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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JERRELL BLASHER, Defendant and Appellant.	A105759 (Alameda County Super. Ct. No. 140612)

A jury convicted appellant Jerrell Blasher of shooting at an occupied motor vehicle, assault with a firearm, and being an ex-felon in possession of a firearm in November 2000. (See Pen. Code,[1] § 246; former §§ 245, subd. (a)(2) [as amended by Stats. 1999, ch. 129, § 1; now Stats. 2004, ch. 494, § 1], 12021, subd. (a)(1) [as amended by Stats. 1999, ch. 662, § 17; now Stats. 2004, ch. 593, § 6].) It also found related firearm use and infliction of great bodily injury enhancement allegations to be true. (See former §§ 12022.5 [as amended by Stats. 1999, ch. 129, § 5; now Stats. 2004, ch. 494, § 4], 12022.53, subd. (d) [as amended by Stats. 1998, ch. 936, § 19.5; now Stats. 2003, ch. 468, § 22], 12022.7 [as amended by Stats. 1995, ch. 341, § 1, pp. 1851-1852; now Stats. 2002, ch. 126, § 6].)[2] Blasher was sentenced to 30 years

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

[2] Many of the applicable sections—including section 12022.53—have been amended since November 2000—the date of the crimes alleged in this matter—but the relevant parts of these provisions are substantially the same for our purposes. (See, e.g.,

to life in state prison. On appeal, he contends that (1) the trial court violated his due process right by admitting evidence of his April 2003 violent attempt to avoid arrest more than two years after the November 2000 charged crimes; (2) it violated due process by failing to adequately instruct the jury not to consider this April 2003 conduct as character evidence tending to prove that he had a predisposition to commit the November 2000 charged crimes; and (3) the imposition of a 25-year-to-life enhancement term constituted unconstitutional cruel and/or unusual punishment. Blasher also contends that the trial court should have stricken rather than stayed certain enhancements. We order the abstract of judgment to be corrected and affirm the judgment in all other respects.

I. FACTS

A. *November 2000 Shooting*

On Monday, November 20, 2000, Beth Connell was in her car near the intersection of Sacramento and Ward Streets in Berkeley when she heard several gunshots fired from a nearby vehicle. She described the vehicle as an older dark brown car with rust spots and a for sale sign in the rear window. Its driver—a dark-complected African-American male, perhaps bald and clean-shaven—pointed a silver and black handgun out of his window. Another dark-skinned African-American man—this one in his mid-20's and wearing short dreadlocks—was a passenger in the car. The passenger did not appear to Connell to be armed. The car stopped at the Ward Street intersection and the driver shot in a northerly direction on Sacramento Street toward a basketball court. The vehicle then turned onto Ward Street and sped away.

Royal G.—a 13-year-old seventh grader at a Berkeley middle school—heard popping sounds as he was playing basketball with friends shortly before school began. In all, he counted seven shots—three shots, a pause, and then four more

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§ 12022.53 [Stats. 1998, ch. 936, § 19.5; Stats. 2000, ch. 287, § 23; Stats. 2001, ch. 854, § 60; Stats. 2002, ch. 126, § 4; Stats. 2003, ch. 468, § 22].)

shots—coming from Sacramento and Ward Streets. An older dark brown Monte Carlo with rust spots turned quickly from Sacramento Street onto Ward Street. The car stopped and the driver—an African-American man—leaned his upper body out of the window and aimed a six or seven-inch silver gray handgun back toward Sacramento Street. Royal described the driver as a light-skinned, thin young man without much hair who wore a dark colored beanie that only partially covered his head. A second man sat in the front passenger seat of the Monte Carlo holding a dark long-barreled weapon inside the vehicle. At most, he leaned his head out the window.

As Royal and his friends ran toward the school building for safety, the driver leaned back into the car and drove fast up Ward Street. The seventh grader reported what he had seen to school officials. All the shots sounded the same, so he assumed that they all came from the same weapon. He was positive that the driver, not the passenger, was the shooter.

Another Berkeley middle school student—11-year-old David P.—was playing basketball with Royal and others when he heard the sound of screeching tires followed by several gunshots. He saw a car—a black Monte Carlo with rust spots on it—coming around the corner of Sacramento Street onto Ward Street. A few seconds later, he heard popping sounds that he realized were gunshots. He saw the driver lean his upper body out of the driver's side window and shoot a gun back toward Sacramento Street. The driver then pulled his body back into the vehicle and drove away quickly on Ward Street.

David later described the driver as a thin African-American man in his mid-20's wearing dark clothing and a dark beanie. He thought that the driver was clean-shaven with a pinkish scar over his left eye. He also believed that a passenger rode in the car, but he was not certain of this. He saw no other gun in the vehicle. David was positive that the driver was the shooter and he thought that all the shots came from the same silver gun, which he described as a revolver about six and a half inches long. After the shooting stopped, David also noticed a boxy silver car with a

shattered front driver's window coasting through the intersection on Sacramento Street as it crossed Ward Street. There was glass on the ground near the silver car.[3] He assumed that the shooter hit this car, but David did not actually see this happen.

Jeremy Cohen—a teacher at the Berkeley middle school—arrived for work at 8:45 a.m. on November 20, 2000. He was standing on the sidewalk near school when he heard five or six popping sounds coming from Sacramento Street. He realized that the sound was gunfire and looked in that direction as he heard a car moving quickly toward him. The vehicle was an older car, a dark, faded two-door American car—perhaps a Buick LeSabre. There might have been two people in it. Cohen thought that the driver might have been an African-American male. He did not get a good look at the passenger, saw no one leaning out of the car and saw no weapons. He noted the rear license plate number as the car passed him.

Steven Aultman—another driver—heard six gunshots while his car was in or just beyond the intersection of Sacramento and Ward Streets. After all the shots were fired, he saw a silver or gray four-door compact car with a shattered left rear window turn onto Sacramento Street from Ward Street. The vehicle moved quickly into the intersection of Ashby and Sacramento Streets, jumping onto the median to pass traffic that blocked its way. The driver appeared to be a dark-complected African-American male wearing a dark knitted cap. A second African-American sat in the passenger seat of the car. Aultman did not observe any weapons. All the gunshots sounded the same and there was no overlapping gunfire, suggesting to him that all the shots came from the same weapon.

B. *Investigation*

Eyewitnesses called 911. Aultman and Cohen gave police the license number of the vehicle[4] that appeared to be the source of the shooting. Berkeley police heard

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[3] Berkeley police did not find any broken glass or tire skid marks in the intersection.

about the shooting approximately 9:00 a.m. and responded to the scene. Royal, David and Cohen each gave a statement to police.

Soon after the shooting was reported, Berkeley police found a parked silver Toyota at Prince Street and Halcyon Court. Its license number matched that of a vehicle reported to police as involved in the Sacramento and Ward Streets shooting. The car had five bullet holes in it, the driver's window was rolled down and the left rear window was shattered. One bullet hole went through the driver's shoulder and lap belt. There was blood inside the vehicle and a large pool of blood on the pavement outside the driver's door. A trail of blood led from the Toyota down Halcyon Court and onto Prince Street heading toward nearby Alta Bates Hospital before it ended.

Two bullet slugs were later recovered from the trunk of the 1980 two-door silver Toyota Corolla. Berkeley police found four bullet casings—three near each other and one a short distance away from the others—on Ward Street near Sacramento Street.[5] The bullet casings were from nine-millimeter Luger ammunition manufactured by Winchester.

The shooting victim—Jamal Tracy—was later found at Alta Bates Hospital. He had been shot in the shoulder and the arm. Tracy was later transferred to an Oakland hospital where a bullet and a bullet fragment were removed from his body. On November 21, 2000, Berkeley police recovered the bullet and a bullet fragment from hospital officials.

Evidence of the suspect's vehicle led police to include a photograph of appellant Jerrell Blasher in a photographic lineup. Shortly after the shooting, Royal and Cohen identified Blasher from the photographic lineup, but David was unable to

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[4] Department of Motor Vehicles records showed that during part of November 2000, the license plate number that Cohen noted was registered to Blasher. In December 2000, the department received evidence that Blasher had sold the car bearing this license number on November 18, 2000.

[5] Police were unable to locate fingerprints on the casings.

do so. Tracy looked at these same photographs while he was still in the hospital but did not recognize anyone.

C. *Charges and Procedural History*

By November 22, 2000, the two photographic identifications of Blasher and the fact that the suspect's car was registered to him led Berkeley police to believe that they had probable cause to arrest him for attempted murder. On November 25, 2000, Berkeley police investigated several addresses associated with Blasher, looking for him and the vehicle registered to him. At one Hayward address, an officer saw a man who matched the description of the person police were seeking get into a four-door Mercury Grand Marquis with a woman. Blasher was arrested. His companion had a gun in her purse and Blasher had a loaded black semiautomatic pistol tucked in the back waist of his pants. The weapon's magazine held Winchester brand nine-millimeter Luger ammunition.

In March 2001, he was charged by information with assault with a firearm, enhanced by allegations of firearm use, inflicting great bodily injury by discharging a firearm at a motor vehicle, and inflicting great bodily injury. (See former §§ 245, subd. (a)(2), 12022.5, 12022.55, 12022.7, subd. (a).) The information also charged the offense of being an ex-felon in possession of a firearm and alleged that he had suffered a prior conviction. (See former § 12021.) Bail was set at $70,000 and Blasher was released on bond.

In July 2001, Blasher moved to suppress evidence found during his detention and arrest. (See § 1538.5.) In September 2001, he moved to dismiss the assault charge. (See § 995.) On September 14, 2001, Blasher did not appear at this hearing, bail was forfeited, and a bench warrant issued for his arrest. The warrant was ordered withheld and Blasher was given until March 18, 2002, to appear in court. His suppression motion was denied without prejudice. Later that month, Blasher appeared in court and the bail forfeiture was set aside. Bail was reinstated and set at $140,000. His motion to dismiss was denied. In October 2001, bail was lowered to $70,000 and Blasher was again released on bail.

In May 2002, the People were permitted to amend the information, over Blasher's opposition. The amended information added a third charge that Blasher shot at an occupied motor vehicle, enhanced by an allegation of firearm use causing great bodily injury, as well as separate allegations of firearm use and infliction of great bodily injury. (See § 246; see former §§ 12022.5, subd. (a)(1), 12022.53, subd. (d), 12022.7, subd. (a).) In June 2002, Blasher moved to dismiss the amended information, arguing that there was no probable cause to amend the information.[6] (See § 995.)

Later in June 2002, Blasher failed to appear at another hearing, $70,000 bail was again forfeited and a bench warrant was issued for his arrest. Bail was then set at $200,000. In September 2002, the trial court granted the motion of Blasher's attorney to withdraw from the case. In December 2002, the bail agent moved for an order extending the time within which it might locate Blasher and bring him to court. (See § 1305.4.) The People did not oppose the bail agent's motion and it was granted.

D. *April 2003 Incident*

On April 29, 2003, bail agent Thomas Truso located Blasher after several months' search. Truso followed Blasher to a Richmond parking lot where he contacted local police and other bail agents for help. Blasher appeared to be waiting in the car while his passenger went into a fast food restaurant. He retrieved something from the trunk of his car, put it under his shirt, and got back into his car. Truso thought that Blasher was acting "fidgety" and feared that he would escape before police arrived. When another bail agent—Tony Thurman—arrived in his vehicle to assist Truso, the two bail agents blocked in Blasher's car with theirs. Truso got out of his car, displayed his bail bondsman badge around his neck and pulled out a gun, telling Blasher that he was under arrest.

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[6] It appears from the record on appeal that no ruling was ever obtained on this motion, as Blasher failed to appear and his attorney withdrew soon after the motion was filed.

Blasher rammed his car into the vehicle in which Thurman sat and then drove his car toward Truso, who dived out of the way before Blasher could run him down. He drove his car back and forth, ramming three other cars in his attempt to flee in his car. When Blasher's car got locked between two other vehicles, Truso and Thurman tried to force Blasher from his vehicle. Truso saw Blasher duck down and reach for something under a seat. Thurman broke the driver's side window in, but by then, Blasher was trying to get out on the passenger side. Thurman went around the passenger side and was striking at the window, when Blasher pointed a .45-caliber semmiautomatic pistol first at Thurman and then at Truso. Just then, Thurman shattered the passenger window, sending glass all over Blasher's face. Stunned, Blasher dropped the gun onto the driver seat and Truso grabbed it from the car. The weapon was loaded—a bullet was in the chamber and a clip was in it—and the safety was off.

Truso and Thurman forcibly removed Blasher from his car through the driver's side door onto the ground, where he was handcuffed. Blasher's passenger returned, coming at the bail agents in an aggressive manner as Blasher yelled orders at him, saying that the bail agents were "not cops." Richmond police arrived about this time—Truso had been in continuous contact with their dispatcher during the entire incident. He identified himself, showed his identification and handed Blasher's gun over to police while giving them a statement. Truso had window glass fragments in his hand. At the time of his arrest, Blasher was wearing a bulletproof vest.

Richmond police questioned Blasher later that day. He told police that he had an outstanding Alameda County warrant for his arrest, that he had appeared in court over the course of two years to clear it up, but that a warrant was issued after he failed to make his last court appearance. Blasher told police that he knew that the men who arrested him were bail agents acting on the outstanding arrest warrant. He also admitted possessing a semiautomatic weapon that day—one that he had borrowed from a friend for protection. Blasher also admitted that he knew the gun

was loaded. He explained that he was wearing a bulletproof vest for protection. He had owned the vest for two years. He had suffered a cut on his thigh from the incident.

E. *Subsequent Procedural History*

In May 2003, the bail agent moved to set aside the bail forfeiture and to exonerate the bail bond. The trial court granted this motion, but ordered that the bench warrant should remain out because Blasher did not appear at this hearing. In July 2003, Blasher appeared in court and bail was set at $200,000. Counsel was appointed for him.

In November 2003, the information was amended again on its face, without objection from defense counsel.[7] Blasher successfully moved to bifurcate trial of the prior conviction allegation from trial on other issues, but the trial court denied his latest motion to suppress evidence seized at arrest and denied his *Miranda* motion (*Miranda v. Arizona* (1966) 384 U.S. 436.) The trial court granted the People's motion allowing the use of evidence of the circumstances surrounding his April 2003 arrest as evidence of flight or consciousness of guilt. Blasher stipulated to his March 1996 prior conviction for purposes of the charge of being an ex-felon in possession of a firearm.

F. *Trial, Verdict and Sentence*

At trial, the jury saw evidence of the trajectory of gunfire that hit the Toyota in November 2000. Berkeley Police Officer Paula Linegar concluded that at least four shots were fired, some of them coming from behind the car. It was possible for one bullet to have made more than one bullet hole in the vehicle. David Frederick—a retired Berkeley police officer—opined that two of the three bullets were shot into the rear of the Toyota—one from the side and one straight on. A third shot came

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[7] The charges alleged all pertained to the November 2000 incidents. There were no new charges stemming from the April 2003 arrest.

from the front of the car, at a slight angle to the side, in his judgment. All the shots appeared to have been fired from the same side.

In court, Royal identified photographs of the shooter's rust-stained Monte Carlo automobile. Aultman identified photographs of the victim's car. Royal testified that the black semiautomatic pistol in evidence—the one that was found on Blasher when he was arrested in November 2000—was not the one he saw the driver holding.

The victim—Jamal Tracy—did not appear in court to testify at trial. His father did, telling the jury that his son's arm had been injured in November 2000. His physician testified that Jamal Tracy came to the hospital on November 21, 2000. He had suffered gunshot wounds to the left shoulder and left forearm the day before. The bones of Tracy's forearm had been fractured into several pieces, requiring surgery to put a permanent plate on the remaining bones to improve their alignment and to prevent a rotational deformity. During surgery, a bullet was removed from his chest and at least one bullet fragment was taken from Tracy's forearm. Later, the bullet and one fragment were turned over to Berkeley police. Tracy was admitted to the hospital, where he stayed for at least two days.

Tracy suffered nerve injury to his left arm, hand and fingers as a result of these wounds. The jury viewed photographs of his injuries. The victim saw a doctor for about six months after the shooting, reporting numbness, stiffness and a reduced range of motion in his left arm, hand and fingers. By May 2001, he still reported some discomfort and the doctor observed a reduced range of motion on the left side as compared to his right side. The doctor opined that the rotation and flexibility of Tracy's arm was less than it was before the injury, but probably did not get any worse after May 2001.

At trial, a firearms expert witness test-fired two bullets found in the magazine of the weapon seized when Blasher was arrested in November 2000. After laboratory analysis, he was certain that the four cartridge casings found at the scene of the crime had been fired from Blasher's gun. He concluded that the test-fired

bullets were consistent with those bullets found in the trunk of the silver Toyota. Finally, the expert opined that Blasher's bullets were consistent with the one that had been removed from Tracy's chest. The firearms expert testified that nothing about these three expended bullets indicated that they were fired from any weapon but the one seized from Blasher, but there was insufficient detail in his analysis to be able to make a positive match.

The parties stipulated that on June 14, 2002, Blasher failed to appear in court, bail was forfeited, and a bench warrant was issued for Blasher's arrest for failure to appear. The jury also heard evidence of Blasher's April 2003 arrest by the bail agent. Truso estimated that one minute passed from the time that he first got out of his car to confront Blasher until Richmond police arrived.

Blasher put on three witnesses in his defense. Defense counsel suggested by the testimony of these witnesses and her cross-examination of the prosecution's witnesses that the jurors should entertain a reasonable doubt about eyewitness identifications linking Blasher to the November 2000 shooting. One defense witness testified that what sounded to her like shooting on November 20, 2000, was started by someone in a Sacramento Street house. Another defense witness testified that she heard popping noises that morning. She saw a gray car drive by her car. An African-American passenger in the gray car had his hand out of the window. The car went up on the median before it turned and she heard more gunshots. The third witness testified that she heard five or six gunshots that day. She saw two cars, one white and one gray, each with as many as two people inside. The driver of one car was shooting with a small gun at two young dark-skinned men in another car. The car that was being shot at came up from behind her, passed her car and made a left turn up over a street divider.

In December 2003, the jury convicted Blasher of shooting at an occupied motor vehicle, enhanced by findings that he personally used a firearm and inflicted great bodily injury during the commission of this offense. The jury found true an allegation that he intentionally and personally discharged a firearm and caused great

bodily injury during the commission of this offense. The jury also found Blasher guilty of assault with a firearm, enhanced by its findings that he used a firearm and inflicted great bodily injury during the commission of this offense. Finally, it convicted him of being an ex-felon in possession of a firearm. (See § 246; see former §§ 245, subd. (a)(2), 12021, subd. (a)(1), 12022.5, 12022.53, subd. (d), 12022.7.)

In January 2004, Blasher moved for a new trial, arguing that the trial court erred by admitting evidence of the circumstances of his April 2003 arrest. (See § 1181.) He also moved to strike or stay a 25-year-to-life punishment for inflicting great bodily injury with a firearm when shooting at an occupied motor vehicle, reasoning that evidence of his personal use of the firearm was weak. (See former § 12022.53, subd. (d).) The trial court did not grant either motion.

The trial court sentenced Blasher to a total term of 30 years to life in state prison—a midterm of five years for shooting at an occupied motor vehicle, a concurrent three-year term for being an ex-felon in possession of a firearm, and 25 years to life for firearm use inflicting great bodily injury enhancement during the commission of the offense of shooting at an occupied motor vehicle. (§ 246; see former §§ 12021, subd. (a)(1), 12022.53, subd. (d).) Sentencing on the other enhancements and the assault conviction were stayed. (See § 654.)

II. ADMISSION OF EVIDENCE

A. *Procedural History*

First, Blasher contends that the trial court erred by admitting evidence that he had "jumped" bail and attempted to avoid arrest through violent means. He argues that the evidence was so much more prejudicial than probative that its admission denied him his federal and state constitutional rights to due process. For this reason, he seeks reversal of his conviction. (See U.S. Const., 5th & 14th Amends.; Cal. Const. art. I, §§ 7, subd. (a), 15.) Before trial, the prosecution obtained the trial court's approval to admit evidence of Blasher's resistance to his April 2003 arrest. It offered this evidence of flight as evidence tending to show his consciousness of guilt.

Defense counsel had opposed the motion, arguing that Blasher reacted as he did because Truso and Thurman were unknown to him and he did not know that they were bail agents—in essence, that his response to what he perceived as a criminal attack was not evidence from which a consciousness of guilt should be inferred.

At trial, the jury heard Truso's testimony about Blasher's attempts to resist being arrested on April 29, 2003. This evidence included references to Blasher's failure to appear in court, his disappearance, his act of ramming several cars and attempting to run down Truso, brandishing a loaded weapon at the bail agents, and wearing a bulletproof vest. A Richmond police officer also verified some of this evidence. The officer also testified that Blasher offered inconsistent evidence to police. When he was first questioned on April 30, 2003, Blasher stated that he did not know the people who arrested him. Later, he admitted that he knew that they were bail agents acting on an arrest warrant outstanding against him at that time. After he was convicted, Blasher challenged the admission of this evidence in his motion for new trial, which the trial court denied.

B. *Cognizability of Review*

On appeal, Blasher first contends that the merits of this argument are properly before us for review. He concedes that defense counsel at trial failed to object to the challenged evidence on the same ground as that which he asserts on appeal. However, he reasons that we may consider the merits of his new challenge for several reasons—because the trial court made the kind of balancing required by section 352 of the Evidence Code; because he presents an issue of law arising from undisputed facts; because an objection is not required if the defendant raises a due process issue; and because his counsel's failure to raise his new challenge constituted ineffective assistance of counsel.

We need not consider all of these reasons, as we would have to address the merits of his claim of error if we assume arguendo that trial counsel might have been ineffective for failing to challenge the proffered evidence on the ground that Blasher

now asserts on appeal.[8] A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. To establish a claim of incompetence of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) To prevail, a defendant must establish incompetence of counsel by a preponderance of evidence. (*People v. Ledesma, supra,* 43 Cal.3d at p. 218.) As an ineffective assistance of counsel claim fails on an insufficient showing of either element, a court need not decide the issue of counsel's alleged deficiencies before deciding if prejudice occurred. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, cert. den. *sub nom. Rodrigues v. California* (1995) 516 U.S. 851.)

Blasher argues that defense counsel was ineffective at trial because she failed to object to the admission of evidence of the April 2003 incident as either irrelevant or unduly prejudicial. (See § 1044; Evid. Code §§ 210, 350, 352.) In order to prevail on this claim of error, he must demonstrate that this testimony would have been excluded if counsel had posed a proper objection. (See *Kimmelman v. Morrison*

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[8] Blasher has not clearly established his claim of ineffective assistance of counsel as a means of challenging the trial court's evidentiary rulings. Although trial counsel filed a written opposition to the prosecutor's motion in limine seeking admission of the April 2003 evidence, a copy of that opposition is not in the record on appeal. Thus, it is not established that trial counsel actually failed to raise the relevancy issue or failed to ask the trial court to balance the probative value of this evidence against its prejudicial effect in her opposition to the motion in limine. On appeal, a trial court's judgment is presumed to be correct. We never presume error. An appellant must affirmatively demonstrate error on the face of the record in order to prevail. If the record is silent, the appellant has not sustained his or her burden of establishing error. (See *People v. Davis* (1996) 50 Cal.App.4th 168, 172.) This failure to affirmatively establish trial counsel's deficit poses another hurdle Blasher would have to overcome on appeal in order to warrant reversal of the underlying conviction, even if we assume arguendo that he met other prerequisites to bring his evidentiary claim of error properly before us.

(1986) 477 U.S. 365, 375 [defendant must prove he would prevail on underlying constitutional claim in order to establish that result would have been different in absence of ineffective assistance of counsel].) Assuming arguendo that Blasher has brought this ineffective assistance of counsel issue before us properly, we consider each of these two evidentiary issues in turn. (See fn. 8, *ante*.)

C. *Relevancy of Evidence*

Blasher first asserts that evidence that he was wearing a bulletproof vest at the time of his April 2003 arrest was irrelevant to the determination of any issue related to the charges pending against him stemming from the events of November 2000. By law, a trial court may only admit relevant evidence. (Evid. Code, § 350; see § 1044.) Relevant evidence tends to prove or disprove any disputed fact of consequence to the determination of the action, including evidence relevant to the credibility of any witness. (Evid. Code, § 210.) Such relevant evidence is admissible. (Evid. Code, § 351.) Whether particular evidence constitutes relevant evidence within this standard is a matter to be determined by the trial court, acting within its discretion. (*People v. Kelly* (1992) 1 Cal.4th 495, 523, cert. den. *sub nom. Kelly v. California* (1992) 506 U.S. 881; *People v. Green* (1980) 27 Cal.3d 1, 19.) On appeal, we review whether the trial court abused that discretion. (See, e.g., *People v. Kelly, supra,* 1 Cal.4th at p. 523.)

A person's flight after the commission of a crime—while not in itself sufficient to establish guilt—is a circumstance to be considered by the jury in connection with all other facts and circumstances tending to prove a consciousness of guilt. Such evidence is admissible to show the defendant's guilty state of mind. Those circumstances surrounding the defendant's flight are relevant to the extent that they tend to characterize and increase the significance of the evidence of flight. (*People v. Hall* (1926) 199 Cal. 451, 460; see *People v. Holt* (1984) 37 Cal.3d 436, 455, fn. 11.) Viewed in this manner, we are satisfied that evidence that Blasher wore a bulletproof vest at the time of his April 2003 arrest was relevant. It had a tendency to increase the significance of the evidence that he had fled from justice to avoid

answering the charges that were then pending against him. That evidence of flight, in turn, allowed the jury to infer that Blasher had a consciousness of guilt which was relevant to the charges of the offenses committed in November 2000.

Assuming arguendo that defense counsel at trial failed to object to the admission of the bulletproof vest evidence as irrelevant, we conclude that such an objection—if made—would have been overruled. Thus, Blasher cannot establish ineffective assistance of counsel resulting from this failure to object to evidence that he was wearing a bulletproof vest when he was arrested in April 2003. (See, e.g., *Strickland v. Washington, supra,* 466 U.S. at pp. 686-688, 694-695; *People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218.) The trial court did not abuse its discretion when it admitted this evidence at trial.

D. *Prejudicial Effect vs. Probative Value*

Blasher also reasons that even if we find that evidence of his absconding and his attempt to avoid arrest demonstrated some consciousness of guilt, the prejudicial effect of this evidence was so overwhelming that it should have been excluded despite its probative value. (See Evid. Code, § 352.) He argues that the evidence offers minimal probative value, but that the vivid portrayal of himself as a violent and dangerous person was unduly prejudicial. He reasons that this evidence led the jurors to improperly infer that he was likely to have committed the charged crimes and also compelled them to find him guilty because he was a danger to society whether or not he committed the November 2000 offenses. For the same reasons, he raises an alternative challenge to admission of evidence that he was wearing a bulletproof vest at the time that he was arrested in April 2003. If we should reject his earlier argument that this evidence should have been excluded as irrelevant, Blasher argues in the alternative that its probative value was so minimal that its prejudicial effect on the jury compelled its exclusion.

In our view, the challenged evidence was more probative than prejudicial. (See Evid. Code, § 352.) A trial court may properly admit evidence of a defendant's flight after committing a crime as a circumstance that the jury may consider as

evidence of the defendant's consciousness of guilt. The evidence offered at trial of the level of violence and resistance Blasher demonstrated when authorities attempted to arrest him in April 2003 tended to increase the probative force of the fact that he had evaded authorities for a lengthy period of time. Thus, the evidence was relevant as evidence of the circumstances surrounding his arrest. (See, e.g., *People v. Hall, supra,* 199 Cal. at p. 460; see also *People v. Holt, supra,* 37 Cal.3d at p. 455, fn. 11.)

All evidence that tends to prove the defendant's guilt is prejudicial. (*People v. Yu* (1983) 143 Cal.App.3d 358, 377, cert. den. *sub nom. Yu v. California* (1984) 464 U.S. 1072.) We conclude that the evidence that Blasher challenges on appeal was not unduly prejudicial as that term is used in Evidence Code section 352. Prejudicial evidence within that context is that evidence uniquely tending to evoke an emotional bias against the defendant as an individual—evidence that has very little effect on the disputed issues at trial. The term is not synonymous with "damaging" evidence. (*People v. Bolin* (1998) 18 Cal.4th 297, 320, cert. den. *sub nom. Bolin v. California* (1999) 526 U.S. 1006; *People v. Yu, supra,* 143 Cal.App.3d at p. 377.) Applying this standard, we conclude that the challenged evidence was not so unduly prejudicial that its probative value was overcome.

Assuming that defense counsel actually failed to raise a section 352 challenge in the trial court, we would find that if counsel had raised this objection, the trial court would have acted within its authority to overrule it. Thus, we find that Blasher has not established the necessary elements to demonstrate that his trial counsel was ineffective. (See, e.g., *Strickland v. Washington, supra,* 466 U.S. at pp. 686-688, 694-695; *People v. Ledesma, supra,* 43 Cal.3d at pp. 215-218.) The claim of error challenging admission of evidence of circumstances surrounding his April 2003 arrest is without merit.

III. JURY INSTRUCTIONS

A. *Procedural History*

Blasher also contends that the trial court violated his due process right by failing to adequately instruct the jury not to consider his April 2003 conduct as

character evidence tending to prove that he committed the November 2000 crimes. He seeks reversal of his conviction on this ground. (See U.S. Const., 5th & 14th Amends.; Cal. Const. art. I, §§ 7, subd. (a), 15.) At the time that the trial court approved the admission of evidence of the April 2003 incident, it suggested that counsel draft a specific jury instruction on evidence of flight and consciousness of guilt. Before this evidence was presented at trial, the trial court advised jurors that evidence about an incident after the November 2000 shooting that they were about to hear was relevant to the issue of whether Blasher had a consciousness of guilt. It explained that the jurors would be formally instructed later that evidence of the April 2003 incident alone was insufficient to decide whether Blasher committed the November 2000 crimes, but was a factor that the jurors could consider and weigh into its deliberations. The evidence was only relevant on the limited issue of consciousness of guilt, the trial court informed the jury.

Both Blasher and the People requested that the jury be instructed on the limited use of evidence. (See CALJIC No. 2.09.) When the evidence had all been presented, the trial court instructed the jury that: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited [] purpose for which it was admitted." (See CALJIC No. 2.09.)

Defense counsel also asked the trial court to give a special instruction on the jury's use of flight as evidence of consciousness of guilt. When the instructions were being discussed before being given to the jury, defense counsel proposed only one modification to the standard jury instruction that the prosecution proposed. The trial court gave the standard jury instruction on this subject, without making defense counsel's proposed modification. Thus, the trial court instructed the jury that: "The attempted flight of a person after he is accused of a crime, or efforts he has taken to avoid apprehension or prosecution for these crimes, may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct 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 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." (See CALJIC No. 2.52.)

B. *Cognizability of Review*

Again, Blasher concedes that his trial counsel did not act to preserve this issue for appeal, as she did not seek any correction or clarification of the trial court's jury instruction about its consideration of this evidence. However, he reasons that we may consider the issue that he raises on appeal, despite trial counsel's apparent failure to raise this issue in the trial court. We agree. Section 1259 permits us to review "any instruction given, refused or modified, even though no objection was made thereto" in the trial court. (§ 1259.)

C. *Relevancy of Evidence*

On appeal, Blasher argues that it is reasonable to assume that some jurors could have misinterpreted the language of CALJIC No. 2.09 as permitting them to consider evidence of the April 2003 incident as proof that he was predisposed to commit the November 2000 offenses. His argument does not persuade us. First, his construction of the jury instruction is contrary to the specific advisement that the trial court gave the jury before evidence of the April 2003 incident was presented to the jurors. At that time, the jury was told that this evidence is only considered for purposes of demonstrating a consciousness of guilt and not to show that anything happened in November 2000. Seen in this context, it is not reasonable that the jurors would have interpreted the language of CALJIC No. 2.09 as Blasher suggests on appeal that they did.

This claim of error is also deficient because it relies on an analysis of the language of CALJIC No. 2.09 in isolation from other instructions given. When we consider an instructional challenge, we must view the jury instructions as a whole and evaluate the challenged instruction in light of all instructions given, as Blasher's jury was specifically instructed to do. (See, e.g., *People v. Rodrigues, supra,* 8

Cal.4th at pp. 1143-1144; see CALJIC No. 1.01.) In addition to being instructed on CALJIC No. 2.09, the jury was also instructed in accordance with CALJIC No. 2.52, setting out how the jury was to evaluate the April 2003 arrest evidence as evidence of flight tending to show Blasher's consciousness of guilt. When we consider the language of CALJIC No. 2.09 and CALJIC No. 2.52 together, we are satisfied that the trial court adequately instructed jurors that they could only consider the evidence surrounding Blasher's April 2003 arrest on the issue of consciousness of guilt and on no other issue. Thus, we reject Blasher's claim that a reasonable juror could have construed the trial court's instructions as permitting him or her to consider this evidence on another issue—as proof of a predisposition to commit the November 2000 crimes.

Alternatively, Blasher argues that the jury was never instructed that it could *not* view the evidence of the April 2003 incident as evidence of a criminal disposition.[9] He reasons that jurors have a natural inclination to infer disposition from behavior, making it reasonably likely that at least one juror could have misinterpreted CALJIC No. 2.09. He argues that the jury instruction given posed an unacceptable risk of his conviction on the basis of character inference rather than the evidence, in a manner inconsistent with federal and state constitutional due process.

We disagree. To demonstrate ineffective assistance of counsel, a defendant must establish that trial counsel's representation fell below an objective standard of

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[9] As a general rule, an appellant may not complain that a jury instruction correct in law and responsive to the evidence was too general or incomplete unless he or she requested appropriate clarifying or amplifying language. (*People* v. *Andrews* (1989) 49 Cal.3d 200, 218, cert. den. *sub nom. Andrews v. California* (1990) 494 U.S. 1060.) As CALJIC No. 2.09 was a correct statement of the law concerning the limited use of evidence, trial counsel's failure to request a modification would ordinarily preclude Blasher from raising this issue on appeal. (See *People v. Cortez* (1981) 115 Cal.App.3d 395, 407.) However, because Blasher couches this aspect of his challenge to CALJIC No. 2.09 in the context of the issue of whether he received the effective assistance of counsel, his trial counsel's failure to request a modification becomes the gravamen of this claim of error, Thus, we consider the question on the merits.

reasonableness. (*Strickland v. Washington, supra,* 466 U.S. at pp. 687-688; *People v. Ledesma, supra,* 43 Cal.3d at p. 216.) Blasher has not done so. Nothing in the record suggests that it would have been reasonable for the jury to have used the limited evidence in the manner that Blasher supposes that they might have done, for lack of a specific instruction not to do so. He cites no reference in the record on appeal—and our independent review has found none—suggesting that the jury should find that he had a predisposition to commit crime based on any evidence brought forth in the trial court. The instructions that were given, considered together in context, were correct. During argument, defense counsel wove together the instructions on the limited use of evidence and the April 2003 arrest evidence as evidence of flight tending to show a consciousness of guilt, explaining that the jurors could not use this evidence for any other purpose. Under these circumstances, it is not reasonable to conclude that a juror might have used the evidence of the April 2003 arrest to demonstrate Blasher's predisposition to commit the November 2000 crimes. We conclude that trial counsel's representation of Blasher in these circumstances—when the jury was instructed by the trial court and trial counsel emphasized in her argument that the jury could not use the April 2003 arrest evidence as evidence of anything other than consciousness of guilt—was not deficient.[10]

IV. CRUEL AND/OR UNUSUAL PUNISHMENT

Alternatively, Blasher contends that the imposition of a 25-year-to-life enhancement term constituted unconstitutional cruel and/or unusual punishment. He asks that his sentence be vacated and the matter remanded for resentencing on this ground. (See U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; see also

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[10] In light of this finding, we need not consider the question of whether Blasher suffered any prejudice. (See *People v. Rodrigues, supra,* 8 Cal.4th at p. 1126.)

former § 12022.53, subd. (d).)[11] The information alleged that Blasher intentionally discharged a firearm and caused great bodily injury while committing the offense of shooting at an occupied motor vehicle. The jury found that this allegation was true. (See § 246; see former § 12022.53, subd. (d).) In accordance with applicable law, the trial court imposed an enhancement of 25 years to life for this conduct. Blasher argues that the sentence was grossly disproportionate to the offense which he committed, in violation of federal and state bans against cruel and/or unusual punishment.

A statutory punishment for a term of years violates the constitutional prohibition against cruel or unusual punishment if it is grossly disproportionate to the offense for which it is imposed. (*People v. Dillon* (1983) 34 Cal.3d 441, 478 [California law]; see *Lockyer v. Andrade* (2003) 538 U.S. 63, 72; *Enmund v. Florida* (1982) 458 U.S. 782, 788 [applying gross disproportionality analysis under Eighth Amendment's ban on cruel and unusual punishment].) Whether a particular punishment is disproportionate to the offense is a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors and responsiveness to the public will. The judiciary should not interfere in this process unless a statute prescribes a penalty out of all proportion to the offense—i.e., a penalty so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 478.) Blasher must overcome a considerable burden in order to prevail on this constitutional claim. (See *People v. Ruiz* (1996) 44 Cal.App.4th 1653,

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[11] "[A]ny person who is convicted of a felony specified in subdivision (a), Section 246 . . . and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury . . . to any person other than an accomplice, shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony." (Former § 12022.53, subd. (d) [as amended by Stats. 1998, ch. 936, § 19.5].)

1662.) The United States Supreme Court has ruled that in the context of punishment by a term of years, a gross disproportionality sufficient to constitute an Eighth Amendment violation occurs only in an extraordinary case. (See *Lockyer v. Andrade, supra,* 538 U.S. at pp. 72-73; see also *Ewing v. California* (2003) 538 U.S. 11, 30.)

Blasher reasons that the punishment imposed in his case was grossly disproportionate to the crime he committed because the same penalty may be imposed for first degree murder.[12] (See *Solem v. Helm* (1983) 463 U.S. 277, 291; *In re Lynch* (1972) 8 Cal.3d 410, 426; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.) A defendant may demonstrate that a sentence is cruel and unusual by comparing the sentence imposed with other sentences imposed in the same jurisdiction for other offenses. (*In re Lynch, supra,* 8 Cal.3d at pp. 425-427; *People v. Mantanez* (2002) 98 Cal.App.4th 354, 359.) He compares his 25 years to life term sentence for the combined effect of shooting into an occupied vehicle, personally using a firearm and inflicting great bodily injury to that of one convicted of murder, for which a defendant could be sentenced to the same term, contending that this shows that the term required by section 12022.53, subdivision (d) is cruel and/or unusual punishment. (See § 190, subd. (a).)

Other courts have rejected similar challenges to the application of section 12022.53. (See, e.g., *People v. Riva* (2003) 112 Cal.App.4th 981, 1003; *People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498.) We are not persuaded by Blasher's challenge. Murder may be committed by various means, but section 12022.53 only applies when the crime committed involves the use of a firearm that results in the infliction of great bodily injury. When enacting section 12022.53, the Legislature determined that the use of firearms in the commission of certain specified felonies is

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[12] As Blasher does not argue that the penalty is disproportionate with punishments proscribed for the same offense in other jurisdictions, we need not consider this factor. (*In re Lynch, supra,* 8 Cal.3d at p. 427; see, e.g., *People v. Cartwright, supra,* 39 Cal.App.4th at p. 1136; see also *Solem v. Helm, supra,* 463 U.S. at pp. 291-292.)

such a danger that substantially longer prison terms should be imposed, both to protect the public and to deter violent crime. The ease with which a victim of one of the statutory felonies could be killed or injured if a firearm is involved supports a legislative distinction treating firearm offenses more harshly than offenses that may be committed by other means, in order to deter firearm use and, hopefully, save lives. (*People v. Martinez, supra,* 76 Cal.App.4th at pp. 497-498.) We are satisfied that the sentence imposed does not constitute cruel and/or unusual punishment under either the federal or the state Constitution. (See, e.g., *People v. Riva, supra,* 112 Cal.App.4th at p. 1003.)[13]

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[13] In a supplemental letter brief, Blasher raises a new issue—that the trial court erred by staying firearm use and great bodily injury enhancements. He urges us to conclude that these enhancements should have been stricken rather than stayed and reasons that the trial court's failure to do so constituted an unauthorized sentence that can be corrected at any time. In this matter, Blasher was found guilty inter alia of shooting at an occupied vehicle. (See § 246.) The jury found true three enhancements that were alleged in connection with this offense—the personal use of a firearm resulting in great bodily injury, firearm use and infliction of great bodily injury. (See former §§ 12022.5, subd. (a)(1), 12022.53, subd. (d), 12022.7, subd. (a); see also fn. 1, *ante*.) When a jury finds all three of these enhancements to be true, statute law provides that the trial court may only "impose" the longest enhancement term. (Former § 12022.53, subd. (f).) The trial court imposed the former section 12022.53 enhancement, but stayed the former section 12022.5 firearm use enhancement and the former section 12022.7 great bodily injury enhancement.

Blasher argues that the prohibition against imposition of the other two enhancements that is codified in subdivision (f) of former section 12022.53 requires these other two to be stricken, rather than merely stayed. The jury found these two enhancement allegations to be true when it found Blasher guilty of assault with a firearm. (See former §§ 12022.5, subd. (a)(1), 12022.7, subd. (a).) Sentencing on the conviction and the related enhancements was stayed to avoid multiple punishment grounds. (See § 654.) None of the enhancements set forth in section 12022.53 apply to the assault count, making the reasoning of that provision inapplicable to this count. As the trial court properly stayed sentence on the assault count to avoid multiple punishment, we conclude that staying the related enhancements was also proper. Thus, no change in this aspect of the judgment needs to be made.

The trial court is instructed to correct the abstract of judgment to strike rather than stay the firearm use and great bodily injury enhancement findings relating to the conviction for shooting at an occupied vehicle consistent with this opinion. As modified, the judgment is affirmed.

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Reardon, J.

We concur:

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Kay, P.J.

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Rivera, J.