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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFRED LAWRENCE JONES,

Defendant and Appellant.

A130604

(Contra Costa County  
Super. Ct. No. 5-0601161)

Defendant was convicted following a jury trial of first degree murder (Pen. Code, § 187), with burglary and robbery special circumstances, and enhancements for personal use and discharge of a firearm causing death (Pen. Code, §§ 190.2, subd. (a)(17), 12022.5, subd. (a), 12022.53, subd. (d)), first degree robbery (Pen. Code, §§ 211, 212.5, subd. (a)) and first degree burglary (Pen. Code, §§ 459, 460, subd. (a)), with associated enhancements for personal use and discharge of a firearm. He was sentenced to life without the possibility of parole for the murder conviction, enhanced with a consecutive term of 25 years to life for intentional discharge of a firearm causing death, a consecutive term of two years and eight months for the burglary conviction, and a stayed four-year term for the robbery conviction.

In this appeal defendant claims that the trial court erred by refusing to give instructions on eyewitness identification, and imposing a consecutive term for the burglary conviction. We conclude that the requested eyewitness identification instructions were unnecessary, and imposition of the consecutive sentence on the

burglary conviction did not violate Penal Code section 654. We therefore affirm the judgment.

### **STATEMENT OF FACTS**

The victim, Cheryl Macey, was shot and killed just outside her apartment at 1604 Sycamore Drive in Antioch. Antioch Police officers arrived at the scene of the shooting on Sycamore Drive at 2:15 p.m. on March 30, 2004, to find Macey lying on the ground on her stomach along an alley near a chain link fence. She was not breathing and had no pulse. Macey had been killed by a single gunshot that passed through her left arm, lung and heart.

Antioch Police Officer Michael Mortimer interviewed Anton Nashchechich, who was present at the scene of the shooting. Nashchechich worked with the victim at a nearby retail store in Antioch. He testified that Macey received a cell phone call at the store between 1:45 and 2:00. The call came from Macey's boyfriend Jason Hunter, who advised her that a robbery had been reported at their shared residence. Macey told co-workers that she "had to go home because" someone "broke into her house." Nashchechich accompanied Macey to her apartment "for support."

They arrived in Macey's car at her residence within three minutes, and parked outside the carport in front of the apartment complex. Nashchechich observed a late model, burgundy, Mitsubishi Gallant with paper, dealer plates parked in the carport. At least four people walked from the front of Macey's apartment toward the burgundy Mitsubishi. One of them was described by Nashchechich to the police as a "tall, skinny African American guy," around six feet, three inches in height, 18 to 24 years old. Another, older man, also African American, was short and stocky.

Nashchechich testified that Macey began a heated argument with the tall, thin Black male as she was standing between the two cars. The man suddenly pulled out a semiautomatic handgun and pointed it at Macey from about 15 feet away. She was shot by the man as she tried to turn around and back away. After the single shot was fired, Macey took a few steps toward the back alley before she fell to the ground. The "tall

skinny guy” then pointed the gun at Nashchechich and asked, “You going to do something about it?” Nashchechich ducked down behind Macey’s car.

The tall, thin man and two others with him entered the Mitsubishi and drove away. The short, stocky man walked away on Sycamore Drive. Nashchechich then called 911.

As Officer Mortimer interviewed Nashchechich after the shooting, he received a dispatch that “a male on A Street in Antioch” reported to the police that he had been at the scene of the shooting, and “the shooter got in his car and made him drive” away. Officer Mortimer escorted Nashchechich to 1210 A Street where the man who had called the police from that location, Rodney Royal, was detained. Royal was in a burgundy Mitsubishi with dealer plates, the same car Nashchechich had seen at Macey’s residence. Nashchechich did not make a positive identification of Royal, but “believed” he may have been the driver of the Mitsubishi.

Royal testified that he was the victim of a home invasion robbery at his apartment in Antioch a few months before Macey was shot. On the morning of March 30, 2004, a friend of Royal’s reported to him that one of the men who kicked his door in and robbed him was named “Mike B.” Royal recruited defendant, whom he knew as “Lo,” and a few other friends, to attempt to locate Mike B., identified as Michael Bradley. In the search for the men who previously robbed him, Royal thereafter embarked on a bit of an odyssey that day, first in an Oldsmobile and then in the burgundy Mitsubishi, from Antioch to Bay Point and Pittsburg, and eventually back to 1608 Sycamore in Antioch, the residence of Edward Robinson, known as “Dirty Rob,” who had been identified by Bradley as the one responsible for directing the robbery of Royal. Royal left defendant and another friend at 1608 Sycamore briefly to travel to Pittsburg, but returned there and parked in a stall at the apartment building.

As Royal and his friends confronted Robinson about the prior robbery, defendant and Anthony Perry emerged from the front of the building. Macey also arrived in her car, parked immediately behind Royal, and began “hollering” at defendant and Perry. From the driver’s seat of his car, Royal heard a gunshot behind him. After the shot, Royal saw Macey “backing up.” Defendant immediately jumped in Royal’s car and yelled, “Come

on, let's go." Royal drove defendant to his home on San Jose Drive in Antioch. Perry asked, "What we gonna do about this gun?" Defendant replied: "I'll get my own mother fuckin' gun," and left the car.

Royal drove to his "son's mother's job," and "told her what happened." He then called 911 to report the shooting. He did not then give the police any names of the people who were present at the scene of the shooting, however, because he "wasn't trying to get nobody in trouble." Royal testified that he did not actually see who fired the shot that killed Macey, but the shot was not fired by Anthony and did not come from inside his car.

Royal was arrested that day, and the following day he was interviewed by police detectives, who told him they knew defendant committed the shooting. Royal subsequently pointed out defendant's photograph and told the detectives what he knew about defendant's "actions that day."

Anthony Perry entered a plea of guilty to voluntary manslaughter and burglary in connection with Macey's death, and testified at trial for the prosecution. On March 30, 2004, Perry was visiting Antioch from his home in Texas. He described his travels that day with Royal and defendant, among others, in search of the person who robbed Royal a few months before. They ultimately arrived at the Sycamore Drive apartments, where they were told Edward Robinson, "the guy that set up the robbery," was located. Perry and defendant remained at the Sycamore Drive apartment complex to make sure Robinson did not leave. Meanwhile, Royal left to retrieve Mike B. to confirm the identity of Robinson as the person they were "looking for, to make sure it was him." According to Perry, Royal agreed to pay him "for roughing up" Robinson "a little bit."

While Royal was away, Robinson told Perry and defendant "there was some marijuana products" in an apartment at the building, so they "decided to go in and get it."<sup>1</sup> Perry broke into the apartment through the front window, and admitted defendant through the front door. Once inside the apartment they gathered money, a watch, some

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<sup>1</sup> Macey's boyfriend, Jason Hunter, sold marijuana from their shared apartment at 1604 Sycamore Drive, No. two.

marijuana, a metal case that contained video games, and a scale. After they left the apartment and walked toward Royal's burgundy Mitsubishi, another car pulled up, driven by a young White "female." Perry testified that the woman got out of her car, yelled and reached for her cell phone, whereupon defendant "pulls out the gun and shoots her." After the shot was fired, Perry ran down Sycamore Drive until Royal's car came by and picked him up. Soon thereafter he returned to Texas, where he was arrested about a month later and charged with Macey's murder. Perry testified that Royal and the others in his car were unaware of the burglary at Macey's apartment.

Arnoldo Amador, an inspector for a utility company, also witnessed the shooting from 70 to 80 feet away, where his pickup truck was parked behind the carport at 1612 Sycamore Drive. As Amador approached his vehicle he heard two people screaming at each other, one a young blond, Caucasian female, the other a young, tall African-American male with thick braided hair. Amador then "heard a gunshot from the same area" where the two people were arguing. He ducked behind his truck window as he observed the blond woman turn from the man and run away, "screaming at the top of her lungs," before she fell to the ground. The African-American man then jumped into the rear seat of a red vehicle that was occupied by two other people, the driver and a man slouched in the front passenger seat. The red vehicle was driven away on Sycamore Drive. Amador followed briefly in his pickup truck until the red vehicle reached the Lowe's parking lot on Mahogany Way. He called 911 as the red vehicle pulled onto Highway 4.

A few days after the shooting, on April 1, 2004, a homicide inspector for the Antioch Police Department displayed a series of six photos of "individuals of similar appearance" to Amador. He pointed to defendant's photo, No. five in the lineup, and said, "Him, that's the guy I saw." Due to the passage of time, Amador was not able to identify defendant as the shooter at trial. Amador also identified a photo of the maroon Mitsubishi Galant as the vehicle that left the scene of the shooting with defendant in the back seat.

An inspection of Macey's apartment revealed that the front bedroom window was broken and the interior of the residence was in disarray. Missing from the apartment were video games, a magnifying glass, and a light, a silver box, a cylinder of coins, a Citizen's brand watch, Hunter's marijuana, a digital gram scale, and packaging materials.

Defendant was arrested for the murder of Macey on April 4, 2004, at an apartment he occupied with his girlfriend and her daughter. Inside a bedroom closet in the apartment were found a silver box that contained video games. Hunter subsequently identified the box and video games as items taken from the apartment the day Macey was killed. Also in defendant's apartment was a newspaper article about Macey's murder. A Cadillac parked outside the apartment that belonged to defendant was also searched. Hunter's digital gram scale was discovered under the left front seat of the vehicle. When Perry was arrested in Texas in late-April of 2004, he was still in possession of Hunter's Citizen's watch taken from Macey's apartment.

Evidence was also presented that on the evening of February 14, 2004, defendant confronted and shot a man named Jimmy Perry in the back of the leg as he walked up the stairs to his apartment on Pepper Tree Way in Antioch,<sup>2</sup> in a dispute over money paid to Jimmy by defendant for repairs made to his car. A firearms expert testified the bullets that killed Macey and wounded Perry had sufficient characteristics in common to support the conclusion they "had been fired from the same gun," a .38-caliber or .357 firearm.

The defense offered testimony from Montrell Hall, who was then serving a state prison sentence of life without the possibility of parole for another murder. Hall admitted that he, not defendant, committed the shooting of Macey, and he alone committed the robbery of Royal a few weeks before that. Hall testified that on March 30, 2004, Royal's friends came to his girlfriend's house to inquire about the prior robbery of Royal. Hall "drew down on them" with a .357 or .38-caliber firearm he had in his possession, but put the gun down when Royal asked who "sent" him to commit the robbery – that is, who advised him that Royal "had money." Hall told them he "could identify" the man if he

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<sup>2</sup> To avoid confusion we will refer to Jimmy Perry by his first name.

saw him, and later accompanied them in Royal's car to the Sycamore Drive apartments, still armed with both of his guns. Hall was anxious because he "just robbed" Royal, and did not "know what's going on." As they waited in the car outside the apartments, Macey arrived and began yelling and "talking crazy." Hall testified that he just "shot out the window," without knowing "what was going on at the time." After he fired the shot, he got out of the car and ran. Hall learned from his family that the police were looking for him, and turned himself in. When Hall was questioned by the Antioch police he denied that he committed the shooting, and identified a photograph of defendant as the shooter.

Defendant testified in his defense that he was present at the scene when Macey was killed, but did not fire the fatal shot. He essentially agreed with Perry's account of the events that preceded the shooting. Defendant testified that he and Perry were left behind at 1604 Sycamore Drive while Royal left to determine if Robinson "actually set him up to get robbed." During their wait, Robinson mentioned that Hunter had a "large amount" of marijuana in his apartment. Perry broke the side window, entered the apartment, then opened the front door. Defendant denied that he ever entered the apartment, or that he carried a gun.

Upon Royal's return in the red Mitsubishi, defendant yelled to Perry, who was still inside the apartment, "that they were back." Perry left the apartment carrying the silver box and a "few other items," which he handed to defendant.

As defendant walked toward the carport, he heard a car "screeching up," then observed Macey jump out of her car. From a standing position outside her car, Macey began yelling at the occupants of the red Mitsubishi. Defendant then heard a gunshot, and saw Macey stagger back and collapse in the carport. He could not "really tell where the gunshot was coming from." Defendant was "in shock," and jumped into Royal's car, still holding the items given to him by Perry. The others leaped out of the Mitsubishi and fled on foot. Royal made a U-turn and drove away. They encountered Perry, who jumped in the back seat.

Defendant denied that he shot Jimmy Perry, although he again admitted he was present when the shooting occurred. Defendant testified that they discussed money he had paid to Jimmy ostensibly to replace the head gasket of defendant's van. They briefly argued, and Jimmy agreed that either he or a friend would repay defendant for the uncompleted repairs. Jimmy walked up the stairs to his apartment as defendant started his car to leave. Defendant heard gunshots coming from a group of people on the street. One of the shots struck defendant's vehicle, whereupon he backed up and drove away.

Also, both sides presented expert testimony that focused on the trajectory of the bullet that killed Macey, and the respective positions of the shooter and the victim when the shooting occurred, none of which was entirely definitive.

## **DISCUSSION**

### ***I. The Trial Court's Refusal to Give Instructions on Consideration of Eyewitness Testimony.***

Defendant argues that the trial court erred by refusing to give instructions requested by the defense in the terms of CALJIC Nos. 2.91 and 2.92, which describe the prosecution's burden of proving identity based solely on eyewitness identification, and recite factors for the jury to consider in evaluating eyewitness testimony. He maintains that identification was "the key issue for the jury to decide," and the evidence did not corroborate the eyewitness testimony that he was the person who "fired the gun." Defendant therefore asserts that the trial court's refusal to instruct the jury on "applicable principles of law" denied him a fair trial and requires reversal of the judgment.

CALJIC Nos. 2.91 and 2.92 instruct the jury to consider various enumerated circumstances that bear on the accuracy of eyewitness identifications, and, upon consideration of the circumstances of an identification, to give the defendant the benefit of any reasonable doubt based on an eyewitness identification. (*People v. Cook* (2006) 39 Cal.4th 566, 599–600; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 561–562.) The instructions are derived from the California Supreme Court decisions in *People v. McDonald* (1984) 37 Cal.3d 351, 377, and subsequently *People v. Wright* (1988) 45 Cal.3d 1126, 1144, which have established that CALJIC Nos. 2.91 and 2.92 or

comparable instructions should be given when requested in a case in which eyewitness identification is a crucial issue and the identification testimony is not substantially corroborated by evidence giving it independent reliability. (See also *People v. Ochoa* (1998) 19 Cal.4th 353, 425–426; *People v. Datt* (2010) 185 Cal.App.4th 942, 952.)

While we agree with defendant that identification of the shooter was a key element in dispute in the case, we conclude that the trial court did not commit error by declining the eyewitness identification instructions requested by the defense. The identifications made by Nashchechich and Amador were subject to some of the vagaries and factors mentioned in CALJIC No. 2.92, but the corroborating identification testimony received from Royal and Perry was not. Royal and Perry were personal friends of defendant, well-acquainted with him, and were present with him for the events that preceded the shooting. The identifications of defendant made by Royal and Perry were not inherently suspect or susceptible to mistake due to the factors mentioned in CALJIC No. 2.92, and provided substantial, independent corroboration for the testimony of Nashchechich and Amador. (See *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 290–291; *People v. Cook*, *supra*, 39 Cal.4th 566, 599–600; *People v. Daniels* (1991) 52 Cal.3d 815, 871.)

Additional, independent corroborating evidence was presented. Defendant testified that he was present at the scene of the shooting. He fled the scene immediately following the shooting, thereby demonstrating consciousness of guilt. (*People v. Abilez* (2007) 41 Cal.4th 472, 522.) Searches of defendant’s residence and vehicle uncovered items stolen from the victim’s residence. Defendant was also found in possession of a newspaper article about the shooting. Evidence was presented that only six weeks before Macey was shot, defendant used the same gun to shoot another victim with whom he had a dispute.

Also, as we read the record, even without the requested instructions defense counsel was able to skillfully cross-examine the eyewitnesses and alert jurors to specific conditions that were pertinent to any shortcomings of the witnesses’ identifications. Finally, the court instructed the jury on witness credibility (CALJIC No. 2.20), discrepancies in testimony (CALJIC No. 2.21), the weighing of conflicting testimony

(CALJIC No. 2.22), the sufficiency of testimony from one witness (CALJIC No. 2.27), and reasonable doubt (CALJIC No. 2.90), thereby furnishing the jury with guidelines to assess the identification testimony, along with the admonition that defendant should be acquitted in the event the jury harbored a reasonable doubt on the issue of identity. (See *People v. Alcala* (1992) 4 Cal.4th 742, 803; *People v. Wright, supra*, 45 Cal.3d 1126, 1144.)

Defendant's argument that no corroborating evidence was presented to corroborate his identity as the *shooter* does not persuade us to rule differently. Defendant claims that the corroboration related only to his presence at the scene, not to his act of shooting the victim. Defendant is correct that only Nashchechich and Amador – and Amador only in a pretrial photo lineup – testified that they observed defendant fire the shot at Macey. However, the issue of whether defendant was merely present or actually shot the victim does not implicate the eyewitness identification principles articulated in CALJIC Nos. 2.91 and 2.92. Those instructions focus on identification of a *person* by eyewitnesses, not to testimony that recounts the *acts* the identified person committed. Stated another way, the corroborating evidence must relate to the identification made by eyewitnesses, not to their descriptions of the events that transpired. Testimony that corroborated the identification of defendant by Nashchechich and Amador was convincing. We conclude that the court had no obligation to give CALJIC Nos. 2.91 and 2.92, and no prejudice to defendant resulted from the omission of those instructions. (*People v. Cook, supra*, 39 Cal.4th 566, 599–600; *People v. Daniels, supra*, 52 Cal.3d 815, 871.)

## ***II. The Imposition of a Multiple Sentence for the Burglary Conviction.***

Defendant also argues that the trial court violated section 654 by imposing a consecutive sentence on the burglary conviction. He claims that “the burglary, the robbery and the murder were part of a single course of indivisible conduct” intended to facilitate the burglary of Macey's residence. Therefore, he maintains that the separate sentence for the burglary conviction constitutes impermissible “double punishment.” Defendant asks that we stay the sentence on the burglary conviction.

Defendant relies on the established rule that the double jeopardy clause of the Fifth Amendment and section 654 forbid multiple punishment for the same offense. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Wader* (1993) 5 Cal.4th 610, 670.) “Section 654, subdivision (a) provides, ‘An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.’ [Citations.]” (*People v. Calles* (2012) 209 Cal.App.4th 1200, 1215; see also *People v. Kramer* (2002) 29 Cal.4th 720, 722; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.)

According to its plain language, “ ‘section 654 proscribes double punishment for multiple violations of the Penal Code based on the “same act or omission.” ’ [Citation.]” (*People v. Atencio* (2012) 208 Cal.App.4th 1239, 1243.) The California Supreme Court recently confirmed that, “Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law.” (*People v. Jones* (2012) 54 Cal.4th 350, 358.)

Our courts also continue to follow a clear protocol in applying section 654 to multiple act cases, such as this one. “[W]hen a defendant’s crimes involve a course of conduct, ‘[w]hether [the] course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ [Citation.]” (*People v. Atencio, supra*, 208 Cal.App.4th 1239, 1244.) While section 654 bars multiple punishment where the defendant’s course of conduct violated more than one statute but nevertheless comprised a single act or indivisible transaction, the statute “does not apply when the evidence discloses that a defendant entertained multiple criminal objectives independent of each other. In that case, ‘the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] . . .’ [Citation.]” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

“[M]ultiple crimes that arise from a single course of criminal conduct may be punished separately, notwithstanding section 654, if the acts constituting the various crimes serve separate criminal objectives.” (*People v. Davey* (2005) 133 Cal.App.4th 384, 390.) “[I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant’s criminal intent and objective were single or multiple. Each case must be determined on its own facts.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.)

“ ‘The question of whether the acts of which defendant has been convicted constitute an indivisible course of conduct is primarily a factual determination, made by the trial court on the basis of its findings concerning the defendant’s intent and objective in committing the acts. This determination will not be reversed on appeal unless unsupported by the evidence presented at trial.’ [Citation.]” (*People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657; see also *People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583; *People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.) “We review the trial court’s findings ‘in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]’ [Citation.]” (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

In the present case, multiple criminal acts were committed. Defendant and Perry burglarized the victim’s residence, and from it appropriated items, some of which were later found in defendant’s possession. The burglary was completed when defendant encountered an enraged Macey in the parking area of the apartment complex. Rather than simply leave, defendant shot the victim. The acts were separate and independent, as were the criminal objectives. (*People v. Surdi* (1995) 35 Cal.App.4th 685, 689; see also *People v. Harrison* (1989) 48 Cal.3d 321, 335–336; *People v. Trotter* (1992) 7

Cal.App.4th 363, 367–368.) Multiple punishment for the murder and burglary convictions did not contravene section 654.

Accordingly, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.