Filed 7/31/18 P. v. Togiola CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JULIE TOGIOLA, et al., Defendants and Appellants.	B281918 (Los Angeles County Super. Ct. No. LA084123)

APPEALS from judgments of the Superior Court of Los Angeles County, Susan M. Speer, Judge. Affirmed as to Julie Togiola. Affirmed and remanded as to Anthony McNeely.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Julie Togiola.

Walter L. Gordon, III, for Defendant and Appellant Anthony McNeely.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Julie Togiola and Anthony McNeely of dissuading a witness from testifying and McNeely of assault with a semiautomatic firearm, attempt to make a criminal threat and possession of a firearm by a felon. The jury found true as to McNeely specially alleged firearm enhancements. On appeal Togiola and McNeely contend the court erred in excluding impeachment evidence concerning the prosecution's key witness. McNeely also contends the court erred in failing to instruct the jury on self-defense and by imposing an on-bail sentencing enhancement without a jury finding. We affirm the judgment against Togiola. We affirm McNeely's convictions, strike the on-bail enhancement and, due to a separate error that resulted in an unauthorized sentence, remand for a limited resentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Informations*

An information filed September 27, 2016 charged McNeely with making a criminal threat (Pen. Code, § 422, subd. (a)),[1] assault with a semiautomatic firearm (§ 245, subd. (b)), dissuading a witness from testifying (§ 136.1, subd. (a)(1)), preparing false documentary evidence (§ 134) and possession of a firearm by a felon (§ 29800, subd. (a)(1)). It was specially alleged that McNeely personally used a semiautomatic firearm in making the criminal threat and in committing the aggravated assault (§ 12022.5, subd. (a)) and had been on bail at the time he

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[1] Statutory references are to this code unless otherwise stated.

committed the offense of dissuading a witness from testifying.[2] McNeely pleaded not guilty and denied the special allegations.

An information filed November 16, 2016 charged Togiola with dissuading a witness from testifying (§ 136.1, subd. (a)) and preparing false documentary evidence (§ 134). Togiola pleaded not guilty.

2. *The Evidence at the Joint Trial*

In February 2015 McNeely received a call from his friend, Unique, who claimed Joshua Alcazar had called her a "bitch" and refused to return her dogs to her. At the time of Unique's encounter with Alcazar, he was at his mother's residence in Woodland Hills. Alcazar's mother lived in a room she rented from Togiola and had agreed at Togiola's request to care for two dogs. McNeely was Togiola's boyfriend. Alcazar and Togiola had been friends.

McNeely drove to the house, saw Alcazar standing outside and demanded Alcazar tell him where the dogs were. Alcazar calmly responded, "You are not going to get the dogs back." McNeely drew a semiautomatic handgun, pointed it at Alcazar's stomach and told him he would not get a chance to light the cigarette he was holding. Alcazar, a much taller man than McNeely, did not see the gun at first. He noticed the weapon only after he heard a sound he recognized as a bullet sliding into a chamber. Alcazar was afraid, but remained calm and told McNeely to "handle his business." Frustrated by Alcazar's refusal to meet his demands, McNeely left Alcazar and went into

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[2] The information also charged McNeely with assault with a deadly weapon (a knife) (§ 245, subd. (a)(1)) on Adam Gibson in July 2015 at Togiola's residence. The jury found McNeely not guilty of that offense.

Togiola's residence. A few moments later Alcazar heard a gunshot. Togiola called the police. McNeely drove away and threw the gun out the window. McNeely later told police he had slammed his gun down on the table during an argument with Togiola and it had discharged. McNeely was arrested and later released on his own recognizance.

Alcazar, a war veteran who used a prosthetic leg after sustaining a combat injury in Kuwait, arrived to McNeely's May 26, 2015 preliminary hearing in a wheelchair. Before he could enter the courthouse, Togiola found him, handed him a note and ordered him to sign it. About the same time, two men joined Togiola and waited with her for Alcazar to sign the note. The note stated, "To the people of the courtroom: I Josh Alcazar, am writing to the judge that the incident that took place regarding the assault, I have no recollection of what took place. I was very inebriated and I have no knowledge of what happened. I do apologize to the courts on behalf of my behavior. I don't feel threatened by Anthony [McNeely] or have been threatened by him at any time." Feeling outnumbered and vulnerable because of his wheelchair, Alcazar signed the note even though the statements in it were not true.

After Alcazar signed the note, Togiola and the two men with her took him around the corner to meet McNeely, who drove Alcazar and his mother to a hotel so that law enforcement officers could not find him and compel him to testify. When Alcazar failed to appear at McNeely's preliminary hearing, the hearing was continued to the next day. Again, Alcazar did not appear. Alcazar told the prosecutor's investigator, who had inquired about his whereabouts, to "leave him alone."

In April 2016 McNeely was in police custody when he made several telephone calls that were recorded and played for the jury. In response to a question from an unidentified caller about the February 2015 assault against Alcazar, McNeely responded, "I caught up with the mother fucker that tried to steal . . . Precious [(one of the dogs)] but the mother fucker turned out to be like 6' . . . 6'4" 440 pounds, so I pulled a pistol on him and the mother fucker went and told."[3]

On June 25, 2016 McNeely told Togiola in a recorded telephone call, "Now that I have Josh [Alcazar] out of the way with the gun, I'm ready to go to trial." Togiola responded, "You have an affidavit. I had him sign one . . . ." When McNeely told Togiola he was concerned the affidavit Alcazar signed had not been notarized, Togiola responded, "He's not going to be there!" "[I]f the victim is not present—if the victim is not present then they have—they have nothing."

During cross-examination Alcazar admitted he had served a prison term for a 2006 felony conviction for transporting cocaine for sale. While incarcerated for that offense he became associated with the San Fernando Peckerwoods (SFP), a White power criminal street gang. Alcazar claimed his association with the gang was mostly for his protection in a de facto racially segregated prison and insisted the gang was more about "White pride" than White supremacy. Although he no longer needed the gang's protection, Alcazar explained the gang follows its members in civilian life. He denied at trial the gang was associated with the Aryan Brotherhood, although he had earlier told police that

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[3] Alcazar was six feet, four inches tall and weighed 350 pounds.

the gang was, in fact, aligned with the Aryan Brotherhood. He also claimed all White prisoners were underlings of the Aryan Brotherhood. Alcazar denied he was a racist or that the fact McNeely was African-American had anything to do with his testimony. Alcazar admitted it was part of the SFP membership code not to cooperate with law enforcement, including testifying in court cases, but stated he did not fear repercussions for doing so because SFP "would not care" if he were to testify against an African-American.

Also on cross-examination Alcazar testified that several months before the offenses charged in this case, McNeely had assaulted Togiola in a domestic dispute. Following that attack, Alcazar called McNeely on the telephone and threatened to "do to him" what McNeely "had done" to Togiola. The next day, however, the two men spoke in person, shook hands and resolved their differences. Alcazar also admitted his mother and Togiola had been involved in a rental dispute. While he was not happy to testify against his friend Togiola, Alcazar told police he would do so if necessary to convict McNeely.

3. *The Evidence Code Section 402 Hearings and the Court's Exclusion of Impeachment Evidence*

Prior to trial the court held an Evidence Code section 402 hearing to consider whether to allow Alcazar to be impeached with his prior misdemeanor convictions. Although the court concluded several of the offenses qualified as crimes of moral turpitude, it excluded them under Evidence Code section 352 as remote in time and, on balance, more prejudicial than probative.[4]

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[4] McNeely and Togiola sought to introduce evidence that Alcazar had suffered multiple misdemeanor convictions,

During Alcazar's cross-examination the court held a second Evidence Code section 402 hearing to consider whether McNeely could introduce images Alcazar had posted on his social media page as recently as December 2016 to impeach Alcazar's testimony that he was not a racist and that his testimony against McNeely was not racially motivated. The images included a teddy bear with a swastika on its stomach; an Internet meme consisting of a Brown Shirt speaking at a swastika-emblazoned lectern under the caption, "Me: I promise I won't get all political. 3 DRINKS LATER"; an emblem depicting two fists with brass knuckles above the caption "Aryan Pride"; a rendition of the *JAWS* movie poster with the image of a shark wearing a broad-brimmed black hat typical of Hasidic men under the title "JEWS"; and a cartoon depicting a man raising his middle finger in a vulgar gesture underneath the caption, "Only 1.4% of White people ever owned slaves." Alcazar acknowledged he had uploaded each of the images. He said he had posted them because he found them funny and did not intend for them "to be taken literally."

The court excluded the images, stating, "They are not statements, they're images . . . . I think if we get into these images and photographs, we're going to have a trial within a trial. They may be somewhat probative but very little. They are so outrageously prejudicial given the ethnic makeup of our jury and even if every person on the jury was White, there are very strong feelings in our society today against racism. So I think the jurors would easily jump to the wrong conclusion, particularly

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including a conviction in 1995 of petty theft (§ 484) and in 2006 of misrepresenting his identity to a peace officer (§ 148.9) and theft from an elder (§ 368, subd. (d)).

since they don't have the entire Facebook postings, only these pages that you've selectively removed, and the witness would be on the stand for days potentially explaining what he meant by each and every one of these images. . . . None of these are statements—They're all animated drawings or they are photographs, but there are no statements made by the witness that I would attribute directly to some type of bias or animus that he has."

Neither Togiola nor McNeely testified at trial. Togiola's defense was that she had not written the note Alcazar signed and had nothing to do with Alcazar's failure to appear at McNeely's preliminary hearing. McNeely's defense was that he came to his encounter with Alcazar armed with a gun to confront a White supremacist. He did not point his gun at Alcazar; he merely brandished it to let Alcazar know he was serious and would not be intimidated. Both Togiola and McNeely argued the prosecution's case hinged almost entirely on Alcazar, who they claimed was not a credible witness.

4. *The Verdicts and Sentences*

The jury found Togiola not guilty of preparing false documentary evidence and guilty of dissuading a witness from testifying. The jury found McNeely not guilty of making a criminal threat and preparing a false document, guilty of a lesser included offense of attempt to make a criminal threat and guilty of all other remaining charges; it also found true the special allegation McNeely had used a semiautomatic weapon in connection with the attempt to make a criminal threat and the aggravated assault on Alcazar. Although the People had specially alleged McNeely had been on bail when he committed

the offense of dissuading a witness, the jury was not asked to, and did not, make a finding as to that allegation.

The court sentenced Togiola to four years' probation on the condition she serve 365 days in jail. At sentencing the court assumed McNeely had waived his right to a jury trial on the on-bail enhancement and made its own finding that the specially alleged on-bail enhancement was true. McNeely was sentenced to an aggregate state prison term of 22 years four months.[5]

DISCUSSION

1. *The Court Did Not Abuse Its Discretion in Excluding Evidence of Alcazar's Misdemeanor Convictions*

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352.[6] [Citations.] [¶] '[T]he admissibility

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[5] The court identified the aggravated assault as the principal determinate term and imposed the upper term of nine years for that offense plus the upper term of 10 years for personal use of a firearm, a consecutive term of eight months (one-third the middle term) for dissuading a witness from testifying plus an additional two years for the on-bail enhancement and a consecutive term of eight months (one-third the middle term) for possession of a firearm by a felon. Pursuant to section 654 the court stayed imposition of sentence on the attempt to make a criminal threat and the firearm enhancement alleged in connection with that count and imposed additional fines and fees.

[6] Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create

of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.' [Citations.] When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify. . . . [¶] Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*People v. Clark* (2011) 52 Cal.4th 856, 931-932; accord, *People v. Contreras* (2013) 58 Cal.4th 123, 157, fn. 24; *People v. Edwards* (2013) 57 Cal.4th 658, 722.)

The trial court carefully considered Alcazar's misdemeanor history, found his most recent misdemeanor convictions that qualified as crimes of moral turpitude occurred in 2006, more than 10 years prior to trial, and concluded those convictions were simply too remote to be of significant probative value for impeachment purposes. That ruling, neither arbitrary nor irrational, was well within the trial court's discretion. (*People v. Clair* (1992) 2 Cal.4th 629, 654 ["[w]hen the witness subject to impeachment is not the defendant," the primary factors to consider are "whether the conviction (1) reflects on honesty and (2) is near in time"]; see *People v. Jones* (2017) 3 Cal.5th 583, 609

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substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[trial court has considerable discretion to exclude evidence under Evidence Code section 352; "'[w]e will not reverse a court's ruling on such matters unless it is shown " ' the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice"'"].)

McNeely and Togiola contend the court's ruling enabled the prosecution to portray Alcazar as a disabled war veteran "without any criminal history." The record demonstrates otherwise. The jury heard evidence Alcazar had suffered a felony drug conviction in 2006 (the same year he suffered the most recent excluded misdemeanor conviction for moral turpitude) for which he served time in prison. The jury also heard evidence Alcazar had used heroin as recently as January 2015 and had lied about his more recent drug use to police. Any assertion that the court's ruling resulted in an unfair characterization of Alcazar as an honorable man with an unblemished history and, in the process, denied Togiola or McNeely the constitutional rights to a fair trial and to confrontation and cross-examination, necessarily fails. (See *People v. Pearson* (2013) 56 Cal.4th 393, 455-456 [unless the defendant can show the prohibited cross-examination would have produced "'a significantly different impression of [the witness's] credibility' [citation], the trial court's exercise of its discretion [to exclude evidence under Evidence Code section 352] does not violate the Sixth Amendment"]; *People v. Brown* (2003) 31 Cal.4th 518,545-546 [same].)

2. *The Trial Court Acted Within Its Discretion in Excluding Images Alcazar Posted on His Social Media Account; Any Error Was Harmless*

McNeely also challenges the court's exclusion of images Alcazar posted on his social media page, arguing that evidence would have contradicted McNeely's claim he had only been active in the White pride movement to protect himself while in prison and was not a racist. McNeely argues the court's ruling excluding the images effectively clothed Alcazar in "false garments of credibility," enabling the prosecutor to portray him as a war hero rather than what he actually was—a White supremacist with inherent racial animus toward McNeely.

The court's determination the images' inflammatory nature far exceeded their probative value for impeachment was neither arbitrary nor irrational nor did it unfairly limit McNeely's attack on Alcazar's testimony as the product of racial bias. Although not addressed by McNeely in his appellate brief, the court permitted defense counsel to question Alcazar about his ties to White supremacist groups; and defense counsel thoroughly exposed Alcazar's racial prejudice when it cross-examined him at trial. Alcazar testified to his association with the SFP and that group's ties to the Aryan Brotherhood and conceded that, once an SFP member, the group and its "code" follow a person in civilian life. Although Alcazar claimed he was not a racist, Alcazar conceded SPF advocated "White pride" and asserted his SFP cohort, strict about not cooperating with police, would not mind if he broke its code to testify against an African-American man. McNeely's counsel repeatedly emphasized Alcazar's ties to hate groups during closing argument, referring to Alcazar multiple times as a White supremacist, White power gang member and "no better than" a Nazi. The exclusion of the racially charged images,

effectively cumulative in nature, did not result in a manifest miscarriage of justice. (Evid. Code, § 353; see generally *People v. Pearson, supra,* 56 Cal.4th at pp. 455-456.)

3. *The Trial Court Had No Sua Sponte Duty To Instruct the Jury on Self-defense*

A trial court has a sua sponte duty to instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Brooks* (2017) 3 Cal.5th 1, 73; accord, *People v. Diaz* (2015) 60 Cal.4th 1176, 1189.) "It is also well settled that this duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence support of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*Brooks,* at p. 73; see *People v. Salas* (2006) 37 Cal.4th 967, 982 [no right to instruction on affirmative defense unsupported by substantial evidence].) In determining whether the evidence is sufficient to warrant a jury instruction, "the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*Salas,* at p. 982.)

Although McNeely contends the court had a sua sponte duty to give some form of a self-defense instruction in this case (he does not specify the instruction he claims should have been given), McNeely did not rely on that defense at trial. In fact, just prior to closing argument, his counsel acquiesced in the court's decision to exclude all self-defense instructions from the packet of instructions given to the jury. And, during the closing argument that followed, McNeely's counsel argued McNeely did not point the gun at Alcazar or threaten him with it in self-defense.

Moreover, the record is devoid of any substantial evidence to warrant a self-defense instruction. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1145 [whether there is evidence that, if believed, would support a particular defense instruction is a question of law subject to de novo review].) "'To justify an act of self-defense [for an assault charge under Penal Code section 245] the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citations.] The threat of bodily injury must be imminent [citation] and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064-1065; see *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083 [reasonableness is determined from the point of view of a reasonable person in the defendant's position; the jury must consider all the facts and circumstances it might """expect[] to operate on [defendant's] mind"""].)

Here, as the trial court recognized, there was no evidence that McNeely knew of Alcazar's ties to a White supremacist group or otherwise feared him and no evidence of any action or statements by Alcazar that suggested McNeely was at risk of imminent bodily harm when he pointed the weapon at Alcazar. Although Alcazar acknowledged at trial that he had threatened McNeely in the past, Alcazar also testified the two men had resolved their differences. Evidence of Alcazar's earlier threat, alone and untethered to the circumstances of the case, was not sufficient to warrant a self-defense instruction. (See *People v. Barnett, supra,* 17 Cal.4th at p. 1145 ["the court need not give the requested instruction where supporting evidence is minimal and insubstantial"]; see generally *People v. Salas, supra,* 37 Cal.4th

at p. 982 [no duty to instruct on self-defense when unsupported by substantial evidence].)[7]

4. *The Court's Sentencing Errors*

a. *The record does not show McNeely waived his right to a jury trial on the on-bail enhancement; accordingly, that enhancement must be vacated*

"Under the Sixth Amendment to the United States Constitution, as interpreted in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435], any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt." (*People v. Gallardo* (2017) 4 Cal.5th 120, 123-124.) McNeely asserts, and the People agree, McNeely had a Sixth Amendment right to a jury trial on the specially alleged on-bail enhancement. (Cf. *Gallardo,* at pp. 134-135 [trial court's factual finding, based on its review of the preliminary hearing transcript, that defendant's prior assault offense was committed with a deadly weapon and thus constituted a serious felony, violated defendant's Sixth Amendment right to a jury trial on that question].)

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[7] Because there was no substantial evidence to warrant the instruction, we necessarily reject McNeely's alternative contention his counsel's failure to request a self-defense instruction amounted to ineffective assistance of counsel. (See *People v. Gray* (2005) 37 Cal.4th 168, 219-220 [because "there was no substantial evidence worthy of the jury's consideration that the crime was something less than robbery[,] . . . [t]he trial court did not err in failing to instruct the jury on the lesser included offense of theft, nor was counsel ineffective for failing to request a theft instruction"].)

At sentencing the court assumed McNeely had waived his right to a jury trial on the on-bail enhancement. However, as the Attorney General concedes, the record shows no such waiver. (See *People v. Daniels* (2017) 3 Cal.5th 961, 991 [waiver of a jury trial valid "only when the record affirmatively demonstrates it was knowing and intelligent"]; *People v. Collins* (2001) 26 Cal.4th 297, 311 [same].) Absent a valid waiver, the on-bail enhancement cannot stand.

If the court's imposition of the on-bail enhancement without the requisite jury finding were the only problem with McNeely's sentence, we would simply strike the enhancement and affirm the judgment as modified. However, a separate sentencing error that resulted in an authorized sentence requires a limited remand for resentencing.

b. *The court imposed an unauthorized sentence for dissuading a witness; remand for resentencing is the most appropriate remedy*

At McNeely's sentencing the court imposed the upper term of nine years for assault with a semiautomatic firearm, the principal determinate term and, pursuant to section 1170.1, a consecutive eight-month term, one-third the middle term of two years, for the offense of dissuading a witness (§ 136.1). The court's calculation of the section 136.1 offense pursuant to the general rules of section 1170.1 was improper: "Notwithstanding subdivision (a) of Section 1170.1, which provides for the imposition of a subordinate term for a consecutive offense of one-third of the middle term of imprisonment, if a person is convicted of a felony, and of an additional felony that is a violation of Section 136.1 or 137 and that was committed against the victim of, or a witness or potential witness with respect to, or a person

who was about to give material information pertaining to, the first felony . . . , the subordinate term for each consecutive offense that is a felony described in this section shall consist of the full middle term of imprisonment for the felony for which a consecutive term of imprisonment is imposed." (§ 1170.15; see *People v. Woodworth* (2016) 245 Cal.App.4th 1473, 1478-1479 [section 1170.15 requires imposition of full, subordinate term for section 136.1 offense; this requirement is a specific exception to the consecutive sentencing requirements for subordinate terms under section 1170.1].)

The Attorney General requests we modify McNeely's sentence to impose the full consecutive term for the section 136.1 offense. McNeely, for his part, insists remand is appropriate for the trial court to determine in the first instance whether to impose the full term for the section 136.1 offense consecutively or concurrently. (See § 669, subd. (a) [unless otherwise specified, trial court has discretion to sentence concurrently or consecutively]; *People v. Woodworth, supra,* 245 Cal.App.4th at pp. 1478-1479 [nothing in section 1170.15 mandates consecutive sentences for a section 136.1 offense; accordingly, court retains discretion under section 669 to impose concurrent sentence for that offense].) Under the circumstances, McNeely has the stronger argument. (See *Woodworth,* at p. 1480; see generally *People v. Bradley* (1998) 64 Cal.App.4th 386, 401-402 [remand for resentencing is appropriate when sentencing choice within trial court's discretion"].)[8]

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[8] On October 11, 2017, while this appeal was pending, the Governor signed Senate Bill No. 620, effective January 1, 2018 (Stats. 2017, ch. 682, § 1) amending section 12022.5 to give

DISPOSITION

As to Togiola, the judgment is affirmed. As to McNeely, the convictions are affirmed; the sentence is vacated; and the matter remanded for the limited purpose of allowing the trial court to resentence McNeely in accordance with the principles expressed in this opinion.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.

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discretion to the trial court to strike a firearm enhancement in the interest of justice. (See § 12022.5, subd. (c) ["The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."].) Although the court's decision to impose the upper term of 10 years for the section 12022.5 enhancement suggests it is unlikely the court will elect to strike that enhancement under newly-enacted section 12022.5, subdivision (c), in light of our limited remand for resentencing, the trial court should consider that question in the first instance.