Filed 11/4/19 P. v. Fultz CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent.<br><br>v.<br><br>JONATHAN ISIAH FULTZ, JR.,<br><br>Defendant and Appellant. | B291461<br><br>(Los Angeles County Super. Ct. No. MA071858) |

APPEAL from judgment of the Superior Court of Los Angeles County, Stephen I. Goorvitch, Judge. Affirmed in part; reversed in part and remanded with instructions.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Jonathan Isiah Fultz, Jr., appeals from a judgment entered after the jury convicted him of assault with a firearm, shooting a firearm in a grossly negligent manner, and misdemeanor resisting, delaying, or obstructing a peace officer. Fultz contends the trial court erred by instructing the jury with CALCRIM No. 875 for assault with a firearm, and there was insufficient evidence to support his conviction on this count. He also challenges the limiting instruction the court gave as to Fultz's testimony, arguing the instruction focused unfair scrutiny on his credibility. In addition, Fultz asserts his attorney's concession in her closing argument that Fultz committed the misdemeanor offense violated Fultz's constitutional rights and constituted ineffective assistance of counsel.

Fultz also requests we review the sealed record of the trial court's in camera hearing to determine whether the court disclosed all relevant complaints in response to his *Pitchess*[1] motion seeking discovery of the investigating officer's personnel records. Finally, Fultz contends, the People concede, and we agree, remand for resentencing is appropriate to allow the trial court to exercise its discretion under Senate Bill No. 1393 (2017-2018 Reg. Sess.), which took effect January 1, 2019, to consider whether to strike the prior serious felony conviction enhancements the trial court imposed pursuant to Penal Code[2] section 667, subdivision (a)(1).

We affirm the convictions but reverse the sentence and remand for the trial court to exercise its discretion whether to impose or strike the sentence enhancements for Fultz's prior

---

1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 536-538 (*Pitchess*).

2 Further statutory references are to the Penal Code.

serious felony convictions pursuant to Penal Code section 667, subdivision (a)(1).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *The Information*

The information charged Fultz with shooting at an inhabited dwelling (§ 246; count 1); assault with a firearm (§ 245, subd. (a)(2); count 2); and misdemeanor resisting, delaying, or obstructing a peace officer (§ 148, subd. (a)(1); count 3). As to counts 1 and 2, the information alleged Fultz committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(4) [count 1]; *id.*, subd. (b)(1) [count 2]; *id.*, subd. (b)(5) [counts 1 & 2].) The amended information alleged as to counts 1 and 2 Fultz suffered two prior convictions of a violent or serious felony under the three strikes law (§§ 667, subds. (b)-(j), 1170.12); two prior serious felony convictions within the meaning of section 667, subdivision (a)(1); and two prior felony convictions for which he served separate prison terms within the meaning of section 667.5, subdivision (b).

Fultz pleaded not guilty and denied the special allegations.

### B. *The Prosecution Case*

#### 1. *The incident*

Jimmy Dozier lived in a second floor apartment in a two-story building on Beech Avenue in Lancaster. Fultz stayed with his girlfriend, Starla Penn, and their two young daughters in an apartment on the first floor of the building. There was graffiti in the building's laundry area with the words "Menlo, 65 times 7" and "Hawk did it." Dozier knew Fultz as "Hawk" and had overheard

Fultz say "Menlo" on three or four occasions. Dozier knew Menlo was a street gang.[3]

On the morning of July 24, 2017, as Dozier went to get his mail, he encountered Fultz standing outside his apartment with his two daughters. One of Fultz's daughters said "hi" to Dozier. Dozier said "hi" back to her. Fultz was angry and asked Dozier if he was "around his kids." Dozier said no. Fultz told Dozier, "I better not find out you're talking to my daughter." Dozier testified Fultz acted "[l]ike he wanted to fight [him]." Fultz and Dozier yelled at each other.

Dozier walked upstairs to his apartment and called his friends Drake and Franco for "backup," telling them "this dude just messed with me." Dozier was angry and wanted to fight Fultz.

Later that night Drake and Franco came with Dozier's brother, Jermaine, to Dozier's apartment.[4] Dozier, Drake, and Franco approached Fultz who was with four other men in front of the building next door. When Fultz saw Dozier and his friends, Fultz left. Dozier did not have a gun, and he did not see his friends or the four men with Fultz with a gun. Dozier and his friends waited for Fultz to return, but after someone told them Fultz went to get a gun, they returned to Dozier's apartment.

Later that night Dozier was in his apartment on his way from the back room to the front of the apartment, when Drake and Franco ran toward the back of the apartment in a panic. Franco said he had seen Fultz coming with a gun. Dozier and his friends

---

[3] At trial, the parties stipulated Fultz was a member of the Menlo Crips, a criminal street gang.

[4] Dozier initially denied Jermaine was involved, but he later admitted Jermaine was in his group. Dozier explained he lied to protect his brother, whom he did not want to be "caught up in this."

jumped out of the window in the back of the apartment to the ground. Jermaine also jumped out the window. Dozier ran toward the front of the apartment building; Drake and Franco went in the opposite direction toward the alleyway. After Dozier jumped out of the window, he heard Fultz yell "neighborhood," then he heard two gunshots.[5] Dozier ducked into the nearby bushes and called 911 on his cellphone.

Los Angeles County Sheriff's Deputy Logan Foley responded to the 911 call and spoke with Dozier at the apartment building. Dozier told Deputy Foley that someone shot at him and his friends in the apartment. Dozier appeared very scared and was rambling. The deputies found a silver .40-caliber shell casing lying in the dirt in front of the apartment building. The casing was from a bullet that had been fired. The deputies searched for 20 minutes, but they did not find any bullets or bullet holes in the first or second floor.

2. *Fultz's Facebook messages*

At 10:00 the next morning Fultz sent several messages on his Facebook account. He wrote, "Think I smoked a nigga on [B]eech last night[.] They raided ma bm shit."[6] In response to a friend's inquiry, Fultz wrote, "Slobs try2 jump me." He added, "I had2 get em up off me. Cuhk." On the same day, in a Facebook post responding to Penn, Fultz stated, "I almost got jumped nd chipped a nigga over u." Fultz's Facebook profile showed his nickname was Hawk.

---

[5] On cross-examination, Dozier testified he heard the gunshots before Fultz yelled "neighborhood."

[6] Los Angeles County Sherriff's Detective Giovanni Lampignano testified "bm" typically meant "baby mama."

The gang expert, Los Angeles Police Officer Jaime Avila, explained, "Cuh is a term used by Crip gang members to refer to their fellow gang members, which, also, means, cuz." Officer Avila testified a "slob" is a member of the rival Bloods gang. According to Officer Avila, "I almost got jumped nd chipped a nigga" meant the individual was saying "he almost got beat up by multiple individuals. And, because of that, he almost shot someone." A Neighborhood Crips gang member usually will yell "neighborhood" during the commission of a crime to show he belongs to the gang.

3. *Fultz's arrest and interrogation*

On August 3, 2017 Los Angeles County Sheriff's Deputy Adam Nelson, who was in uniform, responded to a call indicating a suspect for assault with a firearm had been seen in the area. Deputy Nelson saw Fultz walk into a parking garage. Deputy Nelson parked his patrol vehicle in the same garage, exited the vehicle, and told Fultz, "Hey, come here. Talk to me." Fultz ran away, and Deputy Nelson and another deputy in uniform chased him. Fultz was arrested, and Deputy Nelson took him to a parking lot to conduct a field identification. Deputy Nelson repeatedly asked Fultz to exit the patrol car for the field identification, but Fultz refused.

Later that day, Los Angeles County Sheriff's Detective Giovanni Lampignano interrogated Fultz about the July 24 incident. Fultz stated on that date he was in Los Angeles, not Lancaster. Detective Lampignano asked Fultz for his personal cellphone number, explaining he could track the location of Fultz's phone to determine Fultz's whereabouts on July 24. Fultz gave him a cellphone number.

Fultz told Detective Lampignano the video cameras in the apartment building would show Fultz was not at the scene. The next morning Detective Lampignano went with the apartment building manager into the room in the apartment building that contained the surveillance equipment. The building manager looked shocked upon discovering the surveillance equipment was gone, with the cables cut or ripped.

4. *Fultz's telephone calls from jail*

While in jail awaiting trial, Fultz had a telephone conversation with his friend Jannise Merritt. Fultz stated he had given Merritt's phone number to the lead detective when the detective asked him whether he had a phone. Fultz asked Merritt to disconnect his phone line.

In another jail call, Fultz and Penn discussed the apartment building's surveillance cameras. Penn stated in part, "I tried to get evidence that you wasn't here, but these . . . cameras don't even work so [we're] just going to have to go another route and see." Fultz replied, "Oh yeah the cameras don't work? That's, the cameras don't work." Penn responded, "No and I'm like, . . . how they going to say it's you and they don't even know who . . . did it . . . ." Fultz stated, "Yeah, that's a good thing though, you know."

In another jail call, Fultz told Penn he was with a friend named Biscuit at the time of the shooting, not at the apartment complex, and he asked Penn to tell Biscuit he was with her on that day.

C. *The Defense Case*

Fultz testified he was a Menlo Crips gang member and went by the name Hawk. On the morning of July 24, 2017 Fultz was

watching his two daughters, then ages two and three, who were playing outside their ground floor apartment. Fultz went to dump the trash in the alley. When Fultz returned, he saw Dozier talking to his daughters by the mailboxes. Fultz knew Dozier was not "family," and Fultz had read on the Internet about pedophiles. Fultz "got defensive" because Dozier "was kneeling down with his legs open towards my daughters." Fultz asked, "How you know my daughters? Who are you? What are you doing around my kids?" Dozier responded he liked little kids. Fultz "overreacted a little bit" and got angry. He told Dozier to "back up" from his daughters. Fultz asked, "What are you? A pedophile? Are you a rapist[?]" Dozier got angry and told Fultz he had "something for niggas" like Fultz. Dozier then went up the stairs while looking back at Fultz.

That night Fultz was standing outside Penn's apartment when he saw five or six men, including Dozier, run downstairs "like these guys were looking for somebody," looking "bothered," "kind of hyper," and "a little jumpy." Fultz went back into Penn's apartment and called Merritt to pick him up because he thought the men were trying to jump him.

When the men left the area around Penn's apartment, Fultz went the front of the building to wait for Merritt. While he was in the courtyard, Fultz heard people running up behind him, and he grabbed his hip where he was carrying his gun.[7] A "tall light-skin" man ran up and struck him in the face. Fultz fell down, and a couple of other men hit and kicked Fultz. Dozier was not among the men who jumped him. As the men were beating Fultz, they said, "Get 'em, blood. Get 'em[,] blood. Get 'em." When Fultz got up, he

---

[7] Fultz carried a gun for protection because he had been shot before and was afraid something could happen to him because of his past conduct.

reached for his gun and realized it was gone. One of the men had his gun. He grabbed the man around the waist and wrestled with him. As they struggled over the gun, Fultz heard a shot go off. Fultz ran toward Beech Avenue, he got in Merritt's car, and they left.

Fultz denied he shot anyone that night. His Facebook message, stating, "Think I smoked a nigga on [B]eech last night," was not true. Fultz admitted he lied to Detective Lampignano on the day of his arrest when he denied any involvement in the July 24 incident; he also lied when he said he was not called Hawk. Fultz did not tell Detective Lampignano what happened because he feared for his children's safety if people saw him talking to the police about the incident. Detective Lampignano told Fultz he was being charged with assault with a deadly weapon, but Fultz did not tell him or other police officers that he had been attacked. He was aware his jail calls were being recorded, and his attorney had advised him to not talk about the incident over the phone.

D. *The Verdicts and Sentencing*

The jury found Fultz not guilty of shooting at an inhabited dwelling, but guilty of the lesser included offense of shooting a firearm in a grossly negligent manner (§ 246.3; count 1). The jury found Fultz guilty of assault with a firearm and resisting, delaying, or obstructing a peace officer. The jury found the gang allegations as to counts 1 and 2 were not true.

In a bifurcated proceeding, Fultz admitted the special allegations he suffered two prior violent or serious felony

convictions under the three strikes law and two prior serious felony convictions within the meaning of section 667, subdivision (a)(1).[8]

The trial court sentenced Fultz on count 2 to an indeterminate term of 25 years to life under the three strikes law, plus 10 years for the two prior serious felony convictions. On count 1, the court sentenced Fultz to an aggregate term of seven years, comprised of the upper term of three years, doubled under the three strikes law, plus one year for a prison prior under section 667.5, subdivision (b). The court stayed the sentence on count 1 pursuant to section 654. On count 3, the court sentenced Fultz to 364 days in county jail to run concurrent to the sentence imposed on count 1.

Fultz timely appealed.

## DISCUSSION

### A. *The Trial Court Properly Instructed the Jury with CALCRIM No. 875*

"A trial court has a sua sponte duty to instruct the jury on the essential elements of . . . a charged offense . . . ." (*People v. Mil* (2012) 53 Cal.4th 400, 409, citations omitted; accord, *People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1287 ["A criminal defendant has a right to accurate instructions on the elements of a charged crime."].) We review de novo whether the "instructions correctly state the law [citations] and also whether instructions effectively direct a finding adverse to a defendant by removing an issue from the jury's consideration . . . ." (*People v. Posey* (2004) 32 Cal.4th

---

[8] Fultz did not admit he served two prior prison terms within the meaning of section 667.5, subdivision (b), as alleged in the information. Therefore, on remand the trial court should dismiss this allegation.

193, 218; accord, *People v. Mendez* (2018) 21 Cal.App.5th 654, 659.) ""Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation."" (*Spaccia*, at p. 1287; accord, *People v. Webb* (2018) 25 Cal.App.5th 901, 906.)

For assault with a firearm, the trial court instructed the jury with CALCRIM No. 875, as modified, in relevant part: "The defendant is charged in count 2 with assault with a firearm, in violation of Penal Code section 245(a)(2). [¶] To prove that the defendant is guilty of this crime, the People must prove the following elements beyond a reasonable doubt: [¶] 1. The defendant did an act with a firearm. [¶] 2. The defendant did that act willfully. [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone. [¶] 4. When the defendant acted, he had the present ability to apply force with a firearm. And, [¶] 5. The defendant did not act in self-defense or in defense of someone else."

During deliberations, the jury sent a note to the trial court asking, "We need clarification on verdict form for count two, assault with firearm charge. Form specifies 'upon Jimmy Dozier.' Does this mean the firearm had to be discharged toward Jimmy Dozier specifically?" The court responded, "For purposes of Count Two, the People are not required to prove that the defendant actually fired the gun at Jimmy Dozier. The People are required to prove beyond a reasonable doubt that the defendant committed 'an act with a firearm.' The act may be pointing the gun at Jimmy Dozier, or firing the gun in a manner where the direct and probable result would be the application of force to Jimmy Dozier. [¶] This instruction seeks to clarify the first element. . . ."

Fultz contends the trial court erred in instructing the jury on the elements of an assault with firearm using the natural and probable consequence language in CALCRIM No. 875. But as acknowledged by Fultz, CALCRIM No. 875 is based on the Supreme Court's decision in *People v. Williams* (2001) 26 Cal.4th 779, 782 (*Williams*). In *Williams*, the Supreme Court held that an "assault requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another." (*Ibid.*; accord, *In re B.M.* (2018) 6 Cal.5th 528, 533; *People v. Perez* (2018) 4 Cal.5th 1055, 1066 ["[A]ssault with a deadly weapon is a general intent crime; the required mens rea is 'an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.'"].) The *Williams* court explained, "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Williams*, at p. 788; accord, *People v. Chance* (2008) 44 Cal.4th 1164, 1170 (*Chance*) ["'specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent'"]; *People v. Wyatt* (2010) 48 Cal.4th 776, 779 ["Under *Williams*, a defendant may commit an assault without realizing he is harming the victim, but the prosecution must prove the defendant was aware of facts that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from the defendant's conduct."].)

Fultz contends CALCRIM No. 875 "erroneously defined the mental state required for an assault to be negligence, rather than intentional conduct" because it used the "natural and probable consequence language" from *Williams*. But the "natural and probable result" language in *Williams* is not synonymous with the mental state of negligence. As the *Williams* court explained, "In adopting this knowledge requirement, we do not disturb our previous holdings. Assault is still a general intent crime . . . . Likewise, mere recklessness or criminal negligence is still not enough . . . , because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know . . . ." (*Williams, supra*, 26 Cal.4th at p. 788, citations omitted.)

Fultz also argues he cannot be guilty of assault because the jury, in concluding he negligently discharged the firearm, must have determined he did not intend to shoot anyone. But the Supreme Court in *Williams* rejected a specific intent requirement, reaffirming "that assault does not require a specific intent to injure the victim." (*Williams, supra*, 26 Cal.4th at p. 788.) The Supreme Court explained, "[A] defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id.* at p. 788, fn. 3.)

We are bound by the Supreme Court's pronouncement of the law in *Williams*. (*K.R. v. Superior Court* (2017) 3 Cal.5th 295, 308 ["'[I]t is established that a holding of the Supreme Court binds all of the lower courts in the state, including an intermediate appellate court.'"]; *People v. Johnson* (2012) 53 Cal.4th 519, 527-528 [decisions of Supreme Court are binding on appellate courts].) CALCRIM No. 875, which instructs the jury that for assault with a

firearm the People must prove "[w]hen the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone," is consistent with this Supreme Court precedent. (See *People v. Golde* (2008) 163 Cal.App.4th 101, 122 [CALCRIM No. 875 "was not defective in failing to tell the jurors they could consider the absence of injury as reflecting an absence of intent to harm."].)

B. *Substantial Evidence Supports the Conviction for Assault with a Firearm*

"In evaluating a claim regarding the sufficiency of the evidence, we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Westerfield* (2019) 6 Cal.5th 632, 713; accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 142 ["'To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt.'"].) "'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.' [Citations.] 'We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.'" (*Westerfield*, at p. 713; accord, *Penunuri*, at p. 142 ["'A reversal for insufficient

evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'"].)

Fultz contends there is insufficient evidence to support his conviction for assault with a firearm upon Dozier. Fultz admits his Facebook messages referred to shooting someone but argues the messages do not establish he actually discharged the firearm at Dozier. Fultz also asserts Dozier did not hear the gunshots until Dozier had jumped out of his apartment; thus, the shots could not have been directed at Dozier. Further, he contends there was no evidence he shot at Dozier's apartment because the shell casing was found in the dirt in the front of the apartment building and the sheriffs' deputies did not find any bullet holes in the building.

Fultz ignores the contrary evidence that supports his conviction for assault with a firearm. Fultz and Dozier had a confrontation the morning of the shooting. Dozier testified Fultz was upset and yelling, and he acted "[l]ike he wanted to fight me." When Dozier and his friends approached Fultz and his men, Fultz left to get a gun. Fultz admitted he was carrying a gun that day. Dozier was in his apartment when Franco alerted him Fultz had a gun, and they all jumped out of the back window. Dozier heard two gunshots and Fultz yelling "neighborhood," a term used by Fultz's gang. The day after the shooting, Fultz sent a Facebook message stating, "Think I smoked a nigga on Beech last night," and posted, "I almost got jumped nd chipped a nigga over u." A jury could reasonably infer from the evidence that Fultz intended to shoot at Dozier's apartment, fired two shots, and a reasonable person would realize the direct, natural, and probable result would be shooting Dozier in his apartment. (*Williams, supra*, 26 Cal.4th at p. 788.)

Further, the jury could have reasonably inferred Fultz had the present ability to shoot Dozier, even though Dozier escaped before Dozier fired the shots. The Supreme Court in *Chance* addressed a similar fact pattern, in which the defendant attempted to shoot at a police officer, but he shot in the wrong direction because the officer had moved behind the defendant, and the defendant had not yet transferred a new round into the firing chamber. (*Chance, supra*, 44 Cal.4th at pp. 1168, 1173.) In upholding the assault conviction, the *Chance* court observed, "[W]hen a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Id.* at p. 1172.)

C. *The Trial Court Did Not Abuse Its Discretion by Giving a Limiting Instruction as to Fultz's Testimony*

1. *Fultz's statements and the trial court's limiting instruction*

While the trial court and counsel were at sidebar, the judicial assistant informed them Fultz was speaking with Detective Lampignano in front of the jury. In a hearing outside the presence of the jury, Detective Lampignano testified Fultz said to him in front of the jury, "You're happy now, because you told me I was going to—you were going to put me away for life. How can you prove I shot up an apartment complex? You can't prove that. Are you happy now?" The court's bailiff similarly testified she heard Fultz say, "You know I'm facing life, right?" The bailiff approached Fultz and told him, "Please stop talking in front of the jury. You don't want to do that."

The trial court warned Fultz, "[I]f anything like that happens again, if you talk to a witness, if you talk to [the prosecutor], if you talk to the [investigating officer], if you talk to anyone in the gallery, if you speak to [your attorney] in a manner that disrupts the courtroom, if you interact with me, if you interact with my staff in a manner that disrupts the courtroom, I'll just kick you out and just finish without you." The court instructed the jury, "I just want to remind you that you are to disregard anything you hear when court is not in session or when the attorneys and I are out in the hallway discussing matters. You shall not consider anything you hear, any such statements for any purpose."

Later during his trial testimony, Fultz explained he tried to invent an alibi with his high school friend Biscuit because he was "scared." Fultz added, "And I know that I'm fighting—I'm facing life. And I didn't want to do jail for something I didn't do." The trial court sustained the prosecutor's objection, struck the testimony, and instructed the jury to disregard Fultz's answer.

Outside the presence of the jury, the trial court stated, "[T]his is now the second time that [Fultz] has informed this jury that he is going to jail for life if he is convicted. The first time was an outburst that happened while we were at sidebar, which I thought was completely inappropriate and completely manipulative of the process. . . . [¶] . . . I'm going to read the language from the model instruction saying that you shall not consider punishment, unless the People just want me to let it lie. [¶] But I'm, actually, considering going further and saying . . . I don't know what the sentence will be if he's convicted. [¶] And that's a true statement. I do not know what the sentence will be if he's convicted. I have not gone through the file. I do not know what the jury will convict him

of, if anything. . . . I do not know what will happen with the priors trial. . . ."

Fultz's counsel argued, "I believe that the prosecution opened the door in the line of questioning about whether [Fultz] attempted to invent an alibi with Biscuit. . . . And it would be inappropriate for the court to strike his answer." Fultz's counsel suggested the trial court instruct the jury with the standard instruction not to consider punishment. She argued it would not be appropriate to state the court did not know what Fultz's sentence will be because if Fultz was convicted as charged, "it does carry a life sentence." The prosecutor agreed Fultz was "facing life" if convicted.

When the jury returned, the trial court advised the jury that it was reversing its prior ruling and letting Fultz's answer stand. The court reporter read back the questions and Fultz's explanation for why he tried to invent an alibi with Biscuit. The court instructed the jury, "[I]t does not matter whether the defendant is correct or incorrect in his belief as to the potential sentence in this case. You may only consider that reference for purposes of evaluating the defendant's state of mind and his credibility in relation to that last answer, in relation to the subject discussed in his last answer. [¶] I just want to remind you, ladies and gentlemen, that when you are deliberating, you must reach your verdict without any consideration of punishment."

2. *The limiting instruction was proper*

Fultz contends the trial court's limiting instruction allowing the jury to consider Fultz's reference to a life sentence only "for purposes of evaluating the defendant's state of mind and his credibility in relation to that last answer" improperly told the jury

to give extra scrutiny to Fultz's credibility. The trial court did not abuse its discretion.

"When evidence is admissible . . . for one purpose and is inadmissible as to . . . another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code, § 355; see *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052.) "'A trial court's ruling on the admission or exclusion of evidence is reviewed for abuse of discretion.'" (*People v. Sánchez* (2016) 63 Cal.4th 411, 456; accord *People v. Perez* (2017) 18 Cal.App.5th 598, 620.)

The trial court acted well within its discretion when it initially struck Fultz's answer that he was "facing life," especially given this was the second time Fultz improperly commented on punishment. (See *People v. Mendoza* (1974) 37 Cal.App.3d 717, 727 [improper for prosecutor to comment on penalty defendant will receive because "jury's responsibility is limited to the determination of the defendant's guilt or innocence of the charge against him"]; CALCRIM No. 101 ["You must reach your verdict without any consideration of punishment."].) Although the court later allowed in the testimony at Fultz's request to allow him to explain why he tried to invent an alibi, the court instructed the jury to consider Fultz's response only to evaluate his state of mind (why he invented an alibi) and his credibility (whether his invention of the alibi made him less credible).

Contrary to Fultz's assertion, the limiting instruction that allowed the jury to consider Fultz's response, but only for a limited purpose, did not single out Fultz or instruct the jury to give extra scrutiny to Fultz's credibility. *People v. Wright* (1988) 45 Cal.3d 1126, relied on by Fultz, is distinguishable. The defendant in *Wright* requested the court instruct the jury that it could consider

specific evidence introduced at trial in determining whether the defendant was guilty. (*Id*. at p. 1135.) The Court of Appeal concluded the trial court properly refused to give the instruction, explaining "[i]t is "'improper for the court to single out a particular witness and to charge the jury how his evidence should be considered.'"" (*Ibid*., fn. 6; accord, *People v. Lyons* (1958) 50 Cal.2d 245, 271, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 32.) By contrast, the limiting instruction here appropriately allowed Fultz to comment on his expected punishment to rehabilitate his credibility by explaining why he tried to create an alibi, but prohibited the jury from considering Fultz's possible sentence to generate sympathy with the jury.

D. *Defense Counsel's Concession in Her Closing Argument Did Not Violate Fultz's Constitutional Rights or Constitute Ineffective Assistance of Counsel*

1. *Trial evidence and defense counsel's closing argument*

At trial, Deputy Nelson testified he was in uniform when he exited his patrol car and approached Fultz to talk to him. Fultz ran away, and Deputy Nelson and another deputy chased him. Fultz admitted during his interrogation, "[W]hen they first rolled up on me, I didn't run at first, but when they started getting out of their cars coming towards me of course I ran, I didn't know what the hell this was about you know? I'm right in front of my, right in front of where my people stay like, right where my daughters is at, you feel me? . . . [W]hen they hopped out on me like that of course I ran."

In her closing argument, Fultz's attorney told the jury, "Mr. Fultz is guilty of count 3. Count 3 is delaying a police officer. No question that he ran. [The prosecutor] argued that it was

evidence of his guilt. But I think if you listen to the interrogation tape, he explains why he ran."

2. *The concession was not tantamount to a guilty plea*

Fultz contends his attorney's concession that Fultz was guilty on count 3 of delaying a peace officer violated his constitutional right against self-incrimination, right to a jury trial, and right to confront witnesses, relying on *People v. Farwell* (2018) 5 Cal.5th 295, 300, 306. Fultz's reliance on *Farwell* is misplaced. In *Farwell*, the defendant's attorney entered into a stipulation with the prosecutor that was read to the jury, which admitted all elements of a misdemeanor charge against the defendant. (*Id*. at pp. 298-299.) In reversing the conviction because the defendant had not been advised of his constitutional rights, the *Farwell* court concluded the stipulation was "tantamount to a guilty plea" because it "conclusively established the stipulated facts as true and completely relieved the prosecution of its burden of proof on count 2." (*Id.* at pp. 299-300.)

Unlike *Farwell*, the trial court instructed the jury the People must prove beyond a reasonable doubt the elements necessary for a conviction of resisting, obstructing, or delaying a peace officer in the performance of his duties. Moreover, the court instructed the jury, "Nothing that the attorneys say is evidence. In their opening statements and closing statements, the attorneys discuss the case, but their remarks are not evidence." Thus, the concession by Fultz's counsel that Fultz was "guilty of count 3" was not tantamount to a guilty plea. (*People v. Cain* (1995) 10 Cal.4th 1, 30 ["We have held trial counsel's decision not to contest, and even expressly to concede, guilt on one or more charges at the guilt phase of a capital trial is not tantamount to a guilty plea requiring a . . .

waiver. [Citations.] It is not the trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the evidence."]; *People v. Burns* (2019) 38 Cal.App.5th 776, 783 ["Despite defense counsel's concession, the prosecution still had to present competent evidence to establish the essential elements of each charge, something it would not have had to do had [defendant] pleaded guilty."]; *People v. Marsh* (2019) 37 Cal.App.5th 474, 492 ["defense counsel's alleged concession of guilt on count 2 did not change the prosecutor's burden of proof, or otherwise 'limit the scope of the jury's role'"]; *People v. Lopez* (2019) 31 Cal.App.5th 55, 63-64 [rejecting argument "defense counsel's concession of guilt during argument on the hit-and-run charge was tantamount to guilty plea" where "the jury was instructed that the prosecution had to prove guilt on all counts beyond a reasonable doubt and that statements by counsel were not evidence"].)

3. *The concession did not violate Fultz's Sixth Amendment right*

Fultz contends his trial counsel's concession of guilt violated his Sixth Amendment right to counsel recognized in *McCoy v. Louisiana* (2018) 584 U.S. ___ [138 S.Ct. 1500] (*McCoy*). In *McCoy*, the United States Supreme Court held "counsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission." (*Id.* at p. ___ [138 S.Ct. at p. 1510].) The court explained the Sixth Amendment, which "guarantees to each criminal defendant 'the Assistance of Counsel for his defence,'" gives the defendant "[a]utonomy to decide that the objective of the defense is to assert innocence" and to "insist on maintaining her

innocence at the guilt phase of a capital trial." (*Id.* at pp. ___ [138 S.Ct. at p. 1508].) "When a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (*Id*. at p. ___ [138 S.Ct. at p. 1509].)

The *McCoy* court distinguished its prior opinion in *Florida v. Nixon* (2004) 543 U.S. 175, 181, 192, in which the court held "when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, [citation], '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy, [citation]." (*McCoy, supra*, 584 U.S. at p. __ [138 S.Ct. at p. 1505].) The court explained there was no Sixth Amendment violation in *Nixon* because "Nixon's attorney did not negate Nixon's autonomy by overriding Nixon's desired defense objective, for Nixon never asserted any such objective." (*McCoy*, at p. __ [138 S.Ct. at p. 1509].) The *McCoy* court noted that in contrast to *Nixon*, defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt," thus, his counsel could not override his objection. (*McCoy*, at pp. __ [138 S.Ct. at pp. 1505, 1509].)

Fultz contends his Sixth Amendment right was violated because there is no evidence he agreed to his attorney's concession of guilt on count 3. But unlike *McCoy*, there is nothing in the record indicating Fultz informed his trial counsel of his intent to maintain his innocence on the count for delaying a peace officer. (*People v. Burns, supra*, 38 Cal.App.5th at pp. 784-785 [*McCoy* inapplicable where "there is nothing in the record to suggest [the defendant] disagreed with his counsel's concession strategy"]; *People v. Franks* (2019) 35 Cal.App.5th 883, 891 ["*McCoy* makes

clear, however, that for a Sixth Amendment violation to lie, a defendant must make his intention to maintain innocence clear to *his counsel*, and counsel must override that objective by conceding guilt."]; cf. *People v. Eddy* (2019) 33 Cal.App.5th 472, 481 [defendant's Sixth Amendment right violated where his counsel conceded guilt, and the record showed "trial counsel knew that defendant did not agree with the strategy of conceding manslaughter in closing argument"].) On the record before us, the concession by Fultz's attorney did not violate Fultz's Sixth Amendment right to counsel.

4. *Defense counsel's concession did not constitute ineffective assistance of counsel*

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden to show (1) his or her """counsel's representation fell below an objective standard of reasonableness under prevailing professional norms""" and (2) he or she """suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome."""" (*People v. Johnson* (2016) 62 Cal.4th 600, 653 (*Johnson*); accord, *People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*); see *Strickland v. Washington* (1984) 466 U.S. 668, 687-692.)

"On direct appeal, if the record "'sheds no light on why counsel acted or failed to act in the manner challenged,'" we must reject the claim "'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.'"" (*People v. Caro* (2019) 7 Cal.5th 463, 488; accord, *Mickel, supra*, 2 Cal.5th at p. 198 ["a reviewing court will reverse a conviction based on ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had ""no

rational tactical purpose"" for an action or omission"]; *People v. Lopez* (2008) 42 Cal.4th 960, 972 ["except in those rare instances where there is no conceivable tactical purpose for counsel's actions, claims of ineffective assistance of counsel should be raised on habeas corpus, not on direct appeal"].) We presume "that counsel's actions fall within the broad range of reasonableness, and afford 'great deference to counsel's tactical decisions.'" (*Mickel*, at p. 198; accord, *People v. Bell* (2019) 7 Cal.5th 70, 125.)

In this case the record does not reflect why defense counsel conceded Fultz committed the misdemeanor offense of delaying a peace officer, but there may well have been a tactical reason for doing so. "It is settled that it is not necessarily incompetent for an attorney to concede his or her client's guilt of a particular offense." (*People v. Lucas* (1995) 12 Cal.4th 415, 446; accord, *People v. Arredondo* (2018) 21 Cal.App.5th 493, 502 [counsel's concession to establish credibility was not ineffective assistance of counsel].) Here, Deputy Nelson testified Fultz ran when Deputy Nelson, who was in uniform, exited his patrol car and asked Fultz to talk to him. Fultz admitted during his interrogation he ran away from the deputies. In light of this evidence, defense counsel's concession of guilt on the misdemeanor count to gain credibility with the jury was not an incompetent tactical choice. (*Lucas*, at p. 447 ["Given this evidence, "'[i]t is entirely understandable that trial counsel . . . made no sweeping declarations of his client's innocence but instead adopted a more realistic approach . . . ."'"]; *People v. Freeman* (1994) 8 Cal.4th 450, 498 ["Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt."].)

E. *The Trial Court's* Pitchess *Ruling Was Not an Abuse of Discretion*

1. *Fultz's* Pitchess *motion*

On April 16, 2018 Fultz filed a *Pitchess* motion pursuant to Evidence Code section 1043, seeking discovery of Detective Lampignano's personnel records concerning excessive force, bias, and dishonesty. At the hearing, the trial court found good cause to conduct an in camera hearing to examine Lampignano's personnel records for bias and dishonesty, including false statements and reports. The court conducted an in camera hearing and found there was "nothing to disclose."

2. *The trial court properly determined there was no discoverable information*

"When a defendant shows good cause for the discovery of information in an officer's personnel records, the trial court must examine the records in camera to determine if any information should be disclosed. [Citations.] The court may not disclose complaints over five years old, conclusions drawn during an investigation, or facts so remote or irrelevant that their disclosure would be of little benefit." (*People v. Winbush* (2017) 2 Cal.5th 402, 424; see Evid. Code, § 1045, subd. (b).) "'A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion.'" (*People v. Landry* (2016) 2 Cal.5th 52, 73, quoting *People v. Hughes* (2002) 27 Cal.4th 287, 330; accord *Anderson*, at p. 391.)

Fultz requests we review the sealed portion of the record, which includes the transcript of the in camera hearing. The People do not object to the request. Fultz's request for an independent in camera review is proper. (*People v. Anderson, supra*, 5 Cal.5th at

p. 391 ["Defendant properly asks us to review the sealed record of the in camera hearing to determine whether the court erroneously failed to provide discovery that he should have received."]; *People v. Hughes, supra*, 27 Cal.4th at p. 330 [conducting independent examination of materials in camera on appeal].)

We have reviewed the sealed record. The trial court examined Detective Lampignano's personnel records, and made a detailed record of what it reviewed. The trial court did not abuse its discretion in concluding there was no discoverable information to disclose to Fultz. (See *People v. Anderson, supra*, 5 Cal.5th at p. 391; *People v. Winbush, supra*, 2 Cal.5th at p. 424.)

F. *Remand for Resentencing Is Appropriate Pursuant to Section 667, Subdivision (a)(1)*

Fultz contends, the People concede, and we agree remand is appropriate for the trial court to exercise its discretion whether to strike the prior serious felony conviction enhancements imposed pursuant to section 667, subdivision (a)(1).[9]

In 2018 the Governor signed into law Senate Bill No. 1393 (2017-2018 Reg. Sess.), which went into effect on January 1, 2019. Senate Bill No. 1393 amended section 1385 by deleting subdivision

---

[9] On remand, the trial court should impose or strike the five-year sentence enhancements under section 667, subdivision (a)(1), with respect to counts 1 and 2. (*People v. Williams* (2004) 34 Cal.4th 397, 405 [§ 667, subd. (a), enhancement must be applied to each indeterminate term of third strike sentence]; *People v. Misa* (2006) 140 Cal.App.4th 837, 847 [§ 667, subd. (a), enhancement must be applied to both indeterminate and determinate terms]; see *People v. Minifie* (2018) 22 Cal.App.5th 1256, 1265 [§ 667.5, subd. (b), enhancement applies to both indeterminate and determinate terms].)

(b), which prohibited trial courts from exercising discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667." (§ 1385, former subd. (b).) Senate Bill No. 1393 applies retroactively to Fultz because his sentence was not final at the time the new law became effective on January 1, 2019. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272 [Sen. Bill No. 1393 applies retroactively]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [same]; see *In re Estrada* (1965) 63 Cal.2d 740, 744 [Absent contrary legislative intent, "[i]f the amendatory statute lessening punishment becomes effective prior to the date the judgment of conviction becomes final then, in our opinion, it, and not the old statute in effect when the prohibited act was committed, applies."].)

## DISPOSITION

The convictions are affirmed. We reverse the sentence and remand with directions for the trial court to exercise its discretion whether to impose the sentence enhancements for Fultz's prior serious felony convictions pursuant to section 667, subdivision (a)(1).

FEUER, J.

WE CONCUR:

ZELON, Acting P. J. SEGAL, J.