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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SALUD LOYA,

Defendant and Appellant.

F063177

(Super. Ct. No. F09400467)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Stephen Gilbert, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Jose Salud Loya was convicted after jury trial of seven felony offenses: attempted murder of a peace officer (Pen. Code, §§ 664/187, subd. (a); count 1),¹ assault with a firearm upon a peace officer (§ 245, subd. (d)(1); count 2), possession of a firearm by a convicted felon (former § 12021, subd. (a)(1); counts 3 & 4); possession of ammunition by a convicted felon (former § 12316, subd. (b)(1); count 5),² possession of marijuana for sale (Health & Saf. Code, § 11359; count 6), and transportation of more than 28.5 grams of marijuana (Health & Saf. Code, § 11360, subd. (a); count 7).

Appellant was convicted of one misdemeanor offense: possession of a device used for unlawfully smoking a controlled substance (Health & Saf. Code, §11364; count 8). The jury found true special allegations attached to counts 1 and 2 that appellant personally used a firearm within the meaning of sections 12022.53, subdivision (b) and 12022.5, subdivisions (a) and (d), and that he personally discharged a firearm within the meaning of section 12022.53, subdivision (c). The court found true a special allegation that appellant served one prior prison term within the meaning of section 667.5, subdivision (b). Appellant was sentenced to life imprisonment with the possibility of parole plus a consecutive term of 21 years' imprisonment.

¹ Unless otherwise specified, all statutory references are to the Penal Code.

² The Deadly Weapons Recodification Act of 2010 repealed and recodified former sections 12000 to 12809 without substantive change. (§§ 16000, 16005; Cal. Law Revision Com. com., 51D pt. 2 West's Ann. Pen. Code (2012 ed.) foll. § 16000, p. 317.) Former sections 12021 and 12316 were repealed by Statutes 2010, chapter 711 (Sen. Bill No. 1080), section 4, operative January 1, 2012. (Historical and Statutory Notes, 51D pt. 1 West's Pen. Code (2012 ed.) foll. §§ 12010 to 12021.3, p. 48; Historical and Statutory Notes, 51D pt. 1 West's Ann. Pen. Code (2012 ed.) foll. §§ 12316 to 12325, p. 293.) Former section 12021, subdivision (a) (1) was recodified at section 29800, subdivision (a)(1). Former section 12316, subdivision (b)(1) was recodified at section 30305, subdivision (a)(1).

Appellant argues that the trial court prejudicially erred by failing to give a unanimity instruction on the ammunition possession charge (count 5). Also, he contends that imposition of separate sentences on counts 3, 4, and 5 violated the proscription against multiple punishment for a single act (§ 654). Neither contention is persuasive. The judgment will be affirmed.

FACTS

A. Prosecution Evidence

At approximately 1:40 a.m. on November 30, 2009, City of Parlier Police Department Sergeant Donald Wallace was on patrol in a marked vehicle traveling eastbound on Manning Avenue. He observed a sports utility vehicle swerve within its lane and then pull off the roadway. Sergeant Wallace decided to conduct a vehicle check. Appellant was alone in the vehicle. Sergeant Wallace observed a can of beer in a cup holder. He also observed a purse resting on the passenger seat; the purse's contents were scattered on the seat.

Sergeant Wallace asked appellant if the beer belonged to him. Appellant answered in the negative. Appellant picked up the beer can and held it out towards Sergeant Wallace. When the officer reached for it, appellant pulled it back inside the vehicle. Appellant repeated this action. Sergeant Wallace asked appellant for identification. Appellant appeared to be nervous and reached for the vehicle's front center console.

Sergeant Wallace opened the driver's door and asked appellant to step out of the vehicle. Appellant complied. Sergeant Wallace directed appellant to turn around and place his hands on top of his head. Appellant turned around and briefly placed his hands behind his head but then dropped his left hand towards his waistband. Sergeant Wallace grabbed appellant's right hand with his left hand and drew his service weapon with his right hand. Sergeant Wallace directed appellant to show his left hand. Appellant brought

his hand up but then dropped it back down. Sergeant Wallace radioed for backup assistance. He directed appellant to let him see his hands six to seven times.

Appellant began to push his body against Sergeant Wallace's body as if he was trying to turn around. Sergeant Wallace moved appellant away from the vehicle as a prelude to placing him on the ground. He heard an object hit the ground and saw that it was a glass methamphetamine pipe.

Sergeant Wallace unsuccessfully used his left leg to sweep appellant's left leg in an attempt to cause him to fall on the ground. Then he kned appellant on the back of the left leg, causing appellant to drop down on one knee and fall forward. Sergeant Wallace told appellant that he was under arrest. Appellant responded, "Okay. Okay. I give up."

Appellant tried to stand up. He was balancing on his left knee and his left hand came up. Sergeant Wallace realized that appellant was now holding a black revolver in his left hand. The revolver appeared to be a .38-caliber weapon. Sergeant Wallace pushed appellant away. Appellant pointed the gun back over his left shoulder with his elbow parallel with his shoulder. The gun's muzzle was pointed in the direction of Sergeant Wallace's face. Appellant fired a single shot. Sergeant Wallace saw the flash from the barrel and heard the sound of a gunshot.

Appellant sprinted away, heading towards a nearby orchard. Sergeant Wallace ordered appellant to stop. Appellant turned and started to raise his left arm. Sergeant Wallace fired three shots at him. Sergeant Wallace then backed up to gain cover. Appellant continued running into the orchard.

Sergeant Wallace alerted dispatch that shots had been fired. Sergeant Wallace testified that when Parlier Police Department Officer Richard Rubalcaba arrived at the crime scene, Sergeant Wallace said to him, "He shot at me Ruby." Officer Rubalcaba testified that when he arrived at the crime scene, Sergeant Wallace was checking his body for injuries. He appeared "shocked, scared, shaken up."

At approximately 3:00 a.m., appellant was located in a vineyard approximately one mile away from the crime scene. He was arrested without incident. Appellant had a wallet on his person. It contained \$1,222 in cash. During an in-field show-up, Sergeant Wallace identified appellant as the person who shot at him.

Sergeant Wallace realized that he had a quarter-inch scratch on his forehead above the bridge of his nose. At a later point in time, Sergeant Wallace noticed that he suffered some loss of hearing.

Appellant was not armed at the time of his arrest. Police officers searched the crime scene and the area where appellant was arrested for a gun. To the extent possible, police officers followed appellant's footprints from the crime scene to the location of his arrest and searched a swatch on either side of the footprints. They did not find a gun.

Appellant's hands were bagged to preserve any gunshot residue that might be on them. Jackie Fox, a member of the crime scene unit of the Fresno County Sheriff's Department, tested appellant's hands for gunshot residue at approximately 3:40 a.m. Appellant's shirt, sweatshirt, tennis shoes and wallet were collected and booked into evidence. Sergeant Wallace's uniform was not collected.

In the open area of the front center console of appellant's vehicle, officers found a black plastic bag containing 16 rounds of .45-caliber ammunition. A plastic baggie containing 18.713 grams of marijuana and a .22-caliber pistol that was wrapped in a brown handkerchief were found inside the front center console. The .22 revolver was loaded with six rounds of .22-caliber long rifle ammunition. One round of nine-millimeter ammunition was found underneath the front passenger seat.

Fresno County Sheriff's Department Detective Ramiro Rodriguez is a certified canine handler. His canine partner sniffed the exterior of the vehicle and alerted to the vehicle in two places: the center console and the left rear quarter panel area. Seven individually packaged baggies of marijuana inside one large plastic bag were recovered from the inside of the vehicle's rear driver's side body molding for the wheel well. The

combined gross weight of the marijuana was 202.9 grams. Each of the baggies contained between 25.210 grams and 28.3495 grams of marijuana. Masking odors had been placed in the back of the vehicle: powdered detergent was sprinkled on the carpet and there were three air fresheners and an open box of fabric softener sheets.

Fresno County Sheriff's Department Deputy Brandon Pursell testified as an expert in the area of marijuana for sales. He opined that the marijuana found in the vehicle was possessed for the purpose of sale.

It was stipulated with respect to counts 3, 4 and 5 that appellant previously was convicted of a felony.

B. Defense Evidence

Gary Cortner, who is an independent forensic consultant, testified as an expert in the area of criminalistics. He opined that after a .38-caliber revolver is fired, gunshot residue will be found in an area up to about three and a half to four feet away and will be found adhering to skin and fabric.

Mr. Cortner reviewed a document entitled "Los Angeles Department of the Coroner Forensic Science Laboratory Analytical Report" that contained the results of the gunshot residue test on appellant's hands. No gunshot residue was detected on appellant's hands. Mr. Cortner opined that the absence of gunshot residue on appellant's hands could mean that appellant did not fire a gun. It could also mean that appellant fired a gun but no gunshot residue was deposited on his hands. Finally, it could mean that appellant fired a gun but the gunshot residue was removed before his hands were tested by an activity such as washing his hands.

Mr. Cortner testified that he reviewed a report authored by Valerie Bernardi, a criminalist with the Fresno County Sheriff's Department, regarding her analysis of the shirt and sweatshirt appellant wore when he was arrested. Ms. Bernardi did not find any gunshot residue on either item. Mr. Cortner opined that the absence of gunshot residue on appellant's shirt and sweatshirt reasonably could be interpreted to mean either that

appellant fired the gun from too far away to leave gunshot residue on his clothing or to mean that appellant had not fired a gun.

Mr. Cortner testified that he conducted an experiment during which he fired .38-caliber ammunition from a .357-caliber revolver that was positioned one inch away from fabric and three inches away from fabric. He visibly observed gunshot residue on the fabric when it was located one inch away from the revolver but did not observe gunshot residue when it was located three inches away from the revolver. Mr. Cortner testified that a criminalist employed by the Fresno County Sheriff's Department had conducted a similar test and had detected residue at a distance farther than he had.

Valerie Bernardi, a criminalist with the Fresno County Sheriff's Department, testified that she visually examined appellant's shirt and sweatshirt for the presence of gunshot residue and did not observe any residue. She also testified that she had conducted the test referenced by Mr. Cortner in his testimony and obtained the results he described.

The defense presented the transcript of Sergeant Wallace's testimony at the preliminary hearing. Sergeant Wallace testified that when appellant pointed the gun at him, he held "his left hand over the back of his shoulder ... pretty much adjacent to the left side of his head." The gun's barrel was located "about a foot" away from Sergeant Wallace's face when appellant pointed it towards him.

Ty Kharazi, who formerly represented appellant, testified that he visited appellant on December 1, 2009. Kharazi did not observe any injury on appellant's left ear. At times, Kharazi spoke in whispers to appellant. Appellant did not exhibit any difficulty hearing him.

DISCUSSION

I. Failure To Give A Unanimity Instruction In Connection With Count 5 Was Harmless Beyond A Reasonable Doubt

A. Facts

A black plastic bag containing 16 rounds of .45-caliber ammunition was found in the open area of the vehicle's front center console. A .22-caliber pistol loaded with six rounds of .22-caliber long rifle ammunition was found inside the vehicle's front center console. One round of nine-millimeter ammunition was found underneath the front passenger seat of the vehicle.

Appellant did not proffer any evidence showing that the vehicle did not belong to him or that the ammunition belonged to someone else. During cross-examination of Jackie Fox, a crime scene unit technician with the Fresno County Sheriff's Department, defense counsel elicited testimony that no fingerprints were found on the .22-caliber ammunition. On redirect examination, Fox testified that it would be difficult, but not impossible, to lift a latent print off a .22-caliber cartridge.

During the instructional conference, the prosecutor stated, "In relation to the [section 12316, subdivision (b)] charge, the ammunition, we don't need any sort of unanimity there; correct? [¶] It's just whether he possessed ammunition. That could be any of the ammunition based upon the fact that it's just one charge of that."

The court replied, "I believe that's correct. [¶] ... [¶] And I don't think it's like the guns, where you have two guns and they would have to agree on which gun. I think any of the ammo would be sufficient. [¶] ... [¶] Now, if you have 37 counts of ammunition, they'd have to agree that there were 37 bullets."

The prosecutor said, "That's why it's only charged one time in the Information."

Defense counsel did not participate in this colloquy.

The jury was instructed on the elements of the crime of possession of ammunition by a convicted felon in violation of section 12316, subdivision (b)(1) with CALCRIM

No. 2591. In relevant part, CALCRIM No. 2591 provides: “To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant possessed ammunition; [¶] 2. The defendant knew he possessed the ammunition; [¶] AND [¶] 3. The defendant had previously been convicted of a felony.”

The court did not give a unanimity instruction in connection with the ammunition possession charge (count 5). It did give a unanimity instruction (CALCRIM No. 3500) in regard to the firearm possession charges (counts 3 and 4).

During the prosecutor’s closing argument, he made the following remarks concerning the ammunition possession charge:

“Count 5, the defendant is charged with unlawfully possessing ammunition. We heard testimony about a lot of different ammunition that the defendant possessed. We know that he possessed ammunition in this gun ([the .22-caliber revolver found in the vehicle’s center console]), this gun was loaded when it was found. We know that Jack Fox [(Fresno County Sheriff’s Department crime scene technician)], when he searched the [vehicle] about a week after the incident, located a round of 9mm ammunition in the [vehicle]. We know that right next to where [defendant] kept his back-up weapon, his beer, his soda cup, and a bag of weed right in the center console, not even concealed in the console, we know [defendant] kept that black bag right there, that shiny wrapper (indicating). We know he kept that full of ammunition as well. 16 rounds of [.45-caliber] ammunition were seized there.

“Now, in this case, ladies and gentlemen, as long as you all agree that the defendant possessed at least one bullet, it doesn’t matter if you agree on which bullet he had, as long as you agree that he had at least one bullet in his possession, your verdict to Count 5 is guilty.”

During defense counsel’s closing argument, he made the following remarks concerning the ammunition possession charge:

“There’s no evidence that he’s the owner of that car. There’s a lady’s purse in the front seat. What does that tell you? I don’t know. But you can make a reasonable inference that somebody was seated there recently....

“But when we’re talking about a bullet underneath the passenger’s seat that appears to have been there for a while, knowledge of that

.45-caliber, knowledge of the tied, black plastic container that has 16 bullets in it, 30 caliber. You have to open up the compartment in the console area just to get to the marijuana. You can see the plastic cup near the driver, the closed Budweiser beer on the other side, the closed console area (indicating).

“That’s evidence. Jack Fox says he took fingerprints of everything with negative results. What does that tell you? It doesn’t tell you anything. But according to [Fresno County Sheriff’s Department Deputy Brandon] Pursell, if you’re driving, you’ve had it.”

Defense counsel also argued:

“There’s an allegation of knowingly possessing a .45-caliber or a 9mm bullet, a felony. This is the bullet found in the back rear—in the bottom of the passenger’s seat near the bolt that holds the seat down (indicating). See all the trash around it? And there’s other photographs that show it in a different position. Here is a closer view of the closed compartment. This is the top (indicating). And you have to open it to get to its contents.

“Now, there’s [a] lady’s purse, ladies watch, two cell phones, and Wallace says Mr. Loya was on the cell phone when he pulled up, and there’s no evidence what the others were used for. But you have the purse and you have the lady’s watch, and you have beer on that side.

“That doesn’t add up to knowledge.”

B. The Trial Court’s Determination That A Unanimity Instruction Was Not Required Was Erroneous As A Matter Of Law

Appellant argues his conviction for possessing ammunition in violation of former section 12316, subdivision (b)(1)³ must be reversed because the trial court failed to instruct the jury that it must unanimously agree on the ammunition that he possessed in order to find him guilty of this crime. As will be explained, the trial court erred by failing to give a unanimity instruction. Appellant was not prejudiced by the instructional

³ Former section 12316, subdivision (b)(1) provided: “No person prohibited from owning or possessing a firearm under Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition.”

omission, even if it is assessed under the stringent standard of harmless beyond a reasonable doubt.

A criminal defendant is entitled to a unanimous jury verdict as a matter of due process under the state and federal Constitutions. (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1588.) “Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime.” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) “From this constitutional origin, the principle has emerged that if the prosecution shows several acts, each of which could constitute a separate offense, a unanimity instruction is required. [Citations.] [¶] ... By giving the unanimity instruction[,] the trial court can ensure that a defendant will not be convicted when there is no agreement among the jurors as to which single offense was committed.” (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) In any case in which the evidence would permit the jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. If the prosecution does not make an election, the court has a sua sponte duty to give an instruction stating the jury must unanimously agree upon the act or acts constituting the crime. (*People v. Arevalo-Iraheta, supra*, at pp. 1588-1589.)

In this case, the trial court ruled that a unanimity instruction was required in connection with the firearm possession charges (counts 3 and 4) but was not required in connection with the ammunition possession charge (count 5). She reasoned, “And I don’t think it’s like the guns, where you have two guns and they would have to agree on which gun. I think any of the ammo would be sufficient. [¶] ... [¶] Now, if you have 37 counts of ammunition, they’d have to agree that there were 37 bullets.” This ruling was erroneous as a matter of law; the trial court erred by failing to give a unanimity instruction.

People v. Wolfe (2003) 114 Cal.App.4th 177, held that a unanimity instruction was required where the defendant’s “possession of the various firearms was ‘fragmented as to

space.”” (*Id.* at p. 185.) Likewise, in this case three different types of ammunition were found in three different places in the vehicle: the 16 rounds of .45-caliber ammunition in the center console, the single round of nine-millimeter ammunition on the floor and the six rounds of .22-caliber ammunition in the .22-caliber pistol. Three separate acts of illegal ammunition possession were proven by the evidence, each of which constituted a violation of former section 12316, subdivision (b)(1). The prosecutor did not elect between these acts. Therefore, the trial court had a sua sponte obligation to give a unanimity instruction in connection with the ammunition possession charge. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [unanimity instruction required where the evidence proved “three separate acts forbidden by law charged, any one of which could constitute one element of the offense”].)

C. The Instructional Omission Was Harmless Beyond A Reasonable Doubt

We turn to an assessment of prejudice. “There is a split of authority on the proper standard for reviewing prejudice when the trial court fails to give a unanimity instruction.” (*People v. Vargas* (2001) 91 Cal.App.4th 506, 561.) Some appellate cases hold that the failure to instruct on unanimity is of constitutional dimension and apply the test enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) requiring reversal unless the error is harmless beyond a reasonable doubt. (See, e.g., *People v. Melhado, supra*, 60 Cal.App.4th at p. 1536.) Other cases apply the test from *People v. Watson* (1956) 46 Cal.2d 818, 836 and hold that a conviction will be overturned only if “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Vargas, supra*, at p. 562.) *People v. Wolfe, supra*, 114 Cal.App.4th 177, contains a cogent discussion of the competing views and concludes that the *Chapman* prejudice standard applies to this type of instructional error. (*Id.* at pp. 185-188.) In *People v. Gary, supra*, 189 Cal.App.3d at page 1218, this court applied the *Chapman* prejudice standard to the erroneous omission of a unanimity instruction. It is not necessary to expressly determine whether we will

adhere to our previously expressed opinion on the applicable prejudice standard because, under the facts of this case, the instructional omission is clearly harmless beyond a reasonable doubt.

In *People v. Jones* (1990) 51 Cal.3d 294, our Supreme Court wrote that omission of a unanimity instruction is harmless “if the record indicated the jury resolved the basic credibility dispute against the defendant and would have convicted the defendant of *any* of the various offenses shown by the evidence to have been committed. [Citations.]” (*Id.* at p. 307; see also *People v. Arevalo-Iraheta, supra*, 193 Cal.App.4th at p. 1589.) *People v. Thompson* (1995) 36 Cal.App.4th 843, set forth this principle, as follows:

“Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]” (*People v. Thompson, supra*, 36 Cal.App.4th at p. 853.)

This is such a case. The evidence did not show that a person other than appellant owned the vehicle or that another person had access to it. Appellant did not present any affirmative evidence showing that he possessed some but not all of the ammunition. Instead, appellant presented a unitary defense with respect to the ammunition possession charge. Defense counsel argued that there was insufficient proof that he possessed these items. The jury rejected this defense when it convicted him of possessing all the items of contraband that were found inside the vehicle. Thus, there was no basis in the evidence or arguments for the jury to have distinguished between the three types of ammunition found in the vehicle and the jury resolved the basic credibility dispute against appellant.

The prosecutor did erroneously argue to the jury that “as long as you all agree that the defendant possessed at least one bullet, it doesn’t matter if you agree on which bullet

he had, as long as you agree that he had at least one bullet in his possession, your verdict to Count 5 is guilty.” Yet, in light of the evidence proving that appellant possessed all of the ammunition and the unitary defense, it is not reasonably possible that this argument had any effect on the jury’s verdict on count 5.

For these reasons, we hold that omission of a unanimity instruction in connection with count 5 was harmless beyond a reasonable doubt. (*People v. Curry* (2007) 158 Cal.App.4th 766, 783 [omission of unanimity instruction harmless beyond reasonable doubt]; *People v. Arevalo-Iraheta, supra*, 193 Cal.App.4th at pp. 1589-1590 [same]; *People v. Wolfe, supra*, 114 Cal.App.4th at pp. 188-189 [same]; *People v. Gary, supra*, 189 Cal.App.3d at pp. 1218-1219 [same].)

II. Section 654 Did Not Prohibit Imposition Of Concurrent Sentences For Counts 3, 4 And 5

A. Facts

On August 24, 2011, the trial court sentenced appellant to an indeterminate term of life imprisonment with the possibility of parole plus a consecutive aggregate term of 21 years’ imprisonment. As relevant to the issue before us, appellant was sentenced on count 1 (attempted murder) to an indeterminate term of life imprisonment plus a consecutive aggregate determinate term of 21 years. For each of the two illegal firearm possession convictions (counts 3 and 4) and the illegal ammunition possession conviction (count 5), the court imposed the upper term of three years, to be served concurrent to the term imposed on count 1.

B. Section 654 Claims May Be Raised For The First Time On Appeal

“As relevant, section 654, subdivision (a), provides: ‘An act or omission that is publishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.’” (*People v. Jones* (2012) 54 Cal.4th 350, 353 (*Jones*).)

Appellant argues that section 654 prohibits imposition of separate punishment for counts 3, 4 and 5. Although appellant did not raise this objection during the sentencing hearing, the forfeiture rule does not bar consideration of this type of sentencing challenge for the first time on appeal. “Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.” (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Yet, “on direct appeal the reviewing court is confined to the record. We cannot remand a case to the trial court for the purpose of trying an issue raised for the first time on appeal.” (*People v. Sparks* (1967) 257 Cal.App.2d 306, 311.) We presume that the trial court regularly properly performed its official duties and correctly followed established law. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.) When a section 654 claim is raised for the first time on appeal, the reviewing court assesses the record to determine if it contains facts that would support a lawful decision to impose separate sentences without violating the statutory proscription against multiple punishment. Due to appellant’s failure to raise this challenge during sentencing, he does not have the benefit of any specific factual findings directed at the application of section 654.

C. Imposition Of Concurrent Sentences Does Not Preclude A Section 654 Challenge

The trial court’s imposition of concurrent sentences for counts 3, 4 and 5 does not preclude a section 654 challenge. “It has long been established that the imposition of concurrent sentences is not precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.’ [Citation.] Instead, the accepted ‘procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.’ [Citations.]” (*Jones, supra*, 54 Cal.4th at p. 353.) Thus, “although there appears to be little practical difference between imposing concurrent

sentences ..., and staying sentence ... the law is settled that the sentences must be stayed to the extent that section 654 prohibits multiple punishment.” (*Ibid.*)

D. Imposition Of Separate Punishment Was Proper Because Appellant Possessed Two Types Of Ammunition Stored In Different Locations In The Vehicle In Addition To The Loaded Pistol

We turn to substantive consideration of appellant’s sentencing challenge. He argues that section 654 required the trial court to stay the sentence on one of the two illegal firearm possession convictions or to stay punishment on the illegal ammunition possession conviction because the court might have erroneously punished him twice for the single act of possessing the .22-caliber pistol that was loaded with .22-caliber ammunition. We are not persuaded. As will be explained, appellant’s punishment was commensurate with his culpability. He possessed two loaded guns and two additional calibers of ammunition. There is substantial evidence supporting the trial court’s implied findings that an indivisible course of conduct was not present and that appellant harbored multiple independent criminal objectives.

Section 654 has been interpreted to prohibit multiple punishments for a single act or an indivisible course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) “Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Ibid.*) “On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct.” (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Whether a course of conduct is indivisible depends

on a defendant's intent and objective, not temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.)

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

After briefing was complete in this case, our Supreme Court decided *Jones, supra*, 54 Cal.4th 350. In *Jones*, police searched the car the defendant was driving and found a loaded .38-caliber revolver that was not registered to him. The defendant told the officers that he bought the gun three days earlier for protection. He was convicted of possessing a firearm by a felon, carrying a readily accessible concealed and unregistered firearm and carrying an unregistered firearm in public. He was separately sentenced for each offense. Cutting through the Gordian knot of conflicting appellate authority, *Jones* held that “a single possession or carrying of a single firearm on a single occasion may be punished only once under section 654.” (*Id.* at p. 357.) It further concluded that “[s]ection 654 prohibits multiple punishment for a single physical act that violates different provisions of law.” (*Id.* at p. 358.)

Jones, supra, 54 Cal.4th 350 cited *People v. Lopez* (2004) 119 Cal.App.4th 132 (*Lopez*), on which appellant relies. In that case, the defendant unlawfully possessed a loaded handgun. The appellate court concluded that section 654 proscribed imposition of punishment for both unlawful possession of a firearm and unlawful possession of ammunition. It reasoned, “Where, as here, all of the ammunition is loaded into the firearm, an ‘indivisible course of conduct’ is present and section 654 precludes multiple punishment.” (*Lopez, supra*, at p. 138.)

Appellant's effort to fit within the factual rubric presented in *Jones, supra*, 54 Cal.4th 350 and *Lopez, supra*, 119 Cal.App.4th 132 is not convincing. In those cases, the defendants possessed a single loaded weapon. Here, appellant not only possessed two loaded firearms, but he also possessed two additional calibers of ammunition. Appellant concealed a loaded revolver on his person and used it to shoot at Sergeant Wallace. He concealed a loaded .22-caliber pistol in the vehicle. He concealed 16 rounds of .45-caliber ammunition and one round of nine-millimeter ammunition in different places inside the vehicle. Appellant's conduct in obtaining, possessing and concealing these four separate items of contraband did not constitute "a single physical act," as occurred in *Jones* and *Lopez*.

Section 654 does not prohibit imposition of separate punishment for appellant's independent acts of acquiring and concealing the two loaded firearms, .45-caliber ammunition and the nine-millimeter round of ammunition. The trial court could properly punish appellant on counts 3 and 4 for the revolver that he possessed on his person and the pistol inside his vehicle. It could impose punishment on count 5 for the 16 rounds of .45-caliber ammunition and/or the round of nine-millimeter ammunition.

There is nothing in the record proving that the trial court based the sentence on count 5 on the .22-caliber ammunition that was loaded in the pistol and not on the .45-caliber ammunition or the nine-millimeter round. As we have previously explained, there is no evidence from which the jury could have concluded that appellant possessed some, but not all, of the ammunition. Due to appellant's failure to raise this issue during the sentencing hearing, he does not have the benefit of any specific factual findings directed at the application of section 654. In the absence of evidence to the contrary, we presume the trial court properly performed its official duties and correctly applied the law. (*Ross v. Superior Court, supra*, 19 Cal.3d at p. 913.)

Accordingly, we hold that the record contains substantial evidence supporting a finding that appellant harbored multiple and independent criminal objectives. Section 654 did not prohibit imposition of separate punishment for counts 3, 4 and 5.⁴

DISPOSITION

The judgment is affirmed.

Kane, J.

WE CONCUR:

Cornell, Acting P.J.

Detjen, J.

⁴ In appellant's opening brief, he raised a third appellate issue, arguing that his status as a felon for purposes of counts 3, 4 and 5 was based on an evidentiary stipulation that was invalid because he had not expressly waived his right to trial of the stipulated fact. By letter filed on January 11, 2012, appellant withdrew this argument because it lacked legal merit. We accept appellant's withdrawal of this appellate issue as properly made. Appellant correctly recognized that our Supreme Court decided that defense counsel is authorized to make evidentiary stipulations without the express authority of the accused and without express waiver of the accused's right to trial of the stipulated fact. (*People v. Newman* (1999) 21 Cal.4th 413, 415, 422; *People v. Adams* (1993) 6 Cal.4th 570, 578-583.)