Filed 7/23/19 P. v. Brown CA3

NOT TO BE PUBLISHED

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENYATTA BROWN, Defendant and Appellant.	C085961 (Super. Ct. No. 15F05786)
THE PEOPLE, Plaintiff and Respondent, v. KEYON BROWN, Defendant and Appellant.	C085963 (Super. Ct. No. 15F05786)

Brothers Kenyatta and Keyon Brown[1] were partying with Sawyer Stauffer and Joslynn S., while in the presence of guns. Minutes after Keyon and Stauffer went to bed, Joslynn was shot in the chest with a single bullet, causing her death. Expert evidence showed the shot was not inflicted from close range such that Joslynn could have shot herself. Kenyatta fled the scene and Keyon gave multiple false statements to deputies regarding how the incident occurred. As a result, the jury found Kenyatta guilty of second degree murder and found true an associated firearm enhancement pursuant to Penal Code[2] section 12022.53, subdivision (d), and also found him guilty of possessing an assault weapon. It found Keyon guilty of possessing an assault weapon and being an accessory to a felony.

On appeal, Kenyatta challenges the sufficiency of the evidence supporting his second degree murder conviction. He also contends the court committed several instructional errors and one evidentiary error, and that cumulative error resulted from these individual errors. Finally, he urges us to remand his case for resentencing so the trial court can exercise its newly granted discretion pursuant to Senate Bill No. 620. Keyon raises two related instructional error arguments regarding the trial court's response to a jury question, while also contending his counsel was ineffective for allowing one of those errors to occur without objection.

We agree Kenyatta's case must be remanded for the trial court to exercise its newly granted discretion when sentencing him to the firearm enhancement. We otherwise find no prejudicial error regarding either Kenyatta's or Keyon's case.

---

[1] Because defendants share a surname, we refer to them by their first names. No disrespect is intended.

[2] Further section references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

Because defendants were tried by separate juries, we will relate the facts based on the evidence presented to both juries, before specifying the evidence presented to Kenyatta's jury and then to Keyon's jury.

I

Evidence Presented To Both Juries

A

The Shooting

In mid-September 2015, Joslynn was partying with her friend Stauffer and Stauffer's friends Kenyatta and Keyon at Stauffer's apartment. The four had been drinking alcohol since arriving at the apartment sometime between 11:30 p.m. and midnight and Keyon had ingested ecstasy at some point. The group had also been dancing at times during the night. In Snapchat videos, Joslynn and Stauffer can be seen playing with guns and Kenyatta can be seen walking in the background. There were two guns present that night. One was a TEC-22 handgun with an extended magazine capable of being inserted in a port located in front of the trigger mechanism; the gun resembled a miniature machine gun and held .22 caliber long rifle bullets. Photos showed that both Kenyatta and Keyon had been around this weapon before and played with it in the same manner as the Snapchat videos portrayed. The second was a black .40-caliber Glock handgun.

Around 2:40 a.m., Keyon and Stauffer went to bed in Stauffer's bedroom. Minutes later, a gun blast rang out. Keyon ran into the living room, as did Stauffer's roommate, who was asleep in his room. Joslynn was on the ground with a single bullet wound in the middle of her chest; the bullet passed through her heart causing her death. Kenyatta put something in a backpack and fled the apartment with the backpack. Stauffer called 911.

When deputies arrived, one of them pulled down Joslynn's tank top to render aid. Joslynn was not wearing anything over the tank top when officers arrived. No weapon was seen near her body.

Upon a search of the apartment, deputies found the TEC-22 handgun under the mattress in Stauffer's bedroom. The gun was missing the extended magazine. The magazine, however, was found in a box above the refrigerator in the kitchen and had multiple bullets in it. A fully-loaded magazine to a .40-caliber handgun was found in a closet drawer in Stauffer's bedroom. The Glock, however, was not found in the apartment. An empty box of .22-caliber "copper plated" bullets was found in Stauffer's car.

Keyon made multiple statements to responding deputies indicating a black male adult with long black dreadlocks, approximately six feet four inches tall, and wearing all black had entered the apartment and shot Joslynn once with a .22-caliber handgun before fleeing. He said the man, whom he called Andre but did not know, had come over earlier in the night to hang out. He and Andre got into a "small" and "stupid" argument and Andre left. Keyon then went to bed with Stauffer and approximately 10 minutes later, he heard a gunshot coming from the living room.

Keyon gave a police interview wherein he related the same facts he told responding deputies. He said Kenyatta was not at the apartment when the shooting occurred but admitted Kenyatta was with him and Stauffer when the two picked up Joslynn at her house earlier that night. He claimed they dropped Kenyatta off nearby before returning to Stauffer's apartment.[3] When confronted with a Snapchat video, Keyon admitted the group had been playing with the Glock while partying that night but claimed the Glock was not his gun. He said he did not know where the Glock was but

---

[3] Surveillance footage of the group at a liquor store showed Joslynn wearing a jacket over her clothing. No jacket was found in the apartment after her death.

that it had been on a table by the front door all night and that Andre probably saw it while he was there.

B

Expert Evidence

No usable fingerprints or DNA were detected on the TEC-22. Gunshot residue tests revealed small amounts of gunshot residue on Keyon and Stauffer, while a large amount of gunshot residue was on Joslynn. All the results supported the conclusion that the three either fired a weapon, handled a recently fired weapon, or were in the vicinity of a fired weapon. By the time Kenyatta was apprehended by deputies, no useful gunshot residue test could be performed.

When Joslynn's body arrived at the coroner's office, she was wearing a tank top, a sports bra, pants, socks, and boots. The bra and tank top had been cut by first responders. Because of the cut, the pathologist could not determine whether the bullet had passed through Joslynn's shirt before entering her body. Neither did he see sooting or stippling on Joslynn's body, meaning there was no evidence she was shot from close range. Sooting and stippling are the gunpowder and other particulates discharged from the gun when it is fired. Stippling punctures the surface of the skin and leaves behind pinpricks around the wound. The pathologist defined a close-range shot as any wound accompanied by sooting or stippling. While there was no sooting or stippling, there was some burning and unidentified particulates at the bullet's entry wound. The pathologist thought the particulates could have been part of Joslynn's shirt or could have been deposits from the bullet itself. He could not classify the particulates as sooting because of how they were deposited on the skin.

The bullet recovered from Joslynn's body was a .22-caliber copper wash hollow point bullet. The bullet did not have jacketing. While the bullet shared the same rifling characteristics as other bullets fired from the TEC-22, upon a microscopic inspection the

gun expert could not definitively say the bullet was fired from the TEC-22. Not being able to identify the source of a copper wash bullet, however, was not uncommon.

When a weapon is fired, gunpowder and other particulates, including nitrates and lead, are ejected from the muzzle of the weapon in a cone-shaped pattern. Typically, with a contact shot the sooting is heavily concentrated and any garment the bullet contacts is torn and singed. In a near-contact, shot particulates and vaporous constituents are splayed on the target, and the pattern will get wider the farther the gun is from the target when fired. The particulates travel farther than the vaporous content, so the particulates will be more detectable as the weapon moves away from the target. At even farther distances, nothing will be detectable on the target because it is beyond the maximum range the particulates will travel.

The gun expert tested the TEC-22 with bullets retrieved from the scene of her murder. The weapon had a four-pound trigger pull, which is common for the type of gun it was -- a single-action pistol. That type of weapon is designed to have a lighter weight trigger than a double-action gun, which is eight to 10 pounds but is more than a hair-pull trigger, which requires under a pound of pressure. Dropping the gun or tapping on the trigger would not set it off, a person would have to pull the trigger to fire the gun. This specific TEC-22 did not have a magazine safety feature, meaning the gun would fire if there was a cartridge in the chamber and the magazine was not attached. It also did not have a feature where the action would remain open once the last round was fired from the weapon and the magazine was attached, so that the person firing the weapon would know the weapon was unloaded. Finally, this TEC-22 had some sort of defect that would only allow the expert to fire one cartridge at a time without having to manipulate the gun. After each shot, there was either a problem with the casing ejecting from the weapon, or a problem feeding the next live round into the chamber, or the gun did not fire when the expert pulled the trigger.

Joslynn's thumb measured 18 inches from her chest when outstretched from her body. Taking into account the length between the trigger of the TEC-22 and the muzzle, the maximum distance from which she could have shot herself was 10 and one-half inches. Upon an examination of Joslynn's tank top and sports bra, the expert could not discern any visible bullet hole in the clothing. There was also no evidence of burned or unburned gunpowder or sooting. There were no nitrates detected on the clothing but the expert did detect lead particulates. Because the bullet was not jacketed, the lead could have been deposited from the bullet itself.

The expert performed distance testing at 3, 6, 12, 18, 30, and 48 inches by firing the TEC-22 at a fabric matching Joslynn's tank top. Heavy sooting appeared on the target measuring three and six inches away from the fired weapon, and lighter sooting appeared on the target 12 inches away. There was no visible sooting on the target 18, 30, and 48 inches from the fired weapon. There were grains of gunpowder appearing on all targets but with only a few grains on the 48-inch target. There was a nitrate pattern on all the targets, with more nitrates on closer targets in a smaller diameter of scatter. A vaporous lead pattern appeared on targets from 3 to 18 inches and only particulate lead patterns appeared on the 30- and 48-inch targets.

Not a single test matched Joslynn's tank top. The lead pattern was most like the 30-inch test target; however, there were no nitrates on Joslynn's tank top, which was inconsistent with the 30-inch target. Because of these inconsistencies, the expert believed the lead particulates on Joslynn's tank top were a product of the bullet and not residue from firing the weapon. Assuming, however, the lead particulates were from the fired weapon and not the bullet, the pattern on Joslynn's tank top was most like the test targets of 30 and 48 inches. Nitrates, however, were on all of the test targets and did not appear on Joslynn's tank top. The absence of vaporous lead on Joslynn's tank top supported the conclusion that Joslynn was not shot from less than 12 inches.

The expert's testing assumed Joslynn was wearing the tank top when she was shot. If there was an intervening target between the gun and the tank top, then all of the evidence would have been deposited on that object and not the tank top.

II

Evidence Presented To Kenyatta's Jury

After being arrested, Kenyatta was interrogated and admitted to being in the apartment when Joslynn was shot. He said Joslynn had been playing with the TEC-22 earlier in the night by pointing it at herself. Because of the danger that presented, Kenyatta took it away from her and put it in Stauffer's bedroom. The group then continued to party. Later in the night, Kenyatta and Joslynn went into the bedroom. When they left the bedroom, Joslynn took the TEC-22 with her and Keyon and Stauffer went into the bedroom. Kenyatta did not notice that Joslynn had taken the TEC-22 when they left because she exited the room after he did. When he looked back at her, he saw that she was holding the gun against her chest with both hands. He told her to stop and took a step toward her to take the gun away but the gun fired. Kenyatta yelled out "[s]he got hit."

Later in the interview Kenyatta said the two had been in the living room for a couple minutes talking before the gun went off. Kenyatta also gave varying statements about where the gun landed after it was fired. At first he said the gun landed near Joslynn and then later said it landed near himself. At first Kenyatta claimed to not know if the magazine was in the weapon and later stated the magazine was not in the weapon.

After hearing a gunshot, Keyon came out of the bedroom and asked what had happened. Kenyatta told him he did not know and he had not pulled the trigger. Keyon told Kenyatta to leave and Kenyatta complied because he was scared. Kenyatta claimed he did not take the Glock with him when he left nor did he take a backpack.

III

Evidence Presented To Keyon's Jury

In addition to Keyon's initial interview, he gave a subsequent interview that was presented only to his jury. In that interview, deputies confronted Keyon with their discovery of the TEC-22 under the mattress in Stauffer's bedroom and with the Snapchat video containing the TEC-22 and Kenyatta walking in the background. As a result, Keyon admitted to lying in his initial police interview. He also admitted to owning the TEC-22 for over a month but claimed to have never fired the weapon.

He said Joslynn had been playing with the TEC-22 earlier in the night and had held it directly to her chest. At that time, Kenyatta told Joslynn to stop.

When Keyon heard the gunshot, he ran out of Stauffer's room and saw Kenyatta standing by the television. Kenyatta looked shocked and said he did not do anything and had not pulled the trigger. The TEC-22 was on the floor by Joslynn's feet and the magazine was not in the weapon. Keyon took the TEC-22 out of the room and remembered the Glock being on the table by the front door. He did not see Kenyatta grab anything when he fled the apartment.

Also admitted only to Keyon's jury was a conversation between he and Stauffer at the Sheriff's Department. In that conversation Keyon admitted to putting the TEC-22 under the mattress and said he could not have put it in the backpack with Kenyatta because Kenyatta had already left the apartment.

IV

Verdicts And Sentencing

Kenyatta's jury found him guilty of second degree murder and found he had personally and intentionally discharged a firearm causing death in violation of section 12022.53, subdivision (d). The jury also found Kenyatta guilty of possessing an assault weapon. The court sentenced Kenyatta to 15 years to life for second degree murder and an additional 25 years to life for the firearm enhancement. It sentenced, and

then stayed pursuant to section 654, a two-year sentence for possessing an assault weapon. When imposing sentence, the court did not make any comments regarding Kenyatta's degree of culpability when committing the murder.

Keyon's jury found him guilty of being an accessory to a felony and possessing an assault weapon. The court sentenced him to three years for the accessory conviction and a consecutive eight months for the possession conviction.

Defendants appeal.

DISCUSSION REGARDING KENYATTA's CLAIMS

I

Sufficient Evidence Support's Kenyatta's Conviction For Second Degree Murder

Kenyatta contends sufficient evidence does not support the jury's verdict for second degree murder because there is no evidence he intentionally committed the act of discharging the gun that caused Joslynn's death. We disagree.

"In reviewing the sufficiency of the evidence, we must 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] It is the jury, not an appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] The appellate court may not substitute its judgment for that of the jury or reverse the judgment merely because the evidence might also support a contrary finding." (*People v. Wolfe* (2018) 20 Cal.App.5th 673, 681.)

Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) Moreover, the testimony of a single witness is sufficient to prove a fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.)

" 'Murder is the unlawful killing of a human being . . . with malice aforethought.' (§ 187, subd. (a).) When a person commits a murder without premeditation and deliberation, it is of the second degree. (§ 189.) In a second degree murder, the 'malice may be express or implied.' (§ 188.) 'Malice is implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger.' " (*People v. Wolfe*, *supra*, 20 Cal.App.5th at p. 681.) Malice "may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." (*People v. Watson* (1981) 30 Cal.3d 290, 296.)

Kenyatta points to several items of evidence arguing none of it supported a finding he "committed an intentional act," especially when considered in conjunction with evidence suggesting Joslynn wore a jacket when she was shot. We are not persuaded. As an initial matter, we again note that it is not for us to judge the credibility of the witnesses or assign weight to the evidence -- that was a job for the jury. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 60.) Here, the gun expert testified the TEC-22's trigger had to be pulled to be fired and that the gun would not discharge by merely placing a finger on the trigger or dropping the weapon. Further, there was no evidence of a close-range shot on Joslynn's clothing. As to Kenyatta's intent, Kenyatta admitted knowing the TEC-22 was dangerous to human life -- when Joslynn was pointing the gun at herself earlier in the night, Kenyatta took it away from her and hid it given the inherently dangerous nature of the conduct. Taken together, substantial evidence supported the jury's finding that Kenyatta knew that pointing the TEC-22 at Joslynn and pulling the trigger was dangerous to human life and he ignored those dangers when doing so.

Kenyatta spends much time attempting to undercut the gun expert's conclusions, arguing the evidence suggested Joslynn "could have been" wearing the jacket when she was shot. Indeed, the expert acknowledged that if Joslynn had been wearing a jacket when she was shot, that her conclusions could be different because the jacket would

contain the relevant evidence to judge the distance at which Joslynn was shot, instead of the clothing tested. But while Joslynn wore a jacket earlier in the night when the group bought alcohol, there was no evidence showing she wore the jacket at the time of her murder. The group was drinking and dancing indoors before settling down for the night around the time of the murder. It is readily inferable that Joslynn would not have been wearing a jacket at that time. Further, neither Kenyatta nor Keyon said they removed Joslynn's jacket after she was shot, and when deputies arrived, Joslynn was not wearing a jacket nor was one found in the apartment.

Kenyatta also challenges the gunshot residue and DNA evidence as not proving he committed an intentional act. We agree, but think these items of evidence are not dispositive to the inquiry. Neither Joslynn's nor Kenyatta's DNA was detected on the TEC-22 even though Kenyatta said he took the gun away from Joslynn, and Kenyatta was detained long after a gunshot residue test would have been helpful to the investigation.

He next challenges the autopsy evidence as failing to be reasonable, credible, and of solid value because the pathologist's testimony was subjective and provided no scientific certainty about the distance at which Joslynn was shot. Kenyatta misconstrues the purpose of the pathologist's testimony -- the pathologist was not testifying as an expert in guns or distance. Indeed, he told the jury his definitions of contact, near-contact, and intermediate range were arbitrary in that he could not assign any specific distance to those definitions but that they were defined only by sooting and stippling patterns observable on the skin. In Joslynn's case, there were no discernable sooting or stippling patterns, except for some particulates around the wound. While the pathologist testified these particulates could be soot, in that gunpowder could have been transferred via the bullet to the wound, it did not represent the *pattern* attributable to sooting. Kenyatta's attempts to poke holes in the pathologist's testimony are unavailing.

So too are his attempts to undermine the gun expert's testimony because he repeatedly interprets the evidence in the light most favorable to himself and not to the judgment. For example, he claims the evidence suggests he did not know the gun was loaded because the TEC-22 did not have the safety feature allowing the action to remain open after the last cartridge was fired so a user would know whether the gun was unloaded. The evidence also showed, however, that this was not the first time Kenyatta had been exposed to the TEC-22, suggesting he was somewhat familiar with the weapon's features. Further, the group was playing with the TEC-22 either with or without the magazine attached.[4] If the latter, then Kenyatta knew that conduct was dangerous to human life, which is why he took the weapon away from Joslynn. If the former, Kenyatta did not ensure the weapon was unloaded after the loaded magazine was removed and before pointing it at Joslynn and pulling the trigger. In either scenario, Kenyatta performed an intentional act dangerous to human life without regard to the danger it posed.

Kenyatta's argument that the gun expert was wrong in relying on the bullet as the source of the lead particulates on Joslynn's clothing is similarly unavailing. Kenyatta contends the lead particulates were the product of gunshot residue, which contains lead, as testified to by the gunshot residue expert. Gunshot residue, however, contains more than just lead but also barium and antimony salts, all of which are required for a gunshot residue classification. There is no evidence suggesting the lead particulates on Joslynn's shirt also included these other components making it so the particulates could be attributable to gunshot residue and not the bullet. Further, the gunshot residue expert

---

[4] Kenyatta has not transmitted the Snapchat videos to us for review, something that is his burden. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) From the evidence before us, it is unclear whether the magazine was in the TEC-22 earlier in the night while Joslynn was playing with it.

testified the presence of lead *could* be the result of gunshot residue and did not advance any opinion regarding the lead particulates discovered on Joslynn's shirt in particular. In any event, the gunshot residue conclusion advanced by Kenyatta is but one possible conclusion, as is the gun expert's conclusion. The jury was free to accept the conclusion it found most credible. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 60.)

Kenyatta also points to the box of empty ammunition found in Stauffer's car as undercutting the gun expert's reliance on copper washed bullets in her testing. He argues that because the box was for copper plated bullets and not copper washed bullets, the testing was unreliable. There is nothing in the record to give context to this argument besides Kenyatta's assertion that copper washed bullets are different than copper plated bullets. Without testimony to distinguish the two, we do not see how the expert's conclusions were unreliable.

Finally, Kenyatta points to the fact that none of the gun expert's tests mirrored what was seen on Joslynn's clothing, showing that the tests were unreliable. Not so. None of the tests replicated the lead particulates found on Joslynn's clothing, which is why the expert thought the lead particulates were a product of the bullet itself and not the blast. No nitrates were found on Joslynn's clothing but they were found on all test targets. Thus, if the lead particulates were from the bullet and not the blast, it is reasonable to infer that the shot came from farther than 48 inches away -- the longest range tested by the gun expert. Assuming, however, the lead was a product of the blast, then Joslynn was likely shot from 30 or 48 inches away -- still too far for Joslynn to have shot herself. Accordingly, sufficient evidence supports the jury's second degree murder verdict.

II

Instructional Error

Kenyatta raises two instructional error challenges. One to the constitutionality of CALCRIM No. 362, which instructs the jury it may use a defendant's false statements as

showing a consciousness of guilt. And the other to the sufficiency of the evidence supporting the giving of CALCRIM No. 371, which instructs the jury it may use a defendant's fabrication of evidence as showing a consciousness of guilt. We conclude there was no error in giving the first instruction and any error in giving the second was harmless.

A

CALCRIM No. 362 Does Not Violate Due Process

The jury was instructed with CALCRIM No. 362, as follows: "If the defendant made a false or misleading statement before this trial relating to the charged crime knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Kenyatta objected to the giving of this instruction arguing it was merely the prosecutor's theory that he lied about the circumstances of the crime as shown by the expert testimony and not based on inconsistencies in his own statements. The trial court disagreed and overruled Kenyatta's objection. Relying on *People v. Kimble* (1988) 44 Cal.3d 480, the court reasoned the jury could rely on other prosecution evidence to conclude Kenyatta lied when relating his version of events to deputies.

On appeal, Kenyatta argues this instruction violated his right to due process because it permitted the jury to draw an irrational presumption of guilt to the specific crime charged and to his mental state, instead of to a generalized sense of wrongdoing as the predecessor to CALCRIM No. 362 (CALJIC No. 2.03) charged. As a result, the jury was permitted to infer he was guilty of second degree murder and held the requisite

mental state for that crime, which impermissibly allowed it to disregard the possibility that he was guilty of involuntary manslaughter.[5]

We review de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

We recently rejected defendant's argument in *Burton*. (*People v. Burton* (2018) 29 Cal.App.5th 917, 923-926.) There, we concluded that when considering the instructions as a whole, CALCRIM No. 362 cannot be said to be constitutionally infirm. (*Id.* at p. 925.) Like in *Burton*, the jury here was instructed it had to determine "what specific crime was committed" if any, as well as instructed on second degree murder, voluntary manslaughter (based on both heat of passion and imperfect self-defense), and involuntary manslaughter.

"In considering all of the instructions given, the jury would understand that any consciousness of guilt evidenced by defendant's multiple lies to [the deputies] would operate as to any degree of homicide, not merely [second] degree murder. After all, 'The

---

[5] The People do not mount a forfeiture argument and agree with Kenyatta that we may address this claim. Kenyatta, however, argues in a heading that the instruction also violated his equal protection right but does not provide an argument supporting this contention. We agree with the People that Kenyatta has forfeited his equal protection contention by not providing argument and citation to authority for its support. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

inference of consciousness of guilt from willful falsehood or fabrication or suppression of evidence is one supported by common sense, which many jurors are likely to indulge even without an instruction.' [Citation.] And at the time defendant was speaking to [the deputies], [he] could not have known what [he] *later* would or might be charged with. Few people understand the intricacies of California law pertaining to homicide (e.g., manslaughter vs. murder, second degree vs. first degree murder, justifiable homicide, etc.), and when a person feels some guilt about having done something wrong, fine points of law would not come into play.

"Further, CALCRIM No. 362 *limits* the reach of any adverse inference both by telling the jury that it decides the 'meaning and importance' of the evidence and by telling the jury the making of a willfully false statement 'cannot prove guilt by itself.' (CALCRIM No. 362.) CALCRIM No. 362, like CALJIC No. 2.03 before it, is designed to benefit the defense, ' "admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." [Citation.]' [Citation.] And because the evidence cannot prove guilt by itself, a jury would understand that the consciousness of guilt -- however deep it ran -- was not the equivalent of a confession. [Citation.] Thus, a jury would understand both that false statements were not the equivalent of a confession and that they were not themselves sufficient to prove guilt of the charged crimes. 'The trial court properly left it for the jury to determine whether defendant's statement to police was false or deliberately misleading, and if so, what weight should be given to that evidence.' " (*People v. Burton*, *supra*, 29 Cal.App.5th at p. 925.)

In his reply brief, Kenyatta argues this conclusion was faulty because it is not clear common sense would assist the jury when reading CALCRIM No. 362 "as it was supposed to be understood, rather than as it is actually written" and because the jury is given wide latitude in determining the meaning and importance of a lie. But as we said in *Burton*, we are not concluding the instruction is perfect, only that it is not constitutionally

infirm. (*People v. Burton*, *supra*, 29 Cal.App.5th at p. 926, fn. 2.) "If defendant wanted an instruction to clarify [the] point [raised on appeal], 'it was incumbent upon [him] to request it.' " (*Id.* at p. 926.)

B

The Court's Giving Of CALCRIM No. 371 Was Harmless

The jury was instructed with CALCRIM No. 371 as follows: "Now, if the defendant tried to create false evidence or obtain false testimony, that conduct may show he was aware of his guilt. If you conclude that defendant made such an attempt, it's up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If the defendant tried to create false evidence or obtain false testimony that conduct may show that he was aware of his guilt. If you conclude that the defendant made such a statement, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

Kenyatta objected to the giving of this instruction arguing the evidence did not show he fabricated evidence or obtained false testimony. The prosecutor argued that giving false statements was the equivalent of creating false evidence. The court agreed with the prosecution and overruled Kenyatta's objection. Kenyatta raises the same argument on appeal as he did in the trial court. The People contend that even if error occurred, it was harmless. We agree with the People.

The parties agree the applicable harmless standard is that articulated *Watson*. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178 [errors in jury instructions are typically reviewed under the *Watson* standard].) Under that standard, reversal for instructional error must be based on a reasonable probability, and not just a theoretical possibility, that it affected the trial's outcome. (*People v. Blakeley* (2000) 23 Cal.4th 82, 94.)

We note that CALCRIM No. 371 contains multiple alternatives. The one given here pertains to the fabrication of evidence; however, another alternative pertains to the suppression of evidence. There was evidence presented at trial that supported the giving

of the suppression alternative. Minutes after the shooting, Kenyatta was seen putting something into a backpack and taking the backpack from the apartment. Additionally, Kenyatta admitted to following his brother's instructions to flee. From this evidence, a jury could reason Kenyatta suppressed evidence showing he was at the apartment when Joslynn was shot. While the instruction pertained to fabricating evidence and not suppressing it, a jury could read the instruction as allowing for a consciousness of guilt inference if it found Kenyatta created a false impression of the evidence. (See *People v. Ramos*, *supra*, 163 Cal.App.4th at p. 1088 [" ' "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation" ' "].) Thus, while framed in the wrong language (fabrication instead of suppression), the jury was permitted to make the inference the instruction allowed based on the evidence before it. (See *People v. Alexander* (2010) 49 Cal.4th 846, 920-921 [" ' "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference" ' "].)

Further, the instructions pursuant to CALCRIM No. 371 could be viewed as benefitting Kenyatta. This instruction made it clear to the jury that any effort he may have taken to falsify evidence, was not, by itself, sufficient to establish his guilt. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1235 [addressing CALJIC No. 2.06, predecessor to CALCRIM No. 371].) Accordingly, the error was harmless.

III

The Trial Court Erred By Admitting Two Of The Challenged Photos; However, The Error Was Harmless

Kenyatta argues the trial court erred by admitting five photographs depicting guns. We agree in part. The court did not abuse its discretion by admitting the three photographs of the TEC-22 being displayed around Kenyatta because those photos tended to show Kenyatta's access to and familiarity with the murder weapon. The trial

court erred by admitting photos found on Keyon's phone of the TEC-22 and a handgun unconnected to the murder because it was irrelevant to Kenyatta's access to the weapon. We conclude, however, that the error was harmless.

A

Background

Kenyatta objected to the admission of the prosecution's exhibits 111, 112, 113, 116, and 117. Exhibit 111 is a photo of Keyon, Kenyatta, and an unknown individual standing in a kitchen with their arms around each other. The unknown individual is holding what appears to be the TEC-22, while Kenyatta is holding a handgun with a silver barrel and wooden handle. Exhibit 112 is a photo of the TEC-22. Exhibit 113 is a photo of what appears to be the handgun held by Kenyatta in exhibit 111. Exhibits 111 through 113 were found on Keyon's phone. Exhibit 116 is a photo of Keyon and two men. One of the men is holding the TEC-22 to his head, Keyon and the other man are holding handguns and pointing them at the camera. Exhibit 117 also depicts Keyon and the two men, in the same residence, standing in the same configuration, wearing the same clothing, and holding the same weapons as exhibit 116; however, Kenyatta is also in this photo but not holding a gun. Exhibits 116 and 117 were found on LeAndre Flemmings's phone during a traffic stop at the apartment complex following Keyon's call to 911. Flemmings is one of the men in exhibits 116 and 117, and he was stopped with Johnny Peyton, the other man (not Keyon or Kenyatta) in those photos. Peyton was in possession of a loaded handgun during the stop.

The trial court overruled Kenyatta's relevancy and Evidence Code section 352 objections. It reasoned the photos showed Kenyatta's association with and knowledge of guns, which was relevant to the jury's determination regarding his intent.

B

Discussion

Kenyatta contends admission of the five photos was error because the photos were irrelevant and unduly prejudicial. We agree in part.

Evidentiary rulings are reviewed for abuse of discretion and a court's decision will be upheld unless it exceeds the bounds of reason. (*People v. Williams* (1997) 16 Cal.4th 153, 196-197.) Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Generally, "[w]hen the prosecution relies on evidence regarding a specific type of weapon, it is error to admit evidence that other weapons were found in the defendant's possession, for such evidence tends to show not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1056-1057 [trial court erred in admitting evidence of defendant's prior possession of handgun similar to murder weapon where prosecutor did not claim such weapon was actually used in murder]; see also *People v. Riser* (1956) 47 Cal.2d 566, 576-577 [trial court erred in admitting evidence of a Colt .38-caliber revolver found in defendant's possession two weeks after murders where evidence showed weapon actually used was a Smith and Wesson .38-caliber revolver], overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649.) In other words, "[e]vidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons -- a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360.)

However, evidence of weapons not actually used in the commission of a crime may be admissible when they are relevant for other purposes. (*People v. Cox* (2003) 30 Cal.4th 916, 956 [when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible].) The critical inquiry is

whether the evidence bears some relevance to the weapons shown to have been involved in the charged crimes, or is being admitted simply as character evidence. (*People v. Barnwell*, *supra*, 41 Cal.4th at pp. 1056-1057; *People v. Prince* (2007) 40 Cal.4th 1179, 1248-1249.)

The trial court did not abuse its discretion by admitting exhibits 111, 116, and 117. All three photos show Kenyatta's access to the TEC-22 and his prior conduct of displaying guns while socializing in a residential setting, much like Joslynn and Stauffer were filmed doing the night of Joslynn's murder. While Kenyatta is not photographed holding the TEC-22, he is near it during these social gatherings, tending to show he had access to the weapon throughout the occasion and an opportunity to become familiar with it. This was relevant to Kenyatta's knowledge regarding the functionality of the weapon and whether it could have been loaded when he pointed it at Joslynn and pulled the trigger. It was also relevant as to his knowledge regarding the assaultive characteristics of the gun for purposes of the possession of an assault weapon charge.

Kenyatta argues exhibit 116 was not relevant because it would be "outrageous speculation to conclude Kenyatta was present" when the photograph was taken. Not so. As described, exhibit 116 depicts the group of men in the same room, standing in the same configuration, wearing the same clothing, and holding the same weapons as exhibit 117. The photos appear to have been taken in succession without the subjects moving, except to change poses and include Kenyatta to one side. It is a reasonable inference that Kenyatta was present and participated in the conduct depicted in the photographs, the same conduct Joslynn and Stauffer were filmed doing in Kenyatta's presence.

Neither was admission of these photographs unduly prejudicial. Relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (Evid. Code, § 352.) The type of

prejudice Evidence Code section 352 seeks to avoid is not the damage to a defense that naturally results from relevant evidence, but is instead a tendency to prejudge a person or cause on the basis of extraneous factors, a tendency to evoke an emotional bias against the defendant without regard to the relevance of the evidence to material issues, or a likelihood that the evidence will "be used in some manner unrelated to the issue on which it was admissible." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.)

We do not agree with Kenyatta that exhibits 111, 116, and 117 held limited to no probative value. The exhibits depicted images similar to the Snapchat videos and tended to show Kenyatta engaged in the behavior that led to Joslynn's death -- playing with guns at social gatherings. Kenyatta argues the "careless behavior" of the other men in the photos "served only to inflame the jury against" him and "would provoke negative judgments from everyone." Kenyatta, however, was present and participated in this behavior regardless of whether he was photographed holding a weapon. The prejudice Kenyatta points to is nothing but the damage naturally resulting from these relevant images. We conclude the images were not unduly prejudicial.

Whereas exhibits 111, 116, and 117 tended to show Kenyatta's access to the TEC-22 and his prior conduct of displaying guns at a social gathering, the photo of the TEC-22 and the silver handgun found on Keyon's phone do not. Having been found on Keyon's phone, there is nothing to connect Kenyatta with the weapons at the time the photos were taken. While the TEC-22 could have been the gun used in Joslynn's murder and the photograph was relevant as demonstrable evidence of what the gun looked like, the court admitted the actual weapon into evidence and several photos of it. The purported relevancy of exhibit 112 was that it was discovered on Keyon's phone, something that has nothing to do with Kenyatta. Further, as it pertains to the silver handgun, that weapon was unconnected to Joslynn's murder. While exhibits 112 and 113 may have been admissible against Keyon, they were inadmissible against Kenyatta.

The error, however, was harmless. "Claims of evidentiary error under California law are reviewed for prejudice applying the 'miscarriage of justice' or 'reasonably probable' harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818 . . . . Under the *Watson* harmless error standard, it is the burden of appellants to show that it is reasonably probable that they would have received a more favorable result at trial had the error not occurred." (*Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 447.) Kenyatta cannot make this showing.

Exhibits 112 and 113 merely show guns already shown to the jury. The TEC-22 was admitted for the jury's inspection and numerous images of the gun were also admitted into evidence. This was but one more image of a gun the jury was familiar with. Further, the silver handgun appeared to be the gun held by Kenyatta in exhibit 111, which was the basis of its admission in the first place. The jury was also told these images were found on Keyon's phone, thus it knew Kenyatta had no association with them. Accordingly, it is not reasonably probable a more favorable outcome would have resulted had the court not admitted exhibits 112 and 113.

IV

There Was No Cumulative Error

Kenyatta seeks reversal based on cumulative error. "Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) Here, we found error in the giving of the wrong alternative to CALCRIM No. 371 and error in the admission of two photos found on Keyon's phone depicting guns. As described, however, those errors were not just harmless but resulted in little if no prejudice. The jury instruction, although phrased in terms of fabricating instead of suppressing evidence, was applicable to Kenyatta's case and could have easily been understood in the correct manner. Further, the gun photos merely showed close-up depictions of guns already shown to the jury. There was no cumulative error.

V

Kenyatta's Case Must Be Remanded For The Court To Decide Whether To Strike His Gun Enhancement

Kenyatta contends his case must be remanded so the trial court may exercise its discretion to decide whether to strike his gun enhancement. The People agree the recent amendment to section 12022.53 retroactively applies to Kenyatta and that he is entitled to a limited remand for the court to exercise its discretion pursuant to that amendment.

We agree with the parties that the amendment to section 12022.53 applies to Kenyatta. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) We also agree Kenyatta is entitled to a limited remand for the trial court to exercise its newly granted discretion to decide whether to strike the gun enhancement. Generally, when the record shows the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1895.) Accordingly, we will remand Kenyatta's case.

DISCUSSION REGARDING KEYON'S CLAIM

Keyon contends the trial court erred by instructing the jury, in an answer to its question, that it could find him guilty of being an accessory to a felony if it found he was an accessory to Kenyatta's possession of an assault weapon because the prosecution alleged in the information and argued throughout trial that Keyon was actually an accessory to murder. Keyon argues this error violated his right to due process because he was denied proper notice of the charge he needed to defend against and because the court was also required to instruct the jury with a unanimity instruction. He acknowledges his counsel did not object to the court's instruction and argues that as a result his counsel was ineffective. We disagree and will address Keyon's contentions in reverse.

I

Background

The information alleged that Keyon violated section 32, "in that said defendant did unlawfully, having knowledge that the crime of MURDER, a felony, in violation of Section 187 of the Penal Code of the State of California had been committed by KENYATTA BROWN, did harbor, conceal, and aid said KENYATTA BROWN, with the intent that he might avoid and escape from arrest, trial, conviction, and punishment for said felony." It also alleged that Keyon and Kenyatta possessed an assault weapon in violation of section 30605, subdivision (a).

Keyon's jury was instructed on being an accessory to a felony, as follows: "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. Another person whom I will call the perpetrator committed a felony; [¶] 2. The defendant knew that the perpetrator had committed a felony or that the perpetrator had been charged or convicted of a felony; [¶] 3. After the felony had been committed, the defendant either harbored, concealed, or aided the perpetrator; and [¶] 4. When the defendant acted, he intended that the perpetrator avoid and escape arrest, trial, conviction, or punishment. [¶] To decide whether the perpetrator committed the felonies of murder or manslaughter, please refer to the separate instructions that I will give you on those crimes." The court then instructed the jury regarding the elements of second degree murder, voluntary manslaughter, and involuntary manslaughter.

Keyon's jury was further instructed on the elements of possessing an assault weapon for the charged offense and was told it could rely on that instruction to determine whether Kenyatta committed a crime in a criminally negligent manner for the purposes of involuntary manslaughter.

During jury deliberations, Keyon's jury asked the court whether "[i]n considering the accessory charge (instruction 440) the instruction required the existence of 'a felony.' Can we consider the possibility Kenyatta committed the felony of possession of an

assault weapon?" Keyon's counsel and the prosecutor were notified of the question via e-mail and, without objection, the court responded, ""The answer is Yes. Please refer to CALCRIM 2560 [(the instruction for possession of an assault weapon)]."

II

The Court Was Not Required To Instruct The Jury With A Unanimity Instruction

Keyon argues his due process rights were violated because the court failed in its sua sponte duty to instruct the jury with a unanimity instruction after it had instructed it that Keyon could be found guilty of being an accessory to possession of an assault weapon. We disagree.

In a criminal case, the jury must agree unanimously the defendant is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.) When the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the trial court must require the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) When the prosecutor does not make the election, the trial court has a sua sponte duty to instruct on jury unanimity. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [Citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' " (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135.) "[W]here the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or . . . 'theory' whereby the defendant is guilty." (*Id.* at

p. 1132.) "In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at p. 1135.)

The People argue Keyon's case represents the second scenario and is analogous to *Perryman* where the court rejected the same claim advanced by Keyon. We agree. In *Perryman*, the defendant was convicted of being an accessory to a felony after she saw her codefendant attempt to rob and assault somebody. (*People v. Perryman* (1987) 188 Cal.App.3d 1546, 1547-1548.) On appeal she argued the trial court was required to instruct the jury with a unanimity instruction because it was unclear whether the jury believed she was an accessory to the attempted robbery or to the assault. (*Id.* at p. 1548.) The appellate court rejected this argument, reasoning that "[t]he number of underlying felonies is not determinative of defendant's guilt. Even if the defendant knew the principal committed more than one crime in a single transaction, he may be charged with only one act of being an accessory after the fact." (*Id.* at p. 1549.) The court continued, "As long as the jury found that defendant aided the principal with knowledge that she had committed some felony, that is sufficient to sustain the conviction. [Citation.] Even if we were to assume half of the jurors agreed that defendant acted with knowledge of one felony and the other half agreed that defendant knew of a separate felony, the crime is complete since all jurors agreed that defendant knew the principal committed some felony, although not the same one." (*Id.* at p. 1550.)

Similarly, Keyon was charged with being an accessory to a felony based on a single course of conduct -- Kenyatta's shooting of Joslynn with an assault weapon. He could not be charged or convicted of multiple accessory counts based on these facts and his culpability could not be determined by the number of felonies he knew Kenyatta

committed. Thus, this is not a case like *Hernandez*, on which Keyon relies, where the defendant committed multiple acts of possessing a firearm on different occasions and could be convicted separately for those acts. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 570-571.) Here, there was but one criminal act and the jury was permitted to disagree about how Keyon committed it. Accordingly, the court was not required to give a unanimity instruction.

III

Counsel Was Not Ineffective For Failing To Object To The Court's Instruction

Keyon contends his counsel was ineffective for failing to object to the trial court's instruction that the jury could find him guilty of being an accessory to a felony based on Kenyatta's commission of possessing an assault weapon because he had notice the accessory charge was based only on Kenyatta's commission of murder. We disagree.

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Kelly* (1992) 1 Cal.4th 495, 519-520.) "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90.) Here, had Keyon's counsel objected to the proposed jury instruction, it would have been overruled for being meritless, thus she was not ineffective.

"Due process requires that 'an accused be advised of the charges against him so that he has a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at . . . trial.' [Citation.] Thus, it is the rule that 'a defendant may not be prosecuted for an offense not shown by the evidence at the preliminary hearing or arising out of the transaction upon which the commitment was based.' " (*People v. Graff* (2009) 170 Cal.App.4th 345, 360.) " '[A]t a minimum, a defendant must be prepared to defend against all offenses of the kind alleged in the

information as are shown by evidence at the preliminary hearing to have occurred within the timeframe pleaded in the information.' " (*People v. Jones* (1990) 51 Cal.3d 294, 317.)

"The information plays a limited but important role -- it tells a defendant what kinds of offenses he is charged with and states the number of offenses that can result in prosecution. However, the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of due process notice to a defendant." (*People v. Jeff* (1988) 204 Cal.App.3d 309, 342.) Notice will be found "so long as (1) the information informs defendant of the nature of the conduct with which he is accused and (2) the evidence presented at the preliminary hearing informs him of the particulars of the offenses which the prosecution may prove at trial." (*Id.* at pp. 341-342.)

As described, Keyon could have been charged with only one accessory to a felony offense no matter how many felonies Kenyatta was alleged to have committed when shooting Joslynn. (See *People v. Perryman*, *supra*, 188 Cal.App.3d at p. 1549.) While the information alleged the felony was murder when alleging the accessory charge, the information also alleged that Kenyatta committed possession of an assault weapon. This gave Keyon notice that he would have to defend against a single crime of being an accessory and that the charge included the particular factual scenario encompassing Kenyatta's murder of Joslynn and possession of an assault weapon.

For these reasons, Keyon's case is not like *Burnett*, on which he relies. In *Burnett*, the defendant was charged with one count of "being a felon in possession of a firearm," specifically a " '.38 caliber revolver,' " and one count of brandishing a firearm on or about January 8, 1996. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 155-156.) During the preliminary hearing, the prosecutor introduced evidence that the defendant possessed and brandished a .38-caliber revolver. (*Id*. at p. 164.) No evidence was presented at the

preliminary hearing that would suggest the defendant possessed a revolver of any caliber other than a .38-caliber revolver. (*Ibid*.)

On the first day of trial, "over objection, the court granted the prosecution's motion to amend [the possession charge] by striking the words '.38 caliber' from the information." (*People v. Burnett*, *supra*, 71 Cal.App.4th at p. 156.) At trial, someone with whom the defendant had temporarily stayed before the charged incident, testified that the defendant had shown him a .357 magnum revolver, which he had locked away for safekeeping on January 4, 1996, and then returned to the defendant on January 7, 1996. (*Id*. at p. 157.) The prosecutor requested a unanimity instruction and argued to the jury that the defendant could be convicted for "either of two separate incidents, one of which was never the subject of the preliminary hearing." (*Id*. at p. 181, italics omitted.) The jury found the defendant guilty of being a felon in possession of a firearm. (*Id*. at p. 155.)

The appellate court reversed the defendant's conviction. It observed that "[t]he amendment of the information, combined with the prosecutor's argument at trial and the jury instructions, allowed the jury to convict [the defendant] solely on the basis of his possession of the gun observed by [the temporary roommate], even if it did not believe the testimony of [the other witnesses]." (*People v. Burnett*, *supra*, 71 Cal.App.4th at p. 170.) The court acknowledged that, technically, amendment of the information did not result in a charge of an offense not shown at the preliminary hearing; however, the amendment, coupled with the prosecutor's argument and jury instructions, allowed the defendant to be convicted solely on the basis of the incident he had no notice he could be convicted of. (*Id.* at pp. 173-177.) Here, however, Keyon had notice he could be convicted of being an accessory to possession of an assault weapon because the information alleged Keyon was an accessory and that Kenyatta committed the felonies of murder and possessing an assault weapon.

For similar reasons, Keyon's reliance on *Hess* is misplaced. There, our Supreme Court concluded a defendant could not be convicted of a crime not charged in the information and which was not a lesser included offense of a crime charged in the information. (*In re Hess* (1955) 45 Cal.2d 171, 174-175.) Keyon, however, was convicted of the crime charged in the information -- accessory to a felony -- and, as described, that crime can be charged only once and can be based on multiple felonies occurring during a single course of conduct. Accordingly, Keyon's counsel was not ineffective for failing to object to the court's instruction and the instruction did not violate due process.

DISPOSITION

Kenyatta's case is remanded for the trial court to exercise its newly granted discretion whether to strike his gun enhancement pursuant to section 12022.53, subdivision (h). The judgment is affirmed in all other respects.

Keyon's judgment is affirmed.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Mauro, J.