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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAVON LOVOWE RAMSEY,

Defendant and Appellant.

E052467

(Super.Ct.No. RIF146915)

OPINION

APPEAL from the Superior Court of Riverside County. Thomas E. Kelly, Judge.
(Retired judge of the Santa Cruz Super. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Lise S. Jacobson and Kristine
A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Victim Jonathan Meda got into a brief fistfight with one Aaron Ouimette. Ouimette then recruited defendant Ravon Lovowe Ramsey and others to beat up Meda. During the second fight, defendant upped the ante still further by pulling out a shotgun and shooting not only Meda, but Meda's girlfriend, Aunika Olea.

A jury found defendant guilty as follows:

Count 1: Premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)) of Jonathan Meda, with an enhancement for personally and intentionally discharging a firearm and causing great bodily injury (Pen. Code, § 12022.53, subd. (d));

Count 2: Premeditated attempted murder of Aunika Olea, with an enhancement for personally and intentionally discharging a firearm (Pen. Code, § 12022.53, subd. (d));

Count 3: Assault with a firearm (Pen. Code, § 245, subd. (a)(2)) on Jonathan Meda, with enhancements for personally using a firearm (Pen. Code, § 12022.5, subd. (a)) and personally causing great bodily injury (Pen. Code, § 12022.7, subd. (a)).

Count 4: Assault with a firearm on Aunika Olea, with an enhancement for personally using a firearm.

Defendant was sentenced to a total of 38 years 8 months to life in prison, plus the usual fines and fees.

Defendant contends:

1. The trial court erred by admitting extensive evidence of a prior misdemeanor to impeach defendant's mother; alternatively, defense counsel rendered ineffective assistance by failing to object to this evidence.

2. Defendant could not be convicted of both attempted murder and assault with a firearm, because the latter is a lesser included offense of the former.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *The Prosecution's Case.*

On November 28, 2008, at noon, Jonathan Meda; his girlfriend, Aunika Olea; and his friend, Jonathan Alvarado, went to a 99 Cent Store in Moreno Valley.

At the store, they encountered Aaron Ouimette. Ouimette went to the same high school as Meda and his friends.

Ouimette said something derogatory about Olea. Meda took offense, and he and Ouimette started throwing punches. Alvarado may or may not have joined in. When the owner of the store said he was going to call the police, they stopped. The fight was over in less than a minute, and no one was injured.

Meda's group then went to Honey Hollow Elementary School, where Meda and Alvarado were going to play football with some friends. They sat in Meda's truck, waiting for the friends.

After 10 or 15 minutes, however, Ouimette pulled up behind them, driving a black sports utility vehicle (SUV). Ouimette and some four to seven African-American males¹

¹ Ouimette himself was Caucasian or Hispanic.

got out and ran toward Meda's truck. Alvarado got out, and several of the men attacked him. Meda got out to defend Alvarado, and several of the men attacked him, too.

One member of Ouimette's group, Kesean Waldrip, was armed with a metal baseball bat. Meda "yanked" the bat away from him and started swinging it wildly, "[j]ust to back them off me." The bat hit Waldrip in the head, and he fell.

Ouimette said, "Get the burner" (meaning gun). Another member of Ouimette's group ran to the SUV and got a shotgun.

Meda got into his truck; Olea was still inside. They looked back and saw someone pointing a shotgun at them. That person fired the shotgun three or four times. Meda was struck by at least 50 pellets, in his face, back, arm, and hand. Olea was hit in the neck, back, and wrist.

When the police first interviewed Meda, he did not identify the shooter or claim to know him. Also, in a photo lineup, he failed to pick out defendant as the shooter.

At trial, however, Meda identified defendant as the shooter. He explained that, after he got out of the hospital, he had "flashbacks," and "[i]t just popped in [his] head" that he recognized defendant as the shooter. He had had "problems" with defendant in high school, arising out of a prevailing "blacks against Mexicans" atmosphere. He explained that he had failed to pick defendant out of the photo lineup because the photo "didn't look like" defendant.

In separate photo lineups, both Olea and Alvarado identified defendant as the shooter. At trial, however, they claimed they no longer remembered what the shooter looked like.

Ouimette gave police “two or three” of different accounts of the incident. In the final version, however, he identified defendant as the shooter.

At trial, Ouimette claimed that Meda started both fights. He admitted getting a gun from his car and brandishing it “to back them away.” However, no one else had a gun, and no shots were fired. According to Ouimette, defendant was not even present.

B. *The Defense Case.*

Kesean Waldrip testified that Ouimette picked him up, explaining that “he just got jumped” and he needed Waldrip so “it could be even numbers and we could fight fair.” After that, according to Waldrip, they picked up four other African-American males, but not defendant.

On cross-examination, however, Waldrip admitted that, due to his head injury, he did not remember anything that happened after he was picked up; the rest of his testimony was based on hearsay. The trial court therefore struck that testimony and admonished the jury to disregard it.

Defendant’s mother, Anthona Clifton, testified that on the day of the shooting, defendant was with her all day.

II

IMPEACHMENT OF DEFENDANT'S MOTHER/ALIBI WITNESS

Defendant contends that the trial court abused its discretion under Evidence Code section 352 by admitting unduly extensive evidence to impeach his mother.

A. *Additional Factual and Procedural Background.*

On direct, defendant's mother admitted having pleaded guilty to being an accessory, as a misdemeanor. She explained that a reposessor tried to run over her husband; in self-defense, her husband shot into the grille of the truck. "[T]hey said that I had hid the gun . . . , [but] I didn't."

On cross-examination, she claimed that she would not lie to protect her son, her husband, her family, or anyone. The prosecutor then attempted to impeach her with the details of the incident that led to her guilty plea. However, she continued to deny hiding her husband's gun. She testified that she told the police, truthfully, that she did not know where the gun was. She denied showing them a gun case (or a briefcase) with an empty holster. She also denied telling them that her husband had been at work since 6:00 p.m.: "That's what they put in the report. I did not say that."

The impeachment attempt took up 13 transcript pages. Defendant's mother became somewhat combative, asking, "How is this relevant to this case?" and exclaiming, "This is terrible" and "This is a bunch of crap." Finally, the trial court ruled, "Counsel, I am going to mercy kill this pursuant to [section] 352 [of the] Evidence Code." Later, it explained, ". . . I stopped the questioning[] because it was becoming a mini trial on

something tangential to the main case.” “. . . I don't want to make this into a trial on the 32.”

In rebuttal, the prosecution called Deputy Gabriel Dennington. His testimony (including cross-examination) took up 18 transcript pages.

In January 2008, Deputy Dennington testified, he responded to a report that one Robert Clifton had fired shots at a reposessor. When he arrived at Clifton's home, Clifton was gone, but he spoke to Clifton's wife – i.e., defendant's mother.

She said that Clifton had left for work at 5:00 or 6:00 p.m. (before the shooting). When the police asked how to get ahold of him, she phoned his employer, who said that he had not been to work for weeks. She then claimed that he was “out in the field.” Deputy Dennison concluded that she was lying and arrested her.

Based on shell casings found at the scene, the police were looking for a .357 Sig gun. When asked if there were any guns in the house, defendant's mother led them to a gun safe that contained other guns, but no .357 Sig.

The police then asked her specifically if her husband owned a .357 Sig. She replied that he had more guns in a briefcase, which she showed them. The briefcase contained a .40-caliber Sig and an empty holster for a second Sig. Deputy Dennison asked her where the gun was that matched the holster, and she said she did not know.

Robert Clifton then turned himself in. He admitted shooting at the reposessor. He also admitted asking his wife to get rid of the gun.

At the police station, Clifton told defendant's mother to "tell them where the gun is" She then told the police that the gun was in a shoe box in the closet. They found it there, hidden under a pile of clothes. She explained that she had lied because she was scared.

A transcript of Deputy Dennington's interview of defendant's mother was introduced into evidence.

B. *Analysis.*

Defendant contends that the impeachment evidence was more prejudicial than probative, in violation of Evidence Code section 352. At trial, however, defense counsel did not object on this ground. Accordingly, this contention has been forfeited. (Evid. Code, § 353, subd. (a).)

Defendant asserts: "A forfeiture does not prohibit an appellate court from reaching a nonpreserved issue, but merely allows it to do so," citing *People v. Williams* (1998) 17 Cal.4th 148. Actually, *Williams* states, "An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. [Citations.] Indeed, it has the authority to do so. [Citation.] *True, it is in fact barred when the issue involves the admission (Evid. Code, § 353) or exclusion (id., § 354) of evidence.* Such, of course, is not the case here." (*Id.* at p. 161, fn. 6, italics added.) Here, unlike in *Williams*, the issue *is* the admission of evidence. Defendant's forfeiture precludes us from reaching it.

Defendant also contends that his trial counsel's failure to object constituted ineffective assistance of counsel.

“ . . . ‘In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]’ [Citation.]” (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

As defendant concedes, the fact that his mother lied and concealed evidence was relevant to impeach her. However, “impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or

prejudice which outweighs its probative value.” (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297, fn. omitted.)

In this case, however, the evidence was extremely probative. Defendant’s mother was his alibi witness and hence a key defense witness. Indeed, given that most of Kesian Waldrip’s testimony was stricken, she was virtually the *only* defense witness. As defendant states, “The credibility of his mother’s testimony was essential.” And the impeachment evidence did not merely show that she had lied; it showed that she had lied to the police to protect a family member from criminal prosecution. Thus, it was directly probative of a tendency to give defendant a false alibi. Finally, the evidence did not merely show that defendant’s mother had lied in the past; it showed that she had lied about the prior incident to the jury in this trial while on the stand.

At the same time, we cannot say that the evidence was particularly prejudicial. Defendant mostly complains that it took up too much time. The prosecutor, however, could not be sure that defendant’s mother would deny the incident. If she had admitted it, it would have taken up very little time. Then, once she did deny it, the prosecutor had to spend additional time on cross-examination, trying to shake her story; when that failed, he had to call Deputy Dennison to contradict her. Altogether, we cannot say that 31 transcript pages out of a total of three days of testimony was excessive.

Defendant also argues that the evidence had a tendency to confuse the jury: “The way in which the prosecution browbeat Ms. Clifton over the specific facts of her misdemeanor conviction took focus away from the elements of the present case and gave

the jury the impression that Ms. Clifton's prior conviction somehow lessened the need to focus on the evidence of [defendant's] guilt." This is unfounded speculation. There is no reason why the jury, assisted by appropriate instructions and the arguments of counsel, would not have been able to understand the relevance of the evidence. As defendant himself asserts, "Mothers are known to lie for their children. That is not a hard concept for the jury to grasp."

Finally, in his reply brief, defendant argues that the evidence "gave the jury fodder to associate [defendant] with a lawless and violent upbringing." Actually, several facts tended to mitigate any such "spillover" effect. The evidence showed that Robert Clifton was a former police officer. He turned himself in, and he urged his wife to reveal the location of the gun; thus, he was obviously remorseful. None of the guns in the house was a shotgun. Deputy Dennington made it clear that defendant was not involved in hiding the gun, concluding, "[T]ruthfully, I don't think . . . [defendant] kn[e]w where the gun was."

In sum, if defense counsel had objected to the evidence based on Evidence Code section 352, the trial court could properly have overruled the objection. Accordingly, defense counsel's failure to object was not objectively unreasonable. Moreover, defendant cannot show that it was prejudicial.

III

MULTIPLE CONVICTIONS OF BOTH ATTEMPTED MURDER (WITH A FIREARM ENHANCEMENT) AND ASSAULT WITH A FIREARM

Defendant contends that, in light of the wording of the information, assault with a firearm is a lesser included offense of attempted murder, and therefore he could not be convicted of both.

“Generally, there is no limit to the number of convictions arising from a defendant’s act or course of conduct. [Citation.] But an exception exists for lesser included offenses. . . . [A] defendant may not be convicted of both the greater and the lesser offense. [Citation.]” (*People v. Milward* (2011) 52 Cal.4th 580, 585.)

In determining the propriety of multiple convictions, to determine whether an offense is a lesser included, we apply the “elements” test: “[W]e look strictly to the statutory elements, not to the specific facts of a given case. [Citation.] We inquire whether all the statutory elements of the lesser offense are included within those of the greater offense. In other words, if a crime cannot be committed without also committing a lesser offense, the latter is a necessarily included offense. [Citations.]” (*People v. Ramirez* (2009) 45 Cal.4th 980, 984-985.)

“[A]ssault with a deadly weapon ([Pen. Code,] § 245) is not an offense necessarily included within murder, even if the murder in fact is carried out with a deadly weapon. Murder requires proof of an unlawful killing of a human being committed with malice. [Citation.] Assault with a deadly weapon requires proof that a deadly weapon was used.

Because in the abstract a murder can be committed without a deadly weapon, assault with a deadly weapon is not an offense necessarily included within the crime of murder.

[Citations.]” (*People v. Sanchez* (2001) 24 Cal.4th 983, 988.) A fortiori, assault with a deadly weapon is not a lesser included offense of *attempted* murder. (*People v. Gragg* (1989) 216 Cal.App.3d 32, 41; *In re David S.* (1983) 148 Cal.App.3d 156, 159.)

Defendant argues that, instead of the “elements” test, we should use the “accusatory pleading” test. “Under the accusatory pleading test, a court reviews the accusatory pleading to determine whether the facts actually alleged include all of the elements of the uncharged lesser offense; if it does, then the latter is necessarily included in the former. [Citation.]” (*People v. Parson* (2008) 44 Cal.4th 332, 349.) Here, because the attempted murder charges in the operative information included allegations that defendant personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subs. (c), (d)), he concludes that they subsumed the lesser charges of assault with a firearm.

There are at least two separate problems with this argument.

First, the Supreme Court has held that, for purposes of the rule against multiple convictions, the accusatory pleading test does not apply. (*People v. Reed* (2006) 38 Cal.4th 1224, 1228-1231.) Defendant argues that *Reed* is distinguishable because “it applied to multiple convictions for the same conduct. (See [Pen. Code,] § 654.)” Quite frankly, we do not understand this argument. Penal Code section 654 deals with multiple punishment, not multiple convictions. As the court in *Reed* pointed out early in its

opinion, that case involved only multiple convictions; thus, it presented no issue involving Penal Code section 654. (*People v. Reed, supra*, 38 Cal.4th at p. 1227.) This case likewise involves multiple convictions. Accordingly, *Reed* is on point and controlling.

Second, the Supreme Court has also held that, even when the accusatory pleading test *does* apply, we must disregard any enhancement allegations; we must look only to the allegations regarding the substantive offense. (*People v. Wolcott* (1983) 34 Cal.3d 92, 100-101.) Defendant argues, however, that *Wolcott* is no longer good law in light of two later cases:

(1) *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], which held that a sentencing factor (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum is the “functional equivalent” of an element of an offense for purposes of the right to trial by jury and the requirement of proof beyond a reasonable doubt (*id.* at p. 494, fn. 19); and

(2) *People v. Seel* (2004) 34 Cal.4th 535, which held that a sentencing factor (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum is the “functional equivalent” of an element of an offense for purposes of double jeopardy (*id.* at p. 548).

The Supreme Court itself, however, rejected precisely this argument in *People v. Izaguirre* (2007) 42 Cal.4th 126. There, the court stated: “[D]efendant claims enhancements should be considered when applying the multiple conviction rule to

charged offenses They may not. . . . *Apprendi, supra*, 530 U.S. 466, requires only that the firearm-related enhancements below had to be found true by a jury beyond a reasonable doubt, which they were. *Seel*'s interpretation of the scope of the holding in *Apprendi* pertained to an aspect of federal double jeopardy protection — protection against a second prosecution for the same offense after acquittal — that is not implicated in this case. [Citation.]” (*Id.* at p. 134.)

Defendant’s briefs do not mention *Izaguirre*. Even after the People cited and discussed it in their respondent’s brief, defendant did not bother to address it in his reply. We can only conclude that he is unable to distinguish *Izaguirre* or to think of any other reason why we should not follow it. It requires us to reject his contention.

IV

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.