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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANDRE RENE SCOTT et al., Defendants and Appellants.	C044964 (Super. Ct. No. 01F03583)

A jury convicted defendants Andre Rene Scott and Maurice Kenney of three counts of robbery (counts 1-3; Pen. Code, § 211; undesignated section references are to the Penal Code) and one count of being a felon in possession of a firearm (counts 4 [Kenney] & 6 [Scott]; § 12021). The jury found that each defendant had personally used a firearm in the commission of the robbery (§ 12022.53, subd. (b)). In a bifurcated proceeding, the jury further found that defendant Scott had two serious

prior felony convictions and that defendant Kenney had one (§§ 1192.7, subd. (c), 667, subds. (b)-(i), 1170.12).[1]

The trial court sentenced Scott to 116 years and eight months to life, consisting of 25-year-to-life terms on counts 1 through 3 and 6, plus 16 years and eight months consecutive for the firearm use enhancement. The court sentenced Kenney to 30 years and eight months, consisting of 10 years (the upper term) on count 1, two-year consecutive terms for counts 2 and 3, and 16 years and eight months consecutive for the firearm use enhancement, with a one-year, four-month sentence on count 4 (felon in possession) run concurrently.

Scott contends: (1) The trial court erred by denying his motion to suppress evidence (§ 1538.5) on the grounds that the warrantless search was justified by "exigent circumstances" as a "protective sweep." (2) The trial court erred by ruling that inevitable discovery pursuant to a later-issued search warrant saved otherwise unlawful fruits of the original search, and by denying Scott's motion to traverse the warrant. (3) The trial court erred by ruling that the magistrate's alteration of the time on the face of the search warrant was merely the correction of a clerical error. (4) The trial court erred by denying Scott's requested instruction on the offense of accessory after the fact.

Kenney, joined by Scott, contends the trial court erred by misinstructing a deadlocked jury on constructive possession as

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[1] A third defendant, Rudy Mamaril, obtained a mistrial after the jury indicated it was hopelessly deadlocked.

to counts 2 and 3 in a manner that directed a verdict. Kenney also contends the trial court erred in imposing a concurrent term on count 4, rather than staying sentence on that count under section 654. Kenney further contends in a supplemental brief that his sentencing violated *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). Finally, Kenney purports to join in Scott's contentions.

We shall affirm the judgments.

FACTS[2]

Prosecution case

At around 6:00 a.m. on April 29, 2001, employees Jinel Guillebeau and Diana Salazar and "swing manager" Serena Wong were on duty at the McDonald's restaurant at 2331 Broadway in Sacramento. Guillebeau, a trainee, was working the drive-through window, taking orders and processing food; Salazar was preparing food. Raymond Crutcher, a janitorial employee, was eating breakfast at the restaurant but had not yet started work.

Via a surveillance video camera inside the restaurant, Guillebeau saw three men standing in the drive-through area. She notified her coworkers.

Minutes later, Guillebeau saw two men wearing black ski masks and black gloves, one holding a handgun and one holding a

[2] We recite here only the evidence adduced at trial. The pretrial proceedings on Scott's motions to suppress evidence and to traverse the warrant are discussed below in connection with Scott's claims of error as to those motions.

rifle, enter the restaurant.[3] After hearing someone say, "Get down," she hid under the grill.

Crutcher saw three men, dressed in black and wearing ski masks, enter the restaurant; one carried a rifle. Two went behind the counter, while the one with the rifle stayed in front and ordered Crutcher and a customer to stay where they were. Crutcher later saw all three leave, then one quickly return and leave again.

Salazar also saw three men enter; one took a position in front of the counter while the others went behind it. The robber in front was holding a rifle pointed at chest level.[4] Salazar hid under a table, but saw Wong accompany the other two to the restaurant's office.

At around 6:10 a.m., while Wong was working the drive-through, she heard Guillebeau scream. Wong saw two men wearing tight-fitting black clothing; one held a black handgun with red marks on the side, the other a rifle. The one holding a handgun pointed it at her, told her to put her hands up, and said they would go to the safe. He directed her to the back of the restaurant, made her open the safe, and grabbed her purse, dumping its contents out. Wong took a deposit bag bearing the McDonald's logo and put the money from the safe into it, a sum

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[3] Guillebeau later told a police officer they were African-American.

[4] In court, Salazar identified a rifle obtained in the investigation of the case as apparently the one used in the crime.

she later estimated at $475. The money included "shrink-wrapped" rolls of coins; it also contained a "RAM tag" that emits electronic tracking signals. The robber grabbed the deposit bag and left. Wong placed a call to 911, but had to hang up in midcall because the robber returned and retrieved his firearm before leaving for good.

Wong and Guillebeau together succeeded in calling 911; the audio tape of the call was played in court. They reported a robbery by three male robbers, two bearing firearms; Wong said the robbers were African-American.

Police arrived on the scene immediately after the robbery. Wong appeared "terrified," Guillebeau "shaken up."

Sacramento police officers and Sacramento County Sheriff's officers received radio calls reporting the robbery and the activation of a RAM tag at 6:26 a.m. Some of the police cars could receive and track the signals from the RAM tag.

Numerous police cars converged on an apartment complex on Calvine Road, in which the residence of defendant Scott was located. The officers arrived around 6:40 a.m. A black Ford Mustang with a warm hood was parked near apartment number seven.

Officer Hirai, one of the first officers to arrive, saw a Black male, later identified as defendant Kenney, jump over a residential back fence behind the apartments, carrying something black in his hand; other officers were pursuing him on foot. Running along the fence, Hirai found a black jacket on the sidewalk, with a loaded .380 AMT-brand semiautomatic pistol in its pocket. The jacket was clean and dry and seemed to have

been placed there recently. Hirai then noticed a window screen on the ground outside apartment number seven; it was bent from the inside out, as if someone had forced his way out through it. A few minutes later, Hirai went back to the previously open window and saw it was closed.

The officers pursuing Kenney on foot, after unsuccessfully attempting to get him to stop and watching him jump a fence into a back yard, set up a perimeter around the house. A "K-9" unit arrived. The dog alerted on a debris pile covered by a tarp. Kenney crawled out from under it, but then tried to jump another fence. Officers subdued him after a struggle and took him into custody.

Searching Kenney's person, the officers found rolls of quarters shrink-wrapped in plastic and two two-way radios. Kenney claimed ownership of the jacket Officer Hirai had found. Inside the bag Kenney had been carrying, the officers found an assault rifle with a folding stock and a banana clip with 25 live rounds of .22-caliber hollow-point ammunition, a knit cap with eyeholes cut in it, a nylon glove, a deposit bag containing $412 and a deposit slip, and a dollar bill with a RAM tag in it.

Back at the apartment complex, Officer Hirai made contact with the occupants of apartment number seven: defendant Scott, codefendant Mamaril, and a female. Scott admitted he owned the Mustang parked outside. He said it had been advertised for sale and parked on Martin Luther King Blvd., but could not explain how it had gotten from there to the apartment complex. Other officers subsequently detained Scott in a patrol car.

The police searched the apartment and found: (1) on a bedroom floor, a pair of jeans and a shirt matching the description of the robbers' clothing; (2) in a hamper in a closet, items of black clothing including two ski masks with eyeholes, gloves, and sweatshirts; (3) in another bedroom, a loaded .380-caliber Lorcin pistol with red lettering on the side; (4) in a children's bedroom, a pair of sweat pants and a jacket, a bag with a McDonald's logo hidden under the bedding in a crib, and four rolls of coins shrink-wrapped in plastic behind the crib; (5) in the kitchen, ammunition for a .22-caliber long rifle and a .380-caliber pistol. They also found indicia and documents showing that defendant Scott was the tenant of the apartment.

Later that morning, the police brought Wong to the apartment complex. She identified the McDonald's deposit bag, the rolls of coins, clothing matching the robbers' clothing, black masks, and a deposit slip with her supervisor's handwriting on it. Wong also indicated that she was "almost positive" in identifying defendant Scott as the robber who forced her to remove the money from the safe, even though he had been masked. She positively identified the Lorcin .380 pistol with the red lettering on the side as the one Scott had pointed at her.[5]

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[5] At trial, Wong identified a rifle and a pistol as "similar" to the weapons used in the robbery, but noted that she had positively identified the handgun at an in-field showup on the day of the robbery.

In a videotaped interview with the police that was played for the jury, defendant Scott admitted he owned the Mustang and the Lorcin pistol. The pistol was kept in the dresser for "self-protection."

Both defendants stipulated to having been previously convicted of a felony.

Defense

Defendant Scott, the only defense witness, admitted two prior felony convictions (one for armed robbery), but denied participation in the present crime. He testified as follows:

Both defendant Kenney and codefendant Mamaril visited his apartment the night before the robbery; Mamaril slept over, but Kenney stayed only about an hour. Scott allowed Kenney to borrow his Mustang.

Kenney returned early the next morning, while Scott and Mamaril were asleep. Kenney had a bag and some clothing. He returned the car keys, then opened the door to leave. Scott heard sirens. Scott did not know whether Kenney was involved in wrongdoing, but was "worried about something that ha[d] just gone on." Kenney closed the door. Scott asked him what was going on. When Kenney did not answer, Scott ordered him out. Scott did not want to become involved or implicated in anything. He led Kenney to the children's bedroom and pushed out the screen. Kenney jumped out the window, leaving property behind.

Although the Lorcin pistol belonged to Kenney, Scott falsely told the police it was his. He also admitted having

lied to the police about whether Kenney had been in his apartment.

Rebuttal

The detective who interviewed Scott testified that Scott said he was in bed on the morning of the robbery, heard a noise, grabbed his pistol, and went into another bedroom, where he saw a window screen was missing. Scott at first denied even knowing Kenney. He changed his story several times about whether Kenney had been in the apartment, who owned the Lorcin pistol, who woke up whom that morning, and what the codefendants said to each other. Scott said he had bought the pistol on the street for $50, knowing he was not legally allowed to own a firearm, in order to protect his wife. Scott also insisted he would never be a “snitch.”

DISCUSSION

I

Defendant Scott challenges the trial court’s denial of his motions to suppress evidence and to traverse the search warrant.[6] He contends:

1. The court erred by finding that exigent circumstances justified the initial warrantless entry into his apartment, that the police performed a legitimate protective sweep once inside,

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[6] Defendant Kenney’s purported joinder in this challenge is without merit. As a mere visitor to Scott’s residence, he did not have a legitimate basis to challenge the search of the residence and did not attempt to do so in the trial court. (*People v. Ayala* (2000) 23 Cal.4th 225, 255.) (He does not offer argument to show a reasonable expectation of privacy in any item seized. (See *id.* at p. 254, fn. 3.)

and that during that protective sweep they properly seized items in plain view. In fact, because there were no exigent circumstances justifying entry (or even if there were, the police exceeded the legitimate scope of a protective sweep), they had no right to be where they were when they observed the items they seized.

2. The court erred by finding that items seized during the initial search that were not in plain view could come into evidence because the police would inevitably have discovered them in executing the later-obtained search warrant. According to Scott, "inevitable discovery" does not apply because the warrant purported only to authorize seizing the items already seized illegally; moreover, the warrant was obtained without probable cause and the officers could not reasonably have relied on it in good faith. Thus, the court should have granted Scott's motion to traverse the warrant.

3. The court erred further as to the warrant by finding that the issuing magistrate was merely correcting a clerical error when he changed the time shown on the face of the warrant a week after the warrant was issued. According to Scott, the magistrate's "correction" invalidated the warrant.

We conclude: (1) Exigent circumstances justified the initial entry into Scott's apartment and the protective sweep performed by the police inside, along with the seizure of any items in plain view. (2) Items not in plain view were illegally seized. (3) However, assuming without deciding that "inevitable discovery" did not make that evidence admissible, any error in

admitting it was harmless on the whole record of evidence adduced at trial. (See *People v. Tewksbury* (1976) 15 Cal.3d 953, 972 (*Tewksbury*).) Therefore, we need not address Scott's arguments about the search warrant.

Background

Scott filed a combined motion to suppress evidence and to traverse the warrant. The trial court first heard evidence and argument on the motion to traverse. After tentatively ruling that the warrant was valid and issued on probable cause, the court heard evidence and argument on the initial search. The court then issued a written ruling on all the issues, incorporating its oral ruling as to the warrant.

As to the initial search and seizure, police officers testified as follows:

Detective Bruce Dubke testified that around 7:00 or 7:30 a.m. on the date of the crime, after suspects were in custody, he was told to go to the south station and then to police headquarters. He began gathering information for a search warrant application by collecting reports and talking to patrol officers at the south station. They told him that they had tracked suspects to the Calvine Road residence, that one person was seen running "from the rear window of the apartment," that the officers had found "a bag of guns and things like that, that apparently were used in the robbery," and that one of the victims had identified people from the apartment; the officers also mentioned a handgun found in a dresser drawer and clothing that matched what the suspects allegedly wore.

Sergeant Ronald Ford testified that he responded to the Calvine Road location to supervise the ongoing operation there, having heard from dispatch at around 6:15 a.m. of "[t]hree to four multiple suspects [*sic*] that were armed."[7] He went to the apartment complex, then to the perimeter location on Dartford, then returned to the complex after the suspect at the Dartford location was in custody and someone else who had been in the residence was detained (although he did not learn of that detention until already inside the residence). He knew by that time that the Dartford suspect had been carrying a rifle, that he had a bag with money inside, and that a jacket with a pistol in it had been found; however, he also knew that suspects often have multiple guns. Learning from several officers that the apartment had not been searched, Ford talked to a pregnant woman at the door of apartment number seven and asked her consent to search. After she said, "No," he told her they would search anyway and ordered the officers in to do a protective sweep at 7:18 a.m. He was concerned for officer safety because he did not know whether suspects or weapons might still be in the apartment. He directed the others to search for suspects and evidence, but did not do so himself. After the search, he froze the scene on the orders of his superior officer, probably by

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[7] Ford acknowledged that all the subsequently written police reports mentioned three suspects at most. He insisted, however, that the information available as of the time he got to the scene was "multiple suspects." After reviewing dispatch records, he agreed that the number given over the radio was "two or three."

8:22 a.m., by stationing two officers there, so as to prepare for getting a search warrant and to protect any evidence still at the scene.

As Ford recalled, there were five or six officers at the scene when he asked permission to search, but more were arriving all the time; there could have been nine or 10 there. Things were happening very fast at more than one location from the moment Ford arrived.

Officer Gary Baker testified that after hearing of the robbery he was dispatched to the McDonald's around 6:18 a.m. and interviewed Diana Salazar, then proceeded to the Calvine Road location at around 7:00 a.m. in response to Officer Hirai's request for assistance. At the McDonald's, he was told that there were three suspects, at least two armed; one was wearing a black mask, dark jacket, and blue jeans, one was wearing a black mask, unknown top, and blue pants, and the third's clothing was not described.

When Baker arrived at 7166 Calvine Road, Officer Hirai said he had at least one of the suspects inside apartment number seven; he asked Baker to broadcast the information and request assistance because Hirai's battery was weak. Hirai was the only other officer at the scene at that time; others were pursuing a fleeing suspect.[8]

[8] Baker did not recall whether Hirai went into the apartment and detained codefendant Mamaril before the search began. However, he admitted that both Scott and Mamaril were detained in squad cars by that time.

Officers Phillipe and Trim subsequently arrived, followed by Sergeant Ford. Officer Trim asked the female occupant of the apartment (Diane Revelez) for permission to search and was denied; she did not say that there were no remaining persons or weapons inside. Sergeant Ford then told Revelez the officers were going in. At the moment they did so, the residence had not been cleared. The officers were concerned whether other persons or weapons were inside and whether evidence might be destroyed.

Searching the residence, Baker and the others looked for persons and weapons. They did not find any additional persons, but Baker found a Lorcin pistol in a bedroom dresser drawer, along with letters addressed to defendant Scott. They searched for about a half-hour.

Officer Brad Phillipe testified that he responded to the Calvine Road scene about 7:07 a.m. on April 29, 2001, to help secure a perimeter around an apartment where two robbery suspects had been located. He had heard that the robbery had occurred at a McDonald's and there were three suspects. Things were moving so quickly that he had been told not to wait for roll call, but to get a car that could track a RAM signal.

After Phillipe took his position on the perimeter, Sergeant Ford arrived. Ford told the officers there were still outstanding suspects and weapons and the apartment had not been cleared.[9] Phillipe went in with the others and entered the southeast bedroom, where he saw in plain view a pair of blue

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[9] Phillipe acknowledged that his report mentioned a protective sweep for outstanding weapons, but not for outstanding suspects.

jeans and a red shirt with black writing on it that matched a robbery victim's description. Then he entered a walk-in closet with a clothes hamper that held several articles of black clothing on top in plain view; he knew that some of the suspects had worn all-black clothing. He dumped the hamper over to see if there was a weapon inside. He did not find one, but did find two unmatched black gloves and a black watchcap with holes cut in it. He knew that at least one suspect was reported to have worn a black ski mask and black gloves. He booked all the items he found.

Officer Tatsumi Hirai testified that after hearing of the robbery from dispatch at 6:18 a.m. on April 29, 2001, he went towards the McDonald's in his patrol car, which had a RAM tracking device. Following the RAM signals, he wound up at 7166 Calvine Road by 7:00 a.m.

When another unit pulled up, Hirai told the officers to watch the front of the apartment building while he went around to the back. There, he saw a person jumping over the back fence, holding onto something black. Running after him, Hirai found a black jacket with a .380-caliber Lorcin pistol in the pocket, dropped by the suspect.

Since several officers had joined in the pursuit, Hirai went back to the rear of the apartment complex, where he saw the screen to the bedroom window from apartment number seven on the ground, lying below the closed window. The screen was bent in a "V shape," as if pushed out from the center; it looked as though someone had jumped through it, and not as though someone had

stepped on it while it lay on the ground. He could not tell how long it had been on the ground.

When Hirai returned to the front of the apartment, a Hispanic female contacted him, saying she lived in the apartment. He saw a black or dark gray Mustang, which he recognized as a possible suspect vehicle, parked in front. The woman said her fiancé, who was inside the apartment, owned the car. Defendant Scott came out of the apartment and said he owned the Mustang, but did not know how it had gotten there from where he had parked it around 43rd and Martin Luther King Blvd. Scott then went back into the apartment. Hirai did not immediately detain him because no other officers were present and Hirai knew there were still suspects and weapons outstanding.

When Officer Baker arrived, the two of them got Scott to come out and detained him in a patrol car. The Hispanic female had said there was another male in the apartment (codefendant Mamaril), so they had her go in and get him; then they put him in the other patrol car. A minute or two later, Sergeant Ford arrived. He took a group of officers to the door while Hirai stayed outside with Scott.

The court's ruling

After further briefing, the court issued a written ruling denying Scott's motions. The court found:

1. Exigent circumstances justified the initial warrantless entry because the police were still in pursuit of felons fleeing the scene of an armed robbery. Scott argues that the exigency

ended when two suspects were detained and the police were told that no others remained inside, but the police had no way of knowing then whether they had detained the real perpetrators or whether there might be other suspects or persons able to destroy evidence still in the apartment. The police would have been derelict in their duty had they accepted Revelez's assurance without further investigation.

2. Once inside, the police could properly conduct a limited search to uncover additional suspects and ensure officer safety. In the course of this protective sweep, they could lawfully seize any evidence in plain view that they reasonably believed to be related to the robbery, including the clothing on the bedroom floor and on top of the hamper.

3. However, the scope of the search exceeded the limits of a protective sweep. The police were not entitled to open dresser drawers or dump out the contents of the hamper and rummage through them without a warrant. Thus, the Lorcin semiautomatic handgun, black ski mask, and unmatched gloves obtained through that search were illegally seized.

4. But if the later-obtained search warrant was valid, all of that evidence would inevitably have been discovered pursuant to the valid search and would therefore remain admissible.

5. As previously found, once all paragraphs in the affidavit supporting the search warrant application that derived from information obtained through the illegal search and seizure were deleted, the remaining information in the affidavit supplied probable cause to issue the warrant. Furthermore,

Detective Dubke's testimony that he would have sought the warrant based on the circumstances of the pursuit and the evidence obtained through legal means was credible. Thus, the search warrant provided an independent source for the discovery of the illegally seized evidence. (As also previously found, the time change on the face of the warrant was simply the magistrate's later correction of a "clerical error" and did not invalidate the warrant.) Therefore, inevitable discovery made that evidence admissible.[10]

Analysis

In reviewing a trial court's ruling denying a motion to suppress evidence, we accept the court's factual findings if supported by substantial evidence. However, we decide independently whether the challenged search or seizure was constitutionally reasonable. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Exigent circumstances

Although the Fourth Amendment to the United States Constitution normally requires a warrant for police entry into a person's home, exigent circumstances create an exception to that requirement. (*People v. Seaton* (2001) 26 Cal.4th 598, 632.) "There is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an

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[10] Judge Borack also found that a statement given by Scott about the illegally seized gun was fruit of the poisonous tree and had to be suppressed. That ruling is not challenged on appeal.

extraordinary situation must be measured by the facts known to the officers." (*People v. Ramey* (1976) 16 Cal.3d 263, 276.)

Exigent circumstances may include the "fresh pursuit of a fleeing suspect who has committed a grave offense and remains dangerous to life and limb" (*People v. Smith* (1966) 63 Cal.2d 779, 797), provided the pursuit is "substantially continuous and afford[s] the law enforcement authorities no reasonable opportunity to obtain a warrant[.]" (*People v. Escudero* (1979) 23 Cal.3d 800, 810.) Exigent circumstances may also include the officers' reasonable fear that persons inside a residence may imminently destroy evidence. (*Minnesota v. Olson* (1990) 495 U.S. 91, 100 [109 L.Ed.2d 85, 95]; *People v. Seaton, supra*, 26 Cal.4th at p. 632.) In this case, the People offered both justifications.

Scott asserts "fresh pursuit" does not justify the warrantless entry because (1) the police had apprehended three suspects (the fleeing Kenney, plus Scott and Mamaril, who emerged peacefully from the apartment) and had no reason to believe there were more; (2) they did not know how long the apartment's window screen (through which Kenney had supposedly escaped) had been lying on the ground; (3) they had already recovered two weapons (Kenney's rifle and the pistol in his jacket pocket) and no victim or eyewitness had reported seeing more than two; and (4) they had officers posted at all corners of the building to prevent escape. Thus, in Scott's view, the

officers could simply have removed Revelez, "secured the apartment," and awaited a search warrant.[11] We disagree.

The police pursuit was fresh and continuous: the 911 call and the RAM tag signals put the police on the suspects' trail almost immediately, and there was no break in the pursuit after they reached the apartment complex. One suspect tried to flee as the police were arriving; they apprehended him only shortly before going into the building. The fact that they had heard of only three suspects at the crime scene did not prove that only three persons were involved: there could also have been accomplices or coconspirators who did not go to the McDonald's but awaited the principals' return to Scott's apartment. (For all they knew, Revelez, an admitted associate of Scott, was such a person.) The fact that they had heard of only two firearms used in the crime hardly proved that the criminals possessed only two: violent criminals often have multiple weapons, and the police had recovered firearms from only one suspect by the time they entered the apartment. Having officers posted outside the building would not have prevented an armed criminal inside from firing on them. (Scott does not explain how the police could have "secured the apartment" without securing themselves against that possibility.) And, as the trial court found, the

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[11] Scott also asserts, relying on *United States v. Alvarez* (9th Cir. 1987) 810 F.2d 879, that the government's claim of exigent circumstances is "severely undercut" because the police could have obtained a telephonic warrant. Defendant has not shown that this argument was raised in the trial court; the argument cannot be made for the first time on appeal. (See *People v. Williams* (1999) 20 Cal.4th 119, 131.)

fact that they had detained three persons did not establish that all of those persons or only those persons were the robbers, and the fact that Revelez said no one else was inside did not prove that that was so.

Furthermore, because the police had no way of knowing that all persons able to destroy evidence of the robbery were out of the apartment, they were also justified in entering without a warrant to guard against the possibility of such destruction. (*Minnesota v. Olson, supra,* 495 U.S. at p. 100 [109 L.Ed.2d at p. 95]; *People v. Seaton, supra,* 26 Cal.4th at p. 632.) Scott does not even attempt to rebut this basis for the officers' entry.

Protective sweep and "plain view" seizure

If reasonable fear for officer safety justifies a warrantless entry, the officers may lawfully do a protective sweep of the premises to search for persons and weapons. This does not license a general search, but only a cursory visual inspection of places in which a person might be hiding. (*Maryland v. Buie* (1990) 494 U.S. 325, 327 [108 L.Ed.2d 276, 281]; *People v. Seaton, supra*, 26 Cal.4th at p. 632.) However, during a protective sweep, as in any other situation where the police have the right to be on the premises without a warrant, they may lawfully seize any item in plain view which they have probable cause to believe is evidence of a crime or contraband. (*Maryland v. Buie, supra*, 494 U.S. at p. 330 [108 L.Ed.2d at p. 283]; *Arizona v. Hicks* (1987) 480 U.S. 321, 325-327 [94 L.Ed.2d

347, 354-355]; *People v. Clark* (1989) 212 Cal.App.3d 1233, 1238-1239.)

Scott asserts the police could not properly seize even items in plain view because they lacked probable cause to believe the items were connected to a crime. It is not enough, according to Scott, that the victims had said the robbers were wearing black and the officers saw black clothing in plain view, because that clothing had no distinguishing characteristics and many people own such clothing. We disagree.

Scott's argument sets the bar for probable cause too high. In discussing this issue, he relies on United States Supreme Court decisions that say that the incriminating character of the evidence must be "immediately apparent." (*Horton v. California* (1990) 496 U.S. 128, 136 [110 L.Ed.2d 112, 136]; *Arizona v. Hicks, supra*, 480 U.S. at pp. 326-327 [94 L.Ed.2d at pp. 354-355].) However, in *Texas v. Brown* (1983) 460 U.S. 730 at pages 741 through 742 [75 L.Ed.2d 502, 513-514], decided before the cases Scott cites, the high court explained that this test is just another way of defining probable cause and does not create a higher standard.

As the court explained: "Decisions by this Court since *Coolidge* [*v. New Hampshire* (1971) 403 U.S. 443 [29 L.Ed.2d 564]] indicate that the use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." (*Texas v. Brown,*

supra, 460 U.S. at p. 741 [75 L.Ed.2d at p. 513].) In fact, only probable cause is required. (*Id.* at p. 742 [75 L.Ed.2d at pp. 513-514].) Probable cause "is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' [citation] that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required." (*Id.* at p. 742 [75 L.Ed.2d at p. 514].)[12]

Here, the officers entered an apartment that they had reason to believe might be occupied by one or more suspects in a robbery just performed by persons wearing black clothing, and found black clothing strewn about the apartment in plain view. They were not required to be certain that this clothing was connected to the crime, but only to have a reasonable belief that it might be. The trial court's finding on this point was correct.

Illegally seized evidence and harmless error

As the trial court found, the officers' protective sweep did not permit a general search; thus, anything seized that was not in plain view was illegally seized. The court also found, however, that due to the later-obtained search warrant, the

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[12] Scott cites this definition of probable cause when discussing the warrant. However, he overlooks its relevance to this issue.

doctrines of "inevitable discovery" and "independent source" cured the illegality and made that evidence admissible.

In the parties' original briefing, Scott contended this ruling was not only erroneous but necessarily prejudicial, while the Attorney General simply argued the ruling was correct. Thus, neither party considered whether it could have been harmless error to admit the evidence. We requested supplemental briefing on that point. Having considered the supplemental briefing, we are persuaded that even assuming the search warrant cannot validate the originally illegal seizure of evidence, the admission of that evidence was harmless in light of the whole record.

When a defendant is convicted after illegally seized evidence was improperly admitted, we determine prejudice by looking to the whole record of evidence adduced at trial. (*People v. Tewksbury, supra*, 15 Cal.3d at pp. 971-972.) Here, as the trial court found, the Lorcin .380 pistol in Scott's dresser drawer and the clothing inside the hamper were illegally seized. Because the court denied Scott's motion to suppress, those items came into evidence, along with Scott's statement admitting prior ownership of the pistol, and victim Wong was permitted to identify the pistol. Thus, we must decide whether the error in admitting this evidence was harmless beyond a reasonable doubt. (*Id.* at p. 972.)[13]

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[13] As we have explained, we reject Scott's position that all the evidence was illegally seized because we agree with the trial court that the police were lawfully entitled to enter his

Scott asserts in his supplemental brief that the evidence supporting his conviction was weak because: (1) Eyewitnesses failed to identify him (aside from Wong's identification at the in-field showup, which was based solely on body shape and size, and which she disavowed at trial). (2) There was evidence incriminating codefendant Kenney that did not point to Scott. (3) Scott testified, denied his involvement, and explained that Kenney had left incriminating evidence in Scott's apartment without his knowledge or his awareness of its criminal significance. (4) Absent the illegally seized evidence, all that remained was (a) a car belonging to Scott with a warm hood, which might have been used in the robbery, but which the police had no evidence Scott had driven; (b) the RAM signals that led to Scott's apartment complex, although it was Kenney whom the police caught with the stolen money; (c) a bent and downed window screen from one of Scott's windows, although the police had no way of knowing how or when it came to be there; and (d) black clothing with no distinguishing characteristics in the apartment. Furthermore, Scott asserts, if the illegally seized pistol had not been admitted in evidence, his admission to the police that it was his, which supported his conviction on count 6 (felon in possession of firearm), would also have been excluded. (*Id.* p. 8.) We are not persuaded.

First, viewed in its totality, the evidence strongly suggests Kenney had run from Scott's apartment. Guns and other

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apartment for a protective sweep and to seize the items they found in plain view.

evidence tied to the crime were found with Kenney when he was captured. In his testimony, defendant admitted Kenney had been in defendant's apartment but gave an implausible explanation for Kenney's presence at an early hour of the morning.

Second, it is true that the police could not prove Scott had driven the Mustang with the warm hood (identified over the police dispatch as the likely getaway car) which was parked outside his building and which he admitted owning -- but his claim that he had left it parked elsewhere and had no idea how it had gotten to his doorstep was implausible and inconsistent with his later testimony that he had loaned it to Kenney.

Third, this evidence and the other evidence Scott mentions is all consistent with, and collectively most easily explained by, the theory that he took part in the robbery.

Fourth, clothing matching that used by the robber was found in plain view.

Fifth, Scott's ultimate attempt to shift all the blame to Kenney was not credible because Scott had changed his story frequently and because he had been convicted for a crime of moral turpitude. As the Attorney General points out, "[f]alse statements regarding incriminating circumstances constitute evidence which may support an inference of consciousness of guilt. [Citations.]" (*People v. Showers* (1968) 68 Cal.2d 639, 643.)

Finally, if the jury believed the other admissible evidence against Scott, it would also have believed that he was one of the principals who brought a firearm to the robbery and

personally used it. Thus, even without his statement admitting prior ownership of the gun in his dresser drawer, the jury could have convicted him on count 6 because he possessed a weapon, a separate and distinct offense for a felon, before committing the robbery. (See *People v. Jones* (2002) 103 Cal.App.4th 1139, 1145-1148 [§ 654 does not bar separate sentence for felon-in-possession where defendant armed himself before committing felony].) Under all the circumstances, any error in admitting illegally seized evidence against Scott was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

II

Scott contends the trial court erred prejudicially by denying his requested instruction on the offense of accessory after the fact. The court did not err because the instruction was unsupported by any evidence.

Background

Before trial, Scott's counsel advised the court that he would argue his client was an accessory after the fact (§ 32) and he would seek instruction on that offense.[14] As noted, Scott testified: (1) he let Kenney borrow the Mustang; (2) Kenney returned it early in the morning on April 29, 2001, leaving

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[14] Section 32 provides: "Every person who, after a felony has been committed, harbors, conceals, or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, *having knowledge that said principal has committed such felony* or has been charged with such felony or convicted thereof, is an accessory to such felony." (Italics added.)

clothes and other items in Scott's residence; (3) while Kenney was in the apartment, they heard sirens; (4) Scott helped Kenney escape by pushing the screen out of the window of the children's bedroom; and (5) Scott then hid a black bag and a Lorcin pistol Kenney had left behind.

Scott's counsel requested instruction on the offense of accessory after the fact pursuant to CALJIC No. 6.40.[15] The trial court refused, stating that the evidence did not support that instruction because Scott testified he did not know what was going on and was simply trying to stay out of trouble.

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[15] The requested instruction stated:

"Defendants are accused [in Count[s] 1, 2 and 3] of having committed the crime of being an accessory to a felony in violation of § 32 of the Penal Code.

"Every person who, after a felony has been committed, harbors, conceals or aids a principal in that felony, with the specific intent that the principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that the principal has committed that felony or has been charged with that felony or convicted thereof, is guilty of the crime of accessory to a felony in violation of [section] 32.

"In order to prove this crime, each of the following elements must be proved:

"1. A felony, namely, robbery in violation of [section] 211, was committed;

"2. Defendant harbored, concealed or aided a principal in that felony with the specific intent that the principal avoid or escape [arrest] [trial] [conviction or punishment]; and

"3. Defendant did so with knowledge that the principal [committed the felony] [was charged with having committed the felony] [was convicted of having committed the felony]."

Analysis

Defendant asserts the trial court erred because the evidence showed he knew he was helping Kenney to escape arrest and specifically intended that result. He is wrong. Case law makes even clearer what is already spelled out in both section 32 and CALJIC No. 6.40: Before a defendant can properly obtain instruction on the offense of accessory after the fact, there must be evidence that he knew another person *had committed a specific felony* and he had the criminal intent to help that person escape its consequences. Scott did not so testify: he testified that he did not know what (if anything) Kenney had done and that he himself did not commit or intend to commit any crime whatever.

"The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support a conviction on that theory. [Citation.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528.) In other words, a defendant's "theory of defense" that he committed some lesser crime than the offense charged, if not supported by substantial evidence, does not entitle him to instruction on the lesser crime.

"A conviction under section 32 requires proof that a principal committed a specified felony, the defendant knew that the principal had committed a felony, the defendant did something to help the principal get away with the crime, and that as a result of this action the defendant intended to help

the principal get away with the crime. [Citations.]" (*People v. Nguyen, supra*, 21 Cal.App.4th at p. 536.)

If Scott's testimony was to be believed, he did not know that Kenney had committed any particular felony, and he did not help Kenney get out of the apartment to help him escape arrest for a felony. According to Scott, when Kenney repeatedly refused to tell him what was going on, Scott told him to leave and pushed the screen out of the bedroom window because Scott was anxious about the welfare of his family and houseguest. Scott did not know what Kenney might have done because Kenney would not say, and Scott did not want to help him but to get rid of him. In short, Scott's testimony denied both guilty knowledge and guilty intent. On this "theory of defense," Scott was not an accessory after the fact because he was innocent of any crime. And on the prosecution's theory of the case, Scott was not an accessory after the fact but a principal, and his testimony (except as to pushing out the screen) was wholly incredible.[16]

Scott relies on *People v. Perryman* (1987) 188 Cal.App.3d 1546. But there, the defendant knew that the person she helped to escape had committed a felony *because she saw the felony occurring*. (*Id.* at p. 1548.) Contrary to Scott's position,

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[16] A person can be both a principal and an accessory when there is evidence of distinct and independent acts supporting each crime. (*People v. Mouton* (1993) 15 Cal.App.4th 1313, 1321-1325; accord, *People v. Riley* (1993) 20 Cal.App.4th 1808, 1816.) Scott did not request accessory instructions on that theory, however: he claimed that the evidence showed he was only an accessory and did not take part in the robbery.

that case does not hold that a defendant has sufficient knowledge for accessory liability merely because he might be able to "deduc[e]" from circumstantial evidence that a crime had been committed.

The trial court's denial of the requested instruction was correct.

III

Defendants contend the trial court misinstructed the jury on the law of constructive possession after it reported a deadlock, thus directing a prosecution verdict on counts 2 and 3, which was contrary to law. We disagree.

Background

All three on-duty McDonald's employees were named as robbery victims -- Wong in count 1, Salazar in count 2, and Guillebeau in count 3. The evidence showed, however, that only Wong, the "swing manager," had access to the safe, and only she was forced to give the robbers money as Guillebeau and Salazar hid.

At the close of the People's case-in-chief, defendants jointly moved for acquittal on counts 2 and 3. (§ 1118.1.) Defendants asserted Guillebeau and Salazar were not robbery victims because they did not have actual or constructive possession of the items taken from the safe.

After argument, the trial court denied the motion. The court cited two recent appellate decisions on point -- *People v. Frazer* (2003) 106 Cal.App.4th 1105 (*Frazer*) and *People v. Jones* (2000) 82 Cal.App.4th 485 (*Jones II*) -- and stated that *Jones II*

was better reasoned, but defendants' motion would fail under either.[17] According to the court, *Jones II* holds as a matter of law, based on analysis of case law back to 1924 (cf. *Jones II, supra*, 82 Cal.App.4th at pp. 490-491), that business employees have constructive possession of the employer's property during a robbery because they have a representative capacity with respect to the employer, regardless of whether they have personal access to the property taken. (See *ibid.*) However, under *Frazer* -- which holds that constructive possession exists *if, as a matter of fact,* the employee has a sufficient representative capacity with respect to the employer so as to have express or implied authority over the stolen property (*Frazer, supra*, 106 Cal.App.4th at pp. 1114-1115 [declining to follow *Jones II* so far as it states absolute rule of law]) -- there was sufficient

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[17] Coincidentally, there are two unrelated cases on point called *People v. Jones*: in addition to the one cited above, there is also *People v. Jones* (1996) 42 Cal.App.4th 1047. Later decisions citing both sometimes call the earlier case *Jones I* and the later case *Jones II*, even though they are unrelated. (See, e.g., *Frazer, supra,* 106 Cal.App.4th at pp. 1114-1115.) For convenience, we shall do likewise.

Both in its oral ruling on the motion for acquittal and in its later oral ruling during jury deliberations, the trial court spoke of "*People v. Jones*" without giving a volume-and-page citation or noting that there are two relevant cases by that name. Kenney assumes in his opening brief that the court was talking about *Jones I* and argues the court erred by finding a conflict between that case and *Frazer*. However, we conclude from the court's description of "*People v. Jones*" in its first ruling that it was really talking in both rulings about *Jones II,* which Kenney fails to cite in his opening brief. Thus we call the case by that name even though the trial court did not.

evidence as to Guillebeau and Salazar to make constructive possession a jury question.

The trial court instructed the jury on possession with CALJIC No. 1.24: "There are two kinds of possession[:] actual possession and constructive possession. Actual possession requires that a person knowingly exercised direct physical control over a thing. Constructive possession does not require actual possession but does require that a person knowingly exercised control over or the right to control a thing either directly or through another person or persons. One person may have possession alone or two or more persons together may share actual or constructive possession."

During closing argument, Kenney's counsel stated that Wong had constructive possession of the stolen property because, as the manager, she was "responsible for everything in that store." Then he added: "*But Jinel Guillebeau, she doesn't have constructive possession of the items of* [*sic*] *the safe because she has no access to the items in the safe*." (Italics added.)

The prosecutor objected and asked to approach. Following an unreported discussion, Kenney's counsel did not return to this line of argument.

On rebuttal the prosecutor argued that all three alleged victims had constructive possession of McDonald's property because all were working in a representative capacity for McDonald's at the time of the robbery.

The trial court submitted the case to the jury on Thursday, July 24, 2003. On Friday, July 25, the jury returned a partial

verdict as to the robbery counts, finding Scott and Kenney guilty on count 1 (robbery of Wong) but returning no verdict on counts 2 and 3.

The jury continued its deliberations on Monday, July 28, without reaching any further verdict.

On Tuesday, July 29, the trial court said it had received an inquiry from the jury the previous afternoon requesting "clarification of CALJIC 1.24 [*sic*] . . . regarding Counts 2 and 3." Specifically, the jury had asked: "Do all employees have constructive possession of all [company property] while on duty?"

The trial court then put on the record the discussion it had held with counsel at that time. The court said it had observed that the jury appeared to be "going down the road of *Frazer*" rather than that of *Jones II*, which the court still deemed the better-reasoned decision. Furthermore, it appeared the jury was "totally focusing in on improper argument by [Kenney's counsel] during . . . his closing argument to which [the prosecutor] objected; and the Court sustained it." The court said that in the unreported sidebar it had told Kenney's counsel he had misstated the law and if he did not stop the court would have to give a pinpoint instruction based on *Jones II*. However, the court had not stricken the objectionable argument because the prosecutor had not requested it and the court had not realized how the argument would affect the jury.

Finally, the trial court said it had originally proposed to respond to the jury by quoting the rule of *Jones II*: "[T]he

employees of a business constructively possess the business owner's property during a robbery." (*Jones II, supra,* 82 Cal.App.4th at p. 490.) However, Scott's counsel had said this would amount to directing a verdict for the People on counts 2 and 3. The court now asked all counsels' views on this point.

The prosecutor said the trial court should give such an instruction and it would not direct a verdict: the jury would still have to decide, among other things, whether Guillebeau and Salazar were subjected to force and fear during the robbery.

Scott's counsel replied that giving a pinpoint instruction would necessitate a mistrial as to Scott because it would effectively punish him for the "misbehavior" of Kenney's counsel. Kenney's counsel replied that he still believed his argument legally correct and consistent with CALJIC No. 1.24, and the People could not request a pinpoint instruction now because they had failed to do so when the parties and the trial court were discussing proposed instructions. The prosecutor said she had not anticipated Kenney's counsel would make an argument to the jury that the court had already rejected as a matter of law on his motion for acquittal. The trial court agreed it had done so.

The trial court then ruled that it would give a pinpoint instruction based on *Jones II*. The court explained that this instruction would not answer either yes or no to the jury's question, "Do *all* employees . . . have constructive possession of all company property while on duty?" (Italics added.)

Counsel for codefendant Mamaril observed that *Jones II* was not binding on the trial court because it was not a Third Appellate District case. The court replied: "I have two contradicting cases [i.e., *Jones II* and *Frazer*], and whenever there is two contradictory cases [*sic*] the Court is free to choose the case that the Court believes is better reasoned; and that is what I have done." The court noted that neither the Third Appellate District nor the California Supreme Court had addressed the issue.

The jury was brought in. The trial court then instructed the jury: "The employees of a business constructively possess the business owner's property during a robbery." The court added that it was referring the jury back to CALJIC No. 1.24.

Soon afterward, the jury returned with verdicts of guilty as to Scott and Kenney on counts 2 and 3.

Analysis

Kenney (joined by Scott) contends: (1) The trial court erred by finding a conflict in the law. Understood correctly, neither decision cited by the court stands for the absolute rule of law the court gave the jury in response to its question, and the inquiry whether an employee had constructive possession of the employer's property is necessarily factual. (2) The court's erroneous pinpoint instruction removed from the jury's consideration the factual question whether Guillebeau and Salazar had constructive possession of the stolen property and directed a verdict for the People on counts 2 and 3. (3) This federal constitutional error was not harmless beyond a

reasonable doubt because the jury was deadlocked on counts 2 and 3 until the court gave the erroneous instruction. We disagree.

First, as explained already, Kenney has simply mistaken the "*Jones*" decision on which the trial court relied. Throughout his opening brief, he discusses only *Jones I, supra,* 42 Cal.App.4th 1047. There, as he points out, the court found as a matter of fact that all employees alleged to be victims of a robbery of their place of employment had constructive possession of the stolen property because they had sufficient representative capacity with respect to its owner. (*Id.* at p. 1054.)[18] Similarly, as we have noted, *Frazer, supra*, 106 Cal.App.4th 1105, holds that employees who have sufficient representative capacity have constructive possession as a matter of fact. (*Id.* at pp. 1114-1115.)

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[18] The court went on to reject the unexplained holding of an older decision that a "market box boy" was not a victim of a robbery at his workplace. (*People v. Guerin* (1972) 22 Cal.App.3d 775, 782 (*Guerin*) [disapproved on other grounds in *People v. Ramos* (1982) 30 Cal.3d 553, 589].) The court stated that unless *Guerin*'s holding was based on the employee's possible status as a minor, it was wrong: "[E]ven a market box boy has sufficient representative capacity vis-à-vis the owner so as to be in 'possession' of the property stolen from the store owner." (*Jones I, supra,* 42 Cal.App.4th at p. 1055.) Additionally, *Jones I* cites *Guerin* as the only case that had ever found a business employee present during a robbery not to be in constructive possession of the business's property. (*Jones I, supra,* 42 Cal.App.4th at pp. 1053-1055.)

Kenney is correct, however, to note that *Jones I* does not squarely hold as a matter of law that all business employees have constructive possession of their employer's property in cases of robbery (even though such a rule could be inferred from its discussion). In that sense, as Kenney says, it is not inconsistent with *Frazer, supra*.

But *Jones II*, on which the trial court actually relied, plainly holds that it is not a question of fact but of law: "California follows the long-standing rule that the employees of a business constructively possess the business owner's property during a robbery." (*Jones II, supra,* 82 Cal.App.4th at p. 490.) Although *Jones II* cites *Jones I* as "[t]he case that is most factually apposite" (*Jones II, supra,* 82 Cal.App.4th at p. 491) and purports to follow its reasoning (*ibid.*), it goes further to state flatly: "[B]usiness employees -- whatever their function -- have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*Ibid.*)

As the trial court noted, it is precisely on this point where *Frazer* differs. *Frazer* observes: "*Jones II* concludes that employee status, regardless of function, *is* alone enough to confer constructive possession. The dissent, and to a limited extent the majority opinion[,] in *Jones I*, support a more fact-based inquiry, i.e., an evaluation of the circumstances of the case to determine if the particular employee has sufficient representative capacity to be deemed to have implied authority over the item taken." (*Frazer, supra*, 106 Cal.App.4th at p. 1114.) *Frazer* then points out that the California Supreme Court in *People v. Nguyen* (2000) 24 Cal.4th 756, 762 (*Nguyen*), decided after *Jones II,* had disapproved *People v. Mai* (1994) 22 Cal.App.4th 117 (*Mai*), a decision cited with approval in *Jones II*. (*Frazer, supra,* 106 Cal.App.4th at pp. 1114-1115.) Finally, *Frazer* holds: "Given our Supreme Court's reiteration

in *Nguyen* of the importance of the element of possession to support a robbery conviction, we conclude a fact-based inquiry regarding constructive possession by an employee victim is appropriate. That is, *we conclude the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard, employee status does not alone as a matter of law establish constructive possession. Rather, the record must show indicia of express or implied authority under the particular circumstances of the case.*" (*Frazer, supra*, 106 Cal.App.4th at p. 1115; italics added.) The trial court was right to find that *Jones II* and *Frazer* conflict, since *Frazer* plainly says as much.

We also agree with the trial court that *Jones II* states the correct rule.

First, *Frazer*'s uneasiness about *Jones II*'s supposed reliance on *Mai* was misplaced, because *Jones II* does not in any way derive its rule from *Mai*. A truly anomalous case, *Mai* did not address the issue of employees' constructive possession; rather, it held that a mere visitor to a business establishment became a victim when a robbery occurred on the premises "once force and fear were applied to him in an attempt to deprive *someone, or anyone*, of property[.]" (*Mai, supra*, 22 Cal.App.4th

at p. 129.)[19] The Supreme Court disapproved *Mai* because *Mai* held, contrary to "settled law for nearly a century[,]" that "the property taken during a robbery need not be taken from the possession of the victim." (*Nguyen, supra,* 24 Cal.4th at pp. 760, 762.) *Jones II* cites *Mai* in dictum merely to illustrate the breadth of recent holdings as to business robberies. (*Jones II, supra*, 82 Cal.App.4th at pp. 490-491.) Thus, neither *Mai*'s holding nor *Nguyen*'s disapproval of that holding is critical to the validity of *Jones II*.

Second, even though *Jones II* goes beyond prior cases in stating as a matter of law that business employees per se have constructive possession of their employers' stolen property, it correctly concludes that (but for the anomalous *Guerin*) all the prior cases' holdings are consistent with such a rule and logically imply it. (*Jones II, supra*, 82 Cal.App.4th at pp. 490-492.)

Third, unlike the clear rule of *Jones II*, the "fact-based inquiry" of *Frazer* is essentially standardless. Though *Frazer* speaks of "indicia of express or implied authority," it does not explain how a court can identify such "indicia" or apply them to particular facts: it merely cites two cases ("[t]o illustrate") in which employees were found to have such authority. (*Frazer,*

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[19] Although *Mai* purported to derive this rule from *People v. Arline* (1970) 13 Cal.App.3d 200, one of the seminal cases on employees' constructive possession (*Mai, supra*, 22 Cal.App.4th at p. 129), that rule is not to be found there.

supra, 106 Cal.App.4th at p. 1115.)[20] Nor does *Frazer* explain why the facts of employee status and on-duty presence on the premises during a robbery are not sufficient to resolve "the element of possession to support a robbery conviction." (*Ibid.*)

For all these reasons, we conclude the trial court correctly instructed the jury pursuant to *Jones II*. Contrary to defendants' position, the court's instruction did not remove the "factual question" of constructive possession from the jury's consideration: it simply clarified the law on this subject.

Furthermore, the instruction did not direct a verdict on counts 2 and 3. As the prosecutor pointed out, constructive possession was not the only element the jury had to resolve: it also had to decide whether defendants used force or fear against Guillebeau and Salazar in order to take "their" property. The fact that the jury found against defendants on this point does not prove it was compelled to do so.

Because the trial court's instruction was correct, we need not address defendants' claims of prejudice.

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[20] *Frazer* gives the following examples: (1) "[A] janitor may well be deemed to have implied authority if all other employees who handle the cash are gone." (*Frazer, supra*, 106 Cal.App.4th at p. 1115, citing *People v. Downs* (1952) 114 Cal.App.2d 758, 765-766.) (2) "[B]y virtue of his job title charging him with guarding the premises, a security guard may be deemed to have authority even when other employees who handle the property are present." (*Frazer, supra,* 106 Cal.App.4th at p. 1115, citing *People v. Miller* (1977) 18 Cal.3d 873, 880-881.) We fail to see how these cases elucidate either *Frazer*'s "indicia of express or implied authority" or its criteria for applying them.

IV

Kenney contends the trial court erred by imposing a concurrent sentence on count 4 (felon in possession of firearm) rather than staying sentence on that count under section 654, because his possession of the firearm was part of an indivisible course of conduct with the principal crime (as the court expressly found at sentencing) and the People did not prove any distinctly separate, antecedent possession. The Attorney General concedes the point. Having reviewed the record, we shall accept the People's concession. The sentence on count 4 is hereby stayed pursuant to section 654.

V

Kenney contends his sentencing violated *Blakely, supra*, 542 U.S. 296, because the trial court imposed the aggravated term on count 1 and consecutive sentencing based on facts not submitted to the jury and found true beyond a reasonable doubt. However, our Supreme Court has recently rejected these contentions. (See *People v. Black* (2005) 35 Cal.4th 1238.)

DISPOSITION

The judgment with respect to defendant Scott is affirmed. The judgment with respect to defendant Kenney is modified to show a stay of the sentence imposed on count 4 pursuant to Penal Code section 654. As modified, the judgment with respect to defendant Kenney is affirmed. The trial court shall prepare an amended abstract of judgment showing the aforementioned stay of

sentence on count 4 and shall forward a certified copy of the same to the Department of Corrections.

SIMS, Acting P.J.

We concur:

DAVIS, J.

MORRISON, J.