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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.

MABON DEMETRIC JAMES,

Defendant and Appellant.

E059918

(Super.Ct.No. FVI1301842)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Mabon James, of two counts of second degree robbery (Pen. Code, § 211),<sup>1</sup> dissuasion of a witness (§ 136.1, subd. (b)(1)), and using a knife during the latter and one of the robberies (§ 12022, subd. (b)(1)). In bifurcated proceedings, defendant admitted having suffered three convictions for strike priors (§ 667, subd. (b)-(i)), two convictions for serious priors (§ 667, subd. (a)(1)) and five convictions for priors for which he served prison terms (§ 667.5, subd. (b)). He was sentenced to prison for three consecutive terms of 25 years to life plus 16 years. He appeals, claiming the trial court erred in denying his motion for a mistrial, there was insufficient evidence to support his conviction for robbing the first victim and the sentencing court violated section 654 in imposing consecutive sentences for the second robbery and dissuasion of its victim. We reject his contentions, direct the trial court to correct an error in the abstract of judgment, made an addition to that abstract and otherwise affirm.

### **FACTS**

On June 20, 2013, at 6:00 p.m., the first and second victims, who were best friends and had been drinking together,<sup>2</sup> drove to a neighborhood liquor store in Adelanto in the second victim's car. The first victim stayed at the car while the second victim went inside the store to purchase cigarettes, soda and alcohol. The second victim testified that

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The second victim testified that she had consumed a half-pint of liquor, but she denied being intoxicated.

while she waited in line in the store, defendant, who was behind her, told her that his mother needed something to eat, he asked her if she had any money, and she gave him three \$1 bills.<sup>3</sup> The second victim returned to her car, placed her newly-purchased soda and vodka inside, returned her wallet to and put the cigarettes she had bought in her purse, which was on the driver's side front floorboard, and walked to another car in the parking lot to converse with two men there. The purse contained social security cards for her and her children, her driver's license or identification card, her credit cards, coins, her cell phone, a cigarette case and cigarettes. The first victim walked over to where the second victim was talking to the men to see what the latter was doing, leaving the unlocked car unattended. The second victim told the first victim to return to the car, as her purse was inside and accessible to anyone who happened by. As the first victim returned to the car, she saw defendant standing next to the driver's door holding cigarettes the first victim believed belonged to the second victim. The first victim asked defendant if he put the second victim's cigarettes back. The first victim testified that defendant punched her in the jaw with a closed fist and the second victim testified seeing this from 10 feet away and while defendant held a white handled knife by the blade in his other hand. The first victim screamed and the second victim returned to her car, but by the time she reached it, defendant was gone, having walked towards the back of the store to where dumpsters were located. The second victim told the first victim, "Come

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<sup>3</sup> The second victim admitted that she had not disclosed this to the authorities until the trial. The deputy who testified said that she had not mentioned this to him.

on . . . let's just go home.” When the second victim got in her car, she discovered that her wallet, money, cell phone and cigarettes had been removed from her purse. The second victim returned to the liquor store and asked to use their phone to call the police. She came out of the store with their cordless phone in her hand and went around the corner to where the dumpsters were to see where defendant, who had gone around the store and down the sidewalk, “was going.” The second victim testified that she yelled at defendant, who was perhaps 10-15 feet from her, “Do you have my stuff?” She also testified that defendant approached her, still holding the knife by its blade, hit the phone out of her hand and punched her in the face with his fist, knocking her to the ground. She testified that she got up and ran into another store in the strip mall and asked to use the phone there. The first victim testified that when the second victim later returned to the car, she had bruises and was upset. The first victim identified defendant during a show-up and identified the items that the police had seized from him as belonging to the second victim. The second victim testified that she had met defendant twice before June 20, 2013, and knew him as “Demetrius.”<sup>4</sup> She testified that she identified him during his post-detention show-up as the robber. She also testified that the police returned her

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<sup>4</sup> We note that defendant's middle name is “Demetric” and the probation report lists one of his aliases as “Demetric James Mabon.”

children's social security cards, her driver's license, credit cards, cigarette case<sup>5</sup> and cell phone.

The owner of the store into which the second victim went looking for a telephone testified that he heard a male and female screaming in the parking lot outside his store and heard the sounds of wrestling and saw defendant shaking the second victim, who was screaming, "Give me my wallet" or "Give me my phone" while holding her by the shoulders and defendant screamed in response. A short time later, the owner heard the sound of something hitting the ground and he looked to see a phone in pieces on the asphalt. Defendant walked off and the second victim followed him at about a distance of 50 feet, while continuing to scream at him. The second victim later entered the owner's store and asked to use his phone to call the police. The second victim told the owner that defendant had made her urinate on herself and he had hit her in the face. The owner had seen defendant in his store previously.<sup>6</sup>

A sheriff's sergeant testified that he had been dispatched to the scene of the crimes when he saw defendant walking fast through a field 150 yards away. Defendant matched the description of the robber the sergeant had been given. When the sergeant asked

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<sup>5</sup> The second victim testified that the police returned her cigarette case to her. However, the sergeant testified that he could not recall finding the cigarette case during his preliminary search of defendant. He also said, however, that he did not pull all the defendant's pockets out. The deputy who did the secondary search testified that he could not recall a cigarette case being retrieved from defendant in either search.

<sup>6</sup> The second victim denied that defendant grabbed her by the shoulders and shook her or that she followed him and yelled at him.

defendant his name, defendant gave his brother's name. Defendant was searched a few minutes after the sergeant's arrival at the scene. The white handle of a knife protruded from his back pocket and he had the sheath for the knife blade in his front pocket. He had on his person a social security card and a debit card, belonging either to the first or second victim, the second victim's identification card, two cell phones and cigarettes.

Another deputy who searched defendant a second time testified that defendant had in his possession, inter alia, the second victim's social security card, other people's social security cards, change and three \$1 bills. He testified that the second victim identified the money, cigarettes, cards and cell phones defendant had as hers. She said the knife found on defendant was the same one she had seen in his hand when he had hit the first victim and her. The deputy also testified that the first victim had a red mark and swelling on the left side of her face and the second victim had swelling and a red mark by her eye and on her cheek, swelling to the left side of her face, abrasions on her left elbow, knee and ankle and pronounced bruising to her upper left thigh. Pictures of her injuries were shown to the jury.

#### 1. *Motion for Mistrial*

During a side-bar hearing, a detective testified that he went to the scene of defendant's detention for one of the robberies and heard defendant give one of the deputies there his brother's name, Gil Johnson, as his own. Calling defendant by his true name, the detective asked defendant why he was lying. The detective further testified that he had had prior contacts with defendant.

The trial court ruled it was not going to allow the prosecutor to let the detective go into the fact that he had made contact with defendant before, unless defendant testified or defense counsel attacked the basis for the detective's knowledge that defendant was who he was. The parties debated the probative value of defendant giving his brother's name, rather than his own. The trial court ruled that people who give false names have some consciousness of guilt and evidence of this is not really prejudicial to the extent that the police do not testify that they knew who defendant actually was, due to their prior contacts with him. The trial court summarized its ruling that if the evidence was not extremely probative, it was extremely non-prejudicial. Specifically, the court ruled that the prosecutor could ask the detective if when he came upon the scene of defendant's detention as a possible perpetrator of the robberies, he heard someone ask defendant his name and defendant gave the name "Gil Johnson." The court added that the prosecutor could ask the detective if he was able to determine whether or not that was defendant's true name. The court added that "the stipulation"<sup>7</sup> would be that defendant is not Gil Johnson.

This detective was not called to testify at trial. Instead, a sergeant, who had detained defendant, testified that he saw defendant, who matched the description of the robber, 150 yards from the robbery scene crossing a field. The prosecutor then asked the

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<sup>7</sup> We're not sure to what the trial court was referring.

sergeant,<sup>8</sup> “When you saw [defendant], did you notice anything else in particular about him or—” and the sergeant interrupted him, saying, “[J]ust his description matching the description. [W]hen I asked him what his name was, he advised it was Gil Jackson.” The prosecutor then asked the sergeant if he had conducted a search of defendant, to which the sergeant responded in the affirmative. The prosecutor next asked the sergeant when he conducted a search of defendant and the former testified, “[A]fter he told me his name was Gil Jackson.” The sergeant then added, non-responsively, “I recognized him from prior contact.”

At side-bar, defense counsel moved for a mistrial, on the basis that the sergeant’s non-responsive last statement was a violation of the trial court’s order. The prosecutor said he had not had an opportunity to tell the sergeant “directly” that the jury was not to hear that information. The trial court found that there had not been a violation of its order because the prosecutor had not intentionally elicited the information from the sergeant, a matter the prosecutor affirmed, and the sergeant was unaware of the court’s ruling. The trial court denied the motion for mistrial, finding the testimony was not substantially prejudicial, because the previous contact between the sergeant and defendant could have been innocent, such as they could have run into each other at a ball game. The court

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<sup>8</sup> The trial court had just sustained defense counsel’s relevancy objection to the prosecutor’s question whether, at the time the sergeant saw defendant, the latter appeared to be sweaty. The prosecutor then asked the sergeant whether he made any other observations about defendant when he first viewed him and the sergeant asked the prosecutor to be clearer about what he meant.

offered to admonish the jury to disregard the statement, defense counsel said that would have been his next request and he said that was “fine.” Counsel added, “[The sergeant] can say he knew [defendant] wasn’t Gil Jackson, and that’s fine.” After a recess, the trial court instructed the jury to disregard the last question and answer.

Defendant here contends that the trial court abused its discretion in denying his mistrial motion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985, 986.) We disagree. As the prosecutor argued at the bench, just because there was contact (and we emphasize that the officer said “contact” and not “contacts”<sup>9</sup>) did not mean it was negative. Riverside juries know that in small communities, such as Adelanto, townspeople and law enforcement officers are familiar with each other for a variety of reasons. Moreover, the trial court instructed the jury to disregard the statement and we must assume the jury followed this directive. (*People v. Harris* (1994) 9 Cal.4th 407, 426.)<sup>10</sup> Finally, there was very strong evidence of defendant’s guilt. Even if the story told by the store owner, whom defense counsel argued to the jury was the only credible non-law enforcement witness at trial, somewhat contradicted the victims’ stories, it supported their claim that the second victim had been robbed by defendant in its most important aspects, i.e., that it was, indeed, defendant who had contact with the second victim at the time of the crimes, that the second victim screamed at defendant to give her either her wallet or her phone,

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<sup>9</sup> Defendant fails to appreciate this in his brief.

<sup>10</sup> For the same reasons, we reject defendant’s contention that the denial of his mistrial motion deprived him of his federal due process right to a fair trial.

that a phone had been smashed during the interaction between the two, that the second victim reported to the owner that defendant had hit her in the face and she had asked the owner to use his phone to call the police. Additionally, defendant was caught very soon after the crimes with the fruits of it in his possession, along with the knife, and there was no evidence that either victim had somehow caused her own injuries. Added to this is the fact that defendant deliberately misidentified himself to the police when apprehended. Although defense counsel during argument to the jury made much of the “fact” that the second victim’s cigarette case had not been found on defendant’s person, neither police officer positively testified that it had not been found (the deputy, who conducted the more thorough search simply could not recall if it had) and even if it had not been, defendant could have easily discarded it without being seen by either victim or the store owner as he went behind the store and down the sidewalk.

## *2. Insufficient Evidence of Possession*

As to the charged robberies, the jury was instructed, inter alia, that the property had to have been taken from “another person’s possession and immediate presence.” During argument to the jury, the prosecutor said that the second victim’s items that were stolen were in the possession and control of the first victim when defendant took them because the second victim had told the first victim to return to the car and “watch over and maintain” them. Defense counsel argued, in part, that defendant was not guilty of robbing the first victim because the first victim did not possess the second victim’s property.

Defendant here contends that there was insufficient evidence that the first victim possessed the second victim's property. He acknowledges that constructive possession exists where the robbery victim has a "special relationship" with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*People v. Scott* (2009) 45 Cal.4th 743, 750.) Defendant asserts that the first victim "had no . . . constructive possessory interest in [the second victim's stolen] property at any time . . . ." We disagree. The second victim, upon realizing that the first victim was no longer at her car, guarding her possessions in the car, told the first victim to return to the car, impliedly telling her to do precisely that. That established the special relationship between the first and second victims concerning the property. The fact that the first victim felt it "her place" to demand of defendant that he return the second victim's cigarettes further established that such a relationship existed, which gave the first victim "standing" to demand the return. It was at that point that defendant applied the force, i.e., hitting the first victim in the jaw, required to retain possession of the property. Thus, this case is like *People v. Bekele* (1995) 33 Cal.App.4th 1457 (*Bekele*) [overruled on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13, 14], in which a coworker of the property's owner was found to have constructive possession of the property because the owner, upon him and the coworker seeing the defendant burglarize the owner's truck, said to the coworker, "Let's stop. There is somebody in my truck." (*Bekele*, at pp. 1460-1462.) The appellate court reasoned, "[T]he evidence demonstrated that [the coworker] had a representative capacity with respect to [the

owner's] property, in that he had implied authority from [the owner] to take action to prevent its theft. When [the owner] saw his truck being burglarized, he said to [the coworker], 'Let's stop.' The two of them acted in concert to interrupt the burglary; they simultaneously left [what they were doing] to approach [the owner's] truck, and both told [the defendant] to stop. The obvious implication was that [the owner] wanted [the coworker] to help safeguard [the owner's] property by putting a stop to the theft. [The coworker] was acting in that capacity when he struck [the defendant] and then chased after him, yelling[,] 'Stop, drop the bag.' [The coworker's] position was analogous to that of the security guard who has constructive possession, though not immediate control, of the property he is charged with safekeeping." (*Id.* at p. 1462.)

We disagree with defendant that *Bekele* is distinguishable from the instant case because the owner of the property and the coworker in the former were "in the course of employment" unlike the first and second victims. The owner and coworker in *Bekele* did not pursue the robber in the course of their employment—we greatly doubt that if the coworker had been injured during his interaction with the robber, he would have qualified for worker's compensation. Rather, the fact that they were coworkers created a relationship between the two, such that the owner entrusted his coworker to help him safeguard his property. Here, the fact that the first and second victims were best friends established the same type of relationship. To whatever extent the California Supreme Court has expressed reservations about the owner's words, "Let's stop. There is somebody in my truck" implied authority from the owner to the coworker to take action

to stop the theft (*People v. Nguyen* (2000) 24 Cal.4th 756, 762, fn. 2), the words of the second victim here more clearly conveyed the authority she delegated to the first victim to act on her behalf in protecting her property.

We also agree with the People that *Sykes v. Superior Court* (1994) 30 Cal.App.4th 479 (*Sykes*) and *People v. Galoia* (1994) 31 Cal.App.4th 595 (*Galoia*) are distinguishable. In *Sykes*, a security guard employed by a business across the street from a music store, ordered to stop and chased down someone who had stolen a saxophone from the music store. (*Sykes, supra*, 30 Cal.App.4th at 481.) Distinguishing other cases, the appellate court concluded that the security guard “had no special obligation to protect the goods of [the music store]. Nor did [he] constructively possess the saxophone, because he was not an employee of the owner . . . . [¶] . . . Constructive possession depends upon a special relationship with the owner of the property . . . . The fact [that the security guard] was employed as a guard for another business did not make him an agent of [the music store].” (*Id.* at p. 484.) Here, as we have already concluded, there was a relationship between the first and second victim and the second victim relied on the first victim to protect her possessions.

In *Galoia*, a convenience store “customer” left without paying for the merchandise he had taken. (*Galoia, supra*, 31 Cal.App.4th at 596, 597.) A man who was in the store retrieving money from the video games he owned there, chased the “customer” and was struck by the latter’s companion. (*Id.* at p. 597.) Division Three of this court reasoned, “[The video games owner] was not an employee or agent of the . . . store. Nor was he in

any way responsible for the security of the items taken. Yet, the [People] maintain . . . [that the video games owner] was acting under the ‘implicit authorization’ of the store when he pursued [the “customer.”] The [People] rel[y] on the fact that a store worker followed [the video games owner] outside and yelled for help after [the later] was hit. However, no one from the store instructed [the video games owner] to give chase, and there is no evidence [he] was motivated by anything other than good citizenship. Under these circumstances, we must reject the [People’s] ‘implicit authorization’ argument.” (*Id.* at pp. 597-598.) Here, in contrast, no authorization by the second victim had to be implied, the second victim instructed the first victim to safeguard her possessions and the first victim was acting out of friendship, not good citizenship. In comparing the facts in *Galoia* to those in *Sykes*, the *Galoia* court went on to state, “Like the guard in *Sykes*, [the video games owner] was well intended. But good motives alone cannot substitute for the special relationship needed to create a possessory interest in the goods.” (*Id.* at p. 599.) Here, there was such a special relationship.

### 3. *Sentences for Robbing the Second Victim and Dissuading Her*

The sentencing court imposed a consecutive term for dissuading the second victim from reporting a crime to the police. The prosecutor argued to the jury that defendant “maliciously tried to prevent or discourage [the second victim] from making a report that she was the victim of a crime to police” when he “tried to prevent [her] from calling 911, from notifying the authorities that a crime had just happened.” In arguing that defendant acted maliciously, i.e., that he intended to annoy, harm or injure the second victim, the

prosecutor pointed out that defendant punched the second victim in the face, causing her to fall to the ground. In arguing that the fact that defendant acted maliciously could be proved in an alternate way, i.e., that defendant intended to interfere with the orderly administration of justice, the prosecutor pointed out that defendant had slapped the phone out of the second victim's hand, thus preventing her from calling 911, adding, "[a]nd then after he saw the phone had been destroyed on the ground, he then punched her." As to the robbery of the second victim, the prosecutor argued that the force element occurred when defendant punched her in order to retain her property and the alternative fear element occurred, but it was unclear whether that was based merely on the punch or on the punch and slapping the phone out of her hand.

Defendant does not advance his better argument that section 654 prohibits punishment for both offenses until his reply brief. Of course, at that point, the People have no opportunity to respond. In his reply brief, defendant calls our attention to the holdings of *People v. Mesa* (2012) 54 Cal.4th 191, 199 (*Mesa*), *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*) and *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*). In *Mesa*, the defendant, an ex-felon and gang member, shot a victim. (*Mesa, supra*, 54 Cal.4th at p. 193.) The California Supreme Court concluded that the defendant could not be punished for the substantive gang offense (§ 186.22, subd. (a)) in addition to being punished for assault with a firearm and possession of a firearm by an ex-felon. (*Mesa*, at p. 195.) The court said, "Whether multiple convictions are based upon a single act is determined by examining the facts of the case. . . . [¶] . . . [¶] . . . The only acts shown by the

evidence . . . were that defendant possessed the firearm and shot [the] victim. These two acts resulted in three separate punishments . . . . [¶] . . . [¶] [The ]defendant’s sentence for the [substantive] gang [offense] violates section 654 because it punishes defendant a second time either for the assault with a firearm or for possession of a firearm by a felon. . . . [¶] . . . [¶] Our case law has found multiple criminal objectives to be a predicate for multiple punishments only in circumstances that involve, or *arguably involve, multiple acts*. The rule does not apply where, as here . . . the multiple convictions at issue were *indisputably based upon a single act*. . . . [¶] . . . [¶] . . . Here, the evidence of the shooting or firearm possession offenses committed by defendant was the only evidence [of the third element of the substantive gang offense].” (*Id.* at pp. 196-197, 199-200.) Our high court called attention to *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1346, in which “‘the parties agreed [that the defendant’s] two convictions arose from a single act’” and *People v. Louie* (2012) 203 Cal.App.4th 388, 397, holding, “‘A single criminal act, even if committed incident to multiple objectives, may be punished only once.’” (*Mesa*, at p. 199.)

Although the facts of *Jones* (possession of single firearm punished under three different provisions) and *Correa* (possession of seven different firearms) are so dissimilar to the instant facts that their specific holdings are of little assistance here, some of the language in *Jones* is. “We recognize that what is a single physical act might not always be easy to ascertain. In some situations, physical acts might be simultaneous yet separate for purposes of section 654.” (*Jones, supra*, 54 Cal.4th at p. 358.) The court went on to

point out that the jury had convicted the defendant of three gun possession crimes based on his being caught with a single gun on a particular day in his car and “the prosecutor’s entire jury argument based defendant’s guilt on his possessing the gun when arrested and not earlier.” (*Jones*, at p. 359.) The high court in *Jones* contrasted cases involving a single act with those involving a course of conduct, for which the intent and objective test is appropriate. (*Id.* at p. 359.) It suggested that in single act cases, there is no need to determine the defendant’s intent and objective—the fact that the defendant’s convictions are based on a single act triggers a stay under section 654. (*Id.* at p. 360.)

Finally, another case decided soon after *Mesa*, *Jones* and *Correa* were decided held that where the prosecutor makes an election as to the act that supports a conviction, that election dictates the basis for that conviction for purposes of section 654. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1368; *People v. Siko* (1988) 45 Cal.3d 820, 826.) “[W]here there is a basis for identifying the specific factual basis for a verdict, a trial court cannot find otherwise in applying section 654.” (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339.) Unfortunately, here, the prosecutor did not make an election, thus allowing the jury to find the “acted maliciously” element of dissuasion on either the punch or the smashing of the phone, or, arguably, both. Similarly, he invited the jury to find the force element of the robbery on the basis of the punch, and the alternate fear element on the slapping of the phone or the punch and slapping of the phone. We have no way of knowing on what the jury actually based its conviction of either crime. Therefore, we have no choice but to determine, from the facts, whether the sentencing

court's implied finding that there was more than one act is supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.)

There was substantial evidence adduced at trial that the act underlying the dissuasion of the second victim was separate from the act of robbing her. The former was comprised of defendant knocking the phone out of her hand to prevent her from calling 911, the latter was punching her when she demanded the return of her possessions. Having so concluded, we next determine whether the sentencing court's implied finding that there were separate intents or objectives for these two crimes is supported by the evidence. (*Ibid.*) Again, we conclude that there was. Defendant's intent and objective as to the robbery was to obtain the second victim's possessions. His intent and objective as to the dissuasion was to stop her from calling 911 to report the robbery.<sup>11</sup> Therefore, the sentencing court did not violate section 654 by imposing sentences for both offenses.

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<sup>11</sup> The only case, amongst the many cited by defendant, that is at least arguably helpful to our analysis is *People v. Niles* (1964) 227 Cal.App.2d 749, because it involves crimes similar to those here. In *Niles*, the appellate court concluded that the defendant could not be punished for both burglarizing the victim's room, then assaulting the victim during a scuffle which followed the defendant threatening the victim if the latter called the police. The appellate court reasoned that the burglary and the assault were part of one indivisible transaction because the defendant committed the latter in order to avoid being apprehended for the former. (*Id.* at p. 755.) However, we note that at the time, there was no separate offense prohibiting witness dissuasion.

**DISPOSITION**

The trial court is directed to amend the abstract of judgment to show that it stayed the one-year enhancement for defendant's use of a knife as to the robbery of the second victim (count 2) and imposed the enhancement as to the dissuasion of the second victim (count 5), not the other way around, as the abstract currently states. The trial court is further directed to check box number eight on the abstract of judgment, indicating that defendant was sentenced under the provisions of section 667, subdivisions (b)-(i). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

McKINSTER

J.

KING

J.