

**Not Officially Published**

**(Cal. Rules of Court, Rules 976, 977)**

**(Cite as: 2002 WL 459026 (Cal.App. 2 Dist.))**

**Court of Appeal, Second District, Division 1, California.**

**The PEOPLE, Plaintiff and Respondent,**

**v.**

**Lashun Pamela MORELAND, Defendant and Appellant.**

**No. B142762.**

**(Los Angeles County Super. Ct. No. TA101406).**

**March 26, 2002.**

**2002 WL 459026 (Cal.App. 2 Dist.)**

Defendant was convicted by a jury in the Superior Court, Los Angeles County, Super.Ct.No. TA101406, Ronald J. Slick, Temporary Judge, and James A. Kaddo, J., of attempted murder, three counts of second-degree robbery, and carjacking, with multiple findings of use and discharge of a firearm. Defendant appealed. The Court of Appeal, Mallano, J., held that: (1) evidence supported finding that defendant had intent to kill; (2) denial of request for substitute counsel was not abuse of discretion; (3) jury instruction on witness credibility was not erroneous; and (4) consecutive sentence for gun discharge enhancement was not erroneous.

Affirmed.

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald J. Slick, Temporary Judge (pursuant to Cal. Const., art. VI, § 21), and James A. Kaddo, Judge. Affirmed.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Brad D. Levenson and Michael W. Whitaker, Deputy Attorneys General, for Plaintiff and Respondent.

MALLANO, J.

\*1 Defendant Lashun Pamela Moreland appeals from the judgment entered following a jury trial that resulted in her conviction of attempted murder, three counts of second degree robbery and one count of carjacking, and five findings that she personally used a firearm, three findings that she personally and intentionally discharged a firearm, and three findings that she personally and intentionally discharged a firearm that resulted in great bodily injury to another person. (Pen.Code, § § 664/187, subd. (a), 211, 215, subd. (a), 12022.5 & 12022.53, subds. (b)-(d).) The court sentenced defendant to prison for a determinate term of 21 years 8 months and an indeterminate term of 25 years to life. We affirm.

#### BACKGROUND

At approximately 10:20 p.m. on May 23, 1999, Mauricio Licea and his wife, Ana, parked their car in the parking lot of a Ralph's grocery store. Mauricio went into the store while Ana waited into the car. Mauricio returned to the car a few minutes later. As he opened the driver's side door to get in the car, defendant approached him. Mauricio got in the car and shut the door. Defendant stood outside next to the car, knocked on the driver's side window, and said something. Mauricio tried to ignore her.

Defendant pulled a gun, pointed it at Mauricio, and motioned for him to open the door. Mauricio did not comply. Defendant then put her hand in the driver's side wing window opening and opened the door. Simultaneously, a man, identified as codefendant Hafez Hakeem, opened the car's rear door and got in the back seat. [FN1] Hakeem pointed a gun at Ana's head, and defendant pointed her gun at Mauricio's head.

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FN1. The record indicates that the jury was deadlocked on the charges against Hakeem and that the court sent the jury back for further deliberation. The record does not disclose whether the jury ever reached a verdict as to Hakeem.

Hakeem and defendant took several items from Mauricio and Ana, including Mauricio's watch, Ana's engagement ring, cash, and a receipt from a market named Numero Uno. Defendant yelled at Mauricio, who did not speak English. Still, Mauricio tried to explain to defendant that he had nothing left for her to take.

Hakeem struck Mauricio in the back of his head with the gun. Mauricio tried to get out of the car, raising his hands to his shoulders. Defendant pulled the trigger of her gun in rapid succession. Her gun did not fire during the first couple of attempts, but it then did so, hitting Mauricio twice in his abdomen and once in a finger. After the shooting, defendant and Hakeem ran away.

That same evening, at approximately 10:45 p.m., Hakeem drove into an alley where Sam Smith's business was located. Defendant was in the front passenger's seat of Hakeem's car. Smith's business was approximately 1.6 miles from the Ralph's market where the robbery of the Liceas took place. Smith was in his blue Cadillac waiting for the gate to his business to close. Hakeem parked his car, blocking Smith's Cadillac. Hakeem and defendant got out of the car, both wielding guns. Hakeem ordered Smith out of his car, struck him with the gun, and took Smith's wallet. Hakeem then searched him for more valuables and found a few additional dollars on Smith. Hakeem threatened to kill him if he called the police.

\*2 Hakeem ordered defendant to drive away in Smith's Cadillac. Hakeem drove away in his own car. Five minutes later, Smith telephoned the police from a public telephone booth and reported the robbery and carjacking.

At around midnight, two sheriff's deputies saw Hakeem and defendant in Smith's Cadillac. Hakeem was driving the car. Approximately 45 minutes earlier, the deputies had been advised by Los Angeles police officers about the Licea and Smith incidents. The deputies pursued Hakeem and defendant and signaled for them to stop. Hakeem stopped, but as soon as the deputies got out of their patrol vehicle, Hakeem sped away. After a short chase, during which time defendant tossed a nine-millimeter pistol from the Cadillac, Hakeem parked in a driveway, got out of the Cadillac and fled. Defendant was still in the passenger seat. Hakeem was arrested an hour later about a block away.

A search of defendant by a female deputy sheriff uncovered Mauricio's watch from defendant's left sock, Ana's ring from defendant's jacket pocket, the Numero Uno receipt from defendant's bra, and approximately \$50 from defendant's right sock. A search of the Liceas' car uncovered a spent bullet on the back seat.

Mauricio suffered extensive damage to his intestines as a result of the shooting. He underwent two surgeries, was hospitalized for 20 days, and had to wear colostomy bags for 8 months.

In defense, defendant testified that she did not know Hakeem and had never seen him before. She admitted being in Smith's blue Cadillac during the chase. She claimed that her sister's friend, Robert Rivers, agreed to give her a ride home from her sister's apartment. Rivers was driving the Cadillac when he picked her up to take her home. Earlier that evening, Rivers drove her to her sister's house in a different car.

Defendant claimed that while in the Cadillac Rivers showed her some jewelry and asked her to buy it from him. She took the jewelry from Rivers because she wanted to show it to her boyfriend. Defendant also claimed that Rivers earlier gave her money and a receipt to hold onto, purportedly so Rivers could purchase gas sometime that evening. Defendant further testified that during the pursuit by the Sheriff's deputies Rivers threw the nine-millimeter gun at her and ordered her to get rid of it. She denied participating in the robbery and shooting of the Liceas and the robbery and carjacking of Smith.

#### ISSUES

Defendant contends that there was no substantial evidence that she acted with the specific intent to kill Mauricio

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Licea, the court erred in denying her *Marsden* (*People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44) request and instructing the jury with CALJIC No. 2.21.2, and her sentence violates Penal Code section 654 and constitutes cruel and unusual punishment.

## DISCUSSION

## 1. Substantial evidence of intent to kill

Defendant contends that her conviction for attempted murder must be reversed because there was no substantial evidence that she specifically intended to kill victim Mauricio Licea. We disagree.

\*3 “In determining whether, based on the entire record, a reasonable trier of fact could conclude that the People proved the existence of an element of an offense beyond a reasonable doubt, a reviewing court considers the evidence in a light most favorable to the judgment and presumes the existence of every fact that could reasonably be deduced from the evidence. [Citation.] The standard is the same when a case relies in part on circumstantial evidence. ‘ ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ‘ [Citations.]’ ‘ [Citation.]’” (*People v. Lee* (1999) 20 Cal.4th 47, 58, 82 Cal.Rptr.2d 625, 971 P.2d 1001.)

Defendant and her cohort robbed Mauricio and Ana Licea at gunpoint while they were seated in their car. During the robbery, defendant pointed a gun at Mauricio’s head. When Mauricio tried to exit the car, defendant fired point-blank at Mauricio in rapid succession. Although defendant’s first few attempts were ineffectual, apparently because her gun misfired, she succeeded in shooting Mauricio twice in his abdomen and once in his finger. A bullet was discovered inside of Mauricio’s car. The foregoing reasonably supports a determination that defendant specifically intended to kill Mauricio when she shot him. That the evidence might support a different inference, i.e., that defendant panicked and in her panic she fired the gun without intending to kill Mauricio, is immaterial. On appeal, we are required to determine the legal sufficiency of the evidence and not to reweigh the evidence or second-guess the reasonable inferences reached by the trier of fact. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946, 2 Cal.Rptr.2d 629.)

2. *Marsden* motion

At a November 12, 1999 pretrial hearing, defendant claimed she had an irreconcilable conflict with her court-appointed attorney, Deputy Public Defender William McCallister, Jr., and moved for appointment of a new attorney.

The record reflects that McCallister represented defendant and was present at the August 3, 1999 preliminary hearing, the August 17, 1999 arraignment on the information, and the September 19, 1999 and October 27, 1999 pretrial hearings. Deputy Public Defender Julie Leeds stood in for McCallister at defendant’s October 15, 1999 arraignment on the amended complaint.

At the November 12, 1999 *Marsden* inquiry, McCallister told the court that defendant refused to sign a waiver of her mental health background even though she had suggested to a liaison in the County Mental Health Department that she suffered mental problems due to a past substance abuse problem. Defendant also told McCallister that she wanted another attorney.

The court asked defendant to explain what the problem was between McCallister and her. Defendant answered that there was a breakdown in communication between them. She explained that she had been trying to contact McCallister for the past six months, that he did not speak to her except when she saw him in court, and that when he did speak to her, she did not understand what he was saying. For these reasons, defendant refused to sign the waiver.

\*4 McCallister indicated that he disagreed about defendant’s characterization of his relationship with her, claiming that he spoke with defendant at jail. Defendant rejoined that McCallister spoke to her for only five minutes in jail

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and called her “ignorant” during their conversation. McCallister denied doing so, claiming instead that he said “words to the effect” that he thought she did not “understand” the gravity of her legal predicament. Defendant insisted that McCallister had referred to her as “ignorant.”

In denying defendant’s request for substitution of counsel, the court found that McCallister was an experienced, highly qualified trial attorney and explained to defendant that she would have to understand McCallister could not focus his full attention on her case because he had other clients to defend. The court also explained to defendant that because her case was in the early stages of pretrial, there was not much that McCallister needed to discuss with her. Finally, the court “suggest[ed]” to defendant that she sign the waiver form.

Trial commenced on April 6, 2000, but a mistrial was declared on April 13, 2000, after codefendant Hakeem slit his wrists in the courtroom. Retrial commenced on June 1, 2000, and the jury reached verdicts on the charges against defendant on June 12, 2000.

Defendant contends that the court failed to conduct an adequate *Marsden* inquiry and thus erred in denying her request to substitute counsel. We disagree.

“The governing legal principles are well settled. ‘When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].’ [Citations.]’ [Citation.] ‘[S]ubstitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel.’ [Citations.]” (*People v. Hart* (1999) 20 Cal.4th 546, 603, 85 Cal.Rptr.2d 132, 976 P.2d 683.)

Here, the court gave defendant an opportunity to state her reasons for requesting substitute counsel. Defendant’s objection to McCallister stemmed for her perception that he had been disrespectful toward her and had not seen her as frequently as she wished. These reasons were not sufficient to establish an irreconcilable conflict or inadequate representation. (*People v. Crandell* (1988) 46 Cal.3d 833, 860, 251 Cal.Rptr. 227, 760 P.2d 423 (lead opn. of Kaufman, J.) [“A trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness”]; *People v. Silva* (1988) 45 Cal.3d 604, 622, 247 Cal.Rptr. 573, 754 P.2d 1070 [“the number of times one sees his attorney, and the way in which one relates with his attorney, does not sufficiently establish incompetence”].)

\*5 In addition, the court heard from McCallister, who never indicated that he could not effectively represent defendant. Further, it is significant that defendant did not thereafter renew her request to substitute counsel. In short, there is no basis in the record for defendant’s assertion that the trial court failed to conduct a proper *Marsden* inquiry or abused its discretion in denying her request for substitute counsel. (*People v. Hart, supra*, 20 Cal.4th at pp. 603-604, 85 Cal.Rptr.2d 132, 976 P.2d 683.)

### 3. CALJIC No. 2.21.2

The court instructed the jury with CALJIC No. 2.21.2 as follows: “A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.”

Defendant contends that “the instruction seriously misstates the People’s burden of proof as applied to a defendant’s dispositive testimony.” Our Supreme Court has rejected similar claims. (*People v. Millwee* (1998) 18 Cal.4th 96,

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159, 74 Cal.Rptr.2d 418, 954 P.2d 990 [rejecting claim that CALJIC No. 2.21.2 “cast[s] particular doubt on [the defendant’s] credibility and unfairly limited the exculpatory and mitigating effect of his testimony in violation of due process”]; *People v. Beardslee* (1991) 53 Cal.3d 68, 94, 279 Cal.Rptr. 276, 806 P.2d 1311 [rejecting that CALJIC No. 2.21.2 increases a defendant’s “burden from that of raising a reasonable doubt of the sufficiency of the prosecution’s evidence to one of affirmatively proving his defenses”].) “By its own terms, CALJIC No. 2.21.2 permits--but does not require--a general inference of distrust where testimony is ‘willfully false’ in ‘material part.’ The instruction also authorizes rejection of the witness’s testimony as a ‘whole’ only where appropriate based on ‘all the evidence.’ “ (*People v. Millwee, supra*, 18 Cal.4th at p. 159, 74 Cal.Rptr.2d 418, 954 P.2d 990.) We are bound by the ruling of the Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937.)

Defendant also argues that the instruction permitted the jury to resolve the credibility of prosecution witnesses under a probability standard rather than a standard of beyond a reasonable doubt. This argument has no merit. The court additionally instructed the jury on the reasonable doubt standard (CALJIC No. 2.90) and to consider the instructions as a whole (CALJIC No. 1.01). Our Supreme Court has concluded that, when considered with CALJIC Nos. 2.90 and 1.01, CALJIC No. 2.21.2 does not have the effect of reducing the prosecution’s burden of proof. (*People v. Riel* (2000) 22 Cal.4th 1153, 1200, 96 Cal.Rptr.2d 1, 998 P.2d 969.)

#### 4. Penal Code section 654

Defendant contends that the court erred in imposing a separate 25-years-to- life term for the Penal Code section 12022.53, subdivision (d) gun enhancement that she personally and intentionally discharged a firearm that proximately caused great bodily injury. She asserts that this gun enhancement term was prohibited by Penal Code section 654. We disagree.

\*6 As relevant here, Penal Code section 654, subdivision (a), provides: “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.”

Penal Code section 12022.53 provides for punishment of 25 years to life when a person is convicted of certain enumerated felonies, including attempted murder, and intentionally and personally discharges a firearm that proximately causes great bodily injury to any person other than an accomplice. (Pen.Code, § 12022.53, subs.(a) & (d).) The 25-years-to-life term “shall be imposed in addition and consecutive to the punishment prescribed for that felony.” (Pen.Code, § 12022.53, subd. (d).) In other words, Penal Code section 12022.53, subdivision (d), expressly requires the trial court to impose an *additional* term of 25 years to life if a defendant commits an attempted murder and, during the commission of the crime, the defendant personally and intentionally discharges a firearm that results in great bodily injury. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313, 109 Cal.Rptr.2d 643.)

Because application of Penal Code section 654 would squarely contravene the specific mandates of Penal Code section 12022.53 and its deterrent effect, the trial court properly imposed a consecutive term of 25 years to life for the Penal Code section 12022.53, subdivision (d) gun enhancement. (*People v. Hutchins, supra*, 90 Cal.App.4th at pp. 1313-1314, 109 Cal.Rptr.2d 643; see also *People v. Myers* (1997) 59 Cal.App.4th 1523, 1532-1535, 69 Cal.Rptr.2d 889 [Penal Code section 654 does not bar punishment for enhancement of discharging a firearm from a motor vehicle resulting in death when underlying crime of first degree murder stemmed from the same facts]; *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157-1159, 33 Cal.Rptr.2d 894 [Penal Code section 654 does not bar punishment for personal use of a firearm when underlying crime of manslaughter was perpetrated by the use of a firearm].) “[T]he law is not punishing [defendant] twice for the same act; rather, the law is punishing [defendant] once each for the components of that act which make it so dangerous and antisocial.” (*People v. Hutchins, supra*, 90 Cal.App.4th at p. 1315, 109 Cal.Rptr.2d 643.)

#### 5. Cruel and unusual punishment

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Defendant contends that the imposition of the 25-years-to-life term under Penal Code section 12022.53, subdivision (d) constitutes cruel and unusual punishment under the United States and California Constitutions. We disagree.

Defendant argues that the mandatory requirements of Penal Code section 12022.53, subdivision (d) do not allow the trial court to consider gradations of culpability or mitigating factors in imposing a sentence. This argument has been rejected by Division Four of this District in the thorough and well-reasoned opinion in *People v. Martinez* (1999) 76 Cal.App.4th 489, 494-496, 90 Cal.Rptr.2d 517. We follow *Martinez*.

\*7 We also reject defendant's contention that the 25-years-to-life term was disproportionate when considering her background and the nature of the shooting. "Under the California Constitution, a sentence may be cruel or unusual if it is 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.] The main technique of analysis under California law is to consider the nature both of the offense and of the offender. [Citation.] The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.]" (*People v. Martinez, supra*, 76 Cal.App.4th at p. 494, 90 Cal.Rptr.2d 517.)

Consideration of the facts of this case and of defendant's background supported imposition of the 25-year-to-life enhancement of Penal Code section 12022.53, subdivision (d). The probation officer's report prepared for sentencing stated that defendant was born in 1972. Her criminal history consisted of several misdemeanor convictions, a 1993 felony conviction for assault for which she received probation, and a 1999 felony conviction for possession of a controlled substance for which she also received probation. Defendant was on probation at the time she committed the current offenses.

The facts of the case showed that defendant repeatedly shot Mauricio Licea at point-blank range. Mauricio was hit twice in the stomach, resulting in extensive injuries that required two surgeries and a lengthy period of recovery. And a half-hour later, defendant was involved in another armed robbery and carjacking and then a police pursuit, during which she was a passenger in the car she carjacked. This suggests that defendant was minimally affected, if at all, by her earlier shooting of Mauricio.

"The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.] This is not such a case." (*People v. Martinez, supra*, 76 Cal.App.4th at p. 494, 90 Cal.Rptr.2d 517.)

**DISPOSITION**

The judgment is affirmed.

We concur: ORTEGA, Acting P.J., and VOGEL (MIRIAM A.), J.