bishops gang.

Officer Gerald Harden, who testified as a gang expert, worked on the Newton Gang Task Force. He was familiar with the Pueblo Bishops. Their territory included the area in which the National Auto Sales junkyard was located. The Pueblo Bishop gang had 200 members and its primary activities included drug sales, robberies and shootings, which were committed in an attempt to control the populace in their area and to finance the gang. In Harden's opinion, Roberts was a

member of the gang. He based this conclusion on Roberts's prior police contacts, the vandalism incident, the kind of clothes he wore, and the people with whom he associated. Harden also opined Roberts had robbed R.J. for the benefit of the gang. Harden believed that, when Roberts was arrested in this case, he claimed membership in the Bloodstone Villains to confuse the police.

2. *Defense evidence*.

Roberts was 15 years old at the time of the robbery. He testified he had been riding around on his bike when he saw an open door at National Auto Sales. He went in to see who was there and noticed R.J. sitting inside. He falsely told R.J. he had a flat tire and then he pulled a gun on him. He told R.J. to put his money on the table. R.J. complied. But when Roberts reached for it, R.J. moved his hand over the money as if he were not going to give it up. Roberts, who was now holding the gun by the barrel, swung it at R.J. and hit him in the head. Then the gun went off. The bullet grazed Roberts's pinky finger, which bled. Roberts also felt the impact of the bullet hitting his belt buckle. The bullet did not ricochet. Roberts had not been trying to kill R.J. Although he knew there were bullets in the magazine, he did not know there was a bullet in the chamber.

Roberts denied telling Detective Vena he had gotten the gun from G. Roberts did not know anyone named G. He had found the gun by chance three weeks earlier at the Pueblo Del Rio housing project. Roberts denied admitting his gang membership to police officers, and he denied having written gang graffiti on the park bench. He had grown up in the Pueblo Del Rio housing project and, after his family moved out, he still went back to visit friends and relatives. He denied being a member of either the Pueblo Bishops or the Bloodstone Villains.

A defense gang expert testified that, in his opinion, Roberts was not a gang member. This was based on Roberts's lack of tattoos, his demeanor and a psychological evaluation. The expert also opined Roberts had robbed R.J. as a crime of opportunity, not for the benefit of a gang.

CONTENTIONS

1. The convictions must be reversed because Roberts was denied a competent court interpreter.

2. The trial court erred by discharging a deliberating juror for misconduct.

3. There was insufficient evidence to sustain a firearm use enhancement finding.

4. There was insufficient evidence to sustain a gang enhancement finding.

5. There was *Apprendi/Blakely* sentencing error.

6. The trial court erred by applying the one-third consecutive sentence limitation to the firearm enhancement on count 1.

7. The trial court erred by staying a gang enhancement.

8. The trial court erred by imposing only one court security fee.

DISCUSSION

1. *Roberts was not denied a competent court interpreter*.

Roberts contends his convictions must be reversed because the court interpreter failed to correctly translate key portions of the victim's testimony. This claim is meritless.

a. *Background*.

R.J. testified with the aid of a Spanish interpreter. At one point during R.J.'s cross-examination, defense counsel was asking about the moment when Roberts picked up R.J.'s money from the table. After a confusing colloquy, the prosecutor interrupted the cross-examination for a sidebar, and said, "I'm fluent in Spanish and I don't mean to criticize the interpreter, but . . . there's something that's not being interpreted properly in Spanish regarding who's taking the money out." The trial court proceeded to ask a series of questions which clarified the victim's testimony.

During subsequent redirect examination of R.J. by the prosecutor, the following colloquy occurred:

"Q After the defendant had shot you, you mentioned that you told him where the first aid kit was in the locker; is that correct?

"A Yes.

"Q Is it after that that the defendant told you not to move or he would shoot you?

"A He opened the locker, he took out the things, and then he said don't move or I'll shoot, don't move or I'll shoot.

"Q Now did he say I'll shoot again or did he say –

"A Again."

At that point, the prosecutor again asked for a sidebar and said: "I just wanted the record to be clear. I'm listening to the witness's answer regarding what he's saying about being shot, and he's saying in Spanish that the defendant told him not to move, that he would shoot him again. That's not what's being interpreted by the Spanish interpreter. That's why I had to risk [*sic*] that question. I think we've had some concerns – I mean, I have some concerns regarding – [¶] The Court: Quality of the interpretation? [¶] [The prosecutor]: Just that particular – it's been two times, and I've already mentioned those two times on the record and we've clarified that. I think we clarified this second time what happened. But that's my only concern."

R.J. was excused as a witness immediately after this sidebar. Subsequently, the trial court received the following note from alternate Juror No. 2: "Judge, may I speak with you regarding the interpreter. I have some concerns." While discussing how to respond to this note, the trial court said, "There was another interpreter who happened to be in the courtroom who did confirm to me that . . . she had overheard the victim speak in Spanish, and she did hear the. . . victim, the witness, say the word again." The trial court also said it had confirmed with several judges and interpreters that the prosecutor was fluent in Spanish. The prosecutor reiterated he had only perceived two translation errors during the whole trial, and said, "I've also confirmed with Detective Gonzalez, who's also a

certified Spanish speaker with the police department, and those are also the two mistakes he's caught as far as this particular interpreter." Defense counsel moved for a mistrial on the ground there might have been other translation errors the prosecutor had missed.

Alternate Juror No. 2 was then brought into chambers. She said, "I merely wanted to point out that I feel that the interpreter on more than one occasion has interpreted a word incorrectly." She believed the mistakes had caused some confusion: "[I]t happened in both instances, both when he was interpreting what an attorney was saying and when he was interpreting what the witness was saying. I think eventually it did get cleared up, but I think it caused some confusion." Asked how many translation errors she had noticed, the alternate juror said it was "two for sure that I can think of."

The trial court then denied Roberts's mistrial motion, saying: "I believe that the gist of the . . . testimony . . . was properly translated. There were only one or two instances. And the alternate No. 2 indicated that the sum and substance of the testimony was conveyed adequately and accurately."

b. *Discussion*.

Roberts contends "the mistranslation of a key point in a crucial prosecution witness's testimony deprived him of his Sixth Amendment right to confrontation and Sixth and Fourteenth Amendment rights to a fair trial as well as his corresponding rights under the California Constitution." He argues "the error surely contributed to the verdict. The mistranslated portion of [R.J.'s] testimony, i.e., that Appellant threatened to shoot [R.J.] *again* was the key piece of information in the People's ultimately successful quest for an attempted murder verdict based on willfulness and premeditation for it showed that the shooting was not accidental, which was exactly contrary to Appellant's defense on that score." Roberts asserts that, "[g]iven the error of the interpreter, there was no way to really know what [R.J.] had said."

"[B]oth English-speaking and non-English-speaking defendants are entitled to . . . a *competent* 'witness interpreter.' [Citation.] The question of an interpreter's competence is a factual one for the trial court. [Citations.] The ideal time to question the qualifications of an interpreter is before he is permitted to act [citation], although, if the competence of an interpreter becomes an issue after he commences his duties, it can be raised at that time. [Citation.]" (*People v. Aranda* (1986) 186 Cal.App.3d 230, 237.)

Where there is no evidence any translation error has gone uncorrected, the defendant has not been denied the right to a competent interpreter. In *People v. Mendes* (1950) 35 Cal.2d 537, there were many corrections, but no denial of a competent interpreter: "Defendant contends that the trial court erred in denying a motion to replace the court-appointed interpreter on the ground of incompetence. Defendant and three witnesses testified through the court-appointed interpreter. Defendant also had the assistance throughout the trial of interpreters from the Mexican Consulate. The record contains affidavits of defendant's interpreters that the court-appointed interpreter was incompetent. It was arranged at the trial that if defendant's interpreter disagreed with the court-appointed interpreter the questions should be asked and answered anew for purposes of correction. Defendant points out many instances in the record where corrections were made in this manner and the court interpreter admitted error. The competence of the interpreter is ordinarily for the trial court to determine. [Citations.] *Since the court interpreter and defendant's interpreter were generally in agreement and the affidavits set forth no errors that were not corrected in the course of the trial, the trial court was justified in concluding that the court-appointed interpreter was competent.*" (*Id*. at p. 543, italics added.)

In the case at bar, the trial record demonstrates the interpreter's two translation errors, including the one deemed crucial by Roberts, were quickly corrected. The prosecutor was able to clarify, on redirect-examination, that R.J. had testified Roberts said "*don't move or I'll shoot you again*." Moreover, that

was the same testimony R.J. had already given twice on direct examination. When R.J. was originally asked if Roberts had said anything after R.J. directed him to the first aid kit, R.J. testified: "Then he told me that I shouldn't move or that he was going to shoot again." The prosecutor then went through it a second time: "Q And what did he do with that first-aid kit? [¶] A He opened it and took out some bandages. [¶] Q And what else did he do? [¶] A He told me that if I moved, he would shoot again."[2]

Hence, the record plainly shows the interpreter's rendition of this important testimony was correct the first two times he translated it, and that when he made a mistake the third time he translated it, the mistake was promptly corrected. No translation error was allowed to stand. Roberts's comment, which raised a strong inference he had shot R.J. intentionally, was properly before the jury.

2. *The trial court properly discharged a deliberating juror for misconduct.*

Roberts contends the trial court erred by dismissing a deliberating juror after a partial verdict had been reached. This claim is meritless.

a. *Background*.

During deliberations, some of the jurors sent the trial court a note indicating they believed Juror No. 3 had engaged in misconduct. This note said that, at the very outset of deliberations, Juror No. 3 told how he had been stopped by the police, searched for no reason, and accused of being part of a criminal organization. The note said Juror No. 3 gave a very detailed account of the event and "became very agitated and anxious, and was obviously affected by the experience. [Juror No. 3] then made a statement that he did not believe the police

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[2] In addition, R.J. gave exactly the same testimony at the preliminary hearing, where he had testified by way of a different Spanish interpreter: "And then he shot the weapon and he passed it to the right side and continued aiming at me. [¶] And I told him that there by a drawer there was a first-aid kit. He opened it, took out a small package, took some bandages . . . *and told me not to move or he would shoot again*." (Italics added.)

were honest and that they [had] . . . intentionally detained [him] because he fit a certain criminal profile. After the story, [Juror No. 3] concluded that [he] would not give credence to a police officer's testimony, and felt that certain persons were harassed and stopped without cause. [He repeated this] on more than one occasion. We the jury inquired as to why [he] did not relate the above story at [voir dire], but he did not have an answer as to why."

Six jurors signed onto this note. A seventh appended this statement: "I have similar related concerns."

The trial court proceeded to examine each of the jurors individually. Juror No. 2, who had apparently written the note, gave more details of Juror No. 3's story: "[I]t started off with he doesn't believe police and he doesn't believe they're honest, and let me tell you why. And then he started telling the story that . . . it was late at night and he was on his bicycle and . . . he had friends in Columbia [*sic*] and so they had sent him a videotape and it was strapped to the back . . . of his bike, he said he was pulled over by policemen and they started dismantling his bicycle taking off the . . . handles of the bike and sticking wires and stuff in the handle bars, taking the tires off, totally dismantling the bike. And then they saw the videotape, and the return address from Bogota, Columbia, so he said that they started harassing him and asking him if he was in the Columbia Cartel or something to that effect. And he kept saying no, and they kept harassing him. And they took off all the tires, dismantled the whole bike, then they got another call and they just left him there with the bike dismantled and they had to leave. And at that point he said that . . . he didn't believe cops, he didn't think that they were honest."

Juror No. 9 agreed with the content of the jury note, but thought that as the foreperson of the jury he should not sign it. Juror No. 1 said Juror No. 3 had "told us about his personal experience one time, but he continues to use that example in his arguments when we are deliberating." Juror No. 1 said Juror No. 3 had expressed a bias against police officers and "he used his own personal experience

rather than testimony in this case and evidence to come up with a verdict." Juror No. 9 said Juror No. 3 had a pretty strong negative attitude toward the police. Asked if Juror No. 3's bias was preventing him from being an impartial juror, Juror No. 9 said, "I don't know. I just don't know what to believe." Juror No. 11 said Juror No. 3 had expressed strong feelings about his police encounter and that Juror No. 3's resulting anti-police bias was preventing him from being an impartial juror. Juror No. 11 said he did not disagree with the jury note, he just hadn't wanted to sign it.

When Juror No. 3 was asked if anyone on the jury had talked about a traumatic experience with the police, he said "no." Then he said one of jurors had mentioned a police incident, and then he acknowledged he was that juror. After he described his police encounter, the following colloquy occurred:

"The Court: Do you believe that this experience has affected your ability to be a fair and impartial juror in this case?

"Juror No. 3: No, Your Honor.

"The Court: Does this experience affect your ability to listen to the testimony of a police officer or other peace officer and measure it by the same standards that you would use to judge the credibility of any other witness?

"Juror No. 3: Yes, Your Honor.

"The Court: In what way?

"Juror No. 3: If I have a bias towards the police, Your Honor, it would be in the favor of the police because the police has done many more things for me in my life that have been positive than any negative experience that I've had towards them.

"The Court: So you believe your bias is in favor of the police?

"Juror No. 3: No, Your Honor.

"The Court: It's against the police?

"Juror No. 3: No, Your Honor.

"The Court: You have no bias either way?

"Juror No. 3: I do not believe that I'm biased [*sic*] in anyway."

Juror No. 3 said he did not recall being asked during voir dire about bad police experiences. The following colloquy then occurred:

"The Court: Juror 3, have you expressed to any of the other jurors a bias or . . . strong feelings for or against law enforcement?

"Juror No. 3: No, Your Honor.

"The Court: And the credibility of law enforcement to any of the other jurors?

"Juror No. 3: No, I have not, Your Honor. But I believe that the jurors believe that I have."

The trial court concluded Juror No. 3's answers were not credible and that he should be dismissed for misconduct: "I feel that we had to drag it out of him that this incident occurred at all . . . . He did not want to reveal it. And when he finally did, [he feigned] being positive towards law enforcement. I believe most of the jurors have indicated [he has] a bias. There have been a substantial number of jurors who have indicated a shut down. But even if he's continuing to deliberate . . . [t]he ability to deliberate means . . . a meaningful deliberation as a fair and impartial juror able to fairly and impartially evaluate the evidence." The trial court also concluded Juror No. 3 had concealed this bias during voir dire.

When defense counsel argued there was insufficient reason for concluding Juror No. 3 was biased, the trial court replied: "I believe there was ample evidence, and I believe the court assessed not just the words but his attitude and his demeanor, and assessed . . . his credibility . . . ."

b. *Trial court properly found good cause for discharging Juror No. 3.*

Penal Code section 1089 allows the trial court to discharge a juror who "upon . . . good cause shown to the court is found to be unable to perform his duty . . . ." " 'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternative to serve. [Citation.] If there is any substantial evidence supporting the trial court's ruling, we will uphold it.

[Citation.] We also have stated, however, that a juror's inability to perform as a juror " 'must appear in the record as a demonstrable reality.' " [Citation.]' [Citation.]" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474.)

"A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 111.) "Such false answers or concealment on voir dire also eviscerate a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial." (*Ibid.*) "Whether a failure to disclose is intentional or unintentional and whether a juror is biased in this regard are matters within the discretion of the trial court. Except where bias is clearly apparent from the record, the trial judge is in the best position to assess the state of mind of a juror or potential juror on voir dire examination. [Citations.]" (*People v. McPeters* (1992) 2 Cal.4th 1148, 1175.)

Roberts argues Juror No. 3 should not have been dismissed because he continued to deliberate, he said he could be impartial despite his bad police experience, and several jurors agreed with his assertion he had not been asked about this during voir dire. We are not persuaded.

The trial court did not dismiss Juror No. 3 for failing to deliberate, but for being dishonest and biased. The record indicates some jurors recalled Juror No. 3 had not divulged this negative police experience when asked about it on voir dire. In any event, the trial court was entitled to rely on its own clear memory that Juror No. 3 had been asked about it.[3] The trial court also discharged Juror No. 3 for

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[3] The trial court said, "The issue I think also is was he candid in his voir dire, . . . because the court asked several questions – the court recalls it asked the question would you be able to listen to the testimony of a police or other peace officer and measure it by the same standard that you use to judge the credibility of any other witness." "And I believe [the prosecutor] asked of every single juror do you have any experiences with police or negative experience with police which

actual bias and, in so doing, it was entitled to consider Juror No. 3's demeanor while being examined, and could properly come to the conclusion he was being dishonest about his ability to be impartial. (See *People v. Lucas* (1995) 12 Cal.4th 415, 489 [court properly relied on juror's demeanor in deciding juror could not deliberate fairly]; *People v. Beeler* (1995) 9 Cal.4th 953, 989 [recognizing importance of trial court's observation of juror's demeanor in reviewing decision to discharge]; *People v. Halsey* (1993) 12 Cal.App.4th 885, 892 [trial court properly removed juror because his evasions under questioning led court to conclude he had committed misconduct and could not be objective].)

We agree with the Attorney General that this case is strikingly similar to *People v. Thomas* (1990) 218 Cal.App.3d 1477. There, the jury foreperson sent the trial court a note saying one juror was impeding deliberations because of her bias against the police. Questioned, the foreperson "essentially stated that during the course of deliberations one of the jurors, Anna Williams, announced that she could not accept the testimony of the officers who had testified at trial because of a firm belief, based upon personal experience, that police officers in Los Angeles generally lie. She thereafter rejected the jury's attempt to consider the issue, thus bringing deliberations to a halt until the discussion proceeded to other matters. [¶] The court questioned Juror Williams in chambers with both counsel present, asking her to respond to the foreperson's allegations. Although she denied stating that all officers lie, Williams admitted to telling the other jurors about racist statements made by police officers in her neighborhood. The court then elected to examine each of the remaining jurors independently to determine their perception of Williams's statements. During the discussions which followed, most jurors corroborated the foreperson's version of events." (*Id*. at p. 1482, fn. omitted.)

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could prevent you from being a fair and impartial juror. And I do recall it was specifically asked of Juror 3 by [the prosecutor]."

Thomas held the trial court had not erred by discharging Williams: "A juror's duty is to weigh the evidence and credibility of witnesses with impartiality and to reach a fair and unbiased verdict. [Citations.] It is well settled that a sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution under section 1089 and former section 1123. . . . [¶] There was ample cause to dismiss the juror in the instant case. Williams obviously had prejudged the credibility of the police officers who testified at trial and was unable to cast aside her personal bias in weighing the evidence. [¶] Although she disclaimed any particular bias toward police officers, there is substantial evidence to support the court's finding that Williams was not being truthful in that regard. [¶] Defendant sees something sinister in the fact that the trial judge failed to ask her whether she could fairly consider the case notwithstanding her belief that all officers routinely lie. It is obvious that no amount of questioning was likely to lead to an outright admission of bias, and the court properly relied upon the testimony of the other jurors in determining the issue. Simply put, there was no abuse of discretion." (*People v. Thomas, supra,* 218 Cal.App.3d at pp. 1484-1485.)

Similarly, we conclude the trial court did not abuse its discretion by dismissing Juror No. 3. All the other jurors said Juror No. 3 was biased against the police, and most believed his bias was preventing him from being impartial. The trial court came to the same conclusion after questioning Juror No. 3. The trial court also concluded Juror No. 3 was not truthfully answering the court's questions. Juror No. 3's inability to perform as a juror appeared from the record as a demonstrable reality. (See *People v. Cleveland, supra,* 25 Cal.4th at p. 474.)

c. *Trial court did not err by substituting alternate juror after partial verdict had been reached.*

Roberts contends that, even if Juror No. 3 was properly dismissed, the trial court erred by substituting an alternate juror because the jury had already reached a partial verdict. Roberts argues the trial court should have instead declared a mistrial because the "post-submission substitution of jurors inherently violates the state and federal constitutional rights to jury trial and due process. Even if post-submission substitutions are permissible, such substitution in the present case does not pass constitutional muster [because there was a partial verdict]." This claim is meritless.

In *People v. Collins* (1976) 17 Cal.3d 687, 691, the issue was "whether the substitution of an alternate for an original juror is constitutionally permissible after deliberations have begun. As hereinafter explained we conclude that such substitution is permissible when good cause has been shown and the jury has been instructed to begin deliberations anew." Roberts concedes his jury was instructed to begin deliberations anew.

The only two California cases addressing the question of juror substitution following a partial verdict both found the procedure permissible. (See *People v. Thomas, supra*, 218 Cal.App.3d at p. 1486 ["Nothing in *Collins* limits the holding of that case to *preverdict* deliberations, and we can find no persuasive reason to impose such a limitation here."]; *People v. Aikens* (1988) 207 Cal.App.3d 209, 212 [finding "no intimation in *Collins* that the holding was restricted to preverdict deliberations"]; see also *People v. Cain* (1995) 10 Cal.4th 1, 67-68 [citing *Thomas* and *Aikens* approvingly].)

We conclude the trial court did not err by replacing Juror No. 3 with an alternate even though a partial verdict had been reached.

3. *There was sufficient evidence to sustain the firearm enhancement.*

Roberts contends there was insufficient evidence to sustain a true finding on the section 12022.53, subdivision (c), enhancement allegation (intentionally discharging a firearm during commission of the offense). This claim is meritless.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by

substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

Section 12022.53, subdivision (c), requires imposition of a consecutive 20-year term if, "in the commission" of an enumerated felony, the defendant "personally and intentionally discharges a firearm." Both robbery and attempted murder are enumerated felonies.

Roberts acknowledges there was a direct contradiction in the testimony of the only two people who witnessed the gun's discharge. Roberts testified he hit R.J. on the head with the gun, which caused it to discharge accidentally. R.J. testified Roberts pointed the gun at his head and fired a shot at him. R.J. specifically denied Roberts hit him with the gun.

Focusing on evidence showing the bullet hit him, Roberts asserts there was no physical evidence to support the theory that, *after* hitting R.J., the bullet somehow ricocheted and hit Roberts. He argues, "Viewed as a whole, the record lacks credible evidence to support the ricochet theory, which is the only theory by which Appellant could have sustained his injuries based on his alleged firing of the gun."

But, as the Attorney General correctly points out, Roberts's argument is predicated on a misreading of the proper standard of review. Viewing the evidence in the light most favorable to sustaining the jury's verdict, there plainly was sufficient evidence to sustain the enhancement finding. R.J. testified quite definitively that Roberts pointed the gun at him and shot him in the head. Officer Bracht, who arrived at the scene within minutes of the shooting, testified R.J.'s head injury appeared to be consistent with a grazing gunshot wound. All this evidence directly contradicted Roberts's testimony that the gun went off accidentally after he hit R.J. with it. This was sufficient evidence to sustain the jury's enhancement finding. The prosecution was not required to explain the physics of the ricochet theory. The ricochet theory was not a necessary part of the

prosecution's case; it merely sought to explain what might have happened to the bullet *after* it bounced off R.J.'s head. Roberts's assertion, that the "only logical conclusion" is the bullet did not ricochet and "could only have been discharged" accidentally, is mere speculation.

There was sufficient evidence to sustain the firearm use enhancement finding.

4. *There was sufficient evidence to sustain the gang enhancement finding.*

Roberts contends there was insufficient evidence to support imposition of a gang enhancement because the prosecution failed to prove the crime had been committed "for the benefit of, at the direction of, or in association with any criminal street gang," and "with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) This claim is meritless.

Roberts acknowledges there was evidence he told police on various occasions he was a member of the Pueblo Bishop gang, and that when he was arrested he said a man named G from the Bloodstone Villains gang had given him the gun and told him to commit a robbery. Yet he argues there was insufficient evidence to support the gang enhancement because he denied the G story at trial, there was no evidence G existed, he had not announced any gang affiliation to R.J., and the only evidence of a gang connection was that the crime had been committed in Pueblo Bishop territory.

We disagree. Prior inconsistent statements constitute affirmative evidence. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 55, fn. 4 [under Evidence Code section 1235 "prior inconsistent statements are admissible to prove their substance as well as to impeach the declarant"].) Although Roberts denied G's existence at trial, he earlier told police he had committed the crime at the express direction of G, who was a member of the Bloodstone Villains gang. The gang expert testified Roberts might have labeled G a Bloodstone Villain just to confuse the police investigation. Even if Roberts did not use his gang affiliation to intimidate R.J.,

the gang expert testified "[g]ang members commit robberies to get money or weapons. They get money, they use that to either purchase more weapons or purchase narcotics which they can in turn sell, make more money, purchase more weapons . . . ." Asked about the effect on Roberts's reputation had the robbery been successful, the gang expert testified:

"The witness: It definitely benefits his reputation.

"Q [By the prosecutor]: How so?

"A Earn more respect on the street. Other gang members would be like, okay, this guy he's put in work, he's earning his bones, he's out there doing the thing, and let's see how much further he can go, let's see how he progresses in the gang.

"Q How would he be perceived at, let's say, age 15 if he actually killed a victim and was able to get away with [it]?

"A He would be almost revered. [The] guys that are that brazen and that, you know, crazy, so to speak, they have a lot of respect out there for. [¶] They'll go to any length to promote the gang, promote themselves and commit crimes to keep and gather control of certain territory or the territory in which they're claiming at that time.

"Q Now in your opinion is it the goal of these young gang members to get that respect, to get that respect as being crazy and violent?

"A Yes."

Hence, the evidence showed Roberts was a Pueblo Bishop gang member, that he committed the crimes in Pueblo Bishops territory, that he told police he committed the crimes at the specific direction of another gang member, that he stood to enhance his street reputation by committing a robbery and a killing, and that the gang would benefit by obtaining money and weapons so future crimes could be committed. This evidence proved Roberts had committed the crimes "for the benefit of, at the direction of, or in association with any criminal street gang,"

and "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

Hence, there was sufficient evidence to sustain the gang enhancement.

5. *There was no Apprendi/Blakely error*.

Roberts contends the imposition of the aggravated term on count 2 (robbery) violated *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], because the jury should have made the predicate factual determination, not the trial court. This claim is meritless.

The *Apprendi/Blakely* rule provides that, other than the fact of a prior conviction, any fact increasing the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. "[T]he '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*. [Citations.] 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 v. Washington, supra,* 542 U.S. 296 at p. 303.)

In *People v. Black* (2005) 35 Cal.4th 1238, our Supreme Court concluded "the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of an upper term sentence does not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*,

Blakely, and [*United States v. Booker* (2005) 543 U.S. 220 [160 L.Ed.2d 621]." (*Id.* at p. 1254.)

Hence, there was no sentencing error here.[4]

6. *The trial court erred by not imposing a full-strength firearm enhancement on count 1.*

The Attorney General contends the trial court erred by limiting the section 12022.53, subdivision (c), enhancement (intentionally discharging a firearm during commission of the offense) on count 1 (attempted premeditated murder) to one-third of the statutorily prescribed determinate term of 20 years. This claim has merit.

The trial court utilized section 1170.1's one-third the midterm limitation for consecutive sentences, apparently on the theory the determinate portion of the count 1 sentence was going to be served consecutive to the count 2 sentence (robbery). However, the one-third limitation does not apply to indeterminate sentences. "Section 1170, subdivision (a)(1), makes clear that the DSA [Determinate Sentencing Act] involves 'determinate sentences.' Section 1170, subdivision (a)(3), states that the DSA does not 'affect any provision of law that . . . expressly provides for imprisonment in the state prison for life, . . . ' and "a straight life sentence, as well as a sentence of some number of years to life, is *not* a determinate sentence within the meaning of the DSA." (*People v. Felix* (2000) 22 Cal.4th 651, 659; see also *People v. Williams* (2004) 34 Cal.4th 397, 402 ["Section 1170.1 . . . applies only to *determinate* sentences."].) The attempted premeditated murder in count 1 carried a sentence of 15 years to life, an indeterminate term.

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[4] The United States Supreme Court has granted certiorari in *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.], cert. granted sub nom. *Cunningham v. California* (2006) --- U.S. ---- [126 S.Ct. 1329, 164 L.Ed.2d 47] a case raising the issue of *Blakely's* applicability to California's determinate sentencing scheme.

A trial court "should *impose the full term for enhancements attached to indeterminate terms*." (*People v. Felix, supra,* 22 Cal.4th at p. 656, italics added.) "[W]hen one term is determinate and the other is indeterminate, neither is principal or subordinate; instead, each is calculated without reference to the other." (*People v. Reyes* (1989) 212 Cal.App.3d 852, 858.) Therefore, the trial court here should have imposed, in connection with count 1, a full-strength 20-year term for the section 12022.53, subdivision (c), enhancement.

Because correction of this error may alter the total sentence imposed on Roberts, we will remand to the trial court for resentencing.

7. *Gang enhancement should not have been stayed.*

The Attorney General contends the trial court improperly stayed the gang enhancement in connection with count 2. This claim has merit.

"The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal." (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391 [trial court erred by failing to indicate disposition of one of four prior prison term enhancements]; accord *People v. Savedra* (1993) 15 Cal.App.4th 738, 746-747 [trial court erred by imposing concurrent terms on prior prison term enhancements because these must be either stricken or imposed consecutively].) Hence, the trial court here was required to either impose the gang enhancement on count 2 or strike it. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 187-188 [section 186.22, subdivision (b)(1), gang enhancement must be either stricken or imposed; it cannot simply be stayed].)

Because this case will be remanded to the trial court for resentencing, this issue can be clarified at that time.

8. *Trial court erred by imposing only one court security fee*.

The Attorney General contends the trial court erred because it imposed only one $20 court security fee under section 1465.8, even though Roberts suffered two convictions. This claim has merit.

Section 1465.8, subdivision (a)(1) provides, in pertinent part: "To ensure and maintain adequate funding for court security, a fee of twenty dollars ($20) shall be imposed on every conviction for a criminal offense . . . ." *People v. Schoeb* (2005) 132 Cal.App.4th 861, the only case to have construed this language, held: "[W]e conclude section 1465.8 unambiguously requires a fee to be imposed for each of defendant's convictions. Under this statute, a court security fee attaches to 'every conviction for a criminal offense.' Thus, defendant's argument that only a single fee may be imposed in these five cases cannot be squared with the plain language of section 1465.8." (*Id*. at pp. 865-866.)

We agree with *Schoeb* that this is the plain meaning of the statute. Roberts argues *Schoeb* is inapposite because it involved "multiple counts against the defendant [that] arose out of multiple separate cases." Not so. The defendant in *Schoeb* had "pled guilty to nine separate charges scattered across five different cases . . . ." (*People v. Schoeb, supra,* 132 Cal.App.4th at p. 863.) On appeal, the defendant claimed the trial court's imposition of five separate $20 court security fees was improper because the fee could only be imposed once in a single case. *Schoeb* not only rejected this claim, but it went on to hold that because "defendant was convicted of nine criminal offenses [he was] therefore subject to nine $20 court security fees under section 1465.8." (*Id*. at p. 866.)

The additional court security fee should have been imposed.

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded to the trial court. The convictions are affirmed. The sentence is vacated and the matter is remanded to the trial court for the exercise of its discretion to resentence Roberts in light of this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.