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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCOIS POITIER GIVENS,

Defendant and Appellant.

A101176

(San Francisco County
Super. Ct. No. 184987)

FRANCOIS POITIER GIVENS,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
FRANCISCO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A103979

In re FRANCOIS POITIER GIVENS,
on Habeas Corpus.

A107422

Appellant and petitioner Francois Givens¹ stabbed his estranged girlfriend in the course of a heated discussion, and as a result was convicted of attempted voluntary manslaughter, infliction of corporal injury on a former cohabitant resulting in a traumatic condition, and assault with a deadly weapon. We find merit in his principal argument on appeal, which is that his conviction for attempted voluntary manslaughter must be reversed on the basis of a prejudicial error in the jury instructions on that count. However, we reject his contentions that his convictions for the other offenses must be reversed based on his other claims of error, or vacated due to the reversal of his attempted voluntary manslaughter conviction. The other issues that appellant raises on appeal and in his mandate petition either have been rendered moot, or may be presented to the trial court on remand, and we accordingly do not address them. We deny appellant's habeas corpus petition.

I. FACTS AND PROCEDURAL HISTORY

Appellant was romantically involved with the victim, Leartine Swan, for about two years. The couple lived together at appellant's mother's house from July 2001 to early October 2001.² On Tuesday October 2, appellant told Swan he had contracted a sexually transmitted disease involving "creepy crawly things," and they had an argument about it. Swan testified at trial that she was not aware of having any disease she could have communicated to appellant.

¹ Givens's direct appeal from his criminal conviction, as to which he is represented by counsel, has been consolidated with his petitions for a writ of mandate and/or prohibition and for habeas corpus, as to both of which Givens is representing himself. For convenience, we will refer to Givens simply as appellant, and to his petition for writ of mandate and/or prohibition as his mandate petition.

² All further references to dates are to the year 2001 unless otherwise specified. Some of the trial testimony about the events leading up to the incident refers only to days of the week, without specifying the corresponding dates. In the narrative that follows—purely for clarity, and not because the dates make a difference—we have taken judicial notice of various dates based on the calendar for October 2001. (Evid. Code, §§ 451, subd. (f); 452, subd. (h); 459, subd. (a), (c).)

On Thursday, October 4, Swan told appellant that she would be moving in with her mother because her mother needed her. Swan went to appellant's house after work and picked up her things, and then left to spend the night at her mother's. At that point, Swan considered that she and appellant had broken up, but it is not clear from the record whether she had unequivocally communicated that to appellant.

On Friday, October 5, appellant called Swan's mother's house twice. The first time, appellant was calling from Oakland, and spoke to Swan's mother, who called him a "punk bitch."³ According to Swan, appellant responded that "he would show [Swan's] mother what a punk bitch is," or "what a punk bitch can do." He never threatened Swan directly, however. When he called the second time, Swan could tell from the area code on her caller identification phone that he was calling from San Francisco, but she could not make out what he was saying.

Swan's mother was concerned because she realized she had said the wrong thing to appellant, so when Swan left for work later that morning, her mother advised her to carry a box cutter "just to scare [appellant] off." Swan was "kind of nervous" about appellant, so she complied, and put the box cutter in the pocket of her jacket.

At around 11:00 a.m., as Swan was walking along Beach Street toward her workplace, she saw appellant standing at a phone booth. Appellant approached her, saying "I'm going to show you what a punk bitch can do." A heated conversation ensued, lasting 10 or 15 minutes, during which appellant angrily accused Swan of lying to his mother and giving him a sexually transmitted disease. Swan told appellant that she had not been having sexual relations with anyone but him, and asked him to leave her alone and let her go to work. Appellant blocked her way, and put his hand in his jacket pocket. When Swan responded by putting her own hand in her pocket where the box cutter was, appellant asked her whether she was "fixin' to do something." According to

³ The record is unclear as to whether Swan's mother called appellant a "punk bitch" on October 4 or during the morning on October 5, but the issue does not matter for purposes of this appeal.

Swan, appellant then immediately began to stab her, moving so quickly that she never had a chance to pull out her box cutter.

Swan's loud cries for help drew the attention of several passersby, one of whom pulled appellant off Swan, while another called 911 to summon the police and paramedics, and a third chased appellant away and then pressed his shirt to Swan's neck in an effort to stop the severe bleeding in her neck area. When the paramedics arrived, they cut off Swan's clothing, including her jacket, in the course of giving her emergency treatment. The box cutter was later found on top of a box in the scooter store where Swan had taken refuge from appellant's assault, but the witnesses at trial, including the investigating police officers, were unable to explain how it got there. Photographs of the box cutter taken by one of the investigating officers on the scene showed it to be unopened, which was consistent with Swan's testimony.

While the passersby were helping Swan in the scooter store, appellant yelled out from across the street, saying "She had it coming. That bitch gave me AIDS," and "She deserves to die." Appellant then walked away from the scene, and some of the passersby followed him as he proceeded toward a taxi stand a few blocks away. By the time appellant reached that area, one of the passersby was able to flag down a police car and point appellant out as the assailant. The officer in the car, who had heard a police radio broadcast about the assault, drew his gun and ordered appellant to lie on the ground. The knife then fell out of appellant's pocket and was taken into evidence. As appellant was being handcuffed, he exclaimed, "The bitch had a straight razor. No she had a box

cutter.⁴ You're not going to find it. I cut the bitch. She gave me AIDS. She's my ex-girlfriend, the bitch."

Swan was taken to the hospital, where a medical examination revealed that she had suffered five knife wounds, including a life-threatening one that penetrated the left side of her neck. Extensive surgery was required to repair the wound, and Swan spent about three days in the hospital. At the time of trial, she still had visible scars on her neck and arm as a result of the assault, and she had been advised to have plastic surgery to try to reduce the neck scar. She also suffered permanent paralysis of part of the left side of her face, which interfered with the functioning of her left eye and eyelid, because appellant's knife had severed a nerve in her neck.

The information that was filed against appellant on March 11, 2002, charged him with three counts: (1) attempted first-degree murder (Pen. Code, §§ 187, 664⁵); (2) infliction of corporal injury on a former cohabitant (§ 273.5, subd. (a)) (corporal injury); and (3) assault with a deadly weapon (§ 245, subd. (a)(1)) (assault). Each count also alleged enhancements for use of a deadly weapon under both section 1192.7, subdivision (c)(23), and section 12022, subdivision (b)(1), as well as for infliction of great bodily injury under both section 12022.7, subdivision (e) (domestic violence), and section 1192.7, subdivision (c)(8) (personal infliction on a non-accomplice).

⁴ Appellant's self-defense claim was premised on the theory that Swan attacked him with the box cutter before he stabbed her. In support of this contention, appellant's trial counsel stressed that nothing in the evidence explained how appellant knew, at the time he made this remark, that Swan had been carrying a box cutter. Swan testified at trial that she neither pulled out the box cutter nor told appellant that she had it; that he could not have seen it in her pocket; and that she had never carried a box cutter with her before. When Swan was interviewed at the hospital after the assault, she failed to mention the box cutter. None of the eyewitnesses who testified at trial saw Swan wielding any weapon, but this testimony is not conclusive, because none of them saw the knife in appellant's hand either. The prosecutor argued that in mentioning the box cutter at the time of his arrest, appellant was attempting to concoct a self-defense theory, and simply made a lucky guess.

⁵ All further statutory references are to the Penal Code unless otherwise specified.

On July 5, 2002, appellant's appointed defense counsel expressed doubts as to his client's competency to stand trial, and the proceedings were suspended pending receipt of a report on that subject. On August 2, 2002, the court found appellant competent to stand trial.

Jury selection for appellant's trial began on September 25, 2002, and the jury was sworn on October 1, 2002. The trial took less than two full days, and the jury deliberated for one full day and part of a second day. The jury found appellant not guilty on the attempted murder charge in count one, but found him guilty of attempted voluntary manslaughter as a lesser included offense, as well as on counts two (corporal injury) and three (assault); and returned true findings on all of the enhancement allegations.

Appellant then successfully moved to exercise his right of self-representation, and filed a written motion for new trial on his own behalf. The motion for new trial was heard and denied on December 20, 2002. On the same day, appellant was sentenced to eight years in prison. He filed a timely notice of appeal on December 27, 2002.

II. ISSUES ON APPEAL

A. Jury Instructions on Attempted Voluntary Manslaughter

As already noted, the jury was instructed on, and found appellant guilty of, attempted voluntary manslaughter as a lesser included offense to attempted murder. The trial court's instructions on the elements of this crime included CALJIC No. 3.31⁶; CALJIC No. 6.00, which is the standard instruction defining attempt⁷; and a modified version of the 2001 revision of CALJIC No. 8.40, which defines voluntary manslaughter.

⁶ The text of this instruction, as given in this case, was as follows: "In the crime charged in Count 1, namely attempted murder, and the lesser included crime of attempted manslaughter, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. Unless this specific intent exists, the crime is not committed. [¶] The crime of attempted murder and the crime of attempted manslaughter require the specific intent to unlawfully kill another human being."

⁷ The relevant portion of this instruction reads: "An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."

Appellant's principal issue on appeal is a challenge to these instructions, focusing on CALJIC No. 8.40.

In accord with the Supreme Court's holdings in *People v. Blakeley* (2000) 23 Cal.4th 82 and *People v. Lasko* (2000) 23 Cal.4th 101, CALJIC No. 8.40 was revised in 2001 to expand the definition of the mental state needed for a voluntary manslaughter conviction. Under the new version, a conviction could be based on conscious disregard for life, as an alternative to the traditional mental state of intent to kill. (See 1 Witkin & Epstein, Cal. Criminal Law (3d ed., 2005 pocket supp.) Crimes Against the Person, § 208, pp. 173-174.) In the present case, the trial court adapted the 2001 version of CALJIC No. 8.40 to cover the attempted voluntary manslaughter charge by changing the wording to refer to attempted killing instead of killing, but retained the portions of the instruction referring to conscious disregard for life.

The resulting instruction read as follows: "The lesser included offense to the crime of attempted murder is attempted manslaughter, a violation of Penal Code sections 664 and 192(a). [¶] Every person who unlawfully attempts to kill another human being without malice aforethought but either with an intent to kill, *or in conscious disregard for human life*, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] There is no malice aforethought if the attempted killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury. [¶] 'Conscious disregard for life,' as used in this instruction, means that an attempted killing results from the doing of an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A direct but ineffectual act was done by one person towards killing another human being; [¶] 2. The attempted killing was unlawful; and [¶] 3. The perpetrator of the attempted killing either intended to kill the alleged victim, *or acted in conscious disregard for life*; and [¶] 4. The perpetrator's conduct resulted in an unlawful

attempt to kill another human being. [¶] A killing is unlawful, if it was neither justifiable nor excusable.” (Italics added.)

Appellant contends that this instruction was incorrect as a matter of law. We agree, as have our colleagues in two other districts, in cases decided after the conclusion of the trial in the present case. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709-710 [trial court had no duty to instruct sua sponte on attempted voluntary manslaughter, where only factual basis for instruction would have been invalid one of conscious disregard for life]; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1546-1552 [reversing convictions for attempted voluntary manslaughter based on error in jury instructions].) The inclusion of conscious disregard as a permissible basis for a voluntary manslaughter conviction in CALJIC No. 8.40 was based on the Supreme Court’s holding in a case involving an actual homicide, not an attempt. (*People v. Lasko, supra*, 23 Cal.4th at pp. 104, 107-110.) Where the victim of an assault survives, as occurred here, the perpetrator of the assault can be charged only with *attempted* voluntary manslaughter. The latter crime, like all attempt offenses, must include as one of its elements the perpetrator’s *specific intent* to commit the underlying crime. Thus, a conviction for attempted voluntary manslaughter, unlike a conviction for the completed crime, cannot be based on a lesser mental state such as conscious disregard for life. In this regard, we concur with the reasoning of *People v. Gutierrez, supra*, 112 Cal.App.4th at page 710, and *People v. Montes, supra*, 112 Cal.App.4th at pages 1549, 1551-1552. Indeed, the court in *People v. Montes* reversed a conviction of attempted voluntary manslaughter

based on the trial court’s use of an instruction virtually identical to the one given in the present case. (*Id.* at pp. 1546-1547, fn. 2.)⁸

Respondent concedes that the challenged instruction was substantively incorrect,⁹ but contends that the error was waived, and in any event was harmless. We disagree with both of these contentions. As to waiver, trial counsel’s failure to object to or request clarification of an instruction can waive a defendant’s right to challenge that instruction on appeal only if the underlying instruction is correct as a matter of law. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) In contrast, where an instruction erroneously defines the elements of an offense, the error is not waived by trial counsel’s failure to object, because the trial court has a sua sponte duty to instruct the jury properly on that subject. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Flood* (1998) 18 Cal.4th 470, 480-481; *People v. Frazer* (2003) 106 Cal.App.4th 1105, 1116, fn. 5.)

Respondent also argues that the error was harmless, both because other instructions required specific intent for an attempt, and because the evidence of appellant’s intent to kill was assertedly overwhelming. In so doing, respondent misconstrues the applicable standard for assessing the harmless error question. “When one of the theories presented to a jury is legally inadequate, such as a theory that ‘ ‘fails

⁸ This holding is also in line with a decision of our Supreme Court, *People v. Swain* (1996) 12 Cal.4th 593, which holds that because conspiracy—like attempt—requires the specific intent to commit the target offense, a conviction of conspiracy to commit murder cannot be sustained where the jury finds the target offense to have been second degree murder, and the instructions permitted the jury to find second degree murder on an implied malice theory. (*Id.* at pp. 602-607; see also *People v. Collie* (1981) 30 Cal.3d 43, 62, superseded on other grounds by constitutional amendment as recognized by *Robert S. v. Superior Court* (1992) 9 Cal.App.4th 1417 [reversing conviction for attempted murder, where instructions permitted jury to convict on basis of implied malice, without finding intent to kill].)

⁹ We note that the 2004 revision of CALJIC added a new instruction on attempted voluntary manslaughter, CALJIC No. 8.41, which requires that the jury find intent to kill in order to convict. (CALJIC No. 8.41 (Oct. 2005 ed.), pp. 379-380.) The Comment to this instruction cites *People v. Montes, supra*, 112 Cal.App.4th 1543. (Com. to CALJIC No. 8.41 (Oct. 2005 ed.), p. 380.)

to come within the statutory definition of the crime” ’ [citations], the jury cannot reasonably be expected to divine its legal inadequacy. The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime. In such circumstances, *reversal is generally required* unless ‘it is possible to determine from other portions of the verdict that *the jury necessarily found the defendant guilty on a proper theory.*’ [Citation.]” (*People v. Perez* (2005) 35 Cal.4th 1219, 1233, italics added.) Put another way, “the harmless error test traditionally applied to misinstruction on the elements of an offense [is] whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained’ [citations]” (*People v. Swain, supra*, 12 Cal.4th at p. 607; see also *Neder v. United States* (1999) 527 U.S. 1, 18 [adopting same harmless error standard as matter of federal constitutional law].) Accordingly, the conviction must be reversed unless there is something “discoverable from the verdicts that . . . enable[s] [the reviewing court] to conclude that the jury necessarily found the defendants guilty . . . on a proper theory” (*People v. Swain, supra*, 12 Cal.4th at p. 607.)

Thus, for example, the Third District recently reversed a second degree felony murder conviction in a case in which the jury was permitted to convict on the basis of either implied malice or felony murder; the verdict did not disclose which theory the jury adopted; and the felony murder theory was based on an offense that the court held was not an inherently dangerous felony, and thus not a proper basis for a second degree felony conviction. (*People v. Williams* (2005) 130 Cal.App.4th 1440, 1443.) In so doing, the court concluded that “[a]lthough overwhelming evidence supports a finding of second degree murder on the basis of implied malice, we must reverse the conviction because it is *conceivable* that the conviction was based only on the erroneous theory of second degree felony murder.” (*Id.* at p. 1443, italics added.)

Similarly, in *People v. Sanchez* (2001) 86 Cal.App.4th 970, the court reversed a second degree murder conviction, despite overwhelming evidence of implied malice, because trial court had also instructed on invalid felony murder theory. The court characterized the applicable standard of review as follows: “The trial court’s

misinstructions on the elements of second degree felony murder require reversal of defendant's murder conviction unless it appears beyond a reasonable doubt that the instructional error did not contribute to the jury's verdict. [Citations.]" (*Id.* at p. 980; see also *People v. Pierson* (2000) 86 Cal.App.4th 983, 993 [instructional error that omits an element of an offense requires reversal unless harmless beyond a reasonable doubt].)

In the present case, there is nothing in the record to indicate that the jurors could have convicted appellant of attempted voluntary manslaughter only if they found that he intended to kill Swan. There was overwhelming evidence that appellant assaulted Swan, but the evidence of his intent to kill her consisted solely of whatever inferences could be drawn from the location and severity of her wounds, and from appellant's comment after the assault that she "deserved to die" because she had supposedly given him AIDS. This evidence might have been sufficient to convince the jury that appellant was guilty of attempted voluntary manslaughter based on the valid intent to kill theory, but it was equally consistent with the invalid theory of conscious disregard for Swan's life.

Moreover, there is some indication in the record that the jurors focused on the conscious disregard theory during their deliberations, because one of them submitted a note to the judge remarking that the definition of "conscious disregard" was confusing.¹⁰ In sum, we must reject respondent's argument that the error in the instructions may be disregarded as harmless.

Respondent also argues that the trial court's other instructions—i.e., that attempt requires "a specific intent to commit the crime" (CALJIC No. 6.00) and that "[t]he crime of attempted murder and the crime of attempted manslaughter require the specific intent to unlawfully kill another human being" (CALJIC No. 3.31)—were sufficient to cure the defect in the specific instruction defining the elements of attempted voluntary

¹⁰ The judge responded to this note by indicating that he was not sure whether it was a question or a comment, and that any questions should be submitted by the jury collectively rather than individually. The judge did not give any clarifying instructions on conscious disregard in response to the note, and the jury did not pursue the matter further.

manslaughter. We cannot agree. As appellant argues in his reply brief, it is possible that the jurors interpreted the instructions, taken as a whole, to mean that the “specific intent” referred to in the other instructions could be satisfied, as to attempted voluntary manslaughter, either by the specific intent to kill or by conscious disregard for the victim’s life.

In short, we cannot conclude from the record beyond a reasonable doubt, that in convicting appellant of attempted voluntary manslaughter, the jury must necessarily have found that at the time of his assault on Swan, he harbored the specific intent to kill her. Accordingly, we are required to reverse appellant’s conviction for attempted voluntary manslaughter.

B. Issues Affecting Other Counts

Appellant does not contend that the error in the jury instructions with regard to attempted voluntary manslaughter affects the validity of his convictions for infliction of corporal injury and assault. Accordingly, despite our reversal on the manslaughter count, we must address the remaining issues raised on appellant’s direct appeal insofar as they affect the remaining counts of which he was convicted.

1. Jury Instructions on Self-Defense

Appellant’s defense to all of the charges was that his attack on Swan was prompted by her threatened or actual assault on him with the box cutter, and was therefore justified as self-defense. In this regard, appellant contends that one of the trial court’s jury instructions on self-defense misstated the law regarding provocation.

Specifically, appellant challenges the trial court’s instruction based on CALJIC No. 5.55, which stated that “[t]he right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.” Appellant acknowledges that the instruction is commonly given in appropriate cases, and has long been approved under the case law. (See, e.g., *People v. Holt* (1944) 25 Cal.2d 59, 65-66; *People v. Hinshaw* (1924) 194 Cal. 1, 26 [trial court “correctly state[d] [a] recognized principle of law” in giving instruction “ ‘that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a

deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.’ ”].) He also concedes that a plea of self-defense cannot be contrived, and that the instruction is substantively correct insofar as it provides that “the . . . self-defense doctrine . . . may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary’s attack or pursuit is legally justified. [Citations.]” (*In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)

Appellant contends, however, that the wording of the instruction, particularly the phrase “seeks a quarrel,” is misleading insofar as it implies that the right to self-defense is not available to one who has initiated *purely verbal* aggression, only to meet with a physical response. Unfortunately for appellant, however, this argument was not raised in the trial court. The only objection appellant’s trial counsel raised to the inclusion of this instruction was that it was not justified by the evidence. Appellant does not renew this ground for objection on appeal. Were he to do so, our review of the record would require us to reject it. There was sufficient evidence that appellant initiated not only the verbal, but also the physical confrontation between himself and Swan to warrant presenting the issue to the jury.

As to the argument that appellant makes before us, its gravamen is not that the instruction, properly construed, was an incorrect statement of the law. Rather, appellant’s contention is only that the instruction should have been made clearer by explaining that initiating a *purely verbal* quarrel does not make the right of self-defense unavailable. An argument that an instruction, though substantively correct, should have been clarified or supplemented, is waived by the failure of appellant’s trial counsel to request or suggest any modification or additional instruction. (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1054-1055.)

2. Corporal Injury and Assault as Necessarily Included Offenses

In a supplemental brief filed with permission on April 21, 2005, appellant argues that his corporal injury and assault convictions, if taken together with their enhancements,

are necessarily included offenses of his attempted voluntary manslaughter conviction. He contends that these convictions therefore must be vacated under California's rule precluding a defendant from being convicted of a lesser crime that is necessarily included in another crime of which the defendant has also been convicted based on the same act or omission.¹¹ (See generally *People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

Under California law, an accusatory pleading may charge two or more "different statements of the same offense" and "the defendant may be convicted of any number of the offenses charged." (§ 954.) Although this language seems absolute, there is an exception. Our Supreme Court "has long held that multiple convictions may *not* be based on *necessarily* included offenses. [Citations.]" (*People v. Pearson, supra*, 42 Cal.3d at p. 355, first italics in original, second italics added.) The reasoning behind this rule is that where a lesser offense is necessarily included in a greater one, permitting conviction of both would amount to permitting the defendant to be convicted twice for the lesser offense. (See *People v. Ortega, supra*, 19 Cal.4th at p. 705 (conc. & dis. opn. of Chin, J.).)

"To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met. The elements test is satisfied when ' "all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also

¹¹ Respondent does not contend that appellant has waived this issue because he did not raise it in the trial court. The failure to raise a meritorious defense of double jeopardy is ineffective assistance of counsel. (*People v. Belcher* (1974) 11 Cal.3d 91, 96.) For this reason, courts address double jeopardy claims even when raised for the first time on appeal. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1201; *People v. Marshall* (1996) 13 Cal.4th 799, 824, fn. 1.) In addition, in the present case appellant's argument is based on an appellate decision that was not issued until long after the trial court entered its judgment, and it raises pure questions of law. Accordingly, it is appropriate for us to address the merits insofar as the issue is not mooted by our reversal of the attempted voluntary manslaughter conviction.

necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.] [¶] Under the accusatory pleading test, a lesser offense is included within the greater charged offense ‘ “if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.” [Citation.]’ [Citations.]” (*People v. Lopez* (1998) 19 Cal.4th 282, 288-289; see also *People v. Sanchez* (2001) 24 Cal.4th 983, 988.)

In the present case appellant argues that in applying the accusatory pleading test, the charged enhancements must be considered as if they were elements of the underlying crime, and that when this version of the test is applied here, the corporal injury and assault convictions are both necessarily included in the attempted murder charge. Despite our reversal of the attempted voluntary manslaughter conviction resulting from the attempted murder charge, the issue is not moot, because appellant also contends that the assault conviction must be vacated as a necessarily included offense to the corporal injury conviction. Moreover, as appellant points out, merely staying the sentences for the lesser offenses under section 654 would not adequately protect his rights under the double jeopardy clause, because given the great bodily injury allegations, each of the counts of which he was convicted is a serious felony and thus could qualify as a separate strike in any later felony prosecution. (See *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1095 (*Jose H.*.)

Two days after appellant filed his supplemental reply brief, however, the California Supreme Court granted review in the case on which appellant’s argument primarily relied. (*People v. Sloan* (2005) 126 Cal.App.4th 1148, review granted June 8,

2005, S132605.¹²) Given that development, the only published opinion that addresses the issue is *Jose H.*, *supra*, 77 Cal.App.4th 1090. In *Jose H.*, the juvenile defendant punched a classmate, fracturing his cheekbone, and was found to have committed both felony assault, with a great bodily injury enhancement, and battery with serious injury. On appeal, the defendant contended that where a felony assault charge is accompanied by a great bodily injury enhancement, an accompanying charge of battery with serious injury becomes a necessarily included offense of the felony assault. The court rejected that contention, holding that the determination whether one offense is necessarily included in another must be made on the basis of the elements of the offenses charged, *without* considering any accompanying enhancements. (*Id.* at p. 1095.) We find the *Jose H.* court’s reasoning persuasive.

“Separate convictions may ‘be had for more than one offense committed by means of a single act or series of acts, where there is an element of one crime not found in the other.’ [Citation.]” (*Orlina v. Superior Court* (1999) 73 Cal.App.4th 258, 262.) The crime charged in count two in this case was willful infliction of corporal injury on a former cohabitant resulting in a traumatic condition. (§ 273.5, subd. (a).) The crime charged in count three was assault with a deadly weapon. (§ 245, subd. (a)(1).) It is self-evident that each of these crimes includes an element not present in the other: corporal injury resulting in a traumatic condition may be inflicted on a former cohabitant without the use of a deadly weapon, and conversely, an assault with a deadly weapon may be committed upon someone who is not a former cohabitant, and need not result either in corporal injury or in a traumatic condition. Appellant does not argue that either offense is

¹² In granting review in *People v. Sloan*, the Supreme Court framed the issue as follows: “For purposes of the ban on conviction of necessarily included offenses (see *People v. Pearson* (1986) 42 Cal.3d 351), should enhancement allegations be consider[ed] in determining whether a lesser offense is necessarily included in a charged offense as pled in the information or indictment?” The same issue is also pending before the Supreme Court in another case in which review was granted on the same date. (*People v. Izaguirre*, review granted June 8, 2005, S132980.)

necessarily included in the other unless the accompanying enhancement allegations are taken into account. Accordingly, we decline to vacate appellant's assault conviction.

3. Ineffective Assistance of Counsel

Appellant's direct appeal raises only one issue as to the alleged ineffective assistance of his trial counsel.¹³ The background facts relevant to appellant's argument are as follows. Prior to trial, the judge ruled that the prosecution could not introduce evidence of a prior incident of domestic violence by appellant against Swan under Evidence Code section 1109, but left that ruling open for reconsideration if the trial evidence so warranted. The judge later explained that he had made this ruling under Evidence Code section 352 because the prior incident was "tangential" to the incident giving rise to the current assault.

In cross-examining Swan at trial, appellant's counsel elicited her testimony that during their relationship, she and appellant had generally gotten along well, and that although they had had their differences and arguments as most couples do, appellant had generally been a "nice man" when they were not arguing. He also elicited testimony that prior to the assault, appellant and Swan "had never had an altercation like that before" and that they had never "ended up with weapons" before.

At an ensuing bench conference, which was summarized on the record in the jury's absence shortly thereafter, the prosecutor renewed his request to be allowed to introduce the prior domestic violence incident. The trial judge granted the request, reasoning that the evidence had become admissible under Evidence Code section 1109 because "there were quite a number of questions asked about the prior relationship of the parties, and particularly questions that went to whether there had ever been violence between the two individuals, and she answered those questions no." The judge explained that "I did not think that in light of the questions asked that my concerns about [Evidence Code section] 352 were applicable any further."

¹³ The ineffective assistance of counsel issues raised in appellant's petition for habeas corpus are disposed of *post*.

As permitted by this ruling, during his redirect examination of Swan, the prosecutor elicited her testimony that appellant once pushed her onto a bed and was about to hit her with a bottle, but was prevented from doing so by his mother. Appellant had also ripped off Swan's shirt on a couple of other occasions, but he apologized, and Swan stayed with him because she cared about him. The prosecutor referred to this evidence in his closing argument as tending to undercut appellant's claim that he had acted in self-defense.

Appellant now argues that his trial counsel rendered ineffective assistance because, by eliciting Swan's testimony that the couple got along well, he effectively opened the door for the introduction of the evidence regarding appellant's prior violence against Swan, thus undercutting appellant's contention that he acted in self-defense when he stabbed Swan. Appellant made the same contention below in his motion for new trial, which he filed after discharging his counsel and exercising his right to represent himself.

To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate both (1) that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that the verdict would have been more favorable to the defendant if counsel's performance had not fallen below the applicable standard. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Weaver* (2001) 26 Cal.4th 876, 925.) When a claim of ineffective assistance of counsel is raised on direct appeal, the conviction will be reversed only if the record affirmatively discloses that counsel had no rational tactical purpose for the challenged act or omission. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Reviewing courts defer to trial counsel's reasonable tactical decisions, and "should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott, supra*, 15 Cal.4th at p. 1212; see *People v. Jones* (2003) 29 Cal.4th 1229, 1254; *People v. Garvin* (2003) 110 Cal.App.4th 484, 490.)

In the present case, in assessing whether appellant's trial counsel had a tactical reason for examining Swan on the subject of the couple's history with respect to domestic violence, we have the benefit of the colloquy between appellant's counsel and the court

that was put on the record during the recess. As appellant's counsel explained at that time, he asked the questions in order to bolster appellant's self-defense theory by establishing that appellant did not have an extensive or escalating history of domestic violence. He admittedly knew that this line of questioning posed a risk of making the prior violence evidence admissible, but he averred that he had tried to keep the questions tangential enough to avoid this, and argued that he had succeeded, although the trial judge ultimately ruled otherwise. In light of the scantiness of the other evidence supporting appellant's self-defense claim,¹⁴ and the relatively mild nature of the incidents counsel risked admitting by establishing that the couple's prior history was largely peaceful, we cannot characterize this decision as falling below the applicable standard of reasonable competence.

Moreover, we cannot find it reasonably probable that the jury verdict would have been different if the prior domestic violence evidence had not been introduced. The evidence that appellant stabbed and seriously injured Swan was overwhelming, and appellant does not contend otherwise. The only real factual questions were (1) whether appellant acted with malice; (2) whether appellant intended to kill Swan; and (3) whether appellant acted in self-defense. The first of these was resolved in appellant's favor by the jury when it found him not guilty of attempted murder. The second issue has been rendered immaterial by our reversal of the attempted manslaughter conviction, as intent to kill is not an element of either of the other counts of which appellant was convicted. As to the third issue, in light of the overall state of the evidence at trial, we find it extremely unlikely that the evidence of appellant's previous behavior toward Swan could have played a material role in the jury's decision to reject appellant's self-defense claim.

¹⁴ Appellant contends in his habeas corpus petition that there was other self-defense evidence that his trial counsel should have discovered and introduced. We are concerned here with the direct appeal, and therefore can only consider the evidence that actually appears in the trial record.

For all of the foregoing reasons, we do not find anything in appellant's claim of ineffective assistance of counsel on his direct appeal that requires us to reverse his convictions for corporal injury or assault.

C. Delay in Preparation of Record on Appeal

Appellant's notice of appeal was filed on December 27, 2002. The record initially filed with this court in February 2003 was not complete. Thereafter, despite diligent efforts by appellant's counsel,¹⁵ and appellant's own filing of a mandate petition and request for sanctions, the record was not finally complete until over a year later, on May 13, 2004. In his opening brief, appellant argues that if his conviction is reversed in whole or in part, retrial is barred by the delay in preparation of the appellate record.

The parties agree that the controlling authority on this issue is *Barker v. Wingo* (1972) 407 U.S. 514, 530-532, which sets forth a four-factor test for determining whether delays in the criminal process, whether at trial or on appeal, have infringed on a defendant's right to speedy trial: (1) the length of the delay; (2) the reason for the delay; (3) the degree to which the defendant asserted his or her rights, and (4) the degree of prejudice to the defendant. In the present case, we agree that the first three factors militate in favor of a finding that appellant's speedy trial rights have been compromised by the delay in the preparation of the appellate record. It is simply inexcusable that it took over 16 months after the filing of the notice of appeal for the superior court to complete the record, in a case in which the presentation of evidence at trial took less than two days, and the pretrial and posttrial proceedings were neither particularly numerous nor unusually complex. Neither appellant's counsel nor appellant share any part of the responsibility for this delay, and appellant's right to prompt preparation of the record has been asserted in a timely and consistent manner. As far as appears from the record before us, including the materials of which we have taken judicial notice, the delay in the

¹⁵ On July 22, 2004, we granted appellant's counsel's request for judicial notice of various documents regarding the problems and delays in the preparation of the record on appeal, including counsel's correspondence with superior court personnel.

preparation of the record in this case was been caused solely by a regrettable lack of diligence and inattentiveness to detail on the part of the responsible superior court personnel—inattentiveness that is also reflected in the number of corrections that were necessary in the abstract of judgment.¹⁶

As to the fourth factor, however, it would be premature for us to reach the issue. If the prosecutor were to decide for any reason not to retry appellant on the attempted voluntary manslaughter charge, appellant will not have suffered any prejudice from the delay,¹⁷ and the issue will be moot. (See *In re Christopher S.* (1992) 10 Cal.App.4th 1337, 1341 [delay on appeal not prejudicial where convictions affirmed]; *People v. Sylvia* (1960) 54 Cal.2d 115, 125 [same].) If the prosecutor does decide to retry appellant, the determination whether appellant has been prejudiced by the delay will depend on facts not discernible from the current appellate record, including the availability of witnesses and evidence, the fading of memories, and other factors. Accordingly, if the prosecutor seeks to retry appellant, we leave it to the trial court on remand to conduct appropriate proceedings to determine whether or not the delay has prejudiced appellant to an extent that bars his retrial.

¹⁶ In response to a letter to the trial court from the Department of Corrections, a third amended abstract of judgment was filed on June 25, 2004 (the June 25 abstract). On July 29, 2004, an additional abstract of judgment was filed, also titled the third amended abstract of judgment (the July 29 abstract). A copy of the June 25, 2004 abstract was provided to us by appellant's counsel, but only the July 29, 2004 abstract has been transmitted to this court by the superior court clerk, and that was not done until September 15, 2004. Appellant's reply brief, filed December 8, 2004, indicates that the July 29 abstract also contains several errors.

¹⁷ Appellant has been in custody since his arrest on October 5, 2001. According to the July 29 abstract of judgment, he has been sentenced to a total of eight years in prison, consisting of three-year concurrent sentences on each count, and a total of five years for the enhancements. We have affirmed appellant's convictions for corporal injury and assault, including the enhancements. Even if appellant is not retried on the attempted voluntary manslaughter charge, it appears that his sentence for the counts we have affirmed will equal or exceed the time he will have been in custody by the time he is resentenced, even taking applicable credits into account.

Appellant's mandate petition, which was consolidated with his direct appeal and habeas petition, sought to compel the trial court to complete the preparation of the record on appeal. As that task has now been accomplished, the petition is dismissed as moot. Appellant's request for sanctions is denied.

D. Sentencing Errors

Appellant raises numerous issues regarding alleged errors in his sentence and in the abstract of judgment. Some of these became moot during the pendency of this appeal due to the trial court's correction of the abstract of judgment. The remainder are now moot due to our reversal of the attempted voluntary manslaughter conviction, which will require the trial court to resentence appellant whether or not he is retried on the attempted manslaughter charge. We trust that in resentencing appellant, the trial court will give due heed to the strictures of section 654, and of the prohibition on dual use of sentencing enhancements, to the extent they apply, and will take care to ensure that its orders and abstract of judgment correctly reflect appellant's sentence.

III. PETITION FOR HABEAS CORPUS

Appellant's petition for habeas corpus pleads numerous grounds for relief, including allegations that the police and prosecutor committed misconduct; that appellant's trial and appellate counsel provided ineffective assistance; and that appellant's right to speedy trial was violated. "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474, italics omitted.) If the petitioner fails to allege facts that, if true, would entitle him to relief, no prima facie case has been stated and the petition may be summarily denied. In the present case, we have reviewed appellant's petition and have determined that he has failed to state a prima facie case for relief on any of the grounds in the petition. We therefore deny the petition without issuing an order to show cause or ordering an evidentiary hearing. (*Id.* at pp. 474-475.)

IV. DISPOSITION

Appellant's conviction on count one for attempted voluntary manslaughter is reversed. Appellant's convictions on count two, for corporal injury, and count three, for assault with a deadly weapon, are affirmed, and the case is remanded to the trial court for resentencing on those counts. The petition for a writ of mandate and/or prohibition is denied as moot, and the accompanying request for sanctions is also denied. The petition for a writ of habeas corpus is denied.¹⁸

Ruvolo, J.*

We concur:

Kline, P.J.

Haerle, J.

* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

¹⁸ Appellant's requests for publication of this opinion are denied, as it does not meet the criteria for publication set forth in California Rules of Court, rule 976(c). The request for judicial notice filed by appellant on June 6, 2005, which requests that this court take judicial notice of transcripts of proceedings in the trial court and of exhibits from appellant's motion for new trial, is granted. The request for judicial notice filed by appellant on August 15, 2005, which requests that this court take judicial notice of certain published appellate opinions, is granted as to *People v. Lewis* (1993) 21 Cal.App.4th 243 and *People v. Sanchez, supra*, 24 Cal.4th 983, and otherwise denied, because the other opinions of which judicial notice is requested are no longer citable under California Rules of Court, rules 976(d)(1) and 977(a), due to grants of review by the California Supreme Court. All other pending motions filed by appellant are denied.