

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL KEY, JR.,

Defendant and Appellant.

A101381

(Alameda County
Super. Ct. No. C141569)

Appellant Michael Key, Jr. appeals after a jury found him guilty of one count of first degree murder, three counts of attempted murder, one count of carjacking, one count of second degree robbery, and two counts of possession of a firearm by a felon. Appellant contends the trial court erred when it (1) excluded the out-of-court statements of appellant's friend, Derrick Cummins; (2) denied his motion to sever the charges involving two separate incidents; (3) failed to give imperfect self-defense instructions, pursuant to CALJIC No. 5.17; (4) failed to instruct the jury on the prosecution's burden of proving the unlawfulness of one of the attempted murders, pursuant to CALJIC No. 5.15; (5) instructed the jury regarding its consideration of any fabrication of evidence to be produced at trial, pursuant to CALJIC No. 2.04; (6) imposed unauthorized restitution fines in the amount of \$40,000 each; (7) sentenced him under a Penal Code section 12022.7, subdivision (a)¹ enhancement on three counts; (8) sentenced him to 114 years to life plus 33 years, in violation of the constitutional ban on cruel and unusual

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

punishment; and (9) sentenced him to consecutive terms for robbery and carjacking. We find that the judgment must be modified to (1) reduce the two restitution fines imposed to \$10,000 each; (2) strike the terms imposed on three of the counts, pursuant to the section 12022.7, subdivision (a) enhancement; and (3) stay the term imposed on the robbery count. We shall otherwise affirm the judgment.

PROCEDURAL BACKGROUND

Appellant was charged by a second amended information with one count of first degree murder (§ 187, subd. (a)—count one); three counts of attempted murder (§§ 187, subd. (a), 664, subd. (a)—counts two, three, and four); one count of carjacking (§ 215, subd. (a)—count five); one count of second degree robbery (§ 211—count six); and two counts of possession of a firearm by a felon (§ 12021, subd. (a)(1)—counts seven and eight). As to counts one through six, the information alleged that appellant had personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1), 12022.53, subd. (b)); personally and intentionally discharged a firearm, proximately causing great bodily injury and/or death (§ 12022.53, subds. (c), (d)); and personally inflicted great bodily injury (§§ 1203.075). Counts two through six also contained a great bodily injury allegation under section 12022.7, subdivision (a). The information also alleged that appellant had suffered a prior felony conviction for the sale, transportation, or offer to sell a controlled substance in violation of Health and Safety Code section 11352, subdivision (a), for which he received probation.

Jury trial began on July 25, 2002. On August 22, 2002, the jury found appellant guilty as charged, and found the enhancement allegations true, except the two alleging personal and intentional discharge of a firearm, proximately causing great bodily injury and personal infliction of great bodily injury, with respect to count two.

On December 13, 2002, the trial court sentenced appellant to an indeterminate term of 14 years to life, plus a determinate term of 33 years.

Appellant filed a notice of appeal on January 13, 2003.

FACTUAL BACKGROUND

The charges against appellant arose from two separate incidents. The first incident involved the murder of Dorman Lemon and the attempted murders of Dwayne Washington and Keith T. on March 15, 2001. The second incident involved the robbery, carjacking, and attempted murder of Curtis Luckey on March 30, 2001.

Prosecution Case

March 15, 2001 Incident Involving Lemon, Washington, and Keith T.

On the evening of March 15, 2001, Dwayne Washington met up with his old friend, Dorman Lemon, known to Washington as “Turtle” or “Jabari,” at 83rd and Dowling Streets in Oakland.² They drove around for a while in Lemon’s car, a “dark primer” colored Malibu. After getting some food at Taco Bell and stopping at Lemon’s house, they parked again on 83rd and Bancroft. Lemon got out of the car and went to the side of a building across the street, where he might have “put something up,” i.e., stashed some drugs. Someone briefly came up and talked to Lemon, and then left.

About five minutes after Lemon left the car, Washington heard his friend, Keith T., talking as he walked up to the car. Keith T. was about 16 years old at the time. Keith T., who came from the direction of his nearby house, got in the car and sat in the driver’s seat. It was between 9:00 p.m. and 10:00 p.m. While Washington and Keith T. were talking, a few young guys in a little red car drove up and asked if their car was for sale. Washington directed them across the street to Lemon, who said he would sell it for \$1,800. The car then left. Earlier, two “youngsters” had walked up and asked Washington about the car.

Then, as Lemon walked back toward the car, Washington saw someone come from around the corner on foot. He was wearing a gray hood, brown pants, and maybe something blue, and his attention was on Lemon. As Lemon came toward the car, the man also came toward the car. The man seemed to be about the same height and build as

² At the time of trial, Washington was in custody for violating his probation. He had been on probation following a conviction for possession of narcotics.

Lemon. He stopped by the driver's side door next to Lemon. Washington told the man he had seen him the other day, and asked why he had not said anything. The man bent down and lifted his hood up, as if asking, "Do you know me?" The man's attitude was calm, cool. Washington, who could see the man's face clearly, recognized him. He had given Washington a ride in a white car about six months earlier. He had also seen the man in a brown BMW a few days before March 15, 2001. He asked the man why he had not said anything to him because he sensed something was not right in how the man walked up with his hand in the pocket of his hooded sweater, against his belly, and he wanted to tell the man to leave him out of whatever he was about to do. Washington was also worried because of "stuff" going on on the block over drugs; he knew there was bad blood between Lemon and a man named Derrick Cummins ("Heavy D"). Washington identified appellant at trial as the man he saw that night with the hood on.

Appellant asked Washington and Keith T., who were sharing a cigarette, "Can I hit this cigarette?" Keith T. refused, but Washington said to give it to him. Keith T. handed appellant the cigarette and he took a few hits. He then dropped the cigarette and Washington saw his arm go straight out in front of him and Washington heard a gunshot and saw the flash of a bullet. Washington did not hear any other words spoken before the gunshot. Washington then saw the gun point into the car and appellant started shooting into the car. The gun sounded like a revolver and it went off four or five times in the car. Washington was shot three times: twice in the left arm and once in the leg. Keith T. was screaming and trying to cover up. Washington did not see Lemon with a gun that night, and appellant was the only one shooting.

After the shooting, Washington opened the door and saw appellant running away, but looking back at the car. Washington got out of the car and ran along Bancroft to 81st. Keith T. also got out of the car and ran back toward his house. Washington called the paramedics from a house on 81st Street. The police arrived first, and initially thought Washington was the shooter. Washington was a bit uncooperative with the paramedics because the police were surrounding him and asking questions. Washington had ingested

some powder cocaine about an hour before the shooting, but was not feeling its effects at the time of the shooting.

Washington saw appellant with Derrick Cummins shortly after the shooting. Although Washington recognized appellant, he did not learn his name until some weeks later when he went to Lemon's house. Lemon's father asked Washington what the shooter looked like, and Washington said he was short and chunky, and looked a bit like Lemon, in the face. Lemon's father then said that person was named Mike-Mike and that he and Cummins were riding around and had just left the area. Washington did not go to the police with this information.

On May 10, 2001, Washington identified appellant as the shooter in a photographic lineup. There was never any doubt in Washington's mind that appellant was the man who shot him, Lemon, and Keith T. On cross-examination, Washington testified that he told Sergeant Ferguson that the whole thing had started over a bundle of cocaine; Lemon got angry at Cummins and they threatened each other.

The trial court found Keith T. unavailable to testify at trial. His testimony from the preliminary hearing was therefore read to the jury. Keith T. was 16 years old. On March 15, 2001, he left his home shortly before 11:00 p.m. and walked to 83rd and Bancroft, where he saw Lemon ("Turtle") and Washington pull up in a primer gray Chevy Malibu. Lemon parked on 83rd, facing Bancroft, and got out of the car. Keith T. and Lemon talked briefly; then Keith T. went to the car and got into the driver's seat. At that point, Lemon had started talking to a female they knew.

While Keith T. and Washington were talking in the Malibu, a blue BMW with four "guys" inside pulled up and one of the guys asked if they wanted to sell the car. Washington told Keith T. that they had come by earlier, but only had \$700, so they had come back with \$1,200. The guys in the BMW went to park the car, and Keith T. lost sight of the car after it turned on Bancroft.

Keith T. then saw someone he had never seen before walking toward the Malibu from the direction the BMW had gone. He was wearing an orange or red sweater and maybe blue jeans. Keith T. testified that the man did not have a hood on, though Keith T.

was not paying too much attention to him. He was about five feet eight inches to six feet one inch tall. He was heavy and weighed 190 to 200 pounds.³ Lemon, who was still across the street, walked over, met the man in the street, and they walked toward the Malibu. Keith T. and Washington were smoking a cigarette and laughing while Lemon and the man were talking next to the car. There was no arguing or yelling, and Keith T. thought the man had come to talk about the car. No one else was in sight. Keith T. identified appellant as the man he saw with Lemon.

Lemon and appellant talked for about a minute, and then appellant asked if he could “ ‘hit the cigarette’ ” Washington and Keith T. were smoking. Washington said to pass the cigarette to appellant. Keith T. then heard about six to eight shots and saw sparks at the side of the car. He moved near Washington and told him to open the door. Washington said, “ ‘I’m shot.’ ” Keith T. then was shot in the left shoulder; he got the door open, got out, and snatched Washington out of the car. Keith T. started running in the direction of 83rd and Dowling, toward his friend’s mother’s house. He saw Washington run toward Bancroft. When he got to his friend’s mother’s house, he knocked on the door and said to call the police. The woman was scared and would not let him in, so he ran back to the scene, where he saw Lemon lying on the ground by the driver’s door of the Malibu. The police arrived in less than five minutes and Keith T. was taken to Highland Hospital, where his wound was cleaned and bandaged.

Less than a week after the shooting, Keith T. saw appellant riding in a car with other people at 105th and 98th. Keith T. saw appellant two more times after that, but had no contact with him. One of the times Keith T. saw appellant, he was in a blue BMW at a gas station.

At some point after the shootings, the police showed Keith T. a photographic lineup and Keith T. selected the photograph of appellant as looking most like the shooter, although he thought it possible that another man who looked like appellant could be the

³ Keith T. did not remember telling police at the hospital that the man was six feet three or six feet four inches tall and 210 pounds, but noted that if you are sitting down, someone standing next to you is going to look tall.

shooter. The day after the shootings, police had shown him photographs of Derrick Cummins (“Heavy D”), and asked if he could have been the shooter. Keith T. said, “no, most definitely not. I know him too good. The guy who did this, I never seen before.” Keith T. had known Cummins Keith T.’s entire life and was close to him.⁴ Keith T. saw Cummins, appellant, and some other people standing around talking about six weeks after the shooting. At the preliminary hearing, Keith T. testified that he was sure that appellant was the man he saw outside the Malibu on March 15, 2001.

On March 15, 2001, at about 11:08 p.m., Oakland Police Officer Roland Holmgren was dispatched to the 2000 block of 81st Avenue, where he saw Dwayne Washington, who was yelling and saying he had been shot. Holmgren saw gunshot wounds to his arms and legs. Washington seemed to be in pain and was somewhat hostile. Washington was taken to Alameda County Hospital; Holmgren went to the hospital to check on his condition and obtain information about the shooting. Washington was uncooperative at the hospital and did not want to talk to the police. Washington said he knew who had shot him, but did not say who it was.

When police arrived at the scene, Lemon was lying in the middle of the street. They found a beer can on the sidewalk near the passenger side of the car and a sealed package of Web Van assorted brownies and bars on the front hood of the Malibu, near the driver’s side. Fingerprints lifted from the Web Van package were those of the Web Van driver, who police determined was not associated with the case. Police did not check the car for fingerprints because they understood the shooter never touched the car.

Lemon died of a gunshot wound to his head; the bullet entered directly above his right ear. There was no stippling on Lemon, which indicated that the gun was fired from beyond 18 to 24 inches away. He had no other injuries. His blood showed that he had

⁴ Although Keith T.’s sister was Betty Cummins and his stepfather was Antoine Cummins, Keith T. testified that they were not related to Derrick Cummins.

ingested cocaine between eight and 24 hours before he died. At the time of death, Lemon was approximately five feet eight inches tall and weighed approximately 210 pounds.⁵

Sergeant Jeffrey Ferguson of the Oakland Police Department later showed Keith T. a photographic lineup, and Keith T. identified the photograph of appellant as the man who shot him. Ferguson also showed the photographic lineup to Dwayne Washington, who identified appellant's photograph as that of the shooter as well.

March 30, 2001 Incident Involving Curtis Luckey

On March 30, 2001, between 3:00 a.m. and 4:00 a.m., Curtis Luckey was driving a gold Chevy Malibu, license number 4 BYH 983, in West Oakland.⁶ The car was registered to his mother. He came to that area of Oakland about once a week. He had driven to Oakland from Sacramento with a woman named Carmen. He dropped Carmen off and about 30 minutes later she paged him. He parked his car on 30th near Linden and started walking to a gas station at 34th or 35th and San Pablo, where he was going to meet Carmen. He left two spare keys, his cell phone, clothes, pictures, a driver's license, and a California identification card in the car.

As Luckey walked down 30th, approaching Myrtle, a maroon BMW came down 30th from San Pablo and pulled over 10 to 15 feet from him. A man got out from the passenger side of the car wearing black or dark clothes, including a dark cap. Luckey recognized the man as appellant. He had seen appellant two or three times before in the same neighborhood at about the same time of night. Luckey had first met appellant a couple of months earlier when he came upon appellant talking to someone Luckey knew. They talked for about 20 minutes, and appellant gave Luckey his home phone number because appellant said he was a rapper and Luckey said he knew people in the rap

⁵ The autopsy report stated that Lemon's height was 78 inches tall (six feet six inches), which apparently was a mistake. Lemon's brother testified that Lemon was five feet eight inches or five feet nine inches tall.

⁶ At the time of trial, Luckey was incarcerated for computer fraud. In addition, he was convicted of possessing a loaded weapon in 1996 and transportation of narcotics in 1997.

industry and might be able to “hook [him] up.” Appellant had said his name was “Askari.” At some point, Luckey called the number appellant had given him and had a short conversation with appellant; he stored the number in his pager. He also gave appellant a ride once. There had never been any hostility or conflict between them.

When Luckey saw appellant get out of the car on March 30, 2001, he paused so appellant could catch up. Appellant walked up, pulled out a revolver, and pointed it an inch from Luckey’s left temple. Appellant said, “Break yourself. I want everything.” Luckey assumed appellant wanted whatever he had in his pockets. Luckey took \$140 to \$190 out of his jacket pocket and threw it on the ground. Appellant kneeled down to pick up the money, still pointing the gun at Luckey’s head. When appellant straightened up, he sounded agitated as he said, “I want everything” and “I want your keys.” Luckey reached into his pants pocket, took his keys out, and threw them on the ground.

Appellant picked up the keys, while continuing to point the gun at Luckey’s head. Luckey said, “Okay, you got me. You know, I’m slipping. Please don’t shoot me.” Appellant said, “shut up, bitch,” and shot Luckey. The bullet went through his left cheekbone, through his sinus cavity, and came out his right cheekbone. The impact threw him to the ground. He immediately got up and ran up San Pablo. A woman saw him running and came to him. He assumed the BMW drove away, but did not see it and did not see where appellant went. Luckey did not see anyone else while he was being robbed and shot.

When the first police officer arrived, Luckey told him he knew who had robbed and shot him. A police officer found his pager and Luckey told him Askari’s number was in the pager. Later that morning, Luckey identified appellant in a photographic lineup as the person who shot him. He also identified appellant at the preliminary hearing.

On March 30, 2001, between 3:55 a.m. and 4:10 a.m., Oakland Police Officer Tony Bakhit responded to a call at 33rd Street and San Pablo Avenue regarding a man shot in the face. Once there, he contacted Luckey, who had blood all over his face and hands, and seemed very scared. Luckey said that a man named Askari had shot him at

30th and Myrtle, and had taken his car. Officer Bakhit found fresh blood and a pager at that location, but no casings or bullets. Nor did he find Luckey's gold Chevy Malibu. Later, Officer Bakhit went to the hospital, where Luckey was being treated for a gunshot wound to his left and right cheeks. Luckey confirmed that the pager was his, and located Askari's phone number for the officer.

On April 11, 2001, at approximately 5:40 p.m., AC Transit Police Officer Phil Rose was patrolling the bus zone at the Coliseum BART station in Oakland. He saw a beige or tan Chevy Malibu, license number 4 BYH 983, pull into the bus zone. Officer Rose activated his overhead lights and siren, and the car stopped. A very young white female was driving. She identified herself as Melissa R. She was 14 years old and did not have a driver's license.⁷ There were two black males in the car as well; one other person had left the car at the bus stop. A registration check showed that Melissa R. was a missing person and that the car had been stolen. The three people were detained for the Oakland Police Department.

Melissa R. testified that, in early 2001, she lived with her parents in North Oakland.⁸ She met appellant ("Mike-Mike") in February 2001 through her friend, "Man." A couple of weeks later, at about 10:00 p.m., she was out on her bicycle trying to buy drugs for her father when she saw appellant at an ARCO gas station. She asked him if he could get her some drugs, and he got her \$10 worth of crack. They then went to appellant's house to get his bike, rode to a house in West Oakland to get some marijuana, and rode back to Melissa R.'s house. Melissa R. began dating appellant but, when appellant started trying to pimp her, her father called him and said not to have anything to do with Melissa R., and they broke up. Melissa R. admitted that she had been a prostitute, but she never worked for appellant.

⁷ Luckey did not know anyone named Melissa, and did not give her or anyone else permission to use his car.

⁸ Melissa R. had been in trouble with the law for stealing cars, money, and phones. At trial, she was on probation for stealing a car.

Melissa R. next saw appellant at a gas station in East Oakland at 6:00 a.m., after she ran away from home. Appellant was in a “goldish, peachish” Chevrolet Malibu, which she had never seen before. She went with appellant in the Malibu to another gas station in West Oakland, where he robbed a “crackhead,” using a gun with a black handle. They got gas, then drove to appellant’s house. They parked a couple of blocks away from his house because he said he was wanted for punching somebody’s face. They grabbed some things from appellant’s house, including clothes, rap lyrics, and pictures, and then drove the Malibu to the Sobrante Park area of Oakland.

Appellant parked across the street from a store, got out of the car, and went to talk to a man in a blue Cadillac parked behind them. About 20 minutes later, appellant and the man drove away in the Cadillac. The keys were in the Malibu, and Melissa R. jumped into the driver’s seat and drove in the opposite direction. Melissa R. drove to Motel 6, where she had been staying, to look for “Malachi,” but he was gone. Melissa R. was working for Malachi as a prostitute. He protected her and provided her with cocaine and marijuana. She then drove to the Dollar Inn, where a security guard sometimes let her stay in the security room.

Melissa R. then threw away everything that was in the car, except for some outfits she thought Malachi could wear and a photo album. She gave the gun appellant had used at the gas station and a credit card to a man she had never seen before at East 14th and 4th Streets. There were some identification cards on the floor of the car in the name of Curtis Luckey, which she left there.

Melissa R. had the car for three days. On the day she was arrested, she had slept in the car. That afternoon, Malachi woke her up, and told her to pick up two people and to drop one of them off at the Coliseum BART station. After she dropped Marcello off at BART, an AC Transit police officer pulled her over; Malachi and another man were in the car with her.

Appellant’s Arrest and the Subsequent Investigation

On April 12, 2001, at 6:26 p.m., pursuant to an arrest warrant, Officer Holmgren and his partner were looking for appellant in East Oakland, after getting a tip from an

informant. Holmgren saw appellant driving alone in an older silver BMW. The officers, who were in uniform and driving an unmarked police car, activated the lights and siren on the car. Appellant pulled over to the right side of the road for a couple of seconds, and then took off at a high rate of speed. As they approached 105th Avenue, traffic started bottleneaking and appellant went into the left lane, going against traffic, at about 80 miles per hour. Eventually, appellant crashed into a parked car, exited his vehicle, and began running away. Holmgren caught up with appellant in a fenced backyard, told him to stop, and said that he was under arrest. Appellant resisted when Holmgren tried to handcuff him, and it took Holmgren and his partner to subdue him enough to handcuff him.

Sergeants Ferguson and Galindo interviewed appellant on May 15, 2001. During the interview, he told them he was a rap lyricist and performer. He also gave the officers his mother's, girlfriend's, and sister's telephone numbers. Appellant was already in custody for the Luckey matter, and Sergeant Ferguson said he did not want to discuss that case. He asked appellant if he knew Washington and Keith T. and whether there was any reason why they would say he committed the crimes against them and Lemon. Later that day, Sergeant Ferguson had him charged with murder and two additional counts of attempted murder. During the interview, appellant told Sergeant Ferguson that he goes by the name Askari, which means soldier in Swahili.

Jillian Tague, an Alameda County Sheriff technician, maintained all files related to the Global Tel-Link computer telephone system at the Santa Rita jail. The telephone system records all outgoing telephone calls and keeps them on the computer for 60 days. Outside law enforcement personnel may request copies of telephone calls. Sergeant Ferguson requested all telephone recordings for the three phone numbers he had gotten from appellant. He received recordings of phone calls that had been made to the phone number for appellant's mother. He recognized appellant's voice on the recording.

In the recording from a call on the night of May 15, 2001, after appellant had been charged in the Lemon incident, appellant talked about having been booked for murder. He also told his mother to call "Joe" and tell him "Wayne and Little Keith are running they mouths."

Sergeant Ferguson also obtained a search warrant to search appellant's jail cell, primarily because appellant had said he was a rap artist. In Sergeant Ferguson's experience, people who write rap lyrics often write about their criminal exploits in their songs. He searched the cell on May 17, 2001, and found a stack of rap lyrics and personal papers. In one song called "Show No Love," the first stanza read, "Nigga name Luckey wasn't Luckey in this. Ho chose, now he acting funny and shit." The second stanza read, "Copped then blew, now he weeping and shit. Love it when a fake nigga gives me his bitch." The 12th stanza read, "Caught 'em on da back street sett'em up. Stripped that nigga then I wett'em up." The 13th stanza read, "Be about pappa's, go further ya. Cross my nigga's, I'll murda ya."

The first stanza was significant to Sergeant Ferguson because appellant spelled "Luckey" the way Curtis Luckey spells his name. The 12th stanza also was significant to his investigation because "sett'em up" is a term that "usually means to arrange to victimize someone. Either rob them, attack them, shoot them, or something like that." "Stripped" is a street term for "robbed." And "wett'em up" is a street term for a "bloody murder." Finally, the 13th stanza was significant because "cross my nigga's, I'll murda ya" means if you do something negative to one of my associates or friends, then "I'll murder ya." That stanza fit right into the murder of Dorman Lemon.

Defense Case

Derrick Cummins was called by the defense. In front of the jury, he refused to answer any questions on the ground that doing so might incriminate him.

Oakland Police Officer Jason Andersen testified that on March 15, 2001, he arrived at the scene of the shooting at around 11:00 p.m. Dorman Lemon was lying in the street and Keith T. was sitting on the sidewalk. Keith T. described the shooter as being tall, with a heavy build and light complexion. The description matched a person the officer knew as Derrick Cummins. Officer Andersen went to Cummins's house, but he was not home.

Oakland Police Officer Herbert Webber took a statement from Keith T. in the emergency room at Alameda County Hospital. Keith T. described the person who shot

him as a Black man, six feet three inches to six feet four inches tall, 210 pounds, and wearing an orange T-shirt and light blue jeans.

Appellant testified that he first met Curtis Luckey in early or mid-March 2001 at a small park in Oakland, where appellant, who is a rap musician, was rapping to about eight people he knew.⁹ Luckey said that he liked the lyrics and that he knew people in the music industry. Luckey asked for appellant's phone number so that he could call appellant after he talked to his contacts in the music industry.

Appellant never spoke to Luckey on the phone, but he saw him about three times after they met. Once, appellant was walking home and Luckey gave him a ride. Another time, he saw Luckey in the area with "his girls." Luckey said he was from Sacramento and was pimping six females in the area. Appellant met one of the girls, who was called Princess. Appellant saw her at least five times; they spoke to each other, but never had a romantic relationship.

On March 30, 2001, appellant was driving home by himself in his BMW when he saw Luckey standing by a house on Myrtle Street near 30th. Appellant stopped his car. Luckey walked up and said, "I heard you been fucking with my work. Stay away from my work." Luckey then "exposed a gun" to appellant. Appellant was shocked. He then got out of the car because "I couldn't drive off. The person done exposed a weapon to me. Two, I wanted to see what he was talking about, though. . . . We never had no kind of problems before." He asked Luckey what he was talking about. Luckey responded, "Just stay the hell away from my work. You know what I'm saying. You fucking with my pocket though." Appellant then realized Luckey must have heard that appellant was communicating with Princess and figured appellant was trying to take his woman from him.

Appellant told Luckey that he and Princess had done no more than speak to each other, but he did not get anywhere with Luckey, who said, "Stay the fuck away from my

⁹ Appellant acknowledged that he had been convicted of transporting, selling, or offering to sell a controlled substance in February 2000.

work. I'm going to have to do something to you." Luckey was waving the gun up and down, and appellant "went for" the gun and they tussled for no more than a minute. Appellant got hold of Luckey's wrist and the tussle ended when the gun went off. Appellant heard Luckey screaming and saw him running in the opposite direction. Appellant ran and got in his car and drove home. Appellant did not see a gold Chevrolet Malibu in the area that night.

Appellant testified that he knew Melissa R.—although he had initially told police that he did not know her—and that he met her in February 2001 in West Oakland. She was going with a friend of appellant's named "Man-Man," also known as John. According to appellant, all of Melissa R.'s initial testimony was true except he never had a relationship with her and never bought drugs while he was with her.

Sometime before he was arrested, appellant was walking to the Coliseum BART station when he saw Melissa R. at a gas station in East Oakland. She had a newer silver car that looked like a rental car. Appellant asked Melissa R. for a ride and she said she needed gas. He gave her \$5 and she gave him a ride to his house in West Oakland. Appellant grabbed some clothes, pictures, money, a CD disc changer, and rap lyrics from his house. Melissa R. then drove him back to East Oakland. He was staying at his friend, Derrick Cummins's ("Heavy D's") house in East Oakland because his car was not working, he planned to be working at a music studio in East Oakland for a couple of days, and he did not want to have to go back and forth between his house and East Oakland.

Melissa R. drove appellant to Sobrante Park, where he told her to stop at a store because he wanted to get change for a \$20 bill, so he could give her \$10 for driving him back to East Oakland. He bought them each a hot dog and soda and got some change. When he came out of the store, Melissa R. was gone. He waited for 20 or 30 minutes, and then walked to Cummins's house.

On April 12, 2001, appellant was driving back from the music studio to Cummins's house in his BMW when he noticed a black car close behind him. He pulled over, thinking that maybe the car was trying to pass him, but he took off when he saw

doors opening and someone getting out of the car. A little later he saw the same car with sirens and realized it was a police car. Because he had already driven off at a high speed, he decided to keep running from the police. He eventually lost control of his car and hit another car. He then got out of his car and ran. The police officers eventually caught him in a fenced yard. They had their guns out and told him to get on the ground, which he did. One of them socked him in the head; the other one kicked him in the face. Appellant, who did not have a gun with him that night, was arrested and taken to a police station.

The next day, the police questioned appellant about the Luckey incident. Appellant was nervous, having never had charges like this before. So at first, he lied to police, saying he had nothing to do with the incident. After he realized he was going to be charged regardless of what he said, he decided to tell the truth. Appellant testified that he did not pull a gun on Luckey, rob him, take his car keys, drive his car, or shoot him. He did write the rap lyrics in question, but said he wrote them before he was arrested and had his mother send them to him in jail. He denied that the lyrics referred to any particular person. When he wrote the lyrics, he did not know Curtis Luckey's last name, and his spelling "lucky" as "Luckey" was just a coincidence.

With respect to the Lemon, Washington, and Keith T. incident, appellant testified that on March 15, 2001, he was at home in West Oakland. Appellant, who is left-handed, had been stabbed in the left arm on March 2 and had stitches and a cast on his arm. The stitches were removed on March 14 and his arm was sore. In addition to his own injury, his mother and grandmother were sick with the flu, so he was staying at home. In the late evening hours of March 15, he was not on 83rd between Dowling and Bancroft, did not approach a primer-colored Malibu, and did not take out a gun and shoot at anyone.

Sergeants Ferguson and Galindo questioned appellant on May 15, 2001. He told them he went by the names, Mike, Mike-Mike, and Askari. He gave them the phone numbers of his mother, his sister, and his girlfriend. He told them he knew Cummins, but did not know Dorman Lemon, Omar Harris (another name for Lemon), Turtle, Dwayne Washington, or Keith T. Sergeant Ferguson accused him of killing Lemon. Appellant

had heard and read about the shooting of someone named Turtle, but otherwise knew nothing about the incident. Ferguson also accused him of carrying out the hit for Cummins, which he denied.

After the interview, appellant called his mother to let her know he had been charged with a new case. He told her the names the officers had mentioned during the interview and told her to call a friend to let him know about the new charges. He was not putting Keith T.'s and Washington's names out on the street as snitches. He wrote a letter and sent a newspaper clipping about the case to Cummins. At the end of the letter, he wrote, "Make sure you have this in mind so you will be tight." He did not write the letter so Cummins would match appellant's story if he testified, but so that he would understand why appellant was in custody. He also wrote in the letter that Keith T. had told Ferguson that appellant shot him, but not to let Cummins know Keith T. was a snitch.

On August 4, 2001, appellant wrote a letter to El Louise Carr,¹⁰ in which he told Carr that he was in custody for the murder of Lemon and that at first Cummins was a suspect. He also wrote that Cummins "didn't keep his mouth closed" and was "playing the John Gotti role and claiming credit for it . . . [¶] . . . [¶] . . . until certain people . . . who had common sense realized he couldn't have done it." He also wrote that Cummins "told . . . or 'dry snitched' . . . because them detectives told me some shit that only . . . me, Hev [Cummins] and Jiz knew about." He further wrote that he knew "Jiz didn't open his mouth unless he pulled a Sammy the Bull on me."¹¹ Finally, appellant wrote, "They have no gun, no bullet shells, no fingerprints, and I know . . . for a fact that they have no witnesses that seen me do shit." He asked Carr to make sure no one ever saw the letter.

¹⁰ Appellant said Carr was the wife of a friend, and like a sister to him.

¹¹ Appellant acknowledged that he knew that John Gotti took over the Gambino mafia family, that Sammy the Bull was his associate, that they were responsible for assassinations and murders, and that Sammy the Bull told the police about what Gotti had been doing.

Prosecution Rebuttal

Sergeant Robert Nolan, an Oakland police investigator, interviewed appellant on April 13, 2001, regarding the Luckey incident. Appellant initially said that he had not been involved in the shooting and that another person named John was responsible for shooting Luckey. Nolan then told appellant (falsely) that the police were going to do a gunshot residue test on appellant's hands "in order to try and elicit a statement of a more truthful nature" from appellant. While waiting for the result of the "test," appellant admitted he was more closely involved than he had originally stated. He claimed that he pulled up in a car, and then drove off after Luckey brandished a weapon at him. He then changed his story again, saying that he drove to the area, was approached, and got out of the car at gunpoint. A struggle for the gun ensued, during which the gun discharged. At that point, appellant left the scene.

DISCUSSION

I. Exclusion of Out-of-Court Statements of Derrick Cummins

Appellant contends the trial court erred and violated appellant's constitutional rights to due process, to a fair trial, and to present a complete defense when it excluded the out-of-court statements of Derrick Cummins, which, according to appellant, were admissible as statements against Cummins's penal interest.

A. Trial Court Background

Before trial began, on July 9, 2002, the prosecutor filed a motion to exclude irrelevant evidence, specifically, to require an offer of proof pursuant to Evidence Code section 402, before the defense would be permitted to present the testimony of potential witness Alvin Horn. On July 11, 2002, appellant filed a written offer of proof regarding statements allegedly made to Horn by Derrick Cummins. Appellant cited Sergeant Ferguson's follow-up report of April 11, 2001, in which he stated that informant "X"—later identified as Horn—said that he was present when Cummins and Michael Anderson ("Marcel") got into an argument about drugs. Appellant argued that Horn and Anderson were potential witnesses on whether Cummins had admitted responsibility for shooting

Lemon, Washington, and Keith T. The trial court initially prohibited any mention of this evidence until it could hear additional evidence to determine if the evidence was relevant.

At a July 24, 2002 pretrial hearing, Sergeant Ferguson testified about his April 11, 2001 interview with Horn regarding the Lemon, Washington, and Keith T. shootings. He said that Horn reported overhearing an argument over drugs between Cummins and Anderson, during which Cummins said, “You better ask your partner Keith how we been lighting motherfuckers up.” Ferguson understood that “Keith” referred to Keith T.

In a taped portion of the interview, Horn said that some two weeks before the interview, he was with a man named “Heavy D” (Cummins), “Marcel” (Anderson), and an unknown person. They all had just run from the police. Cummins got into an argument with the unknown person about drugs, and said, “ ‘I been killin’ niggers out here for nothin’.’ ” Anderson then snuck into his house and came out with a pistol. Cummins said “a few more words” and then left. Ferguson asked Horn who Keith was, and Horn said that Keith was the person who got shot with “Turtle” (Lemon). Ferguson understood Horn to be saying that Cummins was claiming that he was involved in the shootings in some way.

Ferguson interviewed Cummins on June 15, 2001, but did not ask him about the statements Horn alleged he had made. Cummins did admit he told Keith T. not to testify in this case. Cummins said Keith T. had told him, “ ‘Man, Dude was hangin’ around you and I think Dude might have, you know, shot me, I think. You know what I’m sayin’?’ ”

Defense counsel told the court that he intended to have Cummins, Horn, and Anderson appear. He argued that if Cummins was unavailable, his statements should be admitted through Horn as statements against penal interest. The court and the parties agreed to take the question up later.

On August 14, 2001, after the prosecution had concluded its case-in-chief, the court and counsel again addressed the issue of Cummins’s statements. The court

considered the transcripts of a police interview with Cummins on June 15, 2001, and Sergeant Ferguson's notes from the Horn interview.¹²

The court summarized the evidence in question: Horn was in custody when Lemon was killed, and when Cummins referred to killing people, Horn thought Cummins was saying he shot Keith T. In his interview, Cummins had indicated that, about four days before Lemon was killed, he and Lemon had had a minor altercation concerning cocaine they bought together. Cummins put his bundle of cocaine in the backyard and used Lemon's car to drop off his girlfriend. When he got back, his bundle was gone. He therefore kept Lemon's car. According to Cummins, there were no threats to kill anyone; it was merely a disagreement. In the interview, Cummins denied telling appellant to "take care of" Lemon and denied involvement in any shooting. There were rumors he was involved and he was talking to police because he wanted to clear his name.

The trial court ruled that the defense could call Cummins as a witness. If Cummins were to deny making the statements in question, counsel could call Horn to impeach Cummins. However, if Cummins invoked his Fifth Amendment right and refused to answer questions, "there would be no need for Horn."

Defense counsel called Cummins as a witness. Cummins invoked the Fifth Amendment to every question asked, including whether he had had a conversation with Horn and Anderson about Lemon's shooting and whether he told them they "had better ask Little Keith how we been lighting M.F.s up."

Shortly thereafter, at a hearing outside the presence of the jury, defense counsel expressed his intention to call Alvin Horn to testify about Cummins's alleged statements. After further argument by defense counsel and the prosecutor, the trial court ruled "that Mr. Alvin Horn will not be allowed to testify simply because the statements made by Alvin Horn to the police officers, the one that has been referenced to by both [counsel] is too vague to be frankly against penal interest."

¹² Horn, who was in custody, had been brought to court for the hearing, but refused to leave the holding cell and testify.

B. Analysis

Evidence Code section 1230 provides in relevant part: “Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.” Hence, “the proponent of the evidence ‘must show that the declarant is unavailable, that the declaration was against the declarant’s penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.’ [Citations.]” (*People v. Lawley* (2002) 27 Cal.4th 102, 153.)

“Whether a statement is self-inculpatory or not can only be determined by viewing the statement in context.” (*People v. Lawley, supra*, 27 Cal.4th at p. 153.) Moreover, “[t]he focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant’s relationship to the defendant. [Citations.]” (*People v. Frierson* (1991) 53 Cal.3d 730, 745.)

We review the trial court’s ruling as to whether a statement is against a declarant’s penal interest for abuse of discretion. (*People v. Lawley, supra*, 27 Cal.4th at pp. 153-154.)

Here, we find no abuse of discretion. First, the trial court reasonably found that Cummins’s statements, in context, were too vague to meet the requirements of Evidence Code section 1230. The two alleged statements in question—“You better ask your partner Keith how we been lighting motherfuckers up” and “ ‘I been killin’ niggers out here for nothin’ ’ ”—did not unambiguously refer to the Lemon, Washington, and Keith T. shootings or to Cummins’s participation in them. Even assuming “Keith” referred to Keith T., the first statement, about what “we” had been doing, was as likely to

refer to the activities of Cummins's associates (e.g., appellant) as to himself; nor was the statement plainly about the Lemon, Washington, and Keith T. shootings in particular. The second statement, in which Cummins spoke of his own actions, was indefinite as to whom he had supposedly killed. Thus, neither statement specifically linked Cummins to the shootings in question, and the trial court reasonably found that they were not frankly against his penal interest.¹³ (See *People v. Lawley, supra*, 27 Cal.4th at p. 153.)

Moreover, the context in which the statements were made does not render them especially trustworthy. Cummins allegedly made the comments during a dispute about drugs, in which Cummins apparently was trying to show how tough he was and to instill fear in the people he was arguing with, in order to get his way. (Cf. *People v. Frierson, supra*, 53 Cal.3d at p. 745 [where declarant's statement to defense investigator that he had shot victim was made long after defendant had been found to have committed crime, "court could reasonably find [declarant] wanted to aid his friend at little risk to himself, and thus the statement was insufficiently trustworthy"].) The reliability of the statements thus is clearly questionable.

Consequently, the trial court did not abuse its discretion when it excluded the statements because they did not meet the requirements of Evidence Code section 1230. (See *People v. Lawley, supra*, 27 Cal.4th at pp. 153-154.)

Having found that exclusion of these statements does not violate Evidence Code section 1230, we also conclude that there was no violation of appellant's constitutional rights to due process, to a fair trial, and to present a complete defense. (See, e.g., *People v. Lawley, supra*, 27 Cal.4th at pp. 154-155 [general rule remains that ordinary rules of evidence do not impermissibly infringe on accused's constitutional right to present a defense].)

¹³ Respondent also notes that even if the statements *were* against Cummins's penal interest in some general sense, they were not against his penal interest with respect to the present case and, therefore, did not constitute relevant, admissible evidence. (See Evid. Code, §§ 210, 350; *People v. Kipp* (2001) 26 Cal.4th 1100, 1123.)

II. *Denial of the Motion to Sever*

Appellant contends the trial court erred and violated appellant's due process rights when it denied his motion to sever the charges related to the Luckey incident from those related to the Lemon, Washington, and Keith T. incident.

A. *Trial Court Background*

Appellant moved to sever the charges, arguing that he wanted to testify in the Luckey case because he was the only witness there, other than Luckey, and he wanted to argue self defense. On the other hand, he did not want to testify in the Lemon, Washington, and Keith T. case because "the evidence on those cases is so weak that he has a right to sit back and put the Prosecution to their burden of proving them beyond a reasonable doubt."

The trial court denied the motion to sever, explaining: "[Appellant] gives no reason as to why he does not want to testify in the [Lemon, Washington, Keith T.] counts. He simply asserts that the evidence is insufficient to convince a jury beyond a reasonable doubt. [¶] And based upon that offer of proof, the Court is going to deny the motion to sever. The Court, however, will entertain a motion at the end of the Prosecution's case if there is sufficient showing at that time, but at least as to the issue of cross-admissibility under [Evidence Code section] 1101(b), I believe that the evidence would be cross-admissible. It doesn't seem to me that any of the charges would unusually inflame the jurors. I mean, there's shootings of people.

"And it seems to me that although you point out some impeachment evidence where you may be able to impeach some of the witnesses [in the Lemon, Washington, Keith T. case], at least as far as the Court is concerned, up to this point, I don't see either case as either a strong or weak case. They're certainly not weak cases, and at least from what I can see so far, they're fairly strong cases." Finally, the court noted that joinder would not convert the matter into a capital case.

B. *Analysis*

Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate

counts . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.”

The statutory requirements for joinder were satisfied in this case because both incidents involved the same class of crimes: murder and attempted murder. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 172 (*Sandoval*.) Since the requirements for joinder were satisfied, and since “[t]he law prefers consolidation of charges, . . . [appellant] can predicate error in the denial of the motion only on a clear showing of potential prejudice.” (*People v. Ochoa* (2001) 26 Cal.4th 398, 423.) We review the trial court’s denial of a motion for severance for an abuse of discretion resulting in a substantial danger of prejudice. (*People v. Mayfield* (1997) 14 Cal.4th 668, 720; *Sandoval*, at p. 172.)

Factors that guide the trial court’s discretion in ruling on such motions include whether: “(1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a ‘weak’ case has been joined with a ‘strong’ case, or with another ‘weak’ case, so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]” (*Sandoval, supra*, 4 Cal.4th at pp. 172-173.)

In the present case, appellant’s request for severance was based on the asserted tension between his need to testify in the Luckey case, in which there were no other witnesses and he claimed self defense, and his desire not to testify in the Lemon, Washington, and Keith T. case, which he believed was weak and in which he wanted to put the prosecution to its burden of proof.

Two California cases have addressed similar arguments. In *Sandoval, supra*, 4 Cal.4th 155, our Supreme Court considered a defendant’s argument that severance was necessary because he had “separate defenses that would be prejudiced because he desired to testify as to one incident but not the other.” (*Id.* at pp. 173-174.) As the court

explained: “Although we have not addressed this theory of prejudice, it has been considered by federal courts. The federal courts have ruled that severance is not mandatory every time a defendant wishes to testify to one charge but not to another. ‘“If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant.” ’ (U.S. v. Archer (7th Cir. 1988) 843 F.2d 1019, 1022.) The need for severance does not arise in federal courts ‘“until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.” ’ (Ibid.; quoting Baker v. United States (D.C. Cir. 1968) 401 F.2d 958, 977; see also United States v. Valentine (10th Cir. 1983) 706 F.2d 282, 291.) Federal courts have required the defendant to present enough information to satisfy the court that the claim of prejudice is genuine and to enable it to weigh the considerations of economy and expedient judicial administration against the defendant’s interest in having a free choice with respect to testifying. (United States v. Valentine, supra, 706 F.2d at p. 291.)” (Sandoval, at pp. 173-174.)

In *Sandoval*, the Supreme Court found that the “[d]efendant’s showing fell far short of anything that would have satisfied the federal standards or any standard this court might adopt. Defendant neither explained the nature of the testimony he wished to give in [one case] nor his reasons for not wanting to testify in the [other] case.” (*Sandoval*, supra, 4 Cal.4th at p. 174.)

Thereafter, in *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1287, the Second District Court of Appeal found that the defendant’s assertion that he would “‘more than likely want to testify’ ” in one case, but not in the other case, was insufficient to demonstrate prejudice. In reaching this conclusion, the *Belton* court applied the federal standard, discussed in *Sandoval*, stating that our Supreme Court had

“adopted” the federal courts’ view regarding the showing necessary to warrant severance. (*Belton*, at p. 1287.)¹⁴

In this case, we similarly find that appellant’s bare declaration that the Lemon, Washington, and Keith T. case was so weak that he had the right to sit back and make the prosecution satisfy its burden of proving him guilty beyond a reasonable doubt simply did not give the trial court “enough information to satisfy the court that the claim of prejudice [was] genuine and to enable it to weigh the considerations of economy and expedient judicial administration against [appellant’s] interest in having a free choice with respect to testifying.” (*Sandoval*, *supra*, 4 Cal.4th at p. 174, citing *United States v. Valentine*, *supra*, 706 F.2d at p. 291.)

Appellant asserts that he made more of a showing than the defendant in *Sandoval*, *supra*, 4 Cal.4th 155, who merely “made passing reference to the fact that he had separate defenses that would be prejudiced because he desired to testify as to one incident but not the other” (*id.* at pp. 173-174), and the defendant in *Belton*, *supra*, 19 Cal.App.4th 1279, who stated only that he would “ ‘ more than likely want to testify’ ” in one case, but not in the other (*id.* at p. 1287.) While appellant’s showing was marginally more substantive than those offered in *Sandoval* and *Belton*, he nonetheless did not meet his burden of providing specific facts showing a need to refrain from testifying in the Lemon, Washington, and Keith T. case, i.e., he failed to show how subjecting himself to cross-examination in that case would expose him to particular prejudice. (See *Sandoval*, at p. 174.)

Appellant submits that “requiring more information from the defendant, for example, about possible cross-examination that he might fear, would be entirely unfair to him because it would require him to assist the prosecutor in both the development and the

¹⁴ Appellant avers that the *Belton* court’s statement that our Supreme Court had “adopted” the federal view is inaccurate. However, regardless of whether the Supreme Court in *Sandoval* adopted the federal view, it plainly relied on federal cases in analyzing the issue, and we too find the federal criteria useful in determining whether appellant made a showing of potential prejudice in the present case.

prosecution of its case against him. It might even require the defense to reveal its strategy and the weaknesses it perceives in its own case.” To the extent that appellant was concerned with such exposure, he could have requested an in camera hearing, in which he could have made as detailed a proffer as necessary without fear of sharing his trial strategy with the prosecution. (Cf. *People v. Memro* (1995) 11 Cal.4th 786, 851.) Defense counsel neither requested such a hearing nor even intimated that appellant had additional reasons for not wanting to testify in the Lemon, Washington, and Keith T. case that he did not want to disclose in open court.

Appellant also asserts that we should follow the reasoning of the federal district court in *U.S. v. Best* (N.D.Ind. 2002) 235 F.Supp.2d 923, 930, in which the court held that, in the absence of clear guidance from the Seventh Circuit on the issue, it was “satisfied that [the] Defendant’s desire to put the Government to its proof on the drug-related counts is a sufficiently strong reason . . . for [the] Defendant not to testify regarding the drug-related charges.” We disagree. To require severance upon such a meager showing as appellant (or the defendant in *U.S. v. Best*) provided would empower defendants to sever charges almost at will, and would result in a court being “ “divested of all control over the matter of severance and the choice would be entrusted to the defendant.” ’ [Citation.]” (*Sandoval, supra*, 4 Cal.4th at p. 174, quoting *U.S. v. Archer, supra*, 843 F.2d at p. 1022.)

We conclude the trial court did not abuse its discretion in finding that appellant did not provide a “ “convincing showing that he [had] . . . [a] strong need to refrain from testifying” ’ ” in the Lemon case. (*Sandoval, supra*, 4 Cal.4th at p. 174, quoting *U.S. v. Archer, supra*, 843 F.2d at p. 1022.)

Although, in his motion and his argument to the trial court regarding severance, appellant did not focus on other factors related to the potential prejudice of failing to sever, we do not believe the trial court abused its discretion in finding those factors inapplicable. (See *Sandoval, supra*, 4 Cal.4th at pp. 172-173.)

First, even assuming the trial court was wrong, as appellant argues, when it found that the offenses would be cross-admissible in separate trials, “the absence of cross-

admissibility does not, by itself, demonstrate prejudice.” (*People v. Kraft* (2000) 23 Cal.4th 978, 1030.) “Cross admissibility suffices to negate prejudice, but it is not needed for that purpose.” (*People v. Memro, supra*, 11 Cal.4th at p. 850; see also § 954.1 [added by Proposition 115 in 1990, section 954.1 provides that “evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact”].)

Second, we do not believe that either case was *unusually* likely to inflame the jury against appellant. (See *Sandoval, supra*, 4 Cal.4th at p. 172.) In both cases, the evidence showed that appellant walked up to unarmed victims and shot them, either for no apparent reason or as part of a robbery. Thus, neither case was especially likely to inflame the jury when compared with the other.

Third, we reject appellant’s claim that both cases were weak “so that the ‘spillover’ effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges.” (*Sandoval, supra*, 4 Cal.4th at pp. 172-173.) Both cases rested primarily on eyewitness identifications. While appellant claimed self defense in the Luckey case, and there were some inconsistencies in Washington’s and Keith T.’s descriptions of the assailant, the trial court did not abuse its discretion in finding that the eyewitness testimony was strong overall. We also note the fact that “[w]henver a defendant is tried for multiple crimes of the same class, the jury will be presented with evidence that the defendant committed multiple offenses. This necessary concomitant of joinder is not sufficient to render the joinder unduly prejudicial. If it were, joinder could never be permitted.” (*People v. Hill* (1995) 34 Cal.App.4th 727, 735.)

The fourth factor concerning the potential prejudice of failing to sever—whether one of the charges carries the death penalty—is inapplicable to the present case. (See *Sandoval, supra*, 4 Cal.4th at p. 173.)

We conclude that appellant did not demonstrate that the potential for substantial prejudice outweighed the benefits to the state from joinder, and the trial court did not abuse its discretion in denying his motion for severance. (See *People v. Ochoa, supra*, 26 Cal.4th at p. 423; *Sandoval, supra*, 4 Cal.4th at p. 172.)

Finally, appellant asserts that the trial court's refusal to sever resulted in gross unfairness amounting to a denial of due process. (See *Sandoval, supra*, 4 Cal.4th at p. 174.) Having reviewed the evidence introduced at trial, there is no indication in the record of improper reliance on the evidence supporting counts in the Luckey case for conviction in the Lemon, Washington, and Keith T. case, or vice versa. Accordingly, we find neither actual nor potential prejudice amounting in a denial of due process.

III. Trial Court's Failure to Instruct Regarding Imperfect Self-Defense

Although the trial court instructed the jury on self-defense (CALJIC No. 5.12),¹⁵ it did not instruct the jury on imperfect self-defense. (See CALJIC No. 5.17.)¹⁶ Appellant

¹⁵ CALJIC No. 5.12 provides: "The killing of another person in self-defense is justifiable and not unlawful when the person who does the killing actually and reasonably believes:

"1. That there is imminent danger that the other person will either kill [him] [her] or cause [him] [her] great bodily injury; and

"2. That it is necessary under the circumstances for [him] [her] to use in self-defense force or means that might cause the death of the other person for the purpose of avoiding death or great bodily injury to [himself] [herself].

"A bare fear of death or great bodily injury is not sufficient to justify a homicide. To justify taking the life of another in self-defense, the circumstances must be such as would excite the fears of a reasonable person placed in a similar position, and the party killing must act under the influence of those fears alone. The danger must be apparent, present, immediate and instantly dealt with, or must so appear at the time to the slayer as a reasonable person, and the killing must be done under a well-founded belief that it is necessary to save one's self from death or great bodily harm."

¹⁶ CALJIC No. 5.17 provides: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter.

"As used in this instruction, an 'imminent' [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer.

"[However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the

contends the trial court's failure to instruct the jury sua sponte on imperfect self-defense constituted prejudicial error.

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.” [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than charged. [Citations.]’ ” (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) “[T]he trial court need not instruct on a lesser included offense whenever any evidence, no matter how weak, is presented to support an instruction, but only when the evidence is substantial enough to merit consideration by the jury. [Citation.]” (*People v. Barton* (1995) 12 Cal.4th 186, 195, fn. 4.)

“Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. [Citation.] If, however, the killer actually, but *unreasonably*, believed in the need to defend himself or herself from imminent death or great bodily injury, the theory of ‘imperfect self defense’ applies to negate malice. [Citation.] The crime committed is thus manslaughter, not murder. [Citation.]” (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1261 (*Viramontes*).

Imperfect or “unreasonable” self-defense is “not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter. And voluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a

circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].]

“[This principle applies equally to a person who kills in purported self-defense or purported defense of another person.]”

lesser offense included in the crime of murder. Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense: this duty arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton, supra*, 12 Cal.4th at pp. 200-201.)

In *Viramontes*, the appellate court took the rule discussed in *People v. Barton* a step further, stating: "The subjective elements of self-defense and imperfect self-defense are identical. Under each theory, the appellant must actually believe in the need to defend himself against imminent peril to life or great bodily injury. To require instruction on either theory, there must be evidence from which the jury could find that appellant actually had such a belief. . . . If the trier of fact finds the requisite belief in the need to defend against imminent peril, the choice between self-defense and imperfect self-defense properly turns upon the trier of fact's evaluation of the reasonableness of appellant's belief. Accordingly, if the evidence is sufficient to support instruction on self-defense, it is also sufficient to support instruction on imperfect self-defense. [Citations.]" (*Viramontes, supra*, 93 Cal.App.4th at pp. 1262-1263, italics added.)

Relying on *Viramontes*, appellant argues that, since the trial court found the evidence sufficient to instruct on self-defense, it was also required to instruct on imperfect self-defense. First, we question whether *Viramontes* applies in the present circumstances. In both *Viramontes* and *People v. Ceja* (1994) 26 Cal.App.4th 78, cited in *Viramontes*, there plainly was evidence that the defendant actually, but unreasonably, believed in the need to use deadly force. (See *Viramontes, supra*, 93 Cal.App.4th at p. 1263 [while there was strong evidence that two guns were used during incident, no gun was found on or near victims, and none of the witnesses specifically stated someone shot at defendant first]; *People v. Ceja*, at p. 86 [defendant testified that victim pulled a gun from his waistband, but no gun was found at scene and prosecution witnesses testified victim did not have gun].)

Here, on the other hand, Luckey testified that appellant pulled a gun on him, robbed him, and then shot him in the face, while appellant testified that Luckey pointed a gun at him and threatened to harm him. According to appellant's version of events, defending himself against Luckey would necessarily have been reasonable. Thus, under the particular facts of this case, *Viramontes* is distinguishable, and the evidence did not support an instruction on imperfect self-defense.¹⁷ (See also *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1273 [disagreeing with suggestion in *People v. Ceja* that trial court must instruct on imperfect self-defense whenever evidence warrants a perfect self-defense instruction].)

Second, even if the court erred in failing to give an imperfect self-defense instruction, the error clearly was harmless. By convicting appellant of attempted first degree murder of Luckey, the jury explicitly found that appellant acted willfully, deliberately, and with premeditation. This finding is inconsistent with appellant's having an actual, but unreasonable belief that he needed to kill to defend himself. The jury was instructed, pursuant to CALJIC No. 8.20, that "[t]he word 'willful' means intentional. [¶] The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. [¶] The word 'premeditated' means considered beforehand."

In deciding that appellant acted willfully, deliberately, and with premeditation, the jury necessarily rejected any lesser offense, such as second degree murder or manslaughter.¹⁸ (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 664-665, 669; *People*

¹⁷ Respondent asserts that no self-defense instructions were warranted for the additional reason that appellant testified that the gun went off *accidentally* as he tried to wrest it away from Luckey. However, the jury could reject appellant's claim that he did not intend to shoot Luckey, and still find that the circumstances supported a theory of self-defense if, for instance, it believed that appellant shot Luckey in the belief that Luckey posed an imminent danger to him. (See *People v. Elize* (1999) 71 Cal.App.4th 605, 615-616.)

¹⁸ The jury's other verdicts also show that it believed Luckey's testimony and rejected appellant's: it found that appellant willfully discharged a firearm, causing great

v. Barnett (1998) 17 Cal.4th 1044, 1156.) Accordingly, even had the court instructed the jury on imperfect self-defense, it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the purported error. (See *People v. Breverman, supra*, 19 Cal.4th at p. 176, citing *People v. Watson* (1956) 46 Cal.2d 818.)¹⁹

IV. Trial Court's Refusal to Give CALJIC No. 5.15

Appellant contends the trial court erred when it refused to give CALJIC No. 5.15, which would have specifically informed the jury that the prosecutor had the burden to prove that the attempted murder of Curtis Luckey was unlawful.²⁰ The trial court reasoned that this instruction was covered sufficiently by other instructions it was planning to give.

Section 1096a provides: "In charging a jury, the court may read to the jury Section 1096 [articulated in CALJIC No. 2.90], and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." Despite section 1096a, a defendant is entitled, upon request, to an instruction that pinpoints the theory of the defense. (*People v. Hughes* (2002) 27 Cal.4th 287, 361, citing *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) CALJIC No. 5.15 has been characterized as a pinpoint instruction. (See *People v. Adrian* (1982) 135 Cal.App.3d 335, 340-341.) However, courts have found that the failure to give CALJIC No. 5.15 is harmless error when the jury is otherwise properly instructed on the burden of proof. (See, e.g., *People*

bodily injury, and personally used a firearm. It also found him guilty of robbing Luckey and of carjacking.

¹⁹ The parties agree that the *Watson* standard of error applies. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) However, even if the *Chapman* standard applied, we would find any error harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

²⁰ CALJIC No. 5.15 provides: "Upon a trial of a charge of murder, a killing is lawful if it was [justifiable] [excusable]. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not [justifiable] [excusable]. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

v. Wittig (1984) 158 Cal.App.3d 124, 135-136 [error in failing to give CALJIC No. 5.15 harmless where jury was instructed with CALJIC Nos. 2.90 and 2.01]; *People v. Adrian*, at p. 342 [same].)

Here, the trial court instructed the jury with CALJIC No. 2.90,²¹ which fully apprised the jury that the prosecution had to prove appellant's guilt beyond a reasonable doubt, as well as with CALJIC No. 2.01, which further told the jury that each fact on which an inference essential to establish guilt necessarily rests must be proved beyond a reasonable doubt.²² We find that these instructions, together with the other instructions given (e.g., CALJIC No. 8.67 [prosecution has burden of proving that attempted murders were willful, deliberate, and premeditated beyond a reasonable doubt], were sufficient to

²¹ CALJIC No. 2.90 provides: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

²² CALJIC No. 2.01 provides: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] [her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] [her] guilt.

"If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

apprise the jury of the prosecution's burden of proving beyond a reasonable doubt that the attempted murder of Luckey was unlawful. Accordingly, the court's error in refusing to instruct the jury with CALJIC No. 5.15 was harmless.²³

V. *Trial Court's Giving of CALJIC No. 2.04*

Appellant contends the trial court erred in giving CALJIC No. 2.04, which read: "If you find that the defendant attempted to or did fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show consciousness of guilt. However, that conduct does not by itself prove guilt and its weight and significance, if any, are for you to decide." According to appellant, there was no evidence from which the jury could reasonably infer that appellant attempted to induce a witness to lie at trial or otherwise tried to fabricate evidence.

Respondent initially asserts that appellant has waived this issue by failing to object at trial. Respondent notes that an appellate court may review any instruction if the substantial rights of the defendant were affected, but asserts that CALJIC No. 2.04 is not such an instruction because its cautionary nature benefits the defense. (See *People v. Boyette* (2002) 29 Cal.4th 381, 438-439.)

Even assuming appellant has not waived the issue, we find no error. There was substantial evidence from which the jury could conclude that appellant attempted to induce a witness to lie at trial or otherwise tried to fabricate evidence. (See *People v. Boyette, supra*, 29 Cal.4th at p. 439.) In particular, there was evidence that, after his arrest, appellant wrote a letter and sent a newspaper clipping about the Lemon, Washington, and Keith T. case to Cummins. At the end of the letter, he wrote, "Make sure you have this in mind so you will be tight." This evidence, which suggests that

²³ Given that the jury's verdicts show that it completely rejected appellant's defense (see pt. III, *ante*), this error was harmless under either the *Watson* or *Chapman* standard of error. (See *Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

appellant was attempting to induce Cummins to lie at appellant's trial, warranted use of CALJIC No. 2.04.²⁴

VI. *Imposition of Two \$40,000 Restitution Fines was Unauthorized*

Appellant contends the trial court's imposition of two restitution fines in the amount of \$40,000 each, pursuant to section 1202.4, subdivision (b), and section 1202.45, was not authorized by statute, and so must be reduced to the maximum allowable amounts. Respondent agrees.

Section 1202.4, subdivision (b)(1), provides that the court must (absent unusual circumstances) impose a restitution fine "set at the discretion of the court and commensurate with the seriousness of the offense, but [which] shall not be less than two hundred dollars (\$200), and not more than ten thousand dollars (\$10,000), if the person is convicted of a felony" Section 1202.45 provides that, "[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional [suspended] parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4."

Appellant's failure to object to the imposition of the fines in the trial court does not limit our review of the question on appeal since the objection and waiver rule "does not apply to claims [such as the present one] that the sentence was 'unauthorized.' [Citation.]" (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.)

²⁴ Respondent avers that the fact that appellant also changed his story about the Luckey incident several times, using the final story in his testimony at trial, also shows he fabricated evidence for trial. We have some doubt that appellant's changed story—offered before he was even charged in the Luckey incident—was sufficient to warrant giving CALJIC No. 2.04. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1225.) However, we have already found that there was other evidence that warranted use of this instruction. Moreover, even were the evidence insufficient to support the giving of CALJIC No. 2.04, the instruction would have been merely " 'superfluous,' " since, where the evidence of a defendant's guilt is strong—as we have found it is here—" 'reversal on such a minor, tangential point is not warranted.' " (*People v. Jackson*, at p. 1225; see also *People v. Pride* (1992) 3 Cal.4th 195, 248-249.)

The maximum amount of a fine under section 1202.4, subdivision (b), is \$10,000 regardless of the number of victims or counts involved. (*People v. Blackburn, supra*, 72 Cal.App.4th at p. 1534.) The additional fine assessed under section 1202.45 must be “in the same amount” as the fine imposed under section 1202.4. (§ 1202.45.) Hence, both restitution fines imposed in this case were unauthorized and the judgment must be modified so as to reduce them to \$10,000 each. (See *People v. Blackburn*, at p. 1534.)

VII. *Trial Court Improperly Sentenced Appellant Under Section 12022.7 on Counts Four, Five, and Six*

Appellant contends the trial court improperly sentenced him to section 12022.7, subdivision (a) enhancements on counts four, five, and six, and these sentences should be stricken as unauthorized. Respondent agrees.

With respect to count four (attempted murder of Luckey), the trial court sentenced appellant to a consecutive term of 25 years to life for the intentional discharging of a firearm resulting in great bodily injury or death, under the section 12022.53, subdivision (d) enhancement. The court also imposed a concurrent three-year prison term for the great bodily injury enhancement, under section 12022.7, subdivision (a). In addition, with respect to count five (carjacking) and count six (robbery), the court sentenced appellant to concurrent terms of 25 years to life for the section 12022.53, subdivision (d) enhancement, and a one-year concurrent term for the great bodily injury enhancements, under section 12022.7, subdivision (a).

Section 12022.53, subdivision (f), provides in relevant part: “An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d).”

We agree that, based on the express language of section 12022.53, subdivision (f), the terms imposed on counts four, five, and six, pursuant to section 12022.7, subdivision (a), must be stricken as unauthorized.

VIII. *Cruel and Unusual Punishment*

Appellant contends his sentence of 114 years to life plus 33 years constituted cruel and unusual punishment under the federal and state Constitutions.

In his abbreviated argument, appellant does not contend the sentence was disproportionate to the crimes he committed (see *In re Lynch* (1972) 8 Cal.3d 410, 424), but simply asserts that “because the chances of appellant’s completing his sentence in his remaining lifetime is virtually nil[,] . . . the punishment is excessive to the point of being cruel and unusual.” In support of this assertion, appellant cites the concurring opinion of Justice Mosk in *People v. Deloza* (1998) 18 Cal.4th 585, 600-601, in which Justice Mosk concluded that “[a] sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishment clause of article I, section 17 of the California Constitution.”

In *People v. Byrd* (2001) 89 Cal.App.4th 1373 (*Byrd*), the appellate court addressed a nearly identical contention, in which the defendant, who had been sentenced to 444 years to life plus 115 years, cited *People v. Deloza, supra*, 18 Cal.4th 585 in arguing that his sentence violated the constitutional ban on cruel and unusual punishment. The *Byrd* court first observed that Justice Mosk’s concurring opinion in *People v. Deloza*, in which no other justice joined, had no precedential value. (*Byrd, supra*, 89 Cal.App.4th at p. 1383.) It then stated that, in any case, it disagreed with Justice Mosk’s analysis, explaining that, “[i]n our view, it is immaterial that defendant cannot serve his sentence during his lifetime. In practical effect, he is in no different position than a defendant who has received a sentence of life without possibility of parole: he will be in prison all his life. However, imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution [citation] or the federal Constitution. [Citation.] [¶] Moreover, in our view, a sentence such as the one imposed in this case serves valid penological purposes: it unmistakably reflects society’s condemnation of defendant’s conduct and it provides a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future.” (*Ibid.*)

We concur in the *Byrd* court’s analysis, and conclude that the fact that appellant’s sentence of 114 years to life plus 33 years cannot be served during his lifetime does not

constitute cruel and unusual punishment. (See *Byrd, supra*, 89 Cal.App.4th 1373; see also *People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 531-532.)

IX. Section 654

The trial court sentenced appellant to a one-year eight-month prison term for carjacking (count five) to run consecutive to a one-year prison term for robbery (count six). Appellant contends the trial court improperly imposed consecutive sentences for the robbery and carjacking counts, in violation of section 654.²⁵

“ “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” ’ [Citation.] However, if the offenses were independent of and merely incidental to each other, the defendant may be punished separately even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. [Citation.] ‘ “The defendant’s intent and objective are factual questions for the trial court; . . . there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]” [Citation.]’ [Citation.]” (*People v. Green* (1996) 50 Cal.App.4th 1076, 1084-1085.)²⁶

²⁵ Section 654, subdivision (a), provides in relevant part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

²⁶ We also note that section 215, which defines the offense of carjacking, provides in relevant part: “[t]his section shall not be construed to supersede or affect Section 211 [concerning robbery]. A person may be charged with a violation of this section and Section 211. *However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.*” (§ 215, subd. (c), italics added; see *People v. Dominguez* (1995) 38 Cal.App.4th 410, 417, 419-420.)

Here, Luckey testified that, after appellant got out of his BMW, he walked up to Luckey, pulled out a revolver, pointed it at Luckey's head, and said, "Break yourself. I want everything." Luckey took \$140 to \$190 out of his jacket pocket and threw it on the ground, and appellant kneeled down to pick up the money, still pointing the gun at Luckey's head. When appellant straightened up, he sounded agitated as he said, "I want everything" and "I want your keys." Luckey reached into his pants pocket, took his keys out, and threw them on the ground. Appellant picked up the keys, while continuing to point the gun at Luckey's head. After Luckey asked appellant not to shoot him, appellant said, "shut up, bitch," and shot Luckey in the face. Luckey then ran away and did not see where appellant went.

Respondent argues that the evidence supports the trial court's implied finding of different intents and objectives by appellant. According to respondent, the evidence shows that appellant initially robbed Luckey of his money, the objective being theft, and then took Luckey's car, the objective being escape. We disagree.

First, Luckey testified that appellant drove up in a BMW; thus, he would not need a second car for purposes of escape. Second, there is absolutely no evidence to support a finding of different intents and objectives. Rather, Luckey's testimony shows that appellant demanded "everything," i.e., all of Luckey's possessions. That Luckey initially only threw down his money does not alter the fact that appellant took Luckey's money

and his car keys²⁷ pursuant to that single objective: to relieve Luckey of all of his possessions. (Cf. *People v. Bauer* (1969) 1 Cal.3d 368.)²⁸

Because we conclude there is not substantial evidence to support the trial court's finding that appellant's taking of Luckey's car was not part of the same transaction in which he took Luckey's money, the one-year term for robbery imposed pursuant to count six must be stayed.

DISPOSITION

The abstract of judgment shall be amended as follows: (1) the two restitution fines, imposed pursuant to section 1202.4, subdivision (b), and section 1202.45, shall be reduced to \$10,000 each; (2) the terms imposed on counts four, five, and six, pursuant to section 12022.7, subdivision (a), are stricken; and (3) the term imposed on count six (§ 211) is stayed. The judgment is otherwise affirmed.

²⁷ We observe that, although Luckey was not present when appellant actually drove the car, “the elements of carjacking were established. [Appellant] took possession of [Luckey’s] car by threatening [him] and demanding [his] car keys. Although [Luckey] was not physically present in the parking lot when [appellant] drove the car away, [he] had been forced to relinquish [his] car keys. Otherwise, [he] could have kept possession and control of the keys and [his] car. Although not the ‘classic’ carjacking scenario, it was a carjacking all the same. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 609, fn. omitted.)

²⁸ Moreover, the robbery was not technically complete until appellant “ ‘[carried] away the loot.’ ” (*Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221.) Hence, even if it were plausible that appellant wanted Luckey’s car keys to facilitate his escape, his demand for the keys would still have been pursuant to the same intent and objective as the robbery.

Kline, P.J.

We concur:

Lambden, J.

Ruvolo, J.

A101381, *People v. Key*