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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. SEAN KEITH SHIELDS, Defendant and Appellant.	A103504 (Contra Costa County Super. Ct. No. 981195-1)

Sean Keith Shields (appellant) was convicted, after a jury trial, of attempted murder of a peace officer, second degree robbery, and possessing an assault weapon. On appeal, he contends: (1) the trial court erred when it refused to sever his trial from that of his codefendant; (2) the prosecutor committed misconduct during cross-examination of appellant; (3) the court erred when it instructed the jury regarding the jury's consideration of a defendant's false or misleading statement, pursuant to CALJIC No. 2.03; (4) the court erred when it gave an unmodified flight instruction, pursuant to CALJIC No. 2.52; (5) defense counsel provided inadequate representation in failing to support appellant's testimony with evidence and argument; (6) the court erred in failing to require the jury to make a unanimous finding on the peace officer penalty allegation; (7) the count for possession of an automatic weapon must be reversed because the court directed a verdict on an element of the offense not supported by sufficient evidence; (8) the count for possession of an automatic weapon must be reversed because the court failed to instruct the jury on an element of the offense; and (9) remand is required because the court failed to exercise its discretion with respect to appellant's motion to strike the peace officer

penalty allegation. We conclude that the failure to require the jury to make a unanimous finding on the peace officer penalty allegation requires that the true finding on that allegation be reversed. We also conclude that appellant's conviction for possession of an automatic weapon must be reversed, and the sentence stricken. We shall otherwise affirm the judgment.

PROCEDURAL BACKGROUND

On August 3, 1998, appellant was charged by information with attempted first degree murder of a "peace officer/human being" (Pen. Code, §§ 187, 664, subd. (e)–count one);[1] second degree robbery (§§ 211, 212.5, subd. (c)–count two); possession of an assault weapon (§ 12280, subd. (b)–count three); and being a felon in possession of a firearm (§ 12021, subd. (a)(1)–count four).[2] As to counts one and two, it was further alleged that appellant had personally used and intentionally and personally discharged a firearm during the commission of the offenses (§§ 12022.5, subd. (a)(1); 12022.53, subds. (b), (c)). The information also alleged that appellant was ineligible for probation, having suffered two prior felony convictions (§ 1203, subd. (e)(4)).

Appellant's and codefendant Payton's jury trial began on March 15, 2000. On April 10, 2000, the jury found appellant guilty of attempted second degree murder of a "peace officer/human being," although it found that the attempt was not willful, deliberate, and premeditated. The jury also found him guilty of second degree robbery and possessing an assault weapon, and further found true all of the firearm enhancement allegations.[3] On August 11, 2000, the trial court found true the prior conviction allegations relating to the probation ineligibility clause.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Appellant's codefendant, Andre Payton, was charged with the same four offenses as was appellant. Counts four and five charging appellant and Payton, respectively, with being felons in possession of firearms were later dismissed.

[3] The jury found codefendant Payton guilty of the lesser offense of attempted voluntary manslaughter, second degree robbery, and possessing an assault weapon. It also found true both enhancements alleged in count one, but, with respect to count two,

On July 18, 2003, the trial court sentenced appellant to a total term of life with the possibility of parole plus 10 years in state prison.[4] Also on July 18, 2003, appellant filed a notice of appeal.

FACTUAL BACKGROUND[5]

Prosecution Case

Tony Lawson testified that on January 3, 1998, he was staying off and on in the apartment of Doris Alston and their two children in Richmond. He was robbed early that morning right in front of Alston's apartment. He did not call the police because he believed the incident was over after he was robbed. He did not want to come to court to testify. He had taken methamphetamine earlier on the evening of January 2, 1998, had drunk quite a bit of beer, and had smoked marijuana just before the robbery.

At trial, Lawson claimed not to remember much of what had happened during the robbery, but did acknowledge that two men came towards him, each holding a gun, and demanded money. One man was dressed all in black, including a black coat and a hat, and was holding a black nine-millimeter handgun. The other man was wearing a ski mask and was holding an AK-47 assault rifle. They stuck the guns in his face. The men went through his pockets, but he told them he had no money. Alston's apartment door opened during the robbery, but closed again quickly. The men took a new black coat that Lawson was wearing and left on foot. Just after they left, Lawson heard one or two gunshots that sounded like they came from the handgun.[6]

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found true the enhancement allegation that Payton had personally used a firearm, but found not true the allegation that Payton intentionally and personally discharged a firearm.

[4] Codefendant Payton was sentenced to a total term of 19 years in state prison.

[5] These facts are taken in large part from our nonpublished opinion in *People v. Payton* (Sept. 2, 2003, A094260).

[6] Due to Lawson's claimed inability to recall much of what had happened during the robbery, the prosecutor was permitted to read various questions and answers from the preliminary hearing transcript and from a videotaped interview of Lawson.

Doris Alston testified that, in the early morning of January 3, 1998, she was in her apartment when she heard people yelling outside her front door. She heard Lawson say to leave him alone, that he did not have anything. She then heard someone tell him to shut up and empty out his pockets. She then heard someone getting hit. She heard something bump the door, and went to the door to listen. Someone said to stop whining and shut up, and "Give me your coat." She heard Lawson repeat that he did not have anything.

When Alston heard Lawson say, "Don't shoot me," she opened the door. She saw Lawson kneeling on the ground. A tall man was standing over him with a sawed-off shotgun pointed at his head, and another man was standing over him with a handgun. The tall man was wearing a mask. The other man had a beanie pulled down over his face so only his mouth and chin were uncovered. He was wearing a blue jumpsuit that zipped up the front. She could not see what race the men were, but by their voices she assumed they were Black. When the man with the handgun pointed the gun at her, Alston shut her apartment door. She heard one of them tell Lawson, "That bitch open the door again, we gonna blast her."

Alston stood inside the apartment, crying and listening. She heard more arguing, and heard someone twice say, "Take off your jacket." She then heard two shots from the smaller gun, and then heard nothing. Alston convinced her brother, who was at her apartment, to open the door. Alston ran outside and saw the back of a blue van turn the corner off her street. Alston then ran next door to her mother's house and told her mother to call the police. At that time, she thought the men had killed or kidnapped Lawson.

The police later took Alston to where the blue van had crashed. An officer took her to see a man who was handcuffed nearby. She told the officer he looked like her next-door neighbor, Shaq. He was not one of the men she had seen outside her apartment with a gun. At trial, Alston identified appellant as Shaq. The officer then took her around the corner to see another suspect. She told the officer that she did not recognize the man; she had not seen him before. She did say one of the robbers was tall and slender like the suspect. Later that morning, Alston learned that Lawson was unharmed.

Alston denied telling Detective Hughes that Shaq's sister had threatened her on the morning of January 4. She also denied telling Detective Hughes that she wanted to relocate because she was scared of Shaq's relatives and friends. Alston also testified that the police moved her and her children to a new location without her requesting or knowing about it in advance. She also denied that three people had approached her the night before the preliminary hearing and told her she had better be at the hearing, and had mentioned Shaq's name. She denied saying, in a videotaped interview, that she was sure that Shaq was the one with the automatic gun; that the second man she was asked to identify was the robber with the sawed-off shotgun; and that if it was Shaq in court, she would not identify him because she would be in danger.[7] Alston further denied telling the police that the man with the sawed-off shotgun had on a long black leather jacket and black boots.[8]

Contra Costa Community College District Police Officer David Shipman testified that, while on duty in San Pablo at about 3:25 a.m. on the morning of January 3, 1998, he heard a dispatch to be on the lookout for a blue van that was wanted for kidnapping and robbery in Richmond. A short time later, Shipman saw a blue van turning onto El Portal. Shipman, who was in uniform and in a patrol car with police emblems on the doors, began to follow the van while waiting for another police unit to arrive. The officer turned on the amber bar on the car's light bar; the amber could only be seen from the rear of the vehicle. The van turned into a gas station and Shipman did the same. The van stopped at a pump and Shipman stopped about 10 feet behind it. After about five seconds, the van accelerated out of the gas station, and then turned left.

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[7] The relevant preliminary hearing testimony and interview questions and answers, in which she had stated these things, were read to the jury. In the videotaped interview, part of the transcript of which was read to the jury, Alston also had said the clothes of one of the robbers (the zippered blue jumpsuit) were the same clothes Shaq was wearing when she was brought to the scene of the car crash to look at suspects.

[8] On cross-examination, Alston testified that the prosecutor had lied to her or told her to lie in various ways, and that the prosecutor had said she would help Alston, whose children had been taken from her by Child Protective Services, to get her children back.

Shipman followed the van at a distance of about 20 to 25 feet. Almost immediately, he "started taking on gunshots into [his] patrol car." The gunshots were coming from in front of him. The first round hit the windshield about a foot to Shipman's right. He ducked down to his left and radioed in that he was being shot at. About two seconds later, the second round hit the driver's side exterior mirror of the patrol car, about six inches away from his head. Shipman then heard about five more impacts of gunfire into his car over about five seconds, and then it stopped. At some point, Shipman saw a head poke out of the driver's side window, look back towards him, and then go back into the van.

Shipman kept following the van, and about 20 seconds later saw another police car coming toward him. The police car made a U-turn and got between Shipman's car and the van, and they all continued driving at about 30 to 35 miles per hour. Eventually, while driving in San Pablo, the van missed a curve in the road and crashed into some parked cars. The subjects left the van. Officer Alameda, who was in the other patrol car, and Shipman stopped, got out of their cars, and started looking for the subjects. Shipman saw someone come out of the corner of an apartment complex and start running. Shipman chased him and saw that the subject was a Black male of medium build, and was wearing a long black jacket and black pants; he also had short black hair and was carrying a rope or leash. Shipman lost sight of the man near an apartment complex. Shipman then backtracked toward the van and found a semi-automatic handgun in some bushes.

San Pablo Police Officer Eugene Alameda, who had also been chasing the van, testified that after the van crashed, he saw that the driver's side door was open and he saw a silhouette running from the driver's side of the van. As Alameda went toward the van, he saw a second person, wearing dark clothing, come out from the passenger side of the van and start to run. Alameda started to chase that person. When an officer in a patrol car pulled in front of the man, he turned around and ran back at Alameda. At that point, Alameda ordered the man to the ground at gunpoint. The man did not comply and struggled with another officer who came from behind him. Alameda sprayed pepper

spray in the man's face, which allowed the officers to subdue the man enough to handcuff him. The man, who was wearing a jumpsuit, claimed to have been the victim of a kidnapping. At trial, Alameda identified the man as appellant.

Brumel Yansane testified that on January 3, 1998, at about 3:50 a.m., he was parking his car in the parking lot by his apartment on Rivers Street in San Pablo when a Black male wearing a black or brown raincoat approached him. The man told Yansane not to talk and to act like he was not there, before hiding behind Yansane's car. A police officer came up and asked if Yansane had seen somebody, and Yansane said he had not. The man then followed Yansane, his wife, and infant son to their apartment. Yansane saw many police cars around, and told the man he could not come inside the apartment. But he told the man he could go to the fitness room, which was on the same floor. Yansane then closed his door. The man started knocking very hard on the door, so Yansane called the police.

About 25 minutes later, Yansane went outside to smoke and found a belt on the ground outside his apartment, which he gave to one of the many officers in the area. As he returned to his apartment, Yansane saw the same man go into the fitness room. In an audio recording of Yansane's 911 call, which was played for the jury, Yansane said the man wore a black jacket and black pants. He also said the man had one gold tooth in the front. It was stipulated at trial that codefendant Payton had one gold tooth.

Richmond Police Officer Shawn Pickett testified that he was searching at the Rivers Street apartment complex with his police dog early on the morning of January 3, 1998, when he saw that the door to a weight room was open. He saw a black leather jacket under some debris on the floor and ordered the man under the debris to come out. The man came out and was taken into custody. At trial, Pickett identified the man as codefendant Payton.

Richmond Police Officer Laurance Robinson testified that at around 3:45 a.m., he took Doris Alston to view appellant near the crashed van. Alston identified the van as the one she had seen earlier. When she saw appellant, she started crying, and said, " 'That's the one that had the .9 millimeter. That's him.' " Robinson then took Alston to view

codefendant Payton. After hesitating for a minute, Alston said, " 'That's the one that had the sawed-off shotgun pointed at Tony's head.' " She also said she was scared because they had seen her face and knew where she lived. When asked how she was able to identify Payton, she said she was able to do so by his height and weight, and the color and fit (dark and baggy) of the clothes he was wearing.

When taken into custody, Payton was 5 feet, 10 inches tall and weighed 175 pounds. He was wearing a large leather jacket with belt loops but no belt, black jeans, a black T-shirt, and black boots. Appellant was 5 feet, 6 inches tall and weighed 175 pounds. His clothing included a blue coverall.

In the van, police found an assault weapon partially underneath the front passenger seat and a black puffy jacket with a white lining. Tony Lawson identified the jacket as the one taken from him during the robbery. The van had several bullet holes in the rear passenger door, all of which were exit holes. Just behind the driver's door on the metal panel was another bullet hole, which seemed to be an entry hole.

Payton's Defense Case

Maria Muro lived near where the van crashed. After she heard the crash, she looked out her window and saw a man running from the driver's side of the van. He was wearing dark blue jeans.

San Pablo Police Officer Clinton Weaver testified that after he arrived at the scene of the van crash, he saw a person in a rear yard on Del Camino. The person was wearing a black three-quarter length coat and had shoulder-length wavy hair.

Forensic toxicologist Warren Cohen testified that he tested a blood sample collected from Payton at 6:55 a.m. on the morning in question. The sample showed the presence of cocaine metabolite; Cohen opined that Payton ingested cocaine four to six hours before the blood sample was taken. From the sample collected, Cohen also estimated that Payton's blood alcohol level at 3:00 or 3:30 a.m. measured approximately 0.10 percent. At that level of intoxication, a person would likely feel the effects of the alcohol, particularly in performing complex tasks like driving an automobile.

Appellant's Defense Case

On January 2, 1998, appellant was staying at his mother's house in Richmond.[9] She had cancer and he was helping to care for her. That day, he cleaned up the garage; he also drank some beer. That evening he walked over to the house of a female friend named Toni, who lived near his mother's house in Richmond. He met Andre Payton there, and drank some more alcohol. He later left the home with Payton. As they stepped outside, they heard gunshots. They crouched down and looked around. Then, two people with guns ran up to them. They ordered appellant and Payton to get into a van. One person hit appellant in the head with a gun and appellant's glasses came off. The two people forced appellant and Payton to lie face-down on the floor of the van. As he felt the van moving, someone searched appellant and took his wallet.

Some time later, appellant heard a banging noise and then a loud explosion that seemed to come from inside the van. Then the van crashed, and appellant thought he was going to die. He heard people get out of the van and heard someone scream to run. Appellant got out of the van and ran because he was afraid of being shot. As he ran, appellant saw a police car pull in front of him. He stopped and heard someone scream "freeze" from behind him. He turned around and saw a police officer approaching with his gun pointed at him. Appellant immediately dropped to his hands and knees.

As the officer came up, appellant tried to tell him he had been kidnapped. The officer said, " 'Kidnapped, my ass. I'll blow your fucking brains out.' " Appellant responded, " 'fuck this. Fuck you. Do it.' " The officers then jumped on appellant's back, maced his face, and handcuffed him.

Appellant repeatedly told the officers he had been kidnapped. They asked how many people were in the van. He responded that there were four people in the van. He never said he had been kidnapped by "four big mother fuckers." He told them he had been kidnapped by "some big mother fuckers."

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[9] Appellant acknowledged that, in 1992, he had been convicted of possession for sale and transportation of cocaine, for which he received probation.

Appellant denied driving the van, robbing Lawson, and possessing or firing either of the two firearms introduced into evidence. He did admit that he also goes by the name, "Shaq."

DISCUSSION

I. *Denial of Appellant's Motion to Sever*

Appellant contends the trial court erred when it denied his motion to sever his trial from Payton's due to the fact that they had mutually exclusive defenses.

A. *Trial Court Background*

Appellant moved to sever his trial from Payton's, arguing that Payton's post-arrest statements implicated appellant, Payton's efforts to conceal himself from police and his prior convictions prejudiced appellant, the factually complex case could lead to jury confusion, and appellant's and Payton's defenses were "mutually exclusive." At the hearing on the motion, the prosecutor said she would not introduce Payton's post-arrest statements at trial if the court was planning to sever on that ground. The trial court stated that it would sever the trial if the prosecutor planned to introduce Payton's statements, to which the prosecutor responded that she was not going to use the statements.

The prosecutor did not introduce Payton's statements at trial. In his defense, Payton presented two witnesses who saw people near the site where the van crashed whose descriptions did not match those of Payton or appellant. Payton also presented scientific evidence regarding his ingestion of cocaine and alcohol on the night of the incident, including the opinion of a toxicologist that a person would feel the effects of the alcohol Payton had ingested while performing complex tasks like driving a car. In his defense, appellant testified that he and Payton had been kidnapped at gunpoint by two men, who forced them into the van. He testified that, after the van crashed, he heard someone scream "run," and he ran until stopped by police, who did not believe him when he said he had been kidnapped. Appellant denied robbing Lawson; he also denied possessing or firing either of the two guns in question.

Just before closing arguments began, appellant personally told the court: "I feel that Ms. Harrigan [Payton's counsel] is in collusion with the prosecution. They seem to

have a pretty close relationship. And I feel that during her closing argument she would deliberately say something to hurt me. And for that reason I feel that a severance is in order. [¶] Furthermore, Mr. Payton and myself, we are in agreement that Ms. Harrigan should lead off in the closing arguments followed by Mr. Hove [appellant's counsel]." The trial court stated that the order of closing argument had already been decided and denied appellant's request for severance. The court further stated that "if there's any objection to comments made by Ms. Harrigan, [appellant's counsel] can voice an objection and I'll be happy to rule at that time."

In her closing argument, Payton's counsel argued that Payton saw crimes committed, but that that did not make him guilty of a crime. She also argued that the prosecution had not proved beyond a reasonable doubt that Payton was one of the two people who robbed Lawson or fired a gun, or, if the defendants did fire a gun, there was no evidence of premeditation, as compared to a gun fired in panic, as a warning, or by an intoxicated person. Counsel also argued that there were many "cracks" in the prosecution's case, that there was a reasonable doubt about whether there were only two people in the van and about the identification of Payton as one of the robbers. Counsel also argued that the evidence did not show that Payton discharged a weapon or that, if he did, there was no evidence of premeditation.

Payton's counsel further argued: "I think when you look at those lessers and all the evidence that you've seen in this case, everything you've heard, it's not what the prosecutor wants you to think. It's the connection that maybe a chauffeur has to his—to his boss, or a fall guy has to the—to the big players, so, you know, a sort of loyal English retainer to his English lord. And that's the connection.

"Ask yourself. Ask yourself when you're thinking about—when you listen to the prosecutor saying, Lump these two people together; Andre Payton must have done this: Who is everyone afraid of here? Not Andre Payton. [¶] Who did Doris—who are Doris and Tony reluctant to testify against? Not Andre Payton. [¶] Who do they go to great lengths to protect? Not Andre Payton.

"Well, ladies and gentlemen, that's why you might run. The prosecutor had a big point about why flee. Why flee from this scene? That's one reason. Fear. [¶] Look back at the robbery. Is the person that they've identified as Andre Payton in charge? No. That's my—that's why you might run. [¶] Who's likely to be taking orders here? Drive. Hold this. Take this. Run.

"That's why you might run. That's why you might run and hide because you have been there. Because you know. Heck, because you're afraid of the police, because you know what might happen when they get you, because you know that they might accuse you even though all you were was there, even though that's all you did and they have nothing more to show you did anything else. [¶] You know that if you're caught in this situation, you are charged and there's nothing you can do about it. That's why you run. That's why you run 'cause you're afraid because you were merely present at the scene of a crime. At the scene of a crime.

"Run. Take this. That does not prove—that does not prove that Andre Payton fired these weapons. Not beyond a reasonable doubt. Not with all the mistakes. Not with all the cracks in this solid house. That does not prove beyond a reasonable doubt that Andre Payton is guilty of any of these crimes, any of the crimes he's been charged with."

The jury ultimately convicted both defendants of second degree robbery and possessing an assault weapon. The jury also convicted appellant of attempted second degree murder of a "peace officer/human being" (though it found the premeditation allegation not true) and convicted Payton of attempted voluntary manslaughter.

B. *Analysis*

Section 1098 provides in relevant part: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." Our Legislature has thus " 'expressed a preference for joint trials.' [Citation.] Separate trials are permitted in the discretion of the trial court, however, and whether a trial court's denial of a severance motion constitutes an abuse of that discretion is judged on the facts as they appeared at the time

the court ruled on the motion. [Citations.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 167 (*Hardy*).) The trial court's discretion to order separate trials is guided by the following principles: " 'The court should separate the trial of codefendants "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." ' [Citations.]" (*Ibid*.)

The present case is a " 'classic case' " for a joint trial since both defendants were charged with having committed " 'common crimes involving common events and victims.' " (*Hardy*, *supra*, 2 Cal.4th at p. 168.)

In *Hardy*, our Supreme Court discussed the question of severance in the context of conflicting or antagonistic defenses: " 'Although several California decisions have stated that the existence of conflicting defenses may compel severance of codefendants' trials, *none has found an abuse of discretion or reversed a conviction on this basis*.' [Citation.] If the fact of conflicting or antagonistic defenses *alone* required separate trials, it would negate the legislative preference for joint trials and separate trials 'would appear to be mandatory in almost every case.' [Citation.]" (*Hardy, supra,* 2 Cal.4th at p. 168.)

The court in *Hardy* also noted that federal courts have almost uniformly construed the doctrine of what constitutes an antagonistic defense "very narrowly. Thus, '[a]ntagonistic defenses do not *per se* require severance, even if the defendants are hostile or attempt to cast the blame on each other.' [Citation.] 'Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.] Stated another way, ' "mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other.' [Citations.]" (*Hardy, supra,* 2 Cal.4th at p. 168; see also *Zafiro v. United States* (1993) 506 U.S. 534, 538, 540 [noting that mutually antagonistic defenses are not prejudicial *per se* and that "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials"].)

In addition, even if there was no abuse of discretion in denying a motion to sever, after trial, " 'the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law.' [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 726.)

In the present case, appellant argues that his and Payton's defenses were not merely conflicting or mutually antagonistic, but were "mutually exclusive," and, for that reason, severance was required. He also argues that the court's refusal to sever the trials deprived him of his constitutional rights to due process, a fair trial, and confrontation.

This case is nearly indistinguishable from *People v. Morganti* (1996) 43 Cal.App.4th 643 (*Morganti*), cited by neither party, in which a panel of this Division rejected the defendant's argument that the codefendants' antagonistic defenses compelled severance. In *Morganti*, one defendant—Paterson—did not testify, but a redacted statement he made to police, in which he admitted to at least being an accessory to a homicide, was admitted at trial. (*Id*. at p. 653 & fn. 1.) The other defendant—Morganti—testified that he was not present on the night of the murder, did not kill the victim, and had no knowledge about who had committed the murder. (*Id*. at p. 655.)

We concluded that the trial court did not abuse its discretion in refusing to grant Morganti a separate trial, despite the fact that the defendants had conflicting and antagonistic defenses. (*Morganti*, *supra*, 43 Cal.App.4th at p. 672.) We found that the court's ruling was consistent with California's statutory preference for joint trials, and noted the fact, discussed in *Hardy*, that conflicting defenses had not resulted in a reversal in any California case. (*Morganti*, at p. 672, citing *Hardy*, *supra*, 2 Cal.4th at p. 168.)

We also addressed Morganti's claim that an event during trial, after his motion to sever was denied, resulted in " 'a gross unfairness' " that deprived him of a fair trial and due process of law. (*Morganti, supra*, 43 Cal.App.4th at p. 672; see *People v. Cleveland*, *supra*, 32 Cal.4th at p. 726.) Specifically, Morganti complained about a comment made during Paterson's counsel's closing argument: " 'I think the evidence in this case shows no doubt that Mr. Morganti committed the crime of murder, and arson, in Cloverdale.

The evidence also shows in this case that George Paterson had knowledge of that murder, that he is guilty as an accessory after the fact. He didn't tell the police, he didn't turn over the car, he lied . . . , he protected himself. He protected Mr. Morganti. That is an accessory after the fact, ladies and gentlemen. That's what the evidence shows in this case.' " (*Morganti*, at p. 673.)

We rejected Morganti's contention that Paterson's counsel's concession was, in effect, a confession that necessarily implicated Morganti, and that his constitutional right to confront witnesses against him was violated because counsel could not be cross-examined. As we explained: "[T]he challenged argument was not Paterson's defense but rather an attempt to deal with the evidence that was presented by the prosecution. Paterson's defense was that he did not commit or participate in the murder. Indeed, Morganti does not identify any evidence presented by Paterson which implicated Morganti in any way." (*Morganti*, *supra*, 43 Cal.App.4th at p. 675.)[10]

In the present case, we find no abuse of discretion in the court's denial of appellant's pretrial severance motion. The court's ruling that it would grant a severance if the prosecutor intended to introduce Payton's statements at any point during trial demonstrates that the court understood the need to protect appellant from any damaging admissions made by Payton. Without Payton's statements, there was no indication that the defendants would present antagonistic defenses at trial. Judging the circumstances as

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[10] In *Morganti*, we also noted an observation made in *Hardy*, *supra*, 2 Cal.4th at page 169, footnote 19: " 'As the Supreme Court of Kentucky opined: "[N]either antagonistic defenses nor the fact that . . . one defendant incriminates the other amounts, by itself, to unfair prejudice. . . . That different defendants alleged to have been involved in the same transaction have conflicting versions of what took place, or the extent to which they participated in it, vel non, is a reason for rather than *against* a joint trial. If one is lying, it is easier for the truth to be determined if all are required to be tried together." ' [Citations.]" (*Morganti*, *supra*, 43 Cal.App.4th at pp. 674-675.)

We also found that the case was similar to *People v. Turner* (1984) 37 Cal.3d 302, in which our Supreme Court held that the fact that the only defendant to testify provided testimony that was quite damaging to his codefendant, and thus helpful to the prosecution, did not result in a denial of due process or a fair trial. (*Morganti*, *supra*, 43 Cal.App.4th at p. 673.)

they appeared at the time of the hearing on the severance motion, the court reasonably concluded that its ruling on Payton's statements would adequately protect appellant in a joint trial. (See *People v. Cleveland*, *supra*, 32 Cal.4th at p. 726.)

We further find that no " 'gross unfairness' " occurred as a result of the joint trial. (See *People v. Cleveland*, *supra*, 32 Cal.4th at p. 726.) Payton's attorney's comments during closing argument were similar to those described in *Morganti*, except that they were even *more* benign than those found to be nonprejudicial in *Morganti*.[11] Payton's counsel did not concede Payton's involvement in the crime or explicitly accuse appellant of having committed the crimes. Rather, she tried to show the weaknesses in the prosecution's evidence against her client and to convince the jury that, even if it found that the defendants were involved in the crimes, Payton's participation was minimal compared to that of appellant. Nor did Payton present any evidence during trial that implicated appellant. In fact, two of Payton's defense witnesses testified to seeing people who looked different from appellant and Payton near the scene of the van crash; this testimony *supported* appellant's claim that he was kidnapped. The prosecutor had also refrained from introducing Payton's incriminating post-arrest statements specifically to avoid the court's conditional severance order. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 933-934 ["[A]ny suggestion that [codefendant] was innocent even if defendant were found guilty came from arguments of counsel, rather than from testimony or out-of-court statements of [codefendant]. This reduced the prejudicial impact of [codefendant's] attempt to shift blame onto defendant"].)[12]

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[11] We also observe that appellant's counsel did not object to Payton's counsel's comments. Appellant asserts that such objection would have been futile, given the court's refusal to sever even though appellant had told the court he believed Payton's counsel would try to "hurt" him during her closing argument. (See *People v. Hill* (1998) 17 Cal.4th 800, 820.) This futility argument is somewhat questionable in light of the fact that the court also reminded appellant that he could object to any improper argument.

[12] For these same reasons, we find no abuse of discretion in the court's denial of appellant's verbal request for severance just before closing arguments, even though appellant expressed concern that Payton's counsel would say something against him.

In addition, any potential prejudice arising from Payton's counsel's argument was alleviated by the trial court's instructions to the jury, which were repeated at the beginning and end of trial, that it must decide separately whether each defendant was guilty or not guilty, and that statements made by the attorneys during trial were not evidence. (See *Zafiro v. United States*, *supra*, 506 U.S. at pp. 539, 540-541 [explaining that measures less drastic than severance, "such as limiting instructions, often will suffice to cure any risk of prejudice"].)[13] Hence, there was no deprivation of appellant's constitutional rights to confrontation, a fair trial, or due process of law. (See *Hardy*, *supra*, 2 Cal.4th at p. 168.)[14]

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[13] Appellant avers that he was further prejudiced when the court gave the jury an instruction, based on the last two paragraphs of CALJIC No. 3.01 (regarding aiding and abetting), which informed the jury, in effect, that mere presence at a crime scene, as well as knowledge that a crime is being committed and failure to prevent it, do not necessarily mean the defendant is guilty of the crime charged. According to appellant, this partial instruction, requested by Payton's counsel, benefited Payton because it endorsed his defense that he was merely present when the offenses were committed, and thereby strengthened the case against appellant. We find this argument unpersuasive for various reasons, including that, according to appellant's version of events, he too was present near where the robbery occurred and was in the van when the robbers shot at the police. Thus, the instruction arguably supported his defense.

[14] *U.S. v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1083, which appellant cites for the proposition that mutually exclusive defenses require severance, stated that, "[w]hile the joinder of trials in which defendants maintain mutually exclusive defenses produces heightened dangers of prejudice, we decline to adopt a per se rule against joinder in such cases. Instead, we hold that in order to establish an abuse of discretion, the defendants must demonstrate that clear and manifest prejudice did in fact occur." In that case, the Ninth Circuit found that one defendant's unremitting efforts to reiterate the prosecution's charges against the other and to emphasize his guilt—through counsel's opening statement, cross-examination of witnesses, and closing argument—rendered the joint trial prejudicial. (*Id*. at p. 1086.) In the present case, where the level of alleged antagonism did not approach that described in *U.S. v. Tootick*, we have concluded that the jury was able to assess the guilt or innocence of each defendant independently. Thus, appellant's severance argument cannot succeed. (See *People v. Zafiro*, *supra*, 506 U.S. at p. 539; see also *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 933-934 [efforts of codefendants to shift blame to each other are not inherently prejudicial, especially where such efforts arise from arguments of counsel, rather than from testimony or out-of-court statements].)

II. *Alleged Prosecutorial Misconduct During Cross-Examination of Appellant*

Appellant contends the prosecutor committed misconduct when she asked appellant questions insinuating damaging facts not in evidence. In the alternative, appellant contends defense counsel was ineffective for failing to object to the improper questions.

A. *Trial Court Background*

Near the end of the prosecution's case in chief, the prosecutor informed the trial court that two subpoenaed witnesses, one of whom was Lurriline Carlisle, had failed to appear that morning, as ordered. At the prosecutor's request, the court issued a body attachment for Carlisle. An inspector was immediately sent to Carlisle's house to bring her to court, and the court delayed trial for over an hour to wait for the two missing witnesses to be located. When trial recommenced, the other witness had been found and testified at the trial. The court later asked the prosecutor what she expected from Carlisle's testimony, and the prosecutor responded: "She bought the van for somebody, that one of the two people in the photo lineup was Shields."

Later, during cross-examination of appellant, the prosecutor asked whether he knew Eugene Carlisle, whether he knew Lurriline Carlisle, and whether Lurriline Carlisle had purchased the van for him in January 1997. Defense counsel did not object to the questions, and appellant responded in the negative to each question.

After appellant finished testifying, the prosecutor told the court that she expected to have one rebuttal witness the next morning. When the jury had left for the day, the prosecutor told the court that, during a break in appellant's testimony, her inspector told her he had contacted Carlisle's father. The prosecutor said that she was still trying to get Carlisle into court, and that Carlisle was the witness she intended to call on rebuttal the next morning.

The next morning, the prosecutor told the court that Carlisle had again failed to appear in court, and that "[w]e've been sitting on her house for 48 hours," without finding her. The prosecutor then took a call from her inspector, and told the court that he had done a walk-through of Carlisle's home and checked other locations where she might

be, and could not find her; she concluded that Carlisle was intentionally evading the inspector. The prosecutor then asked the court to inform the jury that Carlisle was under subpoena and failed to appear. Both defense attorneys objected to referring to Carlisle by name, and the court said it would simply say a witness had failed to appear. The court thereafter told the jury that subpoenaed witnesses expected by both the prosecution and defense had not appeared, and that all parties would be resting.

B. *Analysis*

"It is misconduct for a prosecutor to ask a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means. [Citation.] But if the defense does not object, and the prosecutor is not asked to justify the question, a reviewing court is rarely able to determine whether this form of misconduct has occurred. [Citation.] Therefore, a claim of misconduct on this basis is waived absent a timely and specific objection during the trial. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 481.)

In the present case, appellant did not object to the line of questioning regarding Lurriline Carlisle and the van. Appellant thus has waived this claim of misconduct. (See *People v. Price*, *supra*, 1 Cal.4th at p. 481.)[15]

Appellant nonetheless contends that defense counsel was ineffective for failing to object to the prosecutor's questions.

To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) In addition,

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[15] Appellant argues that an objection would have been futile because an objection would have merely focused the jury's attention on the improper questions. On the contrary, counsel could have objected when the prosecutor began the line of questioning related to Carlisle, before the question regarding the van was asked. In that way, the court could have determined whether the prosecutor could justify the questions before the allegedly prejudicial question was asked.

the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

Here, the record reflects the prosecutor's ongoing efforts to obtain Lurriline Carlisle's testimony at trial. In particular, it appears that, when she questioned appellant regarding Carlisle and the van, the prosecutor believed that Carlisle could be located and would testify regarding the van as a rebuttal witness. Thus, even assuming counsel could be considered ineffective for failing to object to the allegedly improper questions, the prosecutor assuredly would have explained her plan to the court, thereby negating any claim of misconduct. Accordingly, appellant suffered no prejudice from counsel's failure to object. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 694, 697.)[16]

III. *CALJIC No. 2.03*

Appellant contends the trial court erred when it instructed the jury, over defense objection, with CALJIC No. 2.03, as follows: "If you find before this trial a defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Appellant relies on *People v. Rubio* (1977) 71 Cal.App.3d 757, 769, in arguing that CALJIC No. 2.03 is inapplicable when a defendant's trial testimony was consistent with his pretrial statement because, "[i]n such a case, the instruction of necessity casts specific doubt on a defendant's credibility as a witness and singles out defendant's

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[16] We also observe that the court instructed the jury, pursuant to CALJIC No. 1.02, "not [to] assume to be true any insinuation suggested by a question asked a witness" and that "[a] question is not evidence." We assume the jury followed this instruction. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1234.)

testimony as subject to more particular scrutiny than that attached to prosecution witnesses." (Italics omitted.)

Appellant acknowledges that subsequent appellate court opinions have stated that *People v. Rubio* is no longer a correct statement of the law in light of *People v. Kimble* (1988) 44 Cal.3d 480, in which the California Supreme Court disapproved a line of cases holding that the only admissible pretrial statements are those proved to be false by the contrary testimony of the defendant at trial, explaining that "it simply does not follow that the jury would necessarily be engaging in 'rank speculation' if it relied on other evidence to determine that the prior statement was false," and that the question is one of weight, not admissibility. (*Id.* at pp. 496, 498; see also, e.g., *People v. Williams* (1995) 33 Cal.App.4th 467, 478; *People v. Edwards* (1992) 8 Cal.App.4th 1092, 1104.)

We find unpersuasive appellant's attempt to distinguish *People v. Kimble* on the ground that that case did not address the situation in *People v. Rubio* and the present case, where the defendant testifies at trial and his testimony is consistent with his pretrial statement. This narrow reading is not supported by any language in *People v. Kimble*, which did not find that the propriety of instructing pursuant to CALJIC No. 2.03 depends on whether a defendant testifies at trial. (44 Cal.3d at p. 498.) In *People v. Edwards*, *supra,* 8 Cal.App.4th 1092, the appellate court explained: "In light of *Kimball* [*sic*] . . . it is clear that *People v. Rubio* is no longer a correct statement of the law. The giving of CALJIC No. 2.03 is justified when there exists evidence that the defendant prefabricated a story to explain his conduct. The falsity of a defendant's pretrial statement may be shown by other evidence even when the pretrial statement is not inconsistent with defendant's testimony at trial. . . . When testimony is properly admitted from which an inference of a consciousness of guilt may be drawn, the court has a duty to instruct on the proper method to analyze the testimony." (*People v. Edwards*, at pp. 1103-1104.)

Nor do we find persuasive appellant's claim that the instruction lessened the prosecutor's burden of proof, in violation of his rights to a fair trial and due process, because it improperly implied that his trial testimony was false and misleading because it was consistent with his allegedly false pretrial statement. As our Supreme Court stated in

People v. Turner (1994) 8 Cal.4th 137, 202, CALJIC No. 2.03 "has nothing to do with a defendant's trial testimony, but rather focuses on defendant's *pretrial* statements. Thus, defendant's contention that the instruction improperly highlights credibility problems revealed in his trial testimony is unfounded."

In the present case, appellant's statement to Officer Alameda that he had been kidnapped "by four big motherfuckers" was more or less consistent with his trial testimony that he and Payton been kidnapped by two people.[17] However, Officer Alameda further testified that, after he saw one person running out the driver's door and another person running out the passenger's door of the van, he looked inside the van and saw that no one else was inside. This testimony—that only two people fled the van—plainly contradicts appellant's pretrial statement that he and Payton had been kidnapped, i.e., that four (or even two) "big motherfuckers" had taken them by force.

The trial court properly instructed the jury with CALJIC No. 2.03.

IV. *CALJIC No. 2.52*

Appellant contends the trial court erred when it instructed the jury, over appellant's objection, with unmodified CALJIC No. 2.52, as follows: "The flight of a person immediately after the commission of a crime is not sufficient in itself to establish his guilt but is a fact which, if proved, may be considered by you in light of all the other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

The Use Note to CALJIC No. 2.52 states: "It is suggested in *People v. Guzman* [(1975)] 47 Cal.App.3d 380, 388, that if the defendant offers evidence of reasons for flight other than a consciousness of guilt, the following sentence (approved in *People v. Hill* [(1967)] 67 Cal.2d 105), be substituted for the present second sentence: 'Whether or not evidence of flight shows a consciousness of guilt, and the significance to be attached to such a circumstance, are matters for your determination.' "

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[17] At trial, appellant claimed he told the officer that he was kidnapped by "some big motherfuckers," and that when the officer asked him how many people were in the van, he said, four, meaning the two kidnappers, Payton, and himself.

According to appellant, the trial court should have given the modified version of CALJIC No. 2.52 in this case since appellant testified that he fled the van to escape the kidnappers. However, "[t]he unmodified CALJIC instruction provides the defendant almost the same protections as would the modification. The unmodified instruction simply leaves the jury in a position to disregard the evidence of flight altogether (by giving it no weight), but does so impliedly. The suggested instruction provides this option with more specificity." (*People v. Hedrington* (1985) 171 Cal.App.3d 517, 522.) Moreover, "the instruction did not posit the existence of flight; both the existence and significance of flight were left to the jury. [Citation.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 870.) Hence the court did not err in giving unmodified CALJIC No. 2.52.

In any event, even if the court should have given the modified flight instruction, in light of the strong evidence of appellant's guilt and the qualified nature of the instruction, any such error was harmless. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)[18] This evidence of guilt included Alston's description of one of the robber's as wearing a blue jumper that zipped up the front; appellant was wearing a jumpsuit when he was arrested. Alston testified that she saw the back of a blue van leaving just after the robbery; she later identified the crashed van as the same one she had seen earlier. She also identified appellant as one of the robbers shortly after the robbery. In addition, appellant was caught shortly after running from the van; only appellant and one other person were seen leaving the crashed van. Thus, it is not reasonably probable that the result would have been different if the slightly different flight instruction had been given. (See *ibid*.)

V. *Defense Counsel's Allegedly Deficient Representation*

Appellant contends defense counsel provided constitutionally deficient representation in failing to support appellant's testimony with evidence and argument.

[18] We are not persuaded by appellant's claim that the standard of *Chapman v. California* (1967) 386 U.S. 18, applies in assessing any error because the alleged misinstruction reduced the prosecution's burden of proof in violation of appellant's state and federal constitutional rights to a fair trial and due process. (See *People v. Hedrington*, *supra*, 171 Cal.App.3d at p. 523; *People v. Crandell, supra,* 46 Cal.3d at p. 870 [both employing the *Watson* standard for assessing harmless error].)

As already discussed, to prevail on a claim of ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness" and must further establish prejudice by demonstrating a reasonable probability that but for counsel's deficient representation, the result would have been different. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 688, 694.)

In the present case, appellant first argues that counsel barely addressed appellant's claim that he had been kidnapped in either his opening statement or closing argument. As to the opening statement, in his declaration filed during proceedings related to appellant's motion for a new trial, counsel stated that, at the time of his opening statement, he had not decided whether to advise appellant to testify. Thus, since counsel did not know if appellant would be testifying about having been kidnapped, it was reasonable for counsel to mention in his opening statement that appellant told police he had been kidnapped, but not to elaborate on the kidnapping defense.

As to the closing statement, much of counsel's argument properly focused on alleged weaknesses in the prosecution's case, questioning the competence and integrity of the police, and attempting to cast doubt on the value of the testimony and physical evidence introduced at trial. Counsel also explained the apparent discrepancy between appellant's statement to police about being kidnapped by four people and his testimony that he and Payton had been kidnapped by two people.

Counsel noted that two of Payton's defense witnesses testified that they had seen someone leaving the van or hiding in the area who looked like neither appellant nor Payton. Counsel thus argued that it was reasonable to infer that there were two other people in the area when the van crashed. Counsel also referred to appellant's testimony and argued that the facts that he had been drinking, had been through a great deal, and heard gunshots explained why he fled. Counsel concluded that, at trial, appellant had been forthright, had answered all of the prosecutor's questions, had not contradicted himself, and had given full disclosure. This part of counsel's closing argument directly supported appellant's trial testimony, while the remainder of the argument vigorously aimed to raise a reasonable doubt about the prosecution's evidence. Counsel's opening

statement and closing argument thus were not inadequate. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 688.)

Appellant further argues that counsel's failure to call witnesses to corroborate appellant's testimony demonstrates the inadequacy of his representation. First, appellant avers that Toni Mitchell, whom he claimed to have visited on the night of January 2, 1998, as well as another friend, Loretha Percoats, could have testified that he was at Mitchell's house that evening. In addition to uncertainty about the availability of both witnesses at the time of trial, or even during the period of time counsel represented appellant, we cannot imagine how the lack of this testimony could have prejudiced appellant. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) He does not claim that the women would have testified that he was with them at the time of the robbery; indeed, appellant testified that it was *after* he and Payton left Mitchell's apartment that he heard gunshots and was kidnapped.

Appellant also complains about the failure to call Georgetta Turner and Tanisha Madden, who would have testified that they heard gunshots coming from the location where the van crashed and that it sounded like the shots came from outside the van. According to appellant, their testimony would have confirmed his own testimony that the van crashed right after the shots were fired and that the first explosive shot from inside the van was followed by several other shots. He asserts it also would have explained why he ran from the van out of fear. While this testimony might have corroborated appellant's testimony as to the timing of the gunshots, counsel's failure to present these witnesses at trial did not prejudice appellant because the value of the testimony was so limited that it is not reasonably probable, especially in light of the strong evidence of guilt, that, but for counsel's failure to present these witnesses, the result of the trial would have been different. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

Finally, appellant contends counsel could have presented an identification expert to explain how Doris Alston could have mistaken one of the robbers for her former neighbor, given that she only saw the robber for a few seconds, the upper part of his face

was covered, it was dark; and she was frightened, and to discuss the prejudice of a one-person showup.

First, appellant has not established that retained counsel was given sufficient funds to hire such an expert. Nor does he show that he had become indigent, and therefore eligible for public funds to pay for the services of such an expert. (See *Sand v. Superior Court* (1983) 34 Cal.3d 567, 575; §§ 987, subd. (a), 987.8, subd. (g)(1).)

Second, during the trial, counsel for both appellant and Payton extensively cross-examined Alston and Officer Robinson regarding Alston's identifications of appellant and Payton as the robbers. Appellant's counsel also argued at length regarding the many flaws he perceived in Alston's identification of appellant as one of the robbers. In addition, the trial court instructed the jury regarding eyewitness identification. These instructions included CALJIC No. 2.91 (burden of proving identity based solely on eyewitnesses) and CALJIC No. 2.92 (factors to consider in proving identity in eyewitness testimony). In light of both defense attorneys' cross-examination of Alston and Officer Robinson, appellant's counsel's argument, and the court's instructions, we find it extremely unlikely that counsel's presentation of an expert on eyewitness identification would have tipped the balance in this case. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694; cf. *People v. Sanders* (1995) 11 Cal.4th 475, 510 [no abuse of discretion in excluding testimony of eyewitness identification expert and, even if error, error was harmless in light of counsel's cross-examination of eyewitnesses regarding accuracy and reliability of their testimony, closing argument regarding weaknesses of eyewitness identification, and court's related instructions, along with other strong evidence of guilt].)

VI. *Lack of a Unanimous Jury Verdict on the Peace Officer Penalty Allegation*

Appellant contends federal constitutional error in the failure to require the jury to make a unanimous finding on the peace officer penalty allegation requires that it be stricken.

Respondent initially argues that appellant has waived this issue by failing to object to the form of verdict at trial. (See *People v. Toro* (1989) 47 Cal.3d 966, 976, fn. 6 ["An

objection to jury verdict forms is generally deemed waived if not raised in the trial court"].) Appellant is not, however, merely complaining of technical deficiencies in a verdict form. He is arguing that the verdict form, together with the instructions, makes it impossible to discern whether the jury unanimously found the peace officer penalty allegation to be true, in violation of the state and federal Constitutions. (See *People v. Radil* (1977) 76 Cal.App.3d 702, 710 [where no objection is made at trial, "the form of the verdict is to be regarded as immaterial where, considering the form of the information and the plea of the defendant, the intention to convict of the crime charged is unmistakably expressed"]; accord, *People v. McKinney* (1945) 71 Cal.App.2d 5, 15; see also *People v. Osband* (1996) 13 Cal.4th 622, 689 [noting that, pursuant to section 1259, a "claim of instructional error may be considered for [the] first time on appeal if 'the substantial rights of the defendant were affected' by the asserted error"].) Thus, appellant's claim is cognizable on appeal.[19]

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[19] In his dissent, Justice Haerle argues that appellant's claim is waived on appeal, asserting that "absent from the majority's opinion is *any authority* holding that, in circumstances of the sort involved here, i.e., where there are 'ambiguities' in the jury's verdict . . . , the waiver rule is inapplicable." (Dis. opn., at p. 2.) However, appellant is not merely asserting a technical defect in the verdict form. His contention is that various factors—including, inter alia, certain instructions and problems related to the information and verdict forms—taken together, prejudicially deprived him of a unanimous jury verdict on the peace officer penalty allegation. (Cf. *People v. Osband*, *supra*, 13 Cal.4th at p. 689 [declining to decide whether failure to object waived issue of trial court's failure to provide all verdict forms and to read them correctly, but then quoting section 1259 and addressing issue on the merits].) Justice Haerle also ignores the discussion of the waiver rule in an opinion from Division Three of this District, in which the court explained that failure to object in the trial court waives a claim related to the form of the verdict where "the intention to convict of the crime charged is unmistakably expressed." (*People v. Radil*, *supra*, 76 Cal.App.3d at p. 710.) Here, as we shall discuss further, no such intention is "unmistakably expressed" in the jury's verdict. (See *ibid*.) We also note that, in the cases cited by Justice Haerle, the reviewing courts first found that the alleged defects in the verdict form were waived, but then proceeded, nevertheless, to address the merits of the claims. (See, e.g., *People v. Jones* (2003) 29 Cal.4th 1229, 1259 [finding waiver for failure to object to verdict form, but nonetheless addressing merits and concluding that jury's intent to convict was "unmistakably clear"]; *People v. Bolin* (1998) 18 Cal.4th 297, 331 [finding that failure to object to form of verdict waived issue on

Our Supreme Court has explained that "technical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]" (*People v. Webster, supra,* 54 Cal.3d at p. 447, fn. omitted.) However, if a verdict is ambiguous, it must be construed in light of the issues submitted to the jury and the instructions of the court. (*People v. Radil*, *supra*, 76 Cal.App.3d at p. 710.) When so construed, if the verdict expresses with reasonable certainty a finding supported by the evidence, it will be upheld. (*Ibid*.)

The court in the present case instructed the jury, pursuant to CALJIC No. 8.66: "The defendant is accused in Count 1 of having committed the crime of attempted murder in violation of Section[s] 664 and 187 of the Penal Code.[[20]] [¶] Every person who attempts to murder another human being is guilty of a violation of Penal Code Section[s]

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appeal, but also finding no prejudicial defect, since alleged deficiency in verdict form was "technical at worst"; *People v. Webster* (1991) 54 Cal.3d 411, 446-447 [finding waiver for failure to object in trial court, but also finding that defendant could not claim ineffective assistance of counsel (which defendant apparently had not raised on appeal) because the "verdicts conclusively show the jury's intent to convict defendant of first degree murder as charged in count 2"].)

[20] Section 187 provides in relevant part: "(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

Section 664 provides in relevant part: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

"(a) If the crime attempted is punishable by imprisonment in the state prison, the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact."

664 and 187. [¶] Murder is the unlawful killing of a human being with malice aforethought. . . .”

The court then gave CALJIC No. 8.67, which stated: “It is also alleged in Count 1 that the crime attempted was willful, deliberate and premeditated murder. If you find the defendant guilty of attempted murder, you must determine whether this allegation is true or not true. [¶] . . . [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. [¶] You will include a special finding on that question in your verdict using a form that will be supplied for that purpose.” On a separate verdict form, the jury found it not true that the attempted murder was willful, deliberate and premeditated.

The court then gave CALJIC No. 8.68, which stated: “It is also alleged in Count 1 that the victim of the attempted murder was a peace officer and that the perpetrator knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties. [¶] . . . [¶] The People have the burden of proving the truth of this allegation. If you . . . have a reasonable doubt it is true, you must find it to be not true. [¶] You will include a special finding on that question in your verdict using a form that will be supplied for that purpose.” No separate verdict form was given to the jury to specially decide the truth of the peace officer penalty allegation.

The verdict form the jury returned for count one stated: “We, the Jury in this case, find the Defendant, SEAN KEITH SHIELDS, Guilty of a Violation of California Penal Code Section 187-664(e),[[21]] Attempt to Murder Peace Officer/Human Being, a Felony,

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[21] Subdivision (e) of section 664 provides: “(e) Notwithstanding subdivision (a), if attempted murder is committed upon a peace officer or firefighter, as those terms are defined in paragraphs (7) and (9) of subdivision (a) of Section 190.2, and the person who commits the offense knows or reasonably should know that the victim is such a peace officer or firefighter engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific

as charged in Count One of the Information." All of the other related verdict forms similarly described the offense as "Attempt to Murder Peace Officer/Human Being."[22]

Count one of the information charged appellant with "violation of PENAL CODE SECTION 187-664(e) (ATTEMPT TO MURDER PEACE OFFICER/HUMAN BEING), committed as follows, to wit: [¶] On or about January 3, 1998, at San Pablo, in Contra Costa County, the Defendant, SEAN KEITH SHIELDS and ANDRE PAYTON, did unlawfully, willfully, deliberately, with premeditation and with malice aforethought attempt to murder David Shipman, a peace officer."

Subdivision (e) of section 664 is a penalty provision in that it "prescribes an added penalty to be imposed when the offense is committed under specified circumstances," i.e., where the victim is a peace officer. (*People v. Bright* (1996) 12 Cal.4th 652, 656, 661 [holding that portion of section 664, subdivision (a), prescribing a life sentence for attempted murder that is premeditated is a penalty provision because it subjects defendant to a greater base term if attempted murder is found to have been committed with premeditation], overruled on another ground in *People v. Seel* (2004) 34 Cal.4th 535.)[23] "The jury does not decide the truth of the penalty allegation until it first has reached a verdict on the substantive offense charged. [Citation.]" (*People v. Bright*, at p. 661.)

We find that several factors collectively support appellant's contention that the jury did not believe it necessary to make the required finding regarding whether appellant knew or should have known that the victim of the attempted murder was a peace officer.

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intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law."

[22] The court's explanation to the jury of the verdict forms merely described what the forms said, and did not further elucidate their meaning.

[23] In *People v Seel*, *supra*, 34 Cal.4th at pp. 539, 549, our Supreme Court held that, in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466, an allegation under section 664, subdivision (a), that an attempted murder was "willful, deliberate, and premeditated," should be considered " 'the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict,' " and, as such, is subject to the double jeopardy clause.

This combination of factors rendered the verdict form constitutionally deficient, resulting in appellant being convicted of attempted murder of a peace officer even if there was no unanimous true finding on the peace officer penalty allegation.

First, and most significant, although the court had previously instructed the jury that it would receive a special verdict form for the purpose of making the "special finding" as to whether appellant knew or should have known that Officer Shipman was a peace officer (CALJIC No. 8.68), no such form was given to the jury. Consequently, the jury was not required to unanimously decide whether the peace officer penalty allegation was true. Instead, the general verdict form conflated the primary attempted murder allegation and the secondary peace officer penalty allegation, and merely required the jury to find that the victim was a "peace officer/human being."

This forward slash in "peace officer/human being" is known as a "*virgule* (also called a *diagonal, slash, slash mark,* or *solidus*) [and] is a slanted line (/) used between two words to suggest[, inter alia,] that they are alternatives (*and/or*) . . . ." (Wilson, The Columbia Guide to Standard American English (1993), p. 455; see also *U.S. v. Owens* (8th Cir. 1990) 904 F.2d 411, 414, 415 [where indictment charged defendant with conspiring to distribute "methamphetamine/amphetamine," jury instructions repeated same "ambiguous designation," and jury returned a general verdict of guilty, appellate court explained: "The punctuation mark used between the words methamphetamine and amphetamine is called a 'virgule,' and ordinarily means 'or.' [Citation.]" The court then concluded that, "[b]y instructing the jury on an 'either/or' basis with respect to the two substances and by failing to enable the jury to indicate which of the substances it found the conspiracy to have involved, the district court elicited an ambiguous verdict of guilty with two possible alternative interpretations"]; accord, *L.B. Smith v. Bankers Trust* (N.Y. 1981) 80 A.D.2d 496, 498 [" 'The virgule is normally used to separate alternatives. Thus, a bank exercising reasonable care and acting in good faith would necessarily interpret a check drawn to two payees whose names are separated by a virgule as being drawn payable to the payees in the alternative. . . . Such a check is functionally identical to one drawn payable to two payees in the manner "A or B".' Our decision gives the

virgule its commonly accepted meaning . . . . [Citation.]"].) While the virgule has various uses, signifying "and" is not one of them. (*Mumma v. Rainier Nat. Bank* (Wash.App. 1991) 808 P.2d 767, 769 ["While Mumma is correct that the virgule or diagonal symbol has many uses in modern language, she cites none outside of the travel industry that involve the conjunctive ('and') meaning"].)

The use of the virgule between "peace officer" and "human being" in the general verdict form and the information in this case thus is a second factor that added to the ambiguity of the verdict and allowed appellant to be convicted of attempted murder of a peace officer if the jury found that the victim was a peace officer *or* a human being.[24]

Third, in light of the errors already discussed, the instructions given in this case, particularly CALJIC No. 8.66, conveyed to the jury that it could find appellant guilty of count one if it found that he attempted to murder a human being, without also requiring it to determine whether appellant knew that that human being was a peace officer. Moreover, CALJIC Nos. 8.67 and 8.68 each stated that the jury would receive a special verdict form, which, after first deciding if appellant had attempted to murder a human being, it would use to decide whether the premeditation and peace officer allegations were true. However, the jury only received a special verdict form for the premeditation allegation (which it found to be *not* true); no such form was given to the jury regarding the peace officer allegation, compounding the confusion.

Finally, both parties acknowledged during trial that the victim—Officer Shipman—was a peace officer. Given the other errors and ambiguities plaguing this issue, the jurors might not even have understood that the key question was *whether*

[24] Given that juries are not permitted to consider punishment in reaching a verdict (*People v. Engelman* (2002) 28 Cal.4th 436, 442), the jury here obviously was not aware of the crucial importance of the distinction between these two findings, in terms of appellant's sentence.

appellant knew or should have known that Officer Shipman was a peace officer at the time of the offense, rather than merely whether Officer Shipman *was* a peace officer.[25]

In conclusion, we agree with appellant that the errors related to the verdict in this case were not merely technical.[26] (See *People v. Webster*, *supra*, 54 Cal.3d at p. 447;

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[25] In his dissent, Justice Haerle notes that, in our opinion in *People v. Payton* (Sept. 2, 2003, A094260 [nonpub. opn.]), we affirmed the conviction of codefendant Payton for attempted voluntary manslaughter, finding, inter alia, that " 'the evidence supported a finding that [Payton] had the intent to kill Officer Shipman when he fired from the van.' " (Dis. opn., at p. 7, fn. 2.) However, given that the jury found Payton guilty of attempted voluntary manslaughter, rather than attempted murder, the peace officer penalty question *was completely inapplicable to him*. The quoted language from *People v. Payton* thus does not, and could not, reflect a jury finding that Payton had shot at Officer Shipman with the knowledge that he was a peace officer. Rather, it merely reflects the fact that the victim *was* a peace officer who was following the defendants in a patrol car at the time of the shooting, and further reflects the fact that the jury found that Payton had fired the shots at the victim (Officer Shipman) with the intent to kill, as the basis of the attempted voluntary manslaughter conviction. There is *nothing* in our summary of the evidence or conclusions in that opinion that can possibly be construed as a finding that Payton fired the shots *knowing* that the victim was a peace officer, a finding that would have been completely irrelevant to both the verdict and the appeal in that case.

[26] Justice Haerle, in his dissent, cites several cases in which the reviewing courts found that alleged defects in verdict forms were merely technical. (See, e.g., *People v. Bolin*, *supra*, 18 Cal.4th 297, 330-331 [where verdict form erroneously cited relevant section as "192.1," rather than "192, subdivision (a)," "[a]ny variance in the wording was . . . technical at worst"]; *People v. Webster*, *supra*, 54 Cal.3d 411, 447 [finding no basis for reversal where verdicts "conclusively [showed] the jury's intent to convict defendant of first degree murder as charged in count 2"].) Justice Haerle focuses especially on *People v. Osband*, *supra*, 13 Cal.4th 622, 689-690, in which our Supreme Court rejected the defendant's claim of prejudice based on the fact that, when the trial court read the verdict forms to the jury, it failed to read forms returning not guilty verdicts for two offenses, and also failed to provide the jury with two not guilty verdict forms. With respect to the failure to read two of the verdict forms, the court observed that, for the jury to find defendant guilty of these offenses, it would have to decide that he committed those crimes beyond a reasonable doubt. (*Id*. at p. 689.) With respect to the failure to provide the jury with two not guilty forms, the court held that, assuming the trial court erred in failing to provide a verdict form, such an error "results in no prejudice when the jury has been properly instructed on the legal issue the trial presented. When 'the jury has been properly instructed as to the different degrees of the offense, it must be presumed that if [the jurors'] conclusion called for a form of verdict with which they

People v. Radil, *supra*, 76 Cal.App.3d at p. 710.) The combination of problematic factors required the jury to find only that appellant had attempted to murder a human being to find him guilty, pursuant to the general verdict form for count one. The jury was never required to reach the second step: to determine whether the peace officer allegation was true.[27] It is therefore impossible to ascertain from the general verdict form whether the jury's guilty verdict for attempted murder of a "peace officer/human being" included a unanimous true finding on the peace officer allegation. Moreover, the ambiguous verdict resulted in an increase in appellant's sentence from approximately seven years (midterm

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were not furnished, they would either ask for it or write one for themselves. It certainly could have no necessary tendency to preclude them from finding such verdict. [¶] We discover no reversible error in the record . . . .' [Citation.]" (*Id*. at pp. 689-690.)

Each case must be decided on its unique facts. In the cases cited by Justice Haerle, the alleged errors were, at worst, mere technical defects, which did nothing to undermine the clear intent of the jury. For example, in *People v. Osband*, the alleged error did not involve any ambiguity that could potentially mislead the jury into convicting the defendant of an offense without a clear intent to do so. (*People v. Osband, supra,* 13 Cal.4th at pp. 689-690.) The present case, on the other hand, does not simply involve a clerical error in a verdict form or a failure to provide the jury with a particular verdict form. As we have explained, there were several unfortunate flaws related to the peace officer penalty allegation that, in combination, were highly likely to confuse the jury and to render the verdict fatally uncertain. Examination of other cases in which the particular circumstances demonstrate that the jury's intention to convict was "unmistakably clear" (*People v. Webster*, *supra*, 54 Cal.3d at p. 447) cannot alter this conclusion.

[27] We observe in passing that the question whether appellant knew that the person following him in the van was a peace officer was a genuinely contested issue at trial. For example, in closing argument, appellant's counsel argued, inter alia, that "[t]he evidence was Officer Shipman [a Contra Costa Community College police officer] was behind this car with no lights on on his light bar, with one exception, an amber light that would shine to the rear. And you've seen when you see a police car going down from the back, you see it but there's nothing to the front. He wasn't announcing himself . . . as a police officer to anybody, quite the contrary. He didn't really want them to know. He hung back. He was tailing them until help arrived."

for attempted murder of a human being—§ 664, subd. (a)) to life with the possibility of parole (term for attempted murder of a peace officer—§ 664, subd. (e)).[28]

The errors thus were prejudicial under any standard (see *People v. Webster*, *supra*, 54 Cal.3d at p. 447; *People v. Radil*, *supra*, 76 Cal.App.3d at p. 710; see also *People v. Jones*, *supra*, 29 Cal.4th at p. 1260; *People v. Jones* (1997) 58 Cal.App.4th 693, 715-716), and reversal of the true finding on the peace officer allegation is required.[29]

VII. *Lack of Substantial Evidence to Support the Conviction for Possession of an Assault Weapon*

Appellant contends his conviction on count three—possession of an assault weapon—must be reversed because it was not supported by substantial evidence. Respondent agrees and joins appellant in requesting reversal of this count.

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[28] We note that, at the sentencing hearing, the trial court stated that, in light of the jury finding that the attempted murder was not willful, deliberate, or premeditated, "in the interest of comity here, I'm going to reduce the offense [in count one] to attempted murder of a human being[,] not of a peace officer." The prosecutor objected and argued that the trial court did not have discretion to strike the peace officer penalty allegation, and the court ultimately did not reduce the offense to attempted murder of a human being. Appellant contends the trial court's decision was based on a misunderstanding of the law and a failure to exercise its discretion to strike the peace officer penalty allegation. In light of our conclusion that the verdict on count one was prejudicially defective, we need not address appellant's contention about the court's failure to exercise its discretion.

[29] In his dissent, Justice Haerle argues that the errors and ambiguities related to the verdict form and use of the virgule were harmless in that they were outweighed by the arguments of counsel addressing the question whether appellant knew that Officer Shipman was a peace officer, the various instructions related to the peace officer penalty allegation, and the fact that the jury was read the full text of count one before trial. (Dis. opn., at pp. 1, 8.) However, the fact that there was argument and instructions related to the peace officer penalty allegation does nothing to alter the basic problem: that, in light of the combined flaws and ambiguities related to the information, instructions, and, especially, the verdict form, we cannot ascertain whether the jury unanimously intended to find the contested peace officer penalty allegation true. (See *People v. Radil*, *supra*, 76 Cal.App.3d at p. 710 [ambiguous verdict will be upheld *if* it "expresses with reasonable certainty a finding supported by the evidence"].) Justice Haerle's willingness to assume that the jury resolved this issue in favor of the prosecution is based on impermissible speculation.

Count three charged appellant with a violation of section 12280, subdivision (b), possession of an "assault weapon," specifically, an "AK-47 assault rifle (FEG SA 85 M model 7.62 x 39 mm caliber rifle)." During the trial, a criminalist testified that the gun was a "Hungarian version" of an AK-47, not a true AK-47, but "similar" looking. At the sentencing hearing, the trial court imposed a concurrent two-year state prison term on count three, which it ordered stayed pursuant to section 654.

In *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, our Supreme Court explained that, prior to its amendment in 1999, the Assault Weapons Control Act of 1989, of which section 12280 is a part, did not define assault weapons generically. Instead, only those assault weapons listed specifically by manufacturer, model, or series, or those weapons placed by means of a judicial proceeding initiated by the Attorney General onto an identification guide, were prohibited. (*Id*. at pp. 1145-1149, citing §§ 12276, 12276.5.)

In this case, on the date appellant possessed the weapon in question (January 3, 1998), the parties agree that that specific weapon had not been identified as an assault weapon in the identification guide published by the Attorney General and had not been included in the list of assault weapons promulgated by the Attorney General and published in the California Code of Regulations. Accordingly, appellant could not be convicted of violating section 12280, subdivision (b), for possessing an FEG SA 85 M model 7.62 x 39 mm. caliber weapon. Count three must therefore be reversed.[30]

DISPOSITION

The true finding on the peace officer penalty allegation (§ 664, subd. (e)) in count one is reversed and remanded to the trial court for retrial. (See *People v Schulz* (1992) 5 Cal.App.4th 563, 569-570.) Appellant's conviction for possession of an assault weapon

[30] In light of this conclusion, we need not address appellant's claim that count three should be reversed due to instructional error.

is reversed and the two-year concurrent sentence is stricken from the abstract of judgment. In all other respects, the judgment is affirmed.

Kline, P.J.

I concur:

Lambden, J.

Dissenting opinion of Haerle, J.

I respectfully dissent.

I agree with my colleagues that two errors occurred in this case in connection with appellant's conviction. In order of importance, those errors were: (1) the failure of the trial court to give to the jury, and then get back from them, the special verdict form regarding the peace officer allegation, and (2) the use of the possibly confusing virgule in both the caption of count one in the information and the general verdict form for that count. However, I do not believe either error warrants reversal for two separate and distinct reasons. First of all, both were waived by the failure of trial defense counsel to object to either at any point in time. Second, I believe that, on the facts of this case these errors, either separately or in combination, are harmless beyond a reasonable doubt for the reason that the jury *clearly* intended to convict appellant of the attempted murder of a peace officer, namely Officer Shipman.

As the majority correctly notes (maj. opn. at p. 26), the People contend that any objections regarding the verdict form or the failure to secure a special verdict from the jury regarding the peace officer allegation has been waived by appellant's failure to object at any time at trial to either claimed error. The majority rejects this contention by saying that the issue is not "mere technical deficiencies in a verdict form" but, rather, that "the verdict form, together with the instructions, makes it impossible to discern whether the jury unanimously found the peace officer penalty allegation to be true. . . ." (Maj. opn. at p. 27.) As I shall point out below, it is not at all "impossible to discern" the jury's intent. But, additionally, there is clear precedent that the failure to raise an objection in the trial court to an arguably ambiguous jury verdict form results in a waiver of the claim of error.

For example, in *People v. Bolin* (1998) 18 Cal.4th 297, the appellant argued that a special verdict form used by the jury to find a prior conviction allegation to be true was defective because it miscited one of the statutes implicated in the alleged prior as being

Penal Code "section 192.1"[1] when the relevant section was actually section 192, subdivision 1. Aside from finding no prejudice, our Supreme Court ruled that the issue was waived: "We find no objection of record to the form of the verdict either at the time the court proposed to submit it or when the jury returned its finding. The issue is therefore waived." (*People v. Bolin, supra,* at p. 330; see also *People v. Webster* (1991) 54 Cal.3d 411, 446 (*Webster*), a case cited by the majority.)

The same principle was applied in *People v. Jones* (2003) 29 Cal.4th 1229, 1259 (*Jones*), where a unanimous court held: "The jury found true the allegation that '[t]he crime of murder of the first degree of which you have found the defendant guilty was a murder committed in the commission of rape.' Defendant contends the verdict form was fatally ambiguous because it is unclear whether the jury was finding appellant guilty of first degree murder on a rape-felony-murder theory (§ 189), or whether it was finding true the rape-felony-murder special circumstance (§ 190.2, subd. (a)(17(C)). [¶] As the Attorney General points out, defendant waived this issue by failing to object to the form of the verdict when the court proposed to submit it when the jury returned its finding." (See also, to the same effect, *People v. Radil* (1977) 76 Cal.App.3d 702, 710 [verdict form's omission of finding of specific intent to commit bodily injury waived by failure to object]; *People v. Freudenberg* (1953) 121 Cal.App.2d 564, 594 [verdict form's failure to specify whether conviction was for voluntary or involuntary manslaughter waived by failure to object].)

Notably absent from the majority's opinion is *any authority* holding that, in circumstances of the sort involved here, i.e., where there are "ambiguities" in the jury's verdict (maj. opn. at p. 36, fn. 30), the waiver rule is inapplicable.

Separate and apart from the waiver issue, I believe any error was harmless. This is so because, as the majority concedes (albeit only in a footnote): "[T]he question whether appellant knew that the person following him in the van was a peace officer was a genuinely contested issue at trial." (Maj. opn. at p. 34, fn. 27.) *Indeed it was* and, after

[1] All citations are to the Penal Code, unless otherwise noted.

three days of deliberation, the jury found appellant guilty on count one. By so doing, and in view of the "genuinely contested" nature of the issue, it must have concluded that appellant *did* know "that the person following him in the van was a peace officer." (*Ibid.*)

This issue was defined early in the proceedings when the trial judge described the case involved to the jury panel, saying in pertinent part: "We are proceeding here with a criminal case as alleged [in] two different kinds of charges. One is the charge of a violation of Penal Code Section 187/664, which is an attempt to murder a peace officer, that is alleged to have taken place on or about the 3rd of January 1998, San Pablo, the peace officer's name is David Shipman."

After the jury was empanelled and sworn in, and pursuant to the trial court's instruction, the court clerk read it both the caption and full text of count one. The latter read as follows: "On or about January 3rd, 1998, at San Pablo, in Contra Costa County, the Defendant, Sean Keith Shields . . . did unlawfully, willfully, deliberately, and with premeditation and with malice aforethought attempt to murder David Shipman, a peace officer."

As part of the prosecution's case, it called Shipman as a witness. He was examined extensively by both the prosecutor and appellant's counsel regarding the events of that night, including how visible his car and its markings and light bars were to the van he was following. For example, Shipman described for the prosecutor that the patrol car he was in was white in color, and had both an emblem and the words "Contra Costa Community College District Police" on both the sides and the word "police" on the trunk, and had "light bars and spotlights" on it. He also testified that the gas station into which the van he was following and he had entered was open and "well-lit." He also testified that he had turned the amber lights on one of his light bars on just as he was leaving that gas station in pursuit of the van's accelerated exit and that, at the time he was "taking on gunfire" he saw one person put his head out of the driver's side of the van and "look back towards me."

But appellant's counsel, obviously seeking to rebut the suggestion that whoever fired at Shipman from the van knew he was firing at a peace officer, got Shipman to concede that "somebody who might look back at your car, glancing back, would only see really a white-colored car and the bar as well perhaps." He also exacted the concession that, when Shipman turned on the amber lights on one of his light bars, those lights shone only to the rear, and not toward the front.

After twelve days of trial, the court instructed the jury on April 4, 2000. As noted by the majority, the court gave both CALJIC No. 8.66, the general instruction triggered by a charge of a violation of section 664, and then CALJIC No. 8.68, the special instruction—*containing no virgule*—regarding attempted murder of a peace officer. This was followed immediately by CALJIC No.1.26, which specifically defines what is meant by "peace officer" and, a few minutes later, by two instructions which, respectively, define when a peace officer is discharging or attempting to discharge his duties and note that the prosecution has the burden of proving that the peace officer in question was, in fact, "engaged in the performance of his duties." In addition, the court gave nine other instructions relating to possible lesser and included offenses of which either Shields or his co-defendant might be (but ultimately were not) convicted, each of which referenced both a "peace officer" and offenses specifically aimed at such persons.

Shortly after the court finished its initial instructions, the prosecutor commenced her initial closing argument. In it, she reiterated to the jury that the charge in count one was "the attempted willful, deliberate and premeditated murder of [a] peace officer, obviously Officer Shipman."

Almost immediately thereafter, the prosecutor got to the issue at hand. She specifically focused the jury's attention on the reasons why appellant must have known that the shots he was firing were at a peace officer's car, arguing: "How do we know that people in the van, Mr. Shields and Mr. Payton, knew or reasonably should have known an objective standard that officer or that that was a police officer that was behind them that they were firing upon?

“The most basic of which, he’s in a marked patrol car with light bars. And we’ve all seen those light bars in the back of our rearview mirror, we’ve seen them since we were 16 and we’ve got our license. Plus common sense tells us that they’ve just committed a robbery, an armed robbery, two shots fired, they’ve left behind two people who can call 911, so they’re looking for the cops.

“And what do we see them do? Once Officer Shipman falls in behind them, they pull into a well-lit gas station. And we know they’re not there to get gas because the gas tank’s on the wrong side of the van. You look at those pictures. It’s on the other side of the van and there’s absolutely no movement from inside that van.

“Officer Shipman pulls within ten feet in a well-lit gas station. Five seconds later the van burns out -- burns rubber I think was Officer Shipman’s testimony -- testimony, and without stopping pulls back onto Road 20.

“And once they’ve straightened out and once they’re out of a well-lit gas station, that’s when we see the gunfire begin, when there’s no witnesses to get down their license plate. When the cop’s in their direct line of fire behind them on Road 20, that is when the gunshots erupt.

“There’s absolutely no logical common sense reason that the people in the van are going to shoot anybody other than a police officer who they have reason to believe is now behind them because of the robbery, armed robbery that they have just committed.

“That’s what I was telling you about why the fact that it’s a police officer explains not only the allegation but the fact of and the reason for the shooting at Officer Shipman.

“Count 1, the attempted willful, deliberate and premeditated murder of a police officer. Very simple common sense.

“. . . . .

“As well, the driver of that van had to roll down that window, stick that gun outside, position the gun, point it at the patrol car and pull that trigger of the gun. A cold, calculated decision to kill because at that point they got only two choices ‘cause they know it’s a cop behind them. They can either try to outrun them or they got to kill him

because you don't shoot to scare a police officer. You got two choices. And they're not going to outrun him in that van.

"And once they know it's a police officer behind them, once they've confirmed that it's a police officer behind them, that's when we see the shots fired because they've only got two choices because they are in a blue van -- they are two suspects in a blue van with a stolen jacket, AK-47 and a .9 millimeter."

Predictably, appellant's trial counsel countered this argument, contending: "The van's left the scene. What happened? Because the prosecution just told you how she's proved that these people who were in this van know that it was a police officer chasing and they shot with the intent to kill him. But as we all will say to you, we don't know how you'll find the evidence; we don't know what your findings will be. Obviously, the People's perspective is one thing. The evidence in my opinion shows another, that these are not the men who did this. But did she prove that anybody who was ever shooting in this van knew that this was a police officer chasing? And that these shots were fired with the intent to kill? No that's her inference from the circumstantial evidence. Because what is the evidence?

"The evidence was Officer Shipman was behind this car with no lights on his light bar, with one exception, an amber light that would shine to the rear. And you've seen when you see a police car going down from the back, you see it but there's nothing to the front. He wasn't announcing himself. He wasn't announcing himself as a police officer to anybody, quite the contrary. He didn't really want them to know. He hung back. He was tailing them until help arrived.

"Why tip somebody off at that point and tell them you're being tailed? He didn't have his lights on. He didn't have his siren on. That was his testimony. And although this one is 14-A, you have to picture this view of the police car, ladies and gentlemen. Although it's suggested 'cause the doors are open that you can see police markings on this vehicle, if the doors are closed, you cannot, if you're looking to the front of the vehicle.

"Well, if you're a good sight in the dark, maybe you might see part of the light bar. But I ask you even in this picture, as I think I said to Officer Shipman at the time I showed it to him, isn't the light bar a little hard to see even in the daylight? And you bet it is.

"So how do these people, the prosecutor tells you, know it was a police officer coming behind them? He hadn't done anything to announce who he was. Oh, but he went in the gas station.

"Well, he went in the gas station but he still had his lights on; he didn't turn his lights out. They weren't in there that long. Just as plausible, what if they thought it was a security guard, not a police officer, just a security guard following them? Then you wouldn't have any shots at a police officer because it isn't a police officer. It's a security guard. There's a difference."

Finally, in the prosecutor's closing argument, she again noted that it was essentially undisputed that appellant and his co-defendant, Payton[2] "dressed like the robbers are in the van used during the robbery and the attempted murder of Officer Shipman."

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[2] Less than two years ago we filed an unpublished opinion affirming Payton's conviction for, among other things, attempted voluntary manslaughter. In it, we rejected Payton's argument that there was insufficient evidence to support the same jury's verdict that "he had the intent to kill Officer Shipman, as is required for attempted voluntary manslaughter." We said: "[T]he evidence supported a finding that [Payton] had the intent to kill Officer Shipman when he fired from the van. . . . [¶] . . . [T]he shots were fired from the van at Officer Shipman's patrol car from about 20 to 25 feet in front of the patrol car, with nothing in between the two vehicles. Shipman was following the van, which was fleeing the scene of a robbery. The jury could reasonably infer from this evidence that appellant intended to kill Officer Shipman when he shot at him in these circumstances." (*People v. Payton* (Sept. 2, 2003, A094260) [nonpub. opn.] pp. 19-20.) It is true that there was apparently no special "peace officer" verdict form in the *Payton* case. Nevertheless, I find it rather troublesome that this court could, two years ago, so effortlessly summarize the evidence the jury heard *and what it must have concluded from that evidence*, but now opine that it is "impossible to discern" and "we cannot ascertain" the jury's intent (maj. opn. at pp. 27 and 35, fn. 29) and thus a conclusion as to that intent is now "impermissible speculation." (Id. at p. 35, fn. 29.)

I agree it was a mistake to both forget to give the jury the special "peace officer" verdict form and include the virgule in the form they were given and the caption of count one of the information. But both mistakes were purely ministerial in nature. More importantly, I submit that a careful consideration of what was *presented and argued* to the jury compels the conclusion that they must have decided that the shots were fired at a "peace officer" as defined in CALJIC No. 1.26. In sum, the jury (1) was read the full text of count one before trial, (2) was given an accurate summary of it at the beginning of the prosecution's closing argument, (3) was instructed—again, without any virgule—that an essential element of the crime charged in that count was that the attempted murder was of a peace officer (CALJIC No. 8.68), (4) was given *three* supplemental instructions regarding what the term "peace officer" meant and who had to prove such a person was the target, and then (5) heard extensive arguments from both counsel as to whether the prosecution had proved that the shots were fired at a peace officer.

After all that, the jury came back with a unanimous verdict convicting Shields as charged in count one. I submit that, in combination, these facts substantially outweigh the two errors the majority relies upon to reverse the verdict finding appellant guilty of the attempted murder of Officer Shipman.

The majority cites, but then elects not to follow, the leading case from our Supreme Court holding that errors of the sort involved here, i.e., involving arguably ambiguous jury verdicts, are almost always held harmless, even under a *Chapman* harmless error standard. In that case, *People v. Webster, supra,* 54 Cal.3d at p. 447, our Supreme Court held (after first invoking the waiver rule discussed earlier): "In any event, technical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.] [¶] The instant verdicts conclusively show the jury's intent to convict defendant of first degree murder as charged in count 2."

Many other cases hold similarly, and in a variety of circumstances. Thus, in *People v. Bolin, supra,* 18 Cal.4th at pp. 330-331, the court found harmless an erroneous citation of the relevant Penal Code section in the verdict form, holding: "We . . . find no

prejudicial defect. Defendant was convicted of attempted voluntary manslaughter in 1983. At that time, nonvehicular voluntary manslaughter was set forth in section 192, subdivision 1, also referred to as section '192.1,' as in the abstract of judgment for defendant's prior conviction. (See Stats. 1945, ch. 1006, § 1, p. 1942; see also Stats. 1984, ch. 742, § 1, p. 2703 [amending section 192 to designate former subdivision 1 as subdivision (a)].) Any variance in the wording was thus technical at worst. (23) '[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]' [Citations.] The jury returned a 'true' finding based on the testimony and documentary evidence presented at the proceeding, all of which was predicated on the allegation defendant had been convicted under former section 192, subdivision 1. Accordingly, we discern no possibility of prejudice." (See also, to the same effect, *People v. Jones, supra,* 29 Cal.4th at 1259.)

A recent decision from one of our sister courts in the Second District sums up the applicable principles. In *People v. Chevalier* (1997) 60 Cal.App.4th 507, the appellant argued that, under the applicable drug-possession statute, the jury should have been required to make a special finding that he was "substantially involved" in the underlying offenses. For several reasons, the court rejected this argument; one of those reasons is pertinent here: """'A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court.' [Citations.]" "The form of a verdict is immaterial provided the intention to convict of the crime charged is unmistakably expressed. [Citation.]" [Citation.] "[T]echnical defects in a verdict may be disregarded if the jury's intent to convict of a specified offense within the charges is unmistakably clear, and the accused's substantial rights suffered no prejudice. [Citations.]" [Citation.]' A statutory requirement that the jury expressly find against a defendant on an issue is satisfied if the intention to convict of the crime is unmistakably expressed. [Citation.] 'The verdict is insufficient only "if it be susceptible of a different construction than that of guilty of the crime charged."' [Citation.]" (*Id.* at p. 514; see also, to the same effect, *People v. Radil, supra,* 76 Cal.App.3d at p. 710; *People v. Allen*

(1985) 165 Cal.App.3d 616, 628; *People v. Mackabee* (1989) 214 Cal.App.3d 1250, 1256-1257; and *People v. Jones* (1997) 58 Cal.App.4th 693, 710-711.)

A different sort of error regarding a trial court's use—or non-use—of verdict forms was at issue in *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*). There, as part of giving instructions to the jury, the trial court purported to read it the verdict forms. But, as the defendant later pointed out on appeal, it neglected to read two separate "not guilty" forms (one covering first degree murder and the other rape. The court also—*as here*—neglected to provide the jury with two forms it had promised them, one a form for a not guilty verdict first degree murder and the other a verdict for murder in the second degree. On appeal of his death sentence judgment, the defendant argued that the U.S. Constitution was violated "by the court's failure to provide forms for second degree murder." (*Id.* at p. 689.) Our Supreme Court disagreed: "The jury was instructed that to find him guilty of first degree murder or rape it would have to decide that he committed these crimes beyond a reasonable doubt. Thus, just as was true of the error in misreading certain instructions to the jury [citation], the errors in failing to properly read the verdict forms were harmless. [¶] The parties do not raise, and we do not address, the question whether the court has any duty to provide the jury with verdict forms. *But any failure to provide a form, if error it is, results in no prejudice when the jury has been properly instructed on the legal issue the trial presented. When 'the jury has been properly instructed as to the different degrees of the offense, it must be presumed that if [the jurors'] conclusion called for a form of verdict with which they were not furnished, they would either ask for it or write one for themselves. It certainly could have no necessary tendency to preclude them from finding such verdict*. [¶] We discover no reversible error in the record . . . .' [Citations.]" (*Id.* at pp. 689-690, emphasis supplied.) I think it is clear that the rule set forth in *Osband* applies here.

For all of the foregoing reasons, I believe the two ministerial errors involved here were both (1) waived and (2) harmless.

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Haerle, J.