

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE MARK POYNTER,

Defendant and Appellant.

A131607

(Solano County
Super. Ct. No. VCR208414)

Defendant Jesse Mark Poynter appeals from a judgment entered upon a jury verdict finding him guilty of carjacking (Pen. Code,¹ § 215, subd. (a)) (count one), and assault with a firearm on Andrew Gross (§ 245, subd. (a)(2)) (count two), and finding that a firearm was used in the commission of a carjacking (§ 12022 subd. (a)(1)). The trial court sentenced the defendant to a four-year term of imprisonment: three years for carjacking, a concurrent three-year term for assault with a firearm, and one year for the firearm enhancement. Defendant contends the trial court violated his *Miranda* rights by admitting evidence that he exercised his right to remain silent (*Miranda v. Arizona* (1966) 384 U.S. 436) and committed instructional error and sentencing error. We shall order the judgment modified to stay the sentence on count two, and otherwise affirm.

¹ All undesignated statutory references are to the Penal Code.

I. BACKGROUND

Andrew Gross, the victim, testified that he was driving with his friend Marquis Owens on the evening of June 6th, 2010. Owens asked Gross to drop him off at a house in Vallejo. Owens left the car, and Gross waited for him. After a few minutes, a man wearing a mask and a pair of gloves approached the driver's side with a firearm and ordered Gross out of the car. Another man also told Gross to step out of the car. Because a hoodie concealed the man's face, Gross was not able to see him. Gross saw a third person a few feet behind a gunman, who was "looking left and right," "just looking like a look-out." During direct examination, Gross identified the defendant as the person who was standing behind a gunman. Before trial, Gross identified the photo of the defendant in photo line-up with the comment: " 'Was with suspect with gun.' " Gross stated that during the incident he looked at the defendant once for about a second. Defendant did not approach and did not speak with Gross.

The gunman struck Gross two or three times in the face with the back of the gun and forced him out of the car. Gross suffered a fractured eye socket and a broken wrist.

Owens testified that he and Gross were in the car together when Gross pulled over and parked the car. Owens got out of the car to smoke a cigarette. Seven to ten men approached and ordered him to give them everything in his pockets. After one of the men hit Owens with a gun, Owens fought back. He did not see what was going on with Gross, or how he was taken out of the car. Owens stated that defendant was at the scene, but he did not know where defendant was and what he was doing.

Defendant testified in his own defense. According to defendant, he and another man, Brian Hicks, were sitting in Hicks's car when Gross and Owens pulled up and parked in front of Hicks's car. Because defendant knew Owens, he decided to get out of Hicks's car and greet him. Defendant went up to Gross's car and greeted Owens when Owens was getting out from a passenger's seat. They went around the car, and met Gross at the back of the car. After Owens introduced defendant to Gross, they all went inside Hicks's car. While defendant and others were sitting in the car, two people approached them from two sides of the car and demanded money. Defendant gave his cell phone and

ten dollars to a gunman, who was wearing a mask and a black hoodie. Gross was pulled out of the car and was slapped with a pistol. Gross then ran toward his car. He was able to get halfway inside the car before assailants pulled him out, pistol-whipped him, and kicked him in the mouth. Defendant got out of the car, but did not interfere with the assault because he was scared. Defendant did not call the police after the assailants left because he “[does]n’t really like the police.”

In the morning of June 6th, Vallejo Police Department recovered Gross’s unoccupied car. A latent fingerprint found on the passenger’s side of the car matched defendant’s.

II. DISCUSSION

A. *Alleged Violation of the Defendant’s Federal Constitutional Right to Due Process*

Defendant contends he invoked his right to remain silent pursuant to *Miranda*, and that the trial court erred in admitting evidence that he did not tell his exculpatory story during his interview with a Vallejo police officer, John Garcia, after he was arrested.

1. Background

a. *Defendant’s Testimony*

During the prosecutor’s cross-examination of defendant, the following exchange occurred: “Q. And do you recall talking to Officer Garcia about this incident? [¶] A. Yes. [¶] How come you didn’t tell him you were robbed? [¶] [Defense counsel]: Objection. [¶] [Defendant]: I did tell him I was robbed. [¶] [Defense counsel]: May I approach? [¶] The Court: No, but you made an objection. Basis? [¶] [Defense counsel]: I need to be able to approach, if I can. [¶] (Discussion held off the record.) [¶] The Court: The objection is foundation; the statement is foundational. [¶] [Prosecutor]: you want to lay a foundation? [¶] [Prosecutor]: Sure.” The prosecutor then elicited testimony that defendant had spoken with Officer Garcia. She continued: “[Prosecutor]: [Y]ou chose not to tell [Garcia] that you were a victim that night? [¶] [Defendant]: He didn’t ask. [¶] . . . [¶] [Prosecutor]: [] And you chose to tell—to not tell [Garcia] about the fact that you were robbed, right? [¶] [Defendant]: Yes. [¶] [Prosecutor]: And you did tell the officer that—that you gave Marquis’[s] brother a ride home after he was almost

dead, right? [¶] [Defendant]: Exactly. [¶] [Prosecutor]: So you did tell Officer Garcia some things about that night? [¶] Defendant: That's it, and after that- . . .

[¶] [Prosecutor]: Just not everything? [¶] [Defendant]: I was just furious”

b. 402 Hearing on Admissibility of Garcia's Testimony about Interview

In their rebuttal case, the People sought to have Officer Garcia testify about his interview with defendant. Defendant objected to the testimony on *Miranda* grounds, and the trial court held a hearing on its admissibility outside the presence of the jury. (Evid. Code, § 402.) At that hearing, Garcia testified that on August 18, 2010, he obtained an arrest warrant for defendant. Defendant was already in custody on an unrelated matter at the Solano County jail, where Garcia interviewed him. Upon arrival, Garcia explained that he had a warrant for defendant's arrest and that his fingerprint had been found on the car.

Garcia testified that he read defendant his *Miranda* rights. When the prosecutor asked, “After you gave him the Miranda admonishment, did he immediately say, ‘I don't want to talk to you?’ ” Garcia answered, “He got very agitated, stood up, said ‘I don't want to talk to you. I'm, you know, ['] and asked if he was being charged and I explained to him that he had a warrant. [¶] And I told him basically, calm down and try to talk to him as he was in his agitated state.” Garcia testified that he continued to ask defendant questions, and that defendant “continued to get more upset, and he basically, one statement he said was that, you know, I asked him if he had hit Marquis. He denied hitting Marquis and said that he gave Marquis, his brother, um, who was near dead, a ride, and he continued to get more upset, um, and then he asked to go back to his room. That's when I basically terminated the conversation.”

Defense counsel cross-examined Garcia as follows at the Evidence Code section 402 hearing: “[Counsel]: So . . . you're saying that you read him his rights. He got upset, and he got very angry, right? And said, ‘I want to leave?’ [¶] [Garcia]: Well, even when he walked in and when he saw me, he had like a chip on his shoulder. . . . [¶] [Counsel]: But after you read him his rights, you said that he became very angry and said he wanted to leave; is that correct? [¶] [Garcia]: He did say he wanted to leave. I said, well, I

explained to him, you know, why I was there, and what I had, and what evidence I had, and then he basically stayed. [¶] [Counsel]: Well, you continued—well, could he have walked out that door? [¶] [Garcia]: He could have stood up and walked out.

[¶] [Counsel]: He could have walked out. He's in custody, but he could have walked out?

[¶] [Garcia]: He could have walked right out. [¶] [Counsel]: Now, earlier you said after he became angry and he wanted to go, you continued to question him; isn't that correct?

You continued to read him the allegations? [¶] [Garcia]: Well, I tried to tell him to calm him down. Well, I read him the allegations prior. I told him that we had fingerprints and this and that, and he asked if he was being charged. I said yes, and that's when he got upset and said, 'Hey, you know, just take me to the room,' and I tried to calm him down and tried to talk to him. [¶] [Counsel]: So by reading him these allegations, these

statements and repeating this evidence, you're provoking him into making statements. Is that what you are trying to do? [¶] [Garcia]: No. I'm not trying to provoke him to do anything. [¶] . . . [¶] [Counsel]: So when he said he didn't want to talk to you, why didn't you terminate the interview and leave? [¶] [Garcia]: Because I felt he was angry, and I wanted to tell him and calm him down, and tell him exactly what had I had [*sic*] to try to get a statement from him. [¶] He never asked for an attorney, never. You know, he could stand up, get up and leave; he didn't. [¶] He stood his ground there in his little area where he was sitting and staying."

The trial court ruled Garcia could testify about the conversation, concluding there was no *Miranda* violation. The court noted that "the most recent Supreme Court opinion on this says you have to actively invoke," and ruled: "[Garcia] read [defendant] his rights. He did not invoke. He had the opportunity. He was not in handcuffs. He was in what's called out at Claybank, as we know, a big room. He had the ability to stand up and walk away." The court further stated that because the defendant testified under oath, "any impeachment purposes as a fallback position would be allowed."

c. Use of Evidence of Defendant's Statements

The prosecutor asked Garcia the following questions during his testimony before the jury: "[Prosecutor]: Did the defendant tell you Brian Hicks was with him during the

carjacking? [¶] [Garcia]: No, ma'am . [¶] [Prosecutor]: Did the defendant tell you he was robbed by the carjackers that night? [¶] [Garcia]: No, ma'am. [¶] [Prosecutor]: Did you confront the defendant with the evidence against him, that he had been identified as one of the carjackers and that his prints had been found on the victim's car? [¶] [Garcia]: I did. [¶] [Prosecutor]: And did the defendant offer any explanation for how his prints got on the victim's car? [¶] [Garcia]: No, ma'am."

The prosecutor argued to the jury that defendant did not tell Garcia he had been robbed because the exculpatory story he offered at trial was fabricated to explain his presence at the scene. The prosecutor also argued that after being accused of a crime someone would at least come forward and try to explain what happened.

2. Standard of Review

On appellate review of a *Miranda* ruling, we accept the trial court's resolution of disputed facts and inferences, as well as its evaluation of the credibility of witnesses where supported by substantial evidence. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) " 'Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we " 'give great weight to the considered conclusions' " of a lower court that has previously reviewed the same evidence." [Citations.]' " (*Ibid.*) Whether defendant has invoked his or her *Miranda* rights is " 'a question of fact to be decided in the light of all the circumstances' " The words used must be considered in context. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238, quoting *People v. Hayes* (1985) 38 Cal.3d 780, 784-785.)

3. Analysis

Defendant contends the evidence that he did not tell Garcia his exculpatory story was inadmissible under the rule of *Doyle v. Ohio* (1976) 426 U.S. 610, 618-619 (*Doyle*) that a defendant's invocation of the right to silence cannot be used to impeach his or her testimony at trial. As defendant notes, *Miranda* contains an implied assurance that silence will carry no penalty. Accordingly, a defendant's silence at the time of arrest cannot be used to impeach a defendant's exculpatory story at trial if the defendant

remains silent after warnings and chooses not to speak about the facts of the case. (*Doyle, supra*, 426 U.S. at pp. 618-619.)

It is well established that once a suspect has invoked the right to silence, the request “must be ‘scrupulously honored’ [citation]; the police may not attempt to circumvent the suspect’s decision ‘by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.’ [Citation.]” (*People v. Wash* (1993) 6 Cal.4th 215, 238.) However, the United States Supreme Court has also held that the right to remain silent must be invoked *unambiguously*. (*Berghuis v. Thompkins* (2010) __U.S.__ [130 S.Ct. 2250, 2259-2260] (*Berghuis*)). In *Berghuis*, the defendant was warned of his right to silence, then remained largely silent during the next three hours of interrogation. He did not say he wanted to remain silent or did not wish to talk with the police. (*Id.* at pp. 2256-2257.) Later in the interrogation, he responded in the affirmative to a question about whether he prayed to God to forgive him for shooting the victim. (*Id.* at p. 2257.) In considering whether this statement was admissible, the Supreme Court first noted the rule that a suspect must invoke the *Miranda* right to *counsel* unambiguously, rather than in a manner “ ‘ that is ambiguous or equivocal,’ ” and concluded there was no principled reason not to apply the same standard to the invocation of the right to *silence*. (*Id.* at pp. 2259-2260.) The court reasoned: “There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity. [Citation.] . . . Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights ‘might add marginally to *Miranda*’s goal of dispelling the compulsion inherent in custodial interrogation.’ [Citation.] But ‘as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.’ [Citations.]” (*Id.* at p. 2260.)

On these facts, the trial court properly found defendant did not unambiguously invoke his right to silence. There is evidence that the statement upon which defendant relies for his contention—that he told Garcia he did not want to talk with him—was coupled with a question about whether he was being charged. In the context of invoking the *Miranda* right to counsel, such statements have been treated as initiating further conversation with the police. In *Oregon v. Bradshaw* (1983) 462 U.S. 1039 (*Bradshaw*), for instance, a plurality of the Supreme Court ruled that a defendant’s statements were admissible where he invoked his right to counsel and later asked a police officer, “ ‘Well, what is going to happen to me now?’ ” (*Id.* at pp. 1041-1042.) Contrasting the defendant’s statement to a routine request for a drink of water or to use the telephone, the opinion stated: “Although ambiguous, *the respondent’s question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation*; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation.” (*Id.* at pp. 1045-1046, italics added.) Similarly, the California Supreme Court in *People v. Waidla* (2000) 22 Cal.4th 690, 731, concluded that statements such as “ ‘What can I do for you[?]’ ‘What do you want from me?,’ and ‘What can I do to help you[?],’ ” although they might be construed subjectively as a mere manifestation of politeness, under an objective standard could fairly be said to represent a desire for “ ‘*a more generalized discussion relating directly or indirectly to the investigation.*’ ” [Citations.]” (Italics added.)

We recognize that these cases considered statements made in the context of invoking the right to counsel.² However, in light of the rule of *Berghuis* that the

² In *People v. Martinez* (2010) 47 Cal.4th 911, 949, the California Supreme Court noted that “[a]pplying different rules to invocations of the right to counsel and the right to remain silent would be difficult for law enforcement officials to implement in the interrogation setting Applying the same rule to both the right to remain silent and the right to counsel provides a ‘bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information.’ [Citation.]”

invocation of the *Miranda* right to silence must be made unambiguously, we find their reasoning helpful. Defendant did not simply say he did not wish to speak; he made that statement in conjunction with a question about whether he was being charged, a question that can reasonably be seen as showing a desire for a more generalized discussion of the investigation.

After briefing in this case was complete, the Fourth District Court of Appeal decided *In re Z.A.* (2012) 207 Cal.App.4th 1401. In that case, the defendant, a minor, had been arrested with her boyfriend at a port of entry from Mexico. (*Id.* at pp. 1405-1406.) Officers questioned her, and after initially agreeing to speak with them, the defendant said she did not want to answer any more questions, then asked how long her boyfriend was going to stay there. (*Id.* at pp. 1409-1410.) The officers continued to question her, and she made incriminating statements. (*Id.* at pp. 1410-1411.) The appellate court concluded she had unambiguously invoked her right to silence and that her question about her boyfriend “[could not] reasonably be deemed an invitation to reinitiate a ‘generalized discussion relating directly or indirectly to the investigation’ [citation]. . . .” (*Id.* at p. 1418.) Rather, her question concerned only the “ ‘routine incidents of the custodial relationship.’ ” (*Ibid.*) Defendant’s question here about whether he was being charged, however, is more akin to the question asked in *Bradshaw*, and supports the conclusion that he “evinced a willingness and a desire for a more generalized discussion about the investigation.” (*Bradshaw, supra*, 462 U.S. at pp. 1045-1046.)

Moreover, our Supreme Court has concluded that statements that are “ ‘merely expressions of passing frustration or animosity toward the officers’ ” do not constitute an invocation of the right to silence. (*People v. Williams* (2010) 49 Cal.4th 405, 433 (*Williams*)).) The defendant in *Williams* was asked whether he had met the victim, and he denied having done so. When pressed, he responded, “ ‘*I don’t want to talk about it.*’ ” An officer continued to question him, and the defendant continued to respond to questions. (*Ibid.*) Citing *Berghuis, supra*, ___ U.S. ___ [130 S.Ct. at p. 2260], our Supreme Court concluded the italicized statement was an expression of frustration with the officer’s refusal to believe the defendant, “rather than an unambiguous invocation of

the right to remain silent. [Citation.]” (*Williams, supra*, 49 Cal.4th at p. 434.) Here, and particularly given defendant’s agitated state, defendant’s statements can likewise reasonably be seen in context as an expression of frustration or anger, rather than an assertion of his *Miranda* rights. In the circumstances, the trial court did not err in concluding defendant did not unambiguously invoke his right to silence.

We must also consider whether defendant knowingly and intelligently waived his right to silence. This inquiry “ ‘has two distinct dimensions.’ ” (*Berghuis, supra*, 130 S.Ct. at p. 2260 quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421.) First, a waiver must be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” (*Ibid.*) Second, it must have been made “with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” (*Ibid.*) The question of waiver will be evaluated on “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375.)

This waiver need not be explicit, however. “Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.” (*Berghuis, supra*, 130 S.Ct. at p. 2262.) “[A] waiver of *Miranda* rights may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.’ ” (*Id.* at p. 2261, quoting *North Carolina v. Butler, supra*, 441 U.S. at p. 373.) We look at the “ ‘totality of the circumstances’ ” to decide if waiver is knowing and voluntary. (*Bradshaw, supra*, 462 U.S. at pp. 1040, 1046, quoting *Edwards v. Arizona* (1981) 451 U.S. 477, 486, fn. 9.)

The totality of the circumstances here supports the conclusion that defendant waived his right to silence. There is no indication that defendant’s question about whether he was being charged and subsequent statements were the result of Garcia’s intimidation, coercion or deception. The fact that Garcia “took the opportunity provided by [defendant]” to continue interrogation “is quite consistent with the Fifth Amendment.

Miranda gives the defendant a right to choose between speech and silence, and [defendant] chose to speak.” (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529). And, as in *Berghuis*, “[t]here is no basis in this case to conclude that he did not understand his rights.” (*Berghuis, supra*, 130 S.Ct. at p. 2262.) Garcia read defendant his *Miranda* rights. Defendant had been arrested before, and he was already in custody on another matter. The fact that defendant afterward effectively ended the interrogation by asking to leave the room indicates he knew he did not have to remain and speak with Garcia. Accordingly, from the defendant’s actions and words we can infer that he “chose not to invoke or rely on [his *Miranda*] rights when he *did* speak.” (*Ibid.*, italics added.)

Here, of course, the evidence at issue is not defendant’s statements, but his *failure* to make certain statements—that is, to tell Garcia he was a victim of the crime. However, there is no right to selective silence in California. (*People v. Hurd* (1998) 62 Cal.App.4th 1084, 1093; see also *People v. Jennings* (2010) 50 Cal.4th 616, 664 [defendant’s implied adoptive admissions were admissible in evidence]; *People v. Bowman* (2011) 202 Cal.App.4th 353, 365 [use of defendant’s partial silence did not violate his due process rights].)³ That is, “[a] defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights.” (*People v. Hurd, supra*, 62 Cal.App.4th at p. 1093.)⁴ We have already concluded that the trial court correctly found that defendant’s initial statement about not wanting to talk was not an invocation of his *Miranda* rights. He then spoke about the incident before asking to leave the room.

³ A defendant remains partially silent when he selectively chooses to answer some questions and refuses to answer others. (*People v. Hurd, supra*, 62 Cal.App.4th 1084 at p. 1092, quoting *U.S. v. May* (10th Cir. 1995) 52 F.3d 885, 890.)

⁴In light of this clear California authority, we are not persuaded otherwise by a case decided by the Ninth Circuit, *Hurd v. Terhune* (9th Cir. 2010) 619 F.3d 1080, which concluded that a suspect may remain selectively silent without taking the risk that his silence may be used against him at trial.

Having spoken voluntarily about the crime, defendant cannot complain of the admission of evidence of what he did not say during that discussion.

In the totality of the circumstances we conclude defendant did not invoke his right to silence and that his Fifth Amendment rights were not violated by the evidence of his failure to tell Garcia his exculpatory story.

B. Jury Instructions

The trial court instructed the jury pursuant to CALCRIM No. 361 as follows: “If the defendant failed in his testimony to explain or deny evidence against him, and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure.” Defendant contends this instruction was given in error, because he did not “fail[] to explain or deny any fact of evidence that was within the scope of relevant cross-examination,” (see *People v. Saddler* (1979) 24 Cal.3d 671, 682, fn. omitted (*Saddler*)),⁵ and accordingly there was no evidence to support the instruction (see *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1470-1471 (*Lamer*) [error to give CALJIC No. 2.62 where there was no evidence to support instruction]).

⁵ *Saddler* considered the analogous CALJIC No. 2.62, which currently provides: “In this case defendant has testified to certain matters. [¶] If you find that [a] [the] defendant failed to explain or deny any evidence against [him] [her] introduced by the prosecution which [he] [she] can reasonably be expected to deny or explain because of facts within [his] [her] knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] [her] does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] [she] would need to deny or to explain evidence against [him,] [her,] it would be unreasonable to draw an inference unfavorable to [him] [her] because of [his] [her] failure to deny or explain this evidence.” (CALJIC No. 2.62 (Fall 2012); *Saddler, supra*, 24 Cal.3d at pp. 677-678 & fn. 4.)

A claim of instructional error is subject to independent review on appeal. (*People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066, citing *People v. Posey* (2004) 32 Cal.4th 193, 218.) Even if an instruction was given in error, we will not reverse the judgment of the lower court unless defendant was prejudiced by the error, that is, unless it is “ ‘reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ ” (*Lamer, supra*, 110 Cal.App.4th at pp. 1471-1472, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Attorney General contends the instruction was properly given because defendant failed to explain at trial how his palm print got onto Gross’s car. At trial, however, the prosecutor conceded that defendant had offered an explanation for the palm print when he testified he had greeted Owns and walked around the car.

Assuming the evidence did not support the instruction pursuant to CALCRIM No. 361, defendant suffered no prejudice. On its face, the instruction refers to a defendant’s failure in *testimony* to explain or deny evidence against him. Moreover, the jury was instructed pursuant to CALCRIM No. 200 that some of the instructions given might not be applicable, depending on the jury’s findings of fact. (See *Lamer, supra*, 110 Cal.App.4th at p. 1472.) There is no basis to conclude the jury would have interpreted the instruction to refer to defendant’s out-of-court conversation with Garcia rather than his testimony at trial. As noted in *Lamer*, courts have routinely found error in giving this instruction to be harmless. (*Ibid.*) We find it so here.

C. Concurrent Sentence

The trial court imposed concurrent sentences for the carjacking and assault with a firearm convictions. Defendant contends this was error under section 654, which forbids multiple punishment for the same act.⁶

⁶ Section 654, subdivision (a) provides in pertinent part: “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.”

Section 654 applies “ ‘not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. . . . If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses but not for more than one.’ ” (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215; see also *People v. Latimer* (1993) 5 Cal.4th 1203, 1208, 1216; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1368.)

According to defendant, the assault and the carjacking formed part of a continuous course of conduct with the sole objective of stealing the car, and separate punishments were therefore improper. The Attorney General argues that concurrent sentences were proper because the assault was a gratuitous act of violence over and above what was needed to accomplish the carjacking. (*People v. Saffle* (1992) 4 Cal.App.4th 434 [defendant committed false imprisonment after completing sexual assault on victim].) Defendant has the better of the argument. The record shows the carjacking and assault were committed in furtherance of a single criminal objective—to steal Gross’s car. There is no evidence that the carjacking and assault sprang from separate intents. Immediately after ordering Gross out of the car, the gunman struck him two or three times in the face with the gun and pulled him from the car. It appears the only purpose of the assault was to facilitate the carjacking. Accordingly, section 654 bars punishment for both the assault with a firearm and carjacking.

“Where a trial court erroneously fails to stay terms subject to section 654, the appellate court must stay sentence on the lesser offenses while permitting execution of the greater offense consistent with the intent of the sentencing court.” (*People v. Pena* (1992) 7 Cal.App.4th 1294, 1312.) We shall therefore direct the trial court to modify the judgment to stay execution of sentence on count two.

III. DISPOSITION

The trial court is directed to modify the judgment to stay the three-year concurrent sentence for count two, assault with a firearm (§ 245 subd. (a)(2)). In all other respects, the judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

BASKIN, J. *

* Judge of the Contra Costa County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.