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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC LEE,

Defendant and Appellant.

A132687

(Alameda County  
Super. Ct. No. C163824A)

After a jury trial, defendant Eric Lee was found guilty of carjacking (Pen. Code,<sup>1</sup> § 215, subd. (a)) and firearm possession by a felon (§ 12021, subd. (a)(1)<sup>2</sup>). In a bifurcated court proceeding, defendant admitted to allegations that he had suffered five prior convictions, including a prior serious felony and strike conviction for assault with a firearm (§ 245, subd. (a)(2)), and four convictions for which he served prison terms. The court sentenced defendant to an aggregate term of 19 years in state prison consisting of 10 years (the middle term of five years, doubled for the prior strike conviction) on the carjacking conviction (§§ 215, subd. (b), 667, subd. (e)(1)), and a concurrent term of 16 months (one-third the middle term of two years, doubled for the prior strike conviction) on the firearm possession by a felon conviction (§§ 18, subd. (a), 1170, subd. (h)(1), 667,

<sup>1</sup> All further unspecified statutory references are to the Penal Code.

<sup>2</sup> “Former Penal Code section 12021, subdivision (a), is now section 29800, subdivision (a), which became effective January 1, 2012. (Stats. 2010, ch. 711, § 6.) The Law Revision Commission comments to section 29800 make clear that the provision was carried over ‘without substantive change.’ [Citation.] We will refer to the provision by its former designation.” (*People v. Correa* (2012) 54 Cal.4th 331, 334, fn. 1.)

subd. (e)(1), 12021, subd. (a)). The court also imposed additional consecutive terms of five years for a prior serious felony conviction enhancement (§ 667, subd. (a)(1)), and one year for each of four prior prison terms enhancements (§ 667.5, subd. (b)).

On appeal, defendant challenges his sentence, arguing the trial court erred by imposing the five-year enhancement pursuant to section 667, subdivision (a)(1), and by failing to stay the sentence imposed on the firearm possession by a felon conviction pursuant to section 654. We conclude defendant's contentions are without merit. However, we agree with the Attorney General that the court imposed an unauthorized term on the conviction for firearm possession by a felon, and we will modify the sentence to impose an authorized term. As so modified, we affirm the judgment.

### **FACTS**

On March 18, 2010, Timothy Jones drove his car to an auto shop in Oakland. Jones's brother was a passenger in the car. After about two hours at the shop, defendant and three other men approached from the rear of Jones's car. Defendant and one man were on the driver side and two other men were on the passenger side. As Jones looked at the two men on his side of the car, he saw one man pull a gun from his waistband and defendant extend his arm, also holding a gun. Jones did not know where defendant had hidden his gun before seeing the gun in defendant's hand. However, Jones's brother saw that both men on the driver's side of the car had gone under their shirts and pulled out weapons from their pants waistbands. The two men on the passenger side of the car also had drawn guns.

Jones had the driver's side window down. Defendant and the man near him pointed their semiautomatic firearms at Jones. One of the men, possibly defendant, directed Jones to get out of the car, but he refused to do so. The other man then put his gun inside the car and placed it on Jones's stomach and repeated the demand that Jones get out of the car. Jones and his brother then got out of the car. Jones left his keys in the ignition. Defendant handed his gun to one of his accomplices, hopped into the car, and drove off. The other three gunmen ran away. Jones and his brother reported the carjacking to the police, who ultimately recovered the stolen car and apprehended defendant.

After a jury trial, defendant was convicted of carjacking (count one) and possession of a firearm by a felon (count two). At a bifurcated court proceeding, defendant admitted he had sustained five prior convictions. The court sentenced defendant to an aggregate term of 19 years, consisting of the middle term of five years on count one and a concurrent term of eight months on count two, both terms doubled for a prior strike conviction, a consecutive five-year term for a prior serious felony conviction, and consecutive one year terms for four convictions for which defendant had served prison terms.

## DISCUSSION

### I. Serious Felony Enhancement Pursuant to Section 667, Subdivision (a)(1)

Defendant argues the trial court erred in imposing a five-year enhancement under section 667, subdivision (a)(1), for his prior serious felony conviction of assault with a firearm in violation of section 245, subdivision (a)(2).<sup>3</sup> We disagree.

“[T]he imposition of the five-year enhancement for the prior serious felony conviction [is] part and parcel of the Three Strikes statutory scheme,” which is set out in section 667. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 425.)<sup>4</sup> “Section 667, subdivision (a)(1) provides for an enhancement of five years when the current charge is a serious felony and the defendant has previously been convicted of a serious felony.

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<sup>3</sup> Section 667, subdivision (a)(1), reads, in pertinent part: “any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively. [¶] . . . [¶] As used in this subdivision, ‘serious felony’ means a serious felony listed in subdivision (c) of Section 1192.7.” Section 1192.7, subd. (c)(31), defines “serious felony” as assault with a firearm in violation of section 245.

<sup>4</sup> “The charging and sentencing documents in the record reference both the legislative [§ 667] and initiative [§ 1170.12] versions of the applicable three strikes sentencing provisions. . . . For the sake of consistency and ease of reference we shall . . . refer to the legislative version, although the principles we discuss herein are equally applicable to cases arising under either version of the three strikes law.” (*People v. Lawrence* (2000) 24 Cal.4th 219, 222, fn. 1.)

Section 667, subdivision (e)(1)<sup>5]</sup> provides that if the defendant has a prior serious or violent felony, ‘in addition to any other enhancement or punishment provisions which may apply’ the base term is doubled. [Assault with a firearm in violation of section 245, subdivision (a)(2),] is a serious felony. (§ 667, subd. (d)(1).) [¶] Section 667 thus requires the doubling of the base term when there is a prior serious felony, and since such sentence is to be ‘in addition to any other enhancement,’ also requires the addition of five years for any section 667, subdivision (a)(1) enhancement.” (*People v. Nelson* (1996) 42 Cal.App.4th 131, 136, fn. omitted (*Nelson*); see *People v. Dotson* (1997) 16 Cal.4th 547, 554, citing *Nelson* with apparent approval]; see also *People v. Turner* (1998) 67 Cal.App.4th 1258, 1268 [“[i]n the Three Strikes context, the same allegation that a particular prior qualified as a serious felony may serve two separate purposes: for use as a five-year enhancement under section 667, subdivision (a); and as a ‘strike’ [under] the Three Strikes laws”]; but cf. *People v. Ringo* (2005) 134 Cal.App.4th 870, 883 [“section 667 embodies two distinct statutory schemes, each of which operates independently of the other: (1) the five-year enhancement for serious felony prior convictions, as set forth in subdivision (a); and (2) the Three Strikes Law, as set forth in subdivisions (b) to (j)”].)

Defendant argues that the conditions for imposing the five-year enhancement were not met in this case because the prosecutor failed to plead and prove the section 667, subdivision (a)(1), enhancement. He specifically contends the information did not sufficiently allege that his prior serious felony conviction could be used to enhance his sentence by five years if the current prosecution resulted in a conviction for a serious felony. We disagree.

The courts have held that “a valid accusatory pleading need not specify by number the statute under which the accused is being charged.” (*People v. Thomas* (1987) 43

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<sup>5</sup> Section 667, subdivision (e)(1), reads: “For purposes of subdivisions (b) to (i), inclusive, and in addition to any other enhancement or punishment provisions which may apply, the following shall apply where a defendant has a prior felony conviction: [¶] (1) If a defendant has one prior felony conviction that has been pled and proved, the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction.”

Cal.3d 818, 826.) A pleading is sufficient if it alleges “each fact required for imposition of an enhanced term.” (*People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1118.) Additionally, “[n]o accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.” (§ 960.)

Contrary to defendant’s contention, the information contained sufficient allegations that he would be subject to an enhanced punishment for his prior serious felony if convicted of the serious felony of carjacking. The information alleged that he was being charged with a serious felony (carjacking) and he had been previously convicted of assault with a firearm in violation of section 245, subd. (a)(2). Under the heading, “CAL PRIOR-SERIOUS FELONY” and “2 STRIKES (ONE PRIOR),” the information further alleged that the prior assault conviction would subject defendant to sentencing pursuant to section “667(e)(1).” Concededly, the reference to “section “667(e)(1)” “is a less than precise directive to apply section 667, subdivision (a) enhancements.” (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1138.) Nevertheless, the information gave defendant notice that he would be subject to an enhanced sentence if (1) he was convicted of a serious felony and (2) it was determined he had been convicted of a previous serious felony.<sup>6</sup>

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<sup>6</sup> The cases cited by defendant do not support reversal. *People v. Mancebo* (2002) 27 Cal.4th 735 “stands for the limited proposition that a defendant is entitled to notice of the specific facts that will be used to support an enhanced sentence. Facts alleged and proved only as part of the substantive crime charged cannot later be used to support a sentencing enhancement.” (*People v. Tardy* (2003) 112 Cal.App.4th 783, 789.) In *People v. Haskin* (1992) 4 Cal.App.4th 1434, the reviewing court found the factual allegations in the information that defendant’s prior burglary conviction would subject him to an enhanced sentence under section 667.5 (prior conviction for which he served a prison term) was “insufficient” to support an unpleaded section 667 five-year enhancement because “burglary is not deemed a serious felony unless it was of an inhabited dwelling house,” and “[t]he information alleged only that appellant had been convicted of burglary. It made no allegation that the burglary was of an inhabited dwelling house or a residence. . . . He did not admit the character of the burglary . . . .” (*Id.* at pp. 1439-1440.) In this case, the trial court’s imposition of the five-year enhancement was based on defendant’s admission that he had sustained a prior conviction for assault with a firearm in violation of section 245, which was factually charged in the information, and *as pleaded*, qualified for enhanced punishment under the provisions of section 667. (See *People v. Keli* (1999) 21 Cal.4th

“[W]here the information puts the defendant on notice that a sentence enhancement will be sought, and further notifies him of the facts supporting the alleged enhancement, modification of the judgment for a misstatement of the underlying enhancement statute is required only where the defendant has been misled to his prejudice.” (*People v. Neal* (1984) 159 Cal.App.3d 69, 73-74.) In this case defendant makes no claim that he was surprised when the court indicated it would impose the five-year enhancement pursuant to section 667, subdivision (a)(1), or that “preparation of his defense to meet the facts would have been different” if the information had specifically mentioned section 667, subdivision (a)(1). (*Id.* at p. 72.) We therefore conclude the trial court in this case did not err in imposing the five-year enhancement pursuant to section 667, subdivision (a)(1).<sup>7</sup>

## **II. Section 654**

As noted, the trial court imposed a concurrent term for the firearm possession by a felon conviction. Defendant argues the concurrent term should have been stayed pursuant to section 654. We disagree.

Section 654, subdivision (a), reads 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.” The statutory language has been interpreted to mean that multiple punishments are precluded “ ‘for a single act or for a course of conduct comprising indivisible acts. ‘Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.’ [Citations.] ‘[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and

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452, 456 [question of whether conviction qualifies as serious felony pursuant to section 667, subdivision (a)(1), “is entirely legal” when prior conviction is a “per se serious” felony and the elements of the offense have not changed since the time of the conviction].)

<sup>7</sup> In light of our determination, we need not address defendant’s contention that his trial counsel was ineffective for failing to object to the court’s imposition of the five-year enhancement pursuant to section 667, subdivision (a)(1). (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836 [defense counsel is not ineffective for failing to make a meritless objection].)

therefore may be punished only once.’ [Citation.]” [Citation.]’ [Citations.] However, if the defendant harbored ‘multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]’ [Citations.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).

Initially, we note defendant’s failure to raise an objection in the trial court does not mean he forfeits his appellate challenge regarding the applicability of section 654. “[A] court acts in excess of its jurisdiction and imposes an unauthorized sentence when it fails to stay execution of a sentence under section 654. [Citation.]” (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Thus, subject to an exception not applicable here, the “ ‘waiver doctrine does not apply to questions involving the applicability of section 654.’ ” (*Hester, supra*, 22 Cal.4th at p. 295.)

“Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences.” (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) “For this reason, the imposition of concurrent terms is treated as an implied finding that the defendant bore multiple intents or objectives, that is, as a rejection of the applicability of section 654. [Citations.]” (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1468 (*Alford*)). Thus, “implicit in [the trial court’s] imposition of concurrent sentences for the firearm possession by a felon and [the carjacking] offenses was a finding that the firearm possession was a separate and distinct offense. [Citation.]” (*Jones, supra*, 103 Cal.App.4th at p. 1147.)

Our review of the trial court’s implied finding rejecting the applicability of section 654 is limited. (*People v. Green* (1988) 200 Cal.App.3d 538, 543-544.) “[T]he law gives the trial court broad latitude in making [its] determination. . . . ‘We must “view the evidence in a light most favorable to the respondent and presume in support of the [sentencing] order the existence of every fact the trier could reasonably deduce from the

evidence. [Citation.]” [Citation.]’ [Citation.]” (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313.)<sup>8</sup>

Contrary to defendant’s contention, we are not here concerned with “a single physical act that violates different provisions of law” as discussed in *People v. Jones* (2012) 54 Cal.4th 350, 358. Instead, we are concerned with “how section 654 applies to a defendant who is convicted of possession of a firearm by a felon and of committing a separate crime with that firearm.” (*Id.* at p. 358, fn. 3, citing the collection and discussion of cases in *Jones, supra*, 103 Cal.App.4th at pp. 1144-1146.) “ ‘Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms . . . , constitutes a divisible transaction from the offense in which [a defendant] employs the weapon depends upon the facts and evidence of each individual case.’ ” (*People v. Bradford* (1976) 17 Cal.3d 8, 22.) “It is clear that multiple punishment is improper where the evidence ‘demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense . . . .’ [Citation.]” (*Jones, supra*, 103 Cal.App.4th at p. 1144.) “On the other hand, it is clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent.” (*Ibid.*) “Based upon these principles, we conclude that section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.” (*Id.* at p. 1145.) As explained by the court in *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, “[c]ommission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon. [Citations.]” (*Id.* at p. 1414.)

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<sup>8</sup> Consequently, we see no merit to defendant’s contention that we should apply the standard of review applicable to a trial court’s choice of consecutive or concurrent terms as discussed in *People v. Coelho* (2001) 89 Cal.App.4th 861, 885.

Defendant contends there was insufficient evidence from which the trial court could reasonably infer multiple objectives for his possession of a firearm and carjacking for two reasons: (1) there was no evidence showing that before the carjacking he possessed the gun or brought it to the automotive shop and (2) his firearm possession was incidental to the carjacking in that his conduct after the carjacking shows that “by handing the weapon to his accomplice and then jumping into the car, [he] had borrowed [the gun] at the scene solely for the purpose of carrying out the carjacking.” We conclude defendant’s contentions are unavailing. Even if the gun was acquired from an accomplice, as defendant suggests, the evidence shows that defendant already had possession of the gun and drew it from his person as he approached Jones’s car. Thus, “the evidence was sufficient to allow the inference that Jones’s possession of the firearm was antecedent to and separate from the primary offense of [carjacking],” with defendant committing “two separate acts: arming himself with a firearm, and” taking Jones’s car. (*Jones, supra*, 103 Cal.App.4th at p. 1147 [separate punishments upheld for a felon’s firearm possession within minutes of shooting into a residence].) “The evidence likewise supported an inference that [defendant] harbored separate intents in the two crimes. [He] necessarily intended to possess the firearm when he first obtained it, which . . . necessarily occurred antecedent to the [carjacking].” (*Ibid.*) Defendant’s taking of Jones’s car “comprised a ‘separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.’ [Citation.]” (*Ibid.*) The trial court could also find that separate punishments for carjacking and firearm possession were commensurate with defendant’s culpability. Once in possession of the firearm, defendant could have chosen not to participate in the carjacking. The firearm possession and carjacking were separated by a sufficient period of time during which defendant had an opportunity to reflect and break off his efforts to take Jones’s car but failed to do so. (See *People v. Trotter* (1992) 7 Cal.App.4th 363, 368 [separate punishments upheld on two assault convictions where defendant fired two shots a minute apart at the victim as “each shot evinced a separate intent to do violence”].) Therefore, we

see no reason to stay the separate punishment imposed for the firearm possession by a felon conviction. Nothing in the cases cited by defendant warrants a different result.

### **III. Sentence Imposed on Conviction for Firearm Possession by a Felon**

We agree with the Attorney General that the trial court imposed an unauthorized term on the firearm possession by a felon conviction. The court imposed on that conviction a term of 16 months, consisting of a base term of 8 months (one-third of the middle term of two years), doubled for a prior strike conviction. However, “[b]ecause concurrent terms are not part of the principal and subordinate term computation under section 1170.1, subdivision (a), they are imposed at the full base term, not according to the one-third middle term formula, even though they are served at the same time.” (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156 & fn. 3 (*Quintero*)).) The unauthorized term is subject to correction on this appeal. (*Ibid.*) Although we could remand for a new sentencing hearing, such a procedure would not change defendant’s “actual prison time. The futility and expense of such a course militates against it. Instead, . . . we will exercise our authority to modify the judgment. (§ 1260.)” (*Alford, supra*, 180 Cal.App.4th at p. 1473.) We therefore modify the judgment by vacating the unauthorized term on count 2 (firearm possession by a felon) and correcting it to reflect imposition of the full middle term of two years, doubled for a prior strike conviction, for an aggregate term of four years, to run concurrently with count 1 (carjacking), and ordering the trial court to amend its sentencing minute order and the abstract of judgment accordingly. The record indicates that such a correction is consistent with the trial court’s selection of the middle term on count 2 and its determination to impose concurrent terms on counts 1 and 2. (See *Quintero, supra*, 135 Cal.App.4th at p. 1156.)

### **DISPOSITION**

The judgment is modified by vacating the sentence on count 2 (firearm possession by a felon) and substituting a sentence to reflect the imposition of a full middle term of two years, doubled for a prior strike conviction, for an aggregate term of four years, to run concurrently with count 1 (carjacking). The trial court is directed to amend its sentencing minute order and the abstract of judgment to reflect the modification and to forward a copy

of the amended abstract of judgment to the Department of Corrections and Rehabilitation.  
As so modified, the judgment is affirmed.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.