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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARRELL EDWARD ADAMS,

Defendant and Appellant.

G044831

(Super. Ct. No. RIF108462)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Richard J. Hanscom, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed and remanded for resentencing with directions.

Sylvia Koryn, 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, Peter Quon, Jr., and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

After a jury found defendant Darrell Edward Adams guilty of premeditated attempted murder and of illegally possessing a firearm and ammunition, and the jury and the trial court found enhancement allegations true, defendant successfully appealed from his judgment of conviction on the ground the victim's preliminary hearing testimony was erroneously admitted into evidence. Following retrial, the jury found defendant guilty of the charged offenses and found defendant acted willfully, deliberately and with premeditation and personally used a firearm. The trial court found the alleged prior conviction and prison term enhancement allegations true.

Defendant contends that during the retrial, the court erred by failing to instruct the jury, *sua sponte*, on the defense theory of third party culpability. He argues, in the alternative, that his trial counsel was ineffective for failing to request such an instruction. Defendant also asserts the trial court erred by (1) failing to stay execution of punishment for the illegal possession of a firearm offense, under Penal Code section 654;¹ (2) penalizing defendant for exercising his right to appeal the original judgment by imposing a greater sentence than what had been imposed following his first trial; and (3) issuing a minute order and an abstract of judgment that did not reflect the court's oral pronouncement of sentence as to the term imposed for the prior prison term enhancement found true by the court.

We affirm the judgment. However, we remand the matter for resentencing because the trial court erred by imposing a greater prison sentence than what had been imposed following defendant's first trial, and by issuing a minute order and an abstract of judgment that showed the court had imposed a five-year term for the prior prison term

¹ All further statutory references are to the Penal Code unless otherwise specified.

enhancement instead of the one-year term that the court had orally pronounced. We therefore remand the matter to the trial court for resentencing to correct those errors.

FACTS

I.

THE PROSECUTION'S CASE

In February 2003, Justin Gray placed a "For Sale" sign inside the window of the 1994 Oldsmobile Cutlass Supreme that he owned. Around February 16, Gray was driving his car when defendant, who was driving a green Honda owned by one of his roommates, pulled up alongside Gray's car and signaled Gray to pull over. Gray and defendant pulled over; defendant told Gray his name was "Daquan." Defendant and Gray discussed the condition of the car and Gray's asking price of \$2,000. Defendant told Gray he would get in contact with him.

Defendant called Gray and they agreed to meet at a gas station. Gray was at the gas station at the agreed-upon time, but defendant did not show up. Defendant called Gray and told him, it was "[m]y bad, I couldn't make it, something came up, but now I'm ready." Defendant told Gray he wanted to buy the car and had cash. He proposed that they meet at his apartment complex in Riverside. Gray agreed to meet defendant at defendant's apartment complex on February 18 at 6:00 p.m.; defendant gave Gray the address and a pass code to open the gate at the complex, and told him where to park. Defendant told Gray to bring the car and the relevant paperwork.

Gray arrived at the apartment complex at the appointed time. He had the pink slip and the registration for the car with him. After Gray got out of the car, he was approached by a man whom he had not met; the man told Gray that Daquan was "on his way." Gray went upstairs to defendant's apartment to wait for defendant. Fifteen minutes later, defendant arrived and told Gray he did not have all of the money to buy the

car. Defendant said, “he had to go to a friend of his in Moreno Valley to get the rest of the money.” Gray testified he was eager to sell the car and so he said, “[I]et’s go do it.”

Gray and defendant agreed that once defendant got the rest of the money to buy the car and paid Gray, they would exchange the paperwork, Gray would give defendant the keys, defendant would drop Gray off at his father’s house, and defendant would keep the car. Gray left his car at the apartment complex and got into the passenger seat of the green Honda. Defendant drove for about 20 to 30 minutes. After defendant exited the freeway, Gray asked him how much further they had to go; defendant told Gray that their destination was up ahead. Gray thought defendant might not know where he was going because he kept looking around. Gray became uncomfortable; he knew he was in a situation he should not have been in.

Defendant turned onto a dark dirt road and stopped in front of a house; he said they were “where the money was at that he needed to get to make the deal.” No one else was there with defendant and Gray. Gray looked at the house on his right and then heard defendant ask, “[a]re you ready?” Gray looked back at defendant and saw defendant’s left hand reach toward Gray; defendant shot Gray in the center of his chest with a handgun. Gray got out of the car and started running “like zigzag left and right.” Defendant got out of the car and ran after Gray. Gray heard “a whole bunch of shots”; he was unsure of how many times he had been hit, but felt a bullet hit him in the lower waist on his right side. Gray kept running until he heard “click click” and realized defendant had run out of bullets. Defendant turned back while Gray continued running and then hid behind a car. Gray heard defendant’s car drive away.

A nearby resident called 911. Gray had been shot four times. He was transported to the hospital, underwent surgery, and was hospitalized for 10 days.

Defendant was arrested at his apartment on February 20, 2003. One of defendant’s roommates, Amanda Perez, testified that before she saw the damage to her

green Honda from the shooting, defendant showed her a handgun in their apartment. He showed her where it was in the apartment (inside a fax machine) for her safety.

During a search of defendant's apartment, police officers found a live (unfired) bullet in a shoe on the top shelf of the bedroom closet.

II.

DEFENDANT'S TESTIMONY

Defendant testified at trial. He stated he wanted to purchase Gray's car. He told Gray his name was Daquan. He testified that he was at the gas station where he and Gray agreed to meet and brought \$2,000 with him, but Gray did not show up. Defendant and Gray arranged to meet at defendant's apartment on February 18, 2003 at 6:00 p.m. Defendant arrived a few minutes late because he had been stuck in traffic.

Defendant asked Gray if he had brought the paperwork for the car and Gray said he had. Defendant testified that after Gray filled out the bill of sale and defendant signed it, defendant checked the vehicle identification number, and Gray produced the registration for the car, Gray told defendant he did not have the pink slip. Defendant testified that Gray told him "some girl" had the pink slip in Moreno Valley and Gray had to go get it. Defendant told Gray he needed to go to Moreno Valley anyway. Defendant lied to Gray when he told him that he needed to go to Moreno Valley to get the rest of the money to buy the car. Before defendant drove Gray to Moreno Valley, defendant went into his bedroom and took \$2,900 from his safe. He stated he took the extra \$900 out of the safe because he had to pay overdue bills in Moreno Valley.

Defendant drove Gray to Moreno Valley. At one point during their trip, they were in bumper-to-bumper traffic. Gray got out of the car, went toward another car, returned, got back into defendant's car, and patted his pocket. Defendant continued to drive. Gray received a phone call and then asked defendant to stop at a grocery store. Defendant stopped at the grocery store where they waited four to five minutes before

Gray's friend, "Mookie," arrived and Gray got out of the car. Defendant did not speak with Mookie but understood that Mookie would give Gray a ride home after their transaction. Gray got back into the car and Mookie got into a vehicle behind them and followed them until they stopped on the dirt road where Gray had directed defendant to retrieve the pink slip.

Even though defendant did not yet have the pink slip, he testified that at this point, he felt "comfortable" handing Gray the envelope containing the \$2,900. Defendant told Gray that the envelope contained an extra \$900. Gray was rolling a marijuana joint when Mookie knocked on the passenger side window of the green Honda. Gray rolled down the window and asked, "[w]hat's going on?" and "[w]hat are you doing?" and said, "[h]old up, hold up, hold up." Mookie grabbed the money and Gray got out of the car. Mookie "just pull[ed] his hand out" and defendant heard "a pop, a flash." Defendant quickly drove away and returned to his apartment. He did not call the police.

PROCEDURAL HISTORY

I.

THE INFORMATION

Defendant was charged in an information with (1) attempted murder in violation of sections 664 and 187, subdivision (a) and personally and intentionally discharging a firearm in the commission of this crime, causing great bodily injury in violation of sections 12022.53, subdivision (d) and 1192.7, subdivision (c)(8); (2) possession of a firearm in violation of section 12021, subdivision (a)(1); and (3) possession of ammunition and reloaded ammunition in violation of section 12316, subdivision (b)(1). The information alleged that, in 1995, defendant was convicted of reckless evasion of a peace officer in violation of Vehicle Code section 2800.2, for which he served a separate prison term and did not remain free of prison custody for five years

before committing another felony, within the meaning of section 667.5, subdivision (b). The information further alleged that, in 1995, defendant was convicted of robbery, a serious and violent felony within the meaning of sections 667, subdivisions (a), (c), and (e)(1), and 1170.12, subdivision (c)(1).

II.

THE JURY FINDS DEFENDANT GUILTY AS CHARGED AND THE JURY AND THE COURT FIND THE ENHANCEMENT ALLEGATIONS TRUE; DEFENDANT APPEALS; THIS COURT REVERSES THE JUDGMENT OF CONVICTION.

The trial court granted the prosecution's motion to admit Gray's preliminary hearing testimony at defendant's first trial after finding the prosecution conducted due diligence in searching for Gray and finding that he was unavailable to testify. The jury found defendant guilty of premeditated attempted murder and for illegally possessing a firearm and ammunition. The jury also found the firearm enhancement allegation true, and the court found the prior conviction and prior prison term enhancement allegations true. The trial court imposed an indeterminate term of 39 years to life plus a determinate term of 10 years. Defendant appealed.

On November 17, 2009, this court reversed the judgment of conviction, holding that the record showed the prosecution's investigator was first assigned to locate Gray no earlier than eight days before trial, even though Gray's testimony was critical to the prosecution's ability to prove the charged offenses and no documented contact had been made with Gray by law enforcement in 17 months (notwithstanding multiple continuances of the trial date). Furthermore, the record showed that during the two-day hearing on whether the prosecution exercised due diligence in searching for Gray, the prosecution's investigator cultivated some leads as to the Gray's whereabouts but he apparently ran out of time to pursue them. Applying *People v. Cromer* (2001) 24 Cal.4th 889, this court concluded the prosecution failed to exercise due diligence in searching for Gray and the trial court erred by admitting Gray's preliminary hearing testimony at trial.

III.

AT RETRIAL, THE JURY FINDS DEFENDANT GUILTY AS CHARGED AND THE FIREARM ENHANCEMENT ALLEGATION TRUE; THE TRIAL COURT FINDS THE PRIOR CONVICTION AND PRIOR PRISON TERM ENHANCEMENT ALLEGATIONS TRUE AND IMPOSES SENTENCE; DEFENDANT APPEALS.

Several witnesses, including Gray and defendant, testified at the retrial. The jury found defendant guilty as charged, making a finding the attempted murder offense was committed willfully, deliberately, and with premeditation; the jury also found that the firearm enhancement allegation was true. The trial court found the prior conviction and prior prison term enhancement allegations true. The court's oral pronouncement of sentence imposed a total prison term of 39 years to life, plus a determinate term of 13 years four months. Defendant appealed.

DISCUSSION

I.

DEFENDANT'S CONTENTION OF INSTRUCTIONAL ERROR IS WITHOUT MERIT.

“The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.” (*People v. Souza* (2012) 54 Cal.4th 90, 115.) “The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citation.] Evidence is ‘substantial’ only if a reasonable jury could find it persuasive. [Citation.] The trial court's determination of whether an instruction should be given must be made without reference to the credibility of the evidence. [Citation.] The trial court need not give instructions based solely on conjecture and speculation.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200.)

Defendant argues the trial court had a sua sponte duty to instruct the jury with an instruction on a “defense theory of third party culpability, i.e., that ‘Mookie,’ not [defendant], shot Justin Gray” in light of defendant’s testimony that Mookie was responsible for the shooting. Defendant asserts CALCRIM No. 373 constitutes such a “third party culpability instruction,” which “would have provided [defendant]’s jury the guidance of how they could view [defendant]’s defense that ‘Mookie’ not [defendant] shot Gray.” Defendant further asserts, “[t]he failure to relate the theory of the defense to the burden of proof prejudicially abridged [defendant]’s Sixth and Fourteenth federal constitutional rights to trial by jury and due process by undermining and misleading the jury as to the prosecution’s burden and the reasonable doubt standard.” Defendant contends, in the alternative, that if the trial court did not have a sua sponte obligation to so instruct the jury, defendant’s counsel was ineffective for failing to request such an instruction.²

The trial court did not err by failing to instruct the jury with CALCRIM No. 373 and defendant’s trial counsel was not ineffective for failing to request that instruction, because the record did not support giving CALCRIM No. 373 to the jury. CALCRIM No. 373 would not have instructed the jury on how it should view defendant’s testimony that Mookie shot Gray; it instructs the jury not to speculate about whether other people, who might have been involved in the commission of the crime, have been or will be prosecuted. CALCRIM No. 373 states: “The evidence shows that (another person/other persons) may have been involved in the commission of the crime[s] charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not

² To prevail on a claim of ineffective assistance of counsel, defendant must prove both (1) his attorney’s representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards, and (2) his attorney’s deficient representation subjected him to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.)

speculate about whether (that other person has/those other persons have) been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crime[s] charged. [¶] [This instruction does not apply to the testimony of _____ <insert names of testifying coparticipants>.]”

No evidence was presented at trial showing that Mookie participated in the shooting with defendant. Defendant testified that he did not know Mookie, who he understood was Gray’s friend. Defendant testified that Mookie had a gun and that defendant heard a pop and saw a flash before he drove away. He did not see Mookie shoot Gray. Gray, on the other hand, testified that he was alone with defendant at the time of the shooting. Gray did not testify about the existence of Mookie; he was never asked about him. There is no evidence that the individual whom defendant referred to as Mookie was ever identified by law enforcement, much less arrested or prosecuted. Consequently, there was no risk a reasonable jury would speculate about Mookie’s prosecution status to defendant’s detriment; defendant does not point to any event or argument, made during the retrial, suggesting otherwise.

As CALCRIM No. 373, therefore, did not reflect a “general principle[] of law” necessary to the jury’s understanding of this case, the trial court did not err by failing to instruct the jury with CALCRIM No. 373, regardless whether defendant’s counsel had requested it. (*People v. Souza, supra*, 54 Cal.4th at p. 115.)

In his reply brief, defendant argues the jury should have been instructed with the same instruction considered by the California Supreme Court in *People v. Earp* (1999) 20 Cal.4th 826, 887, which stated: “Evidence has been offered that a third party is the perpetrator of the charged offense. It is not required that the defendant prove this fact beyond a reasonable doubt. In order to be entitled to a verdict of acquittal, it is only required that such evidence raise a reasonable doubt in your minds of the defendant’s guilt.” The Supreme Court held the trial court’s refusal to give that instruction was harmless, stating, “[e]ven assuming that this proposed instruction accurately pinpointed

the defense theory, defendant suffered no prejudice from the trial court's refusal to give it. The jury was instructed under CALJIC No. 2.90 that the prosecution had to prove defendant's guilt beyond a reasonable doubt, and the jury knew from defense counsel's argument the defense theory that [a third party], not defendant, had committed the crimes. Under these circumstances, it is not reasonably probable that had the jury been given defendant's proposed pinpoint instruction, it would have come to any different conclusion in this case." (*Ibid.*)

We do not need to determine whether the trial court erred by failing to instruct the jury with the instruction considered in *People v. Earp*, *supra*, 20 Cal.4th at page 887, sua sponte, or whether defendant's trial counsel was ineffective for failing to request such an instruction, because it is not reasonably probable the jury would have arrived at a different verdict had it been so instructed.

In *People v. Hartsch* (2010) 49 Cal.4th 472, 504, the Supreme Court explained why third party culpability instructions are generally ineffective: "We have noted that similar instructions add little to the standard instruction on reasonable doubt. [Citation.] We have also held that even if such instructions properly pinpoint the theory of third party liability, their omission is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof." (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1277 [holding the trial court did not err by denying the defendant's request for a third party liability theory instruction when counsel never offered proposed language, but "[i]n any event," the omission of such an instruction was not prejudicial in light of the reasonable doubt instruction given to the jury].)

In *People v. Gutierrez* (2009) 45 Cal.4th 789, 825, the Supreme Court held that although the defendant testified others were responsible for the victim's death, any error in not giving a third party culpability instruction was harmless because "[t]he jury

was instructed on reasonable doubt and burden of proof, and could have acquitted defendant had it believed defendant's testimony."

Here, the jury was instructed on the presumption of innocence, the prosecution's burden to prove defendant guilty beyond a reasonable doubt, and the definition of proof beyond a reasonable doubt in the form of CALCRIM No. 220. Defendant testified on his own behalf and testified Mookie, not defendant, had a gun and was responsible for the shooting. As defendant acknowledges in his reply brief, that testimony was "a significant point defense counsel argued during his closing argument." As in *People v. Gutierrez, supra*, 45 Cal.4th at page 825, the jury could have acquitted defendant if it had believed defendant's testimony. We find no prejudicial error.

II.

THE TRIAL COURT DID NOT VIOLATE SECTION 654 BY IMPOSING A CONSECUTIVE SENTENCE FOR THE ILLEGAL POSSESSION OF A FIREARM OFFENSE.

Defendant contends the trial court violated section 654 by imposing a sentence for the illegal possession of a firearm offense to run consecutively to the sentence for the attempted murder; he argues both offenses were part of a single, indivisible transaction. Defendant's argument is without merit.

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654's applicability "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 [defendant] and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

In *Jones, supra*, 103 Cal.App.4th 1139, the appellate court thoroughly analyzed the applicability of section 654 to a conviction for illegal possession of a firearm in violation of section 12021 when the defendant had also been convicted of a crime involving the use of that firearm. The *Jones* court explained: ““Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus *where the evidence shows a possession distinctly antecedent and separate from the primary offense*, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.”” (*Jones, supra*, at p. 1143, fn. omitted, italics added.)

The *Jones* court stated: “It is clear that multiple punishment is improper where the evidence ‘demonstrates at most that fortuitous circumstances put the firearm in the defendant’s hand only at the instant of committing another offense’ [Citation.] For example, in *People v. Bradford*[(1976)] 17 Cal.3d 8, the defendant was stopped by a highway patrol officer for speeding. He wrested away the officer’s revolver and shot at the officer with it. [Citation.] The California Supreme Court found punishment for both assault with a deadly weapon upon a peace officer and possession of a firearm by an ex-felon was prohibited by section 654. The defendant’s possession of the officer’s revolver was not antecedent and separate from the use of the revolver in assaulting the officer. [Citation.] [¶] Likewise, in *People v. Venegas*[(1970)] 10 Cal.App.3d [814,] 821, the defendant shot a companion in a bar. A waitress heard a gunshot, turned to see the defendant holding a gun, and heard two more shots. The defendant was shot in the leg during the incident. There was no showing that the defendant had possessed the gun before the assault, and the defense presented evidence suggesting that he obtained it

during a struggle at the bar moments before the shooting. [Citation.] Section 654 barred punishment for possession of a firearm by an ex-felon in addition to punishment for assault with a deadly weapon. [Citation.] The evidence showed ‘a possession only at the time defendant shot [the victim]. Not only was the possession physically simultaneous, but the possession was incidental to only one objective, namely to shoot [the victim].’ [Citation.]” (*Jones, supra*, 103 Cal.App.4th at p. 1144.)

The *Jones* court’s analysis continued: “On the other hand, it is clear that multiple punishment is proper where the evidence shows that the defendant possessed the firearm before the crime, with an independent intent.” (*Jones, supra*, 103 Cal.App.4th at p. 1144.) The court explained, “section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm.” (*Id.* at p. 1145; see *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1414 [“Commission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon”].)

The *Jones* court, after applying the above summarized legal principles, concluded section 654 did not apply to the case before it, holding: “[T]he evidence was sufficient to allow the inference that [the defendant]’s possession of the firearm was antecedent to and separate from the primary offense of shooting at an inhabited dwelling. It strains reason to assume that [the defendant] did not have possession for some period of time before firing shots at the [victim]’s home. Any other interpretation would be patently absurd. [The defendant] committed two separate acts: arming himself with a firearm, and shooting at an inhabited dwelling. [The defendant] necessarily had the firearm in his possession *before* he shot at [the] house, when he and his companion came to the house 15 minutes before the shooting, or, at the very least, when they began driving toward the house the second time. It was therefore a reasonable inference that

[the defendant]’s possession of the firearm was antecedent to the primary crime. [Citation.]” (*Jones, supra*, 103 Cal.App.4th. at p. 1147.) The court further held: “The evidence likewise supported an inference that [the defendant] harbored separate intents in the two crimes. [He] necessarily intended to possess the firearm when he first obtained it, which, as we have discussed, necessarily occurred antecedent to the shooting. That he used the gun to shoot at [the] house required a second intent *in addition* to his original goal of possessing the weapon. [His] use of the weapon after completion of his first crime of possession of the firearm thus comprised a ‘separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.’” (*Ibid.*)³

We agree with the analysis set forth in *Jones, supra*, 103 Cal.App.4th 1139, and conclude that in this case, substantial evidence supported the trial court’s finding section 654 did not apply to defendant’s conviction for illegal possession of a firearm. Substantial evidence showed that at the time defendant and Gray arrived at the dirt road where defendant shot Gray, defendant was already in possession of the gun. Defendant’s roommate testified defendant had shown her a gun at their apartment around the time of the shooting. Gray testified it took defendant and Gray 20 to 30 minutes to drive from the apartment complex to the dirt road where Gray was shot. No evidence was presented that defendant ever got out of the car from the time they left the apartment complex until after Gray had been shot once. Substantial evidence supported the reasonable inference defendant had the gun throughout the duration of their drive. No evidence suggested defendant suddenly came into possession of the gun at the time of the shooting.

³ In a case sharing the same name, the California Supreme Court in *People v. Jones* (2012) 54 Cal.4th 350, 358, footnote 3, referred to “cases concerning how section 654 applies to a defendant who is convicted of possession of a firearm by a felon and of committing a separate crime with that firearm.” Citing *Jones, supra*, 103 Cal.App.4th at pages 1144-1146, and the cases discussed therein, the Supreme Court stated, “[t]hese cases concern a very different situation [from the issue before the court], and we do not intend to cast doubt on them.” (*People v. Jones, supra*, at p. 358, fn. 3.)

Defendant argues what distinguishes this case from *Jones* and cases finding section 654 inapplicable under similar circumstances is that “where, as here, the charge involves an allegation of premeditation and deliberation, the antecedent possession is incidental to the act of premeditation. By definition, if [defendant] premeditated the shooting of Gray, he would have to have armed himself before the act. Thus, the prior possession of the weapon cannot be said to have a separate objective because it is subsumed within the conduct alleged in the charge of premeditation.” Defendant does not cite any legal authority supporting this argument.

We review the jury’s premeditation finding and the trial court’s implied findings in determining the inapplicability of section 654 for substantial evidence. Substantial evidence supported the reasonable inference that defendant completed the offense of illegally possessing a firearm before he stopped the car on the dirt road where he shot Gray. Substantial evidence also supported the reasonable inference defendant decided to attempt to kill Gray after he completed the possession of a firearm offense.

Consequently, defendant’s punishment for attempted murder and for illegal possession of a firearm did not constitute multiple punishment in violation of section 654. We find no error.

III.

THE TRIAL COURT ERRED BY IMPOSING A GREATER PRISON SENTENCE AFTER RETRIAL THAN THE SENTENCE THAT HAD BEEN IMPOSED FOLLOWING THE FIRST TRIAL.

Defendant argues the trial court violated his state and federal constitutional rights because the court increased his sentence following his successful appeal. After the first trial, the court sentenced defendant to an indeterminate term of 39 years to life, plus a determinate term of 10 years. Defendant successfully appealed and the judgment of conviction was reversed. Following retrial, the trial court sentenced defendant to a total prison term of 39 years to life, plus 13 years four months, by (1) increasing defendant’s sentence for the illegal possession of a firearm offense from the middle term of four years

to the upper term of six years, and (2) changing his concurrent sentence for the illegal possession of ammunition offense to a consecutive sentence.

“When a defendant successfully appeals a criminal conviction, California’s constitutional prohibition against double jeopardy precludes the imposition of more severe punishment on resentencing.” (*People v. Hanson* (2000) 23 Cal.4th 355, 357.) The Attorney General concedes that the initial sentence following the first trial was not unauthorized and the trial court erred by imposing a greater sentence following retrial. We therefore remand the matter for resentencing. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.)

IV.

ON REMAND, THE TRIAL COURT SHALL CORRECT ITS MINUTE ORDER AND THE ABSTRACT OF JUDGMENT TO REFLECT THE COURT’S ORAL PRONOUNCEMENT OF THE SENTENCE IMPOSED AS TO THE PRIOR PRISON TERM ENHANCEMENT.

Defendant contends the minute order issued after the sentencing hearing and the abstract of judgment each erroneously state that the trial court imposed a five-year term for the prior prison term enhancement under section 667, subdivision (a)(1), instead of the one-year term under section 667.5, subdivision (b), imposed by the trial court. At the sentencing hearing, the trial court orally stated it imposed “one [year] on the prior prison [term].” The minute order and the abstract of judgment, however, state the trial court imposed a five-year term for the prior prison term enhancement.

The Attorney General asserts that the minute order and the abstract of judgment should be corrected to accurately reflect the trial court’s imposition of one year for the prior prison term enhancement. We agree. “The record of the oral pronouncement of the court controls over the clerk’s minute order” (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; *People v. Zackery* (2007) 147 Cal.App.4th 380,

385 [“Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls”].)

Upon resentencing on remand, the trial court shall ensure that the court’s minute order and the corrected abstract of judgment, thereafter issued, reflect a one-year prison term for the prior prison term enhancement.

DISPOSITION

The judgment is affirmed and the matter is remanded for resentencing. On remand, the trial court shall ensure that defendant does not receive a greater sentence than the sentence the court imposed following defendant’s first trial. The trial court shall also correct its minute order and the abstract of judgment to reflect the court’s imposition of a one-year prison term for the prior prison term enhancement.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.