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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICKY R. SANDERS, Defendant and Appellant.	A142875 (San Mateo County Super. Ct. No. SC077150)

Following a series of robberies and attempted robberies of commercial establishments in 2011, appellant Ricky R. Sanders was convicted of 44 felonies including second degree robbery, attempted second degree robbery, false imprisonment, criminal threats, assault with a firearm and felon in possession of a firearm, accompanied by firearm enhancements and prior serious felony allegations. (Pen. Code, §§ 211, 212.5, subd. (c), 211/664, 236, 422, 245, subd. (a)(2), former 12021, subd. (a)(1), 12022.5, subd. (a), 12022.53, subds. (b) & (d), 667, subd. (a), 1170.12.)[1] He appeals from a judgment sentencing him to prison for a term of "834 years to life" under the Three Strikes law, arguing: (1) all but one of his convictions for felon in possession of a firearm must be reversed because no evidence was presented to show his possession of the firearm was not continuous; (2) the prosecutor committed misconduct in prefacing questions to certain victims with a description of the difference between a revolver and a semiautomatic handgun; (3) the sentence imposed amounts to cruel and unusual punishment; (4) a three-year great bodily injury allegation imposed under section

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

12022.7, subdivision (a), must be dismissed because the jury did not return a true finding on that allegation; and (5) the court must impose sentence on the remaining felon in possession count.[2] We agree that only one conviction for felon in possession of a firearm may stand, that appellant must be resentenced on that count, and that the great bodily injury allegation must be stricken. We otherwise affirm.

I. BACKGROUND

A. *Trial Evidence*

Appellant, who is African-American, was five feet eight or five feet nine inches tall and weighed 220 pounds as of January 2012. He owned a white Toyota Scion, which he purchased in February 2011, and lived in Oakland. Appellant has dated Sharon Leoso off and on, and owned a cell phone used by the two of them during the period relevant to this case.

1. February 21, 2011: Party City in Daly City (counts 1-3)

On February 21, 2011, Romilene Encarnacion was working as a retail associate at Party City in Daly City. Kimberly Byrne was the store manager. At 7:16 p.m., the cell phone shared by appellant and Leoso made a call to the store from a distance of .2 or .3 miles away.

At 7:30 p.m., a man wearing a mask over part of his face walked into Party City and told Encarnacion to open the register while pointing a gun with a long silver barrel. Encarnacion paged Byrne, and the man had Byrne open the safe and put about $5,100 in a bag before running out of the store. The man was described by Encarnacion as about five feet eight inches tall with a medium build and medium dark skin. Appellant's cell phone was within a mile and a half of the Party City at 9:21 p.m. to 9:24 p.m. and at 9:28 p.m.

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[2] Appellant has withdrawn an additional argument that the entire judgment must be reversed because his cell phone location records were obtained through an unlawful search and seizure and his trial counsel was ineffective in failing to file a motion to suppress the evidence. He has presented a related argument in a petition for writ of habeas corpus filed concurrently with his reply brief, which we have denied by separate order filed this date. (*In re Sanders* (A147274).)

Byrne was later shown a video lineup and selected appellant as the man who was the most similar of two subjects who were similar in appearance to the robber.

2. April 10, 2011: Colma BevMo (counts 4–6)

On April 10, 2011, Nicholas Ruperto and Aaron McNab worked at a "Beverages and More" (BevMo) in Colma. At 4:38 p.m. and 5:38 p.m., appellant's cell phone was near a tower in nearby Daly City, and at 6:00 p.m., a call was made from the cell phone appellant shared with Leoso to appellant's phone, which was less than a quarter of a mile away from the store.

At about 6:35 p.m., a customer approached McNab asking about a wine that was out of stock, and pulled out a silver revolver that looked like a gun "from the movie Dirty Harry." At the man's direction, McNab paged Ruperto, who put an estimated $4,000 from the safe into a leather bag. McNab described the man as stocky and about five feet nine or ten inches tall, whereas Rupert described him as a heavyset male between six feet two and six feet four inches tall with medium brown skin.

3. April 17, 2011: Colma Petco (counts 7–9)

Thomas Oetzel and Manuel Ocon were working at the Colma Petco on April 17, 2011. At 3:59 p.m., appellant's cell phone was within a quarter mile of the Petco and at 4:08 p.m., it was near a tower close to the Petco. At about 4:34 p.m., a man entered the store carrying a long barreled silver revolver while Oetzel and Ocon were in the office with the safe open. The man provided a canvas bag and took about $3,400 from the safe. Oetzel described the robber, whose lower face was covered with a red bandana, as about five feet ten inches tall, stocky with light brown skin, while Ocon described the skin tone as medium brown. Oetzel later selected appellant's picture from a photographic lineup based on his eyes and opined in court that appellant was the person whose photo he selected, noting he bore an "incredible" resemblance to the robber.

4. May 1, 2011: Redwood City BevMo (counts 10, 11 and 18)

On May 1, 2011, Jonathan Jacobsen and Stuart James Smith were working at the BevMo in Redwood City. Appellant's shared cell phone was used to call the store at 4:33 p.m. when it was near the approach to the Bay Bridge from the East Bay, and at 6:03

p.m., the phone pinged off a tower between Redwood City and Palo Alto. Around 6:28 p.m., while Jacobsen was doing the final tally of the money taken in that day, he saw a man at the door of the manager's office pull out a very large revolver made of stainless steel. The man demanded that Jacobsen put money in a bag, after which he demanded access to the safe. Neither Jacobsen nor Smith could open the safe and the robber left. The robber's face was partially covered, but Jacobsen described him variously as five feet two inches tall to five feet eight inches tall weighing about 220 pounds with medium to dark brown skin tone. Smith described the robber as a light complected Black man who was taller than five feet ten and weighed about 190 pounds.

5. May 1, 2011: Menlo Park BevMo (counts 12, 13, 18)

On May 1, 2011, Angelica Rodriguez and James Higgins were working at the BevMo in Menlo Park. At 6:43 p.m. (about 10 minutes after the Redwood City BevMo robbery) Rodriguez had removed her register till to prepare for closing when a man entered with a large revolver wearing a black ski mask. After warning Rodriguez and Higgins not to do anything stupid, the man directed Higgins to get money from the safe and registers and appeared agitated when Higgins had difficulty filling a bag with money. At one point the robber held a gun directly to Higgins's neck. The robber left with between $3,500 and $4,000.

6. May 1, 2011: Redwood City GameStop (counts 14–18)

At 6:41 p.m. on May 1, 2011, shortly before the Menlo Park BevMo robbery, the phone appellant shared with his girlfriend was used to call GameStop in Redwood City from a place near the BevMo. By 7:19 p.m., appellant's phone was active a few miles away in East Palo Alto, and at 7:59 p.m. and 8:02 p.m., the shared phone was used to call the GameStop.

At 8:30 p.m., a man entered the GameStop with a "Dirty Harry" revolver and went to a register where employee Andrew Ramos was assisting customer Aimee Zapolya. The man told Zalpolya that if she moved, he would shoot her. Ramos put the register money in a GameStop bag and the man left with about $4,000. Ramos and Zalpolya described the man as five feet nine with a darker-than-brown skin tone and a stocky

build. He was wearing a mask covering the lower part of his face and a "Crooks and Castles" brand hat.

Appellant's cell phone was active in Colma at 8:33 p.m. At 8:44 p.m., it was active near a cell tower one mile north of the GameStop.

7. May 8, 2011: Pacifica Ross Dress for Less (counts 19–23)

On May 7, 2011, Nancy Fernandez was working at the Ross Dress for Less in Pacifica. She received a strange phone call from a man asking her when she got off work, and telling her he had an eye on her and would wait for her outside. At 8:19 p.m. that evening, the phone appellant shared with his girlfriend was used to call the Ross store in Pacifica.

The shared phone was used again to call the Ross store on May 8, 2011, at 3:50 p.m., 8:47 p.m. and 8:48 p.m., the latter two calls having been made from a location near the store. The caller used the "star 67" key to block the call each time. Appellant's phone was active south of the Ross store at 9:10 p.m. and 9:13 p.m. The shared phone was active near the store between 8:47 p.m. and 10:16 p.m.

At 10:20 p.m., Ross employees Nikki Gal and Ruby Speros left the store and were walking to Gal's car when they noticed a white Toyota Scion with paper license plates with red on them idling behind the store. The Scion drove away and an African-American man with medium skin tone approached them wearing a black jacket with "Security" written on it. The man, who was about five feet nine or ten inches tall, pulled out a silver pistol "from . . . like the old westerns" and told them to go back inside the store, turn off the alarm, and take out all the money from the safe. Gal told him she did not have access to the safe and after a brief exchange on the subject, the man told them to get into Gal's car and sat in the back seat himself. Gal said she would give the man anything in the store, but he wanted cash. After asking for Gal's car keys, he threatened her and ran away.

8. May 22, 2011: San Bruno Petco (counts 24–26)

Appellant's shared cell phone was active at 5:56 p.m. and 6:22 p.m. near the San Bruno Petco. At 6:23 p.m., a man entered the store and approached employee Johnny

Yap, telling him to be quiet and showing him a black, shiny gun tucked into his waistband. Yap ran away. Jessica Lynn Russell, who was visiting another employee at the store, saw a man carrying a chrome colored gun. Felipe Flores, a security guard at the mall where the Petco was located, saw the man running and chased him to the loading dock in the parking garage, where the man got into a white Scion and drove away. Yap described the man as African–American with light brown skin, about five feet eight inches tall and 180 pounds. Flores described the man as medium complexioned, five feet nine inches to six feet tall, 230 pounds, and a little bit portly. Appellant's cell phone was active near the Petco at 7:01 and 7:09 p.m.

9. August 7, 2011: San Mateo PetSmart (counts 27–30)

During the afternoon of August 7, 2011, appellant's cell phone pinged in Alameda, then Hayward, then San Mateo. It was within half a mile of the San Mateo PetSmart at 5:21 p.m.

Stephanie Chang and Daniel Hernandez were working at the PetSmart and were talking together at a cash register at 6:30 p.m. when a man identified by Hernandez as appellant approached and asked to speak to the manager. Appellant pulled out a long, silver chrome revolver, clicked the hammer back, and held it to Chang's stomach, telling her "it's okay, mama" and directing Hernandez to give him money. Appellant let Chang go and Hernandez told her to go in the office, where she asked a manger to call the police. Hernandez told appellant the store had cameras, and appellant looked at the ceiling and said something like "fuck it, I'll be back" before leaving.

Banking records showed that appellant made a transaction at a Metro PCS in San Mateo that same day, although the majority of his other financial transactions took place in the East Bay, where he lived.

10. August 12, 2011: San Carlos GameStop (counts 31–35)

On the afternoon of August 12, 2011, appellant's cell phone pinged in the East Bay, then in San Francisco, then in San Mateo County. The phone was near a cell tower a mile and a half from the GameStop in San Carlos at 7:18 p.m., and was near a tower located less than a mile from the GameStop between 7:31 and 8:18 p.m. At 8:20 p.m., a

man who was about five feet eight inches tall with a medium brown complexion entered the GameStop, where James Thivierge and Christopher Peralta were working. The man covered his face, pulled out a silver revolver, and directed Thivierge and Peralta to the back storage room, where he had Peralta open the safe and threatened to shoot Thivierge if Peralta did not give him all the money and change. The safe was on a delay system, and the man stole some game systems while waiting for it to open. He pulled a disk out of the store surveillance system and tried to destroy the system before leaving with $2,820 in cash plus video games and two game systems.

11. October 8, 2011: San Mateo Pet Smart Redux (counts 36–44)

On October 8, 2011, Daniel Hernandez was again working at the PetSmart in San Mateo, and was doing paperwork in the office with Lin Ni. At 8:00 p.m., employee Lily Fan came inside the office to tell Hernandez she was leaving because her shift was over when a man grabbed her from behind and pushed her into the office. The man told Hernandez, "Let's do this again . . . [g]ive me the money." He was carrying a long silver revolver and cursed at Hernandez as he walked out of the office to get the money. Fan curled up in a ball on the floor and the man asked Ni, "What the fuck are you looking at?" and hit her behind her left ear with the gun. After gathering the money with Hernandez, the man said, "this is for the last time, motherfucker," and shot him in the leg, breaking Hernandez's shin and cutting the artery and nerve. Hernandez told police the robber was the "same guy from last time" and described him as African-American, about five feet ten inches tall, and heavyset. Hernandez identified appellant as the robber in a photographic lineup and at trial and had "no doubt in [his] mind" about the identification.

11. Uncharged Robberies

Evidence of uncharged robberies linked to appellant were admitted under Evidence Code section 1101, subdivision (b). They included the April 1, 2011, robbery of a sales associate of a San Francisco Lane Bryant store, the June 12, 2011, robbery of

employees at a San Jose BevMo, and the October 30, 2011, robbery of clerks at a San Jose Petco.

12. Appellant's Financial Circumstances

During the period in which the robberies were committed, appellant was employed part time by the Oakland Parks and Recreation Department and earned between $700 and $1,300 each month. He made cash deposits totaling $18,594.07 between February 2011 and October 2011. Leoso testified that appellant worked three to four days a week as a welder making stripper poles and earned between $700 and $1,000 per pole. Steven Faz, who had worked with Leoso and rented a room from appellant, saw appellant with rolls of money in rubber bands in the cup holder of his white Scion "almost daily." Faz had seen appellant with several gaming devices, including a box with about 10 to 15 systems. He had also seen a gun with a silver barrel on appellant's nightstand. When they visited a casino together, appellant gave Faz a couple hundred dollars.

Appellant bought his white Scion on February 24, 2011. The paper license plates had some red color in them, consistent with the car Nikki Gal described as being involved with the attempted robbery at the Pacific Ross Dress for Less on May 8, 2011.

13. Post-arrest Activity

Appellant was arrested in November 2014 and his calls from the jail were recorded. His first call on the day of his arrest was to Navab Akuila. He asked her to call Steve Faz and tell him to call Leoso. Appellant said "she's gonna already know what's crackin' " and said he needed Faz to "clean out that box that's sitting on the table. Tell him to throw that shit away." At appellant's request, Akuila conferenced in Faz to the phone call and appellant told Faz to "[g]o to the house and . . .take that box off the table and get rid of it." Appellant said Faz should tell Leoso to come over and "get the stuff" for him, and to hurry because his "place might be getting searched right now." He said Leoso knew what she needed to get.

Appellant next called Leoso, told her he had been arrested for robbery and said he needed her to "monitor all that situation and shit." Leoso assured him, "I got your back." Appellant told her, "um, uh, you know where I keep my money?" and Leoso told him not

to say anything. Appellant called Faz again and told him to take Leoso to his house and give her a cell phone that was laying on appellant's nightstand. During this call, Faz asked appellant about "thangs," meaning guns, and appellant told him not to worry about that. Appellant then called Akuila back and told her to take everything in "the car" and put it in a garbage bag and hold onto it for a while.

Faz picked up Leoso and took her to appellant's home as appellant had requested. When Faz brought Leoso to the house, she rummaged though appellant's room and removed some clothing and a hat.

A piece of paper found in appellant's jail cell after his arrest contained a sequence of letters and numbers that looked like a coded message. A detective deciphered it by removing all the Os, so it read "Phone records r suspected? is given to pop" and "If chip is taken out & powered off can i phone be tracked at." Appellant admitted writing the note, but testified he it had used code because he did not trust his cell mate and the message had to do with tracking a missing iPhone.

On December 14, 2011, detectives executed a search warrant at Leoso's home and found a Crooks & Castles brand hat with a "C" embroidered on the front, similar to the hat worn by the suspect during the Petco robbery in Colma. A gun holster that could have been used to hold a revolver was found in a Tupperware bin that contained appellant's effects and a pair of black gloves.

14. Defense

Appellant testified at trial and presented a defense of mistaken identity, attempting to shift the blame to his part-time roommate, Charles "Charlie Hustle" Williams. According to appellant, Charlie Hustle gave appellant eight personal gaming systems and asked appellant to sell them for him; borrowed appellant's car about 20 times; and used the cell phone appellant had bought for Leoso.

B. *Convictions and Sentence*

Following a jury trial, appellant was convicted of 16 counts of second degree robbery (§ 211, 212.5; counts 1, 2, 4, 5, 7, 8, 10, 11, 12, 13, 14, 31, 32, 36, 39, and 41), nine counts of felon in possession of a firearm (former § 12021, subd. (a)(1); counts 3, 6,

9, 18, 23, 26, 30, 35, 44), five counts of attempted robbery (§ 211/212.5/664; counts 19, 20, 24, 27, 28), five counts of assault with a firearm (§ 245, subd. (a), counts 15, 25, 29, 38, 40), seven counts of felony false imprisonment (§ 236, counts 16, 21, 22, 33, 34, 42, 43), one count of criminal threats (§ 422; count 17), and one count of mayhem (§ 203; count 37). Firearm use enhancement allegations under section 12022.5, subdivision (a), were found true as to the assault, false imprisonment, and criminal threats counts (counts 15, 16, 17, 21, 22, 25, 29, 33, 34, 38, 40, 42, 43). Firearm use enhancement allegations under section 12022.53, subdivision (b), were found true as to the robbery and attempted robbery counts (counts 1, 2, 4, 5, 7, 8, 10, 11, 12, 13, 14, 19, 20, 24, 27, 28, 31, 32, 39, 41). As to one of the robbery counts and the mayhem count (counts 36 and 37, involving David Hernandez), the jury found appellant had intentionally discharged a firearm causing great bodily injury under section 12022.53, subdivision (d).

In a bifurcated proceeding, the trial court determined that appellant had suffered four prior convictions for purposes of the Three Strikes law (§ 1170.12) and one prior serious felony conviction for purposes of the five-year enhancement under section 667, subdivision (a). It also found true allegations that appellant was ineligible for probation by virtue of having committed the present offenses while on parole. (§ 1203.085, subds. (a), (b).)

The court sentenced appellant to prison for "834 years to life,"[3] calculated as follows:

(1) For the robbery conviction in count 36 (involving Daniel Hernandez), the court imposed a sentence of "55 years to life," consisting of 25 years to life under the Three Strikes law (§ 1170.12, subd. (c)(2)(ii)), plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), plus a five-year serious felony enhancement.

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[3] Once the minimum term for a Three Strikes sentence has been calculated under section 1170.12, subdivision (c)(2), enhancements carrying a determinate term (e.g., § 667, subd. (a), 12022.5, subd. (a), 12022.53, subd. (b)) are imposed separately rather than being incorporated into the minimum term. (*People v. Williams* (2004) 34 Cal.4th 397, 403–404.) The abstract of judgment correctly treats these enhancements as distinct from the indeterminate terms to which they are attached.

(2) For the mayhem conviction in count 37 (involving Daniel Hernandez), the court imposed a sentence of "68 years to life," including a 37-year minimum term under the Three Strikes law (calculated as the eight-year upper term for mayhem, plus 25 years for the enhancement under section 12022.53, subdivision (d), plus five years for the serious felony under section 667, subdivision (a)), plus a 25-year-to-life enhancement under section 12022.53, subdivision (d), plus a five-year serious felony enhancement. (See § 1170.12, subdivision (c)(2)(iii)); *People v. Miranda* (2011) 192 Cal.App.4th 398, 417 [25-year-to-life enhancement under § 12022.53, subd. (d), used to calculate minimum term under Three Strikes law and again to impose enhancement itself]; *People v. Mason* (2002) 96 Cal.App.4th 1, 10–14 [§ 12022.53, subd. (d), enhancements applied "per count" rather than "per use"].)[4]

(3) For the robbery and attempted robbery convictions in counts 1, 2, 4, 5, 7, 10, 12, 13, 14, 19, 20, 24, 27, 28, 31, 32, the court sentenced appellant to consecutive terms of "40 years to life," calculated as 25 years to life under the Three Strikes law, plus ten years for the use of a firearm under section 12022.53, subdivision (b), plus five years for the serious felony enhancement under section 667, subdivision (a).

(4) For the criminal threats conviction in count 17, the court sentenced appellant to 25 years to life under the Three Strikes law, plus four years for the use of a firearm under section 12022.5, subdivision (a), plus five years for a serious felony prior under section 667, subdivision (a).

(5) For the assault with a firearm conviction in count 40, the court sentenced appellant to 25 years to life under the Three Strikes law, plus four years for the use of a firearm under section 12022.5, subdivision (a), plus three years for a great bodily injury

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[4] The abstract of judgment and minute order from the sentencing hearing describe the sentence on count 37 as consisting of the eight-year upper term for the mayhem count, plus two 25-year-to-life enhancements under section 12022.53, subdivision (d), plus two five-year prior serious felony enhancements under section 667, subdivision (a). It should instead reflect a Three Strikes term of 37 years to life plus a consecutive 25-year-to-life enhancement under section 12022.53, subdivision (d), and a consecutive five-year serious felony enhancement under section 667, subdivision (a).

enhancement under section 12022.7, subdivision (a), plus a five-year serious felony enhancement.

(6) On the remaining counts (3, 6, 8, 9, 11, 15, 16, 18, 21, 22, 23, 25, 26, 29, 30, 33, 34, 35, 38, 39, 41, 42, 43, 44), sentence was stayed under section 654.

II. DISCUSSION

A. *Multiple Counts of Firearm Possession by a Felon*

Appellant was convicted of nine counts of firearm possession by a felon in violation of former section 12021,subdivision (a)(1),[5] for which sentence was stayed under section 654. Appellant argues all but one of these convictions must be reversed because his continuous possession of the same weapon over the period when the robberies were committed was a single offense. The People appropriately agree. There was no evidence appellant used different guns during his crime spree or ever lost dominion and control over the gun he used. His unlawful possession of a firearm was "complete at the first time he first possessed the gun because he violated the duty imposed by the statute not to do so. . . . But the crime continued—as a single offense—for as long as the same possession continued, i.e., so long as [he] continued to violate his duty under the statute." (*People v. Mason* (2014) 232 Cal.App.4th 355, 366.) All but one of appellant's convictions under former section 12021 must be reversed.

B. *Prosecutorial Misconduct/Ineffective Assistance of Counsel*

During the questioning of several of the victims, the prosecutor explained the difference between a revolver and a semiautomatic handgun and then asked the witness which type of gun had been used. Appellant argues these prefatory statements amounted to misconduct, citing the principle that a prosecutor may not testify before the jury by

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[5] Penal Code former section 12021, subdivision (a)(1), was repealed effective January 1, 2012, but its provisions were reenacted without substantive change as section 29800, subdivision (a)(1). (*People v. Sanders* (2012) 55 Cal.4th 731, 734, fn. 2.) Because defendant was convicted under the repealed statute, we refer to that statute throughout this opinion.

referring to facts not in evidence. (See *People v. Hill* (1998) 17 Cal.4th 800, 827–828.) We reject the claim.

1. Challenged Comments

The alleged misconduct in this case arises from the prosecutor's direct examination of victims and witnesses Romilene Encarnacion, Manuel Ocon, Angelica Rodriguez, Andrew Ramos, Johnny Yap and Jessica Lynn Russell. During the questioning at issue, the prosecutor was attempting to establish that the gun used was the same silver revolver described by other witnesses, thus making it more likely the crimes had all been committed by the same person.

Romilene Encarnacion, a victim of the February 21, 2011, Party City robbery, was questioned as follows:

"Q: [After explaining what a barrel is] Just so we're talking about the same things. So when you first saw the gun what part of the gun could you see?

A: The barrel.

Q: Do you remember what color the barrel was?

A: Silver.

Q: Was it a small barrel or a long barrel?

A: A long barrel.

Q: Can you estimate about how long? [¶] You can hold your fingers up if you want if that's easier.

A: Maybe like this long.

Q: Okay. I would estimate from here that's approximately five to six inches.

The Court: Yes.

Q. Thank you. [¶] Okay. So then when you say that's the barrel is that the part—so there's the part where there's the trigger that comes up and then the actual long circular part, that's the part that was about five or six inches long?

A: Yes.

Q: Could you see what color handle the gun had?

A: I could not."

. . . .

"Q : . . . I think you described a gun a little bit before. Do you know the difference between a revolver and a semiautomatic gun?

A: No.

Q: Okay. Have you ever seen cowboys and Indians movies?

A: Yes.

Q: I sound old when I say that. [¶] So the cowboys and Indians type guns, those are called revolvers. They have a cylinder. That's the thing that spins around. You have to cock it back. Then the semiautomatic is a gun where you pop in the magazine clip and just pull the trigger. Those tend to have more of a rectangular or square barrel. Which type is this?

A: Revolver."

The second instance of alleged misconduct involved the direct examination of Manuel Ocon, who was working at the Colma Petco during the April 17 robbery, and who testified he saw a "long silver gun." When asked whether he knew the difference between a revolver and a semiautomatic, Ocon said he did not, and the prosecutor explained:

"Q. So a revolver being a cowboys and [I]ndians kind of gun, it has what's called a cylinder. It's a thing that's circular in the middle. And when you pull the hammer back and pull the trigger, it turns. That's a revolver. Then a semi—so the barrel on those is more circular like a circle, whereas a semiautomatic has more square edges and it's the kind of gun that doesn't have that cylinder; it has something you put into the handle. So do you know—using those descriptions do you have an idea of what type of gun it was?

A. A revolver."

Angelica Rodriguez testified that the gun used during the May 1 robbery of the Menlo Park BevMo was silver and "looked like a pistol." The prosecutor clarified:

"Q. When you say "pistol," do you mean—you know the difference between a semi-automatic and a revolver?

A. I think I do.

Q. I'm just saying, Cowboys and Indians has a revolver with the thing that spins around, like a six-shooter?

A. Yeah, it looked something like that."

The challenged exchange with Andrew Ramos, who was robbed on May 1 while working at the Colma GameStop, was as follows:

"Q. Can you describe the gun?

A. It was like a—like a big revolver like a Dirty Harry gun.

Q. What color?

A. Silver."

Johnny Yap, the victim of the attempted robbery at the San Bruno Petco on May 22, testified that he saw only the "handle" of the gun. The prosecutor, attempting to ascertain whether he saw enough of the gun to determine whether it was a revolver, continued:

"Q. So let me explain. So a gun has the barrel part, that's the part –

A. Yeah.

Q. --that's long.

A. Uh-huh.

Q. And then there's the part – if it's a Cowboys and Indians gun, it's called the revolver, that has where my fingers are in the shape of a gun, that has a part that sometimes turns and that's where the bullets are, so usually like a six-shooter. And then there's also the part that has the handle that you described.

A. Yeah.

Q. Okay.

A. Yeah.

Q. So did the gun – and then obviously there's a trigger as well. So did you see – were you able to see whether or not the gun had that part that turns.

A. No.

Q. You couldn't see whether –

A. I couldn't see."

Jessica Lynn Russell, who was inside the Petco at the time of the May 22 attempted robbery, saw a man come into the store carrying a "chrome colored" gun. The prosecutor followed up:

"Q. Was it a—do you know the difference between a revolver and a semi-automatic?

A. No, I don't.

Q. A revolver is like the Cowboy and Indians type. It has a cylinder. Was it that type?

A. It kind of looked like that actually."

2. Prosecutorial Misconduct

" 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the *federal* Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " [Citations.] Under *state law*, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citations.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 965–966 (*Lopez*).) A prosecutor may commit misconduct by referring to facts outside the record because such statements " 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination.' " (*Hill*, *supra*, 17 Cal.4th at p. 828.) It is not misconduct to state matters that are not in evidence but are drawn from common knowledge or common experience. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026 (*Cunningham*).)

3. Forfeiture

As appellant acknowledges, trial counsel did not object to the prosecutor's questions or request a curative instruction. " ' "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" ' [Citation.]" (*People v. Pearson*

(2013) 56 Cal.4th 393, 426 (*Pearson*).) Appellant's claim has been forfeited on appeal. (*Ibid*.; *Lopez*, *supra*, 42 Cal.4th at p. 966.)

4. Ineffective Assistance of Counsel

Recognizing that his claim for prosecutorial misconduct has not been preserved for appellate review, appellant argues his attorney's failure to object to the challenged questions amounted to ineffective assistance of counsel. (See *Lopez*, *supra*, 42 Cal.4th at p. 966.) The familiar standard for review of such claims requires appellant to show (1) defense counsel's performance fell below an objective standard of reasonableness; i.e., counsel failed to act in a manner to be expected of a reasonably competent attorney, and (2) it is reasonably probable a more favorable result would have been obtained absent counsel's shortcomings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–694 (*Strickland*); *Lopez*, *supra*, 42 Cal.4th at p. 966; *Cunningham*, *supra*, 25 Cal.4th at p. 1003.) Appellant has failed to establish either deficient performance or prejudice.

" 'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy." [Citation.] If the record "sheds no light on why counsel acted or failed to act in the manner challenged," an appellate claim of ineffective assistance of counsel must be rejected "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." [Citations.]' " (*Lopez*, *supra*, 42 Cal.4th at p. 966; *Cunningham*, *supra*, 25 Cal.4th at p. 1003.) The record on appeal " 'rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored.' " (*Lopez*, *supra*, 42 Cal.4th at p. 966.)[6]

[6] Appellant has raised this issue in his companion petition for writ of habeas corpus, which, as previously mentioned, we have denied by separate order.

Appellant has not carried his burden of establishing his attorney did not have a valid tactical reason for failing to object to the prosecutor's questions on the grounds of misconduct. Assuming the prosecutor's statements regarding the basic difference in appearance between a revolver and a semiautomatic handgun did not concern a matter of common knowledge (*Cunningham*, *supra*, 25 Cal.4th at p. 1026), and were susceptible to an objection as being outside the evidence presented at trial, they do not amount to a pattern of deceptive or reprehensible actions constituting misconduct. (*Lopez*, *supra*, 42 Cal.4th at pp. 965–966.) The prosecutor was trying to elicit a description of the handgun used, and his explanation of the difference between a semiautomatic handgun and a revolver was accurate. He did not lead the witnesses in any way by suggesting a particular answer. (See *Pearson*, *supra*, 56 Cal.4th at p. 426.) The same information regarding the appearance of the gun could have been obtained without prefacing the questions with a short description of the differences between a revolver and a semiautomatic handgun, and defense counsel may have believed an objection would not have prevented the jury from hearing the information ultimately provided by the witnesses.

Nor is it reasonably probable the jurors would have reached a different verdict had the prosecutor had not explained the difference between a revolver and a semiautomatic handgun. (*Strickland*, *supra*, 466 U.S. at p. 694.) While some of the victims were uncertain as to the type of handgun they had seen, nothing in the record suggests that absent the prosecutor's comments, any of them would have described the gun in a manner suggesting it was something other than a metallic revolver similar to that used in other robberies.

Angelica Rodriguez and Andrew Ramos appeared to know the difference between a revolver and a semiautomatic handgun without the prosecutor's clarification. Johnny Yap was unable to describe the gun used even after the prosecutor's explanation because he only saw the handle. And Thomas Oetzel, the victim who was present with Manuel Ocon during the April 17 Petco robbery, identified appellant in court as the robber,

diminishing the significance of Ocon's description of the gun. We can confidently say the challenged comments by the prosecutor did not affect the verdict.

Having failed to preserve his claim of prosecutorial misconduct, establish that such misconduct occurred, or show his trial counsel was ineffective, appellant is not entitled to reversal on the counts at issue.

C. *Cruel and Unusual Punishment*

Appellant argues his sentence of "834 years to life" amounts to cruel and unusual punishment under the Eighth Amendment of the United States Constitution and *Coker v. Georgia* (1977) 433 U.S. 584, 592 (*Coker*). Correctly observing it will be impossible for him to serve his minimum term before he dies, appellant argues his sentence is "nonsense" and amounts to a de facto sentence of life without the possibility of parole for which there is no statutory authority. Assuming the issue has not been forfeited by the failure to object on this ground at sentencing (*People v. Russell* (2010) 187 Cal.App.4th 981, 992–993), we reject appellant's claim on the merits.

The Eighth Amendment prohibits the imposition of a sentence that is grossly disproportionate to the crime. (*Graham v. Florida* (2010) 560 U.S. 48, 59–60 (*Graham*); *Ewing v. California* (2003) 538 U.S. 11, 21 (*Ewing*).) In a noncapital case, challenges to the proportionality of a particular sentence (at least in the case of adult offenders) has been " 'exceedingly rare.' " (*Ewing*, at p. 22.) "In the rare case where gross disproportionality can be inferred from (1) the gravity of the offense and harshness of the penalty, the court will consider (2) sentences imposed for other offenses in the same jurisdiction and (3) sentences imposed for commission of the same crimes in other jurisdictions." (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1087–1088 (*Haller*), citing *Harmelin v. Michigan* (1991) 501 U.S. 957, 1005.)[7] The second step of this

[7] A similar analysis is used in assessing challenges to a sentence as cruel *or* unusual punishment within the meaning of the state constitution (Cal. Const., art. 1, § 17), under which "punishment is disproportionate if it 'shocks the conscience' and offends fundamental notions of human dignity, considering the offender's history and the seriousness of his offenses." (*Haller*, *supra*, 174 Cal.App.4th at p. 1092, citing *In re*

disproportionality analysis—comparing the sentence imposed to those for other crimes in the same jurisdiction—must be tempered when the defendant has been sentenced under the Three Strikes law, because it is "a defendant's 'recidivism in combination with his current crimes that places him under the three strikes law.' " (*People v. Cline* (1998) 60 Cal.App.4th 1327, 1338.)

Appellant was 34 years old when he began committing the current offenses and had a criminal history that included two robbery convictions and two convictions for dissuading a witness, for which he received a nine-year prison sentence in 2002. His current prison sentence is the result of a series of crimes that included 33 serious or violent felonies against numerous victims over a several-month period while he was still on parole. Appellant used a gun during each event and purposefully shot one victim in the leg, seriously injuring him. In addition to robbing or attempting to rob his victims and shooting one of them, appellant made threats to and falsely imprisoned some of the victims.

Extended prison terms may be imposed under the Three Strikes law without running afoul of the proscription against cruel and unusual punishment because such defendants are being punished for recidivism in addition to the current offenses. (*Ewing*, *supra*, 538 U.S. at pp. 29–30 [upholding 25-year-to-life sentence under Three Strikes law when current offense was theft of golf clubs]; *Lockyer v. Andrade* (2003) 538 U.S. 63, 70–77 [upholding 50-year-to-life sentence under Three Strikes law for two counts of petty theft with a prior].) Courts in California have regularly rejected claims that a sentence under the Three Strikes law is cruel and/or unusual punishment, particularly when the current offenses are serious or violent in nature. (E.g., *People v. Deloza* (1998) 18 Cal.4th 585, 589 (*Deloza*) [four consecutive terms of 25 years to life plus enhancements for four robbery convictions]; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382–1384 (*Byrd*) [115 years plus 444 years to life for 15 felony counts, including

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Lynch (1972) 8 Cal.3d 410, 424.) Appellant does not challenge his sentence as violating the state constitution, but our analysis would apply equally to such a claim.

robberies, mayhem and attempted murder, plus firearm enhancements]; *People v. Ayon* (1996) 46 Cal.App.4th 385, 396–401, disapproved on another point in *Deloza*, at pp. 593, 600, fn. 10 [240 years to life for seven counts of robbery and two counts of attempted robbery with firearm allegations]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1134–1136 [sentence of 375 years to life plus 53 years for 19 felonies, including assaults and sexual offenses].) Additionally, the mandatory 25-year-to-life enhancement for personally and intentionally discharging a firearm and causing great bodily injury or death under section 12022.53, subdivision (d), is not cruel and unusual punishment. (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214–1215; *People v. Martinez* (1999) 76 Cal.App.4th 489, 493–495.)

Rather than discussing these authorities, appellant argues his sentence is unconstitutional because it is longer than any human can serve and because it furthers no valid legislative purpose. He relies on Justice Mosk's concurring opinion in *Deloza*, *supra*, 18 Cal.4th at pp. 600–602, which stated, "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. . . .[¶] A grossly excessive sentence can serve no rational legislative purpose, under either a retributive or a utilitarian theory of punishment. It is gratuitously extreme and demeans the government inflicting it as well as the individual on whom it is inflicted. Such a sentence makes no measurable contribution to acceptable goals of punishment." (*Id.* at pp. 601–602.)

Justice Mosk's concurring opinion in *Deloza* did not command a majority of the court and lacks precedential value. (*Byrd, supra*, 89 Cal.App.4th at p. 1383.) In any event, we are not persuaded by the analysis. That a sentence exceeds a defendant's life expectancy does not necessarily render it constitutionally cruel or unusual. (*Ibid.*) "[I]t 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.]" (*Ibid*.)

To the extent appellant is arguing that a sentence of life without parole is cruel and unusual, that is simply not the law. It has been held that a *juvenile* offender cannot be sentenced to life without parole for a nonhomicide offense. (*Graham v. Florida* (2010) 560 U.S. 48, 82; *People v. Caballero* (2012) 55 Cal.4th 262, 268.) But the same considerations do not apply to an adult offender like appellant, particularly one who has suffered prior convictions for serious and violent felonies but has failed to reform. Similarly inapposite is *Coker, supra*, 433 U.S. at page 592, which held cruel and unusual the imposition of the *death penalty* for a single count of rape.

We reject appellant's challenge to his sentence as cruel and unusual.

D. *Great Bodily Injury Enhancement on Count 40*

Appellant argues the trial court erred by imposing a three-year enhancement under section 12022.7, subdivision (a), for the personal infliction of great bodily injury on the term for count 40 (assault with a firearm of Lin Ni, § 245, subd. (a)(2)), because the jury did not receive a verdict form requesting a true finding on that allegation and consequently did not make such a finding. The People agree. Because no finding on the enhancement allegation was made, we will order the trial court to strike the three-year term. (See *Cunningham v. California* (2007) 549 U.S. 270, 275.)

E. *Sentencing for Violation of former section 12021*

We have previously concluded that all but one of the felon in possession of a firearm counts under former section 12021 must be reversed. Appellant correctly notes that the trial court did not select a term for any of these counts, although the abstract of judgment erroneously reflects that a term of 25 years to life was imposed for the felon with a firearm violation in count 18. (See *People v. Mesa* (1975) 14 Cal.3d 466, 471–472 [court's oral pronouncement of judgment controls over minute order].) The People agree that on remand, the court must correct the abstract of judgment and impose a sentence on

the sole remaining former section 12021 count before staying it under section 654. (See *People v. Alford* (2010) 180 Cal.App.4th 1463, 1466.)

Appellant also notes—again correctly—that special allegations under sections 1203.085, subdivisions (a) and (b), and 1192.7, subdivision (c)(8), (19) and (40), were found true with respect to the felon with a firearm counts under former section 12021, even though they were not alleged in the information.[8] The People agree that with respect to the remaining felon with a firearm count, those special allegations must be stricken.

III. DISPOSITION

Appellant's convictions in counts 6, 9, 18, 23, 26, 30, 35, 44, for felon in possession of a firearm in violation of former section 12021, are reversed. The trial court is directed to resentence appellant on count 3, the sole remaining conviction under former section 12021, consistent with the views expressed in this opinion, and shall stay that sentence pursuant to section 654. As to count 40, the three-year great bodily injury enhancement under section 12022.7, subdivision (a), is stricken. The court shall prepare an amended abstract of judgment, which shall also include a correction of the sentence imposed for mayhem under count 37 as described in footnote 4 of this opinion, and shall forward the same to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

[8] Such allegations affect probation eligibility and the designation of a current offense as a serious felony.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J.

(A142875)