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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GLEN AUSTIN WAGNER, Defendant and Appellant.	B282371 (Los Angeles County Super. Ct. No. BA384191)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed in part, remanded in part.

Paul Couenhoven, 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, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Glen Austin Wagner appeals the judgment following his convictions for first-degree murder and mayhem. (Pen. Code, §§ 187, subd. (a), 203.)[1] The jury also found true sentence enhancement allegations for personal and intentional discharge of a firearm and proximately causing great bodily injury (§ 12022.53, subds. (a)(1), (2) & (d)), and for committing the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

Appellant contends (1) he was afforded ineffective assistance of counsel, who failed to discover that his prior felony burglary conviction used to impeach his testimony had been reduced to a misdemeanor, (2) the trial court erroneously admitted a witness's involuntary statements to police, and counsel provided ineffective assistance by failing to make a timely motion to suppress, and (3) remand is required so that the trial court may exercise its newly enacted discretion to strike the firearm enhancements pursuant to Senate Bill No. 620 (Stats. 2017, ch. 682, § 2), and to correct a miscalculation of his pre-sentence credits.

We remand the matter to the trial court to determine whether to strike the firearm enhancement under section 12022.53, subdivision (h), and with instructions to issue an amended abstract of judgment reflecting one additional day of pre-sentence custody credit. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged by information with murder, mayhem and possession of a firearm by a convicted felon. The

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[1] All further undesignated statutory references are to the Penal Code.

information also alleged that all three crimes were committed for the benefit of a criminal street gang, and that appellant personally discharged a firearm, causing death or great bodily injury with respect to the murder and mayhem charges.

Appellant is purportedly a member of the Mob Piru gang, with the moniker "G-Mac." On April 16, 2011, Brittany Jackson (the mother of appellant's son), and Lawon Wagner[2] (appellant's cousin) gathered at appellant's residence in Compton for a house party. The group drank an excessive amount of alcohol. At approximately 2:00 a.m., the group decided to go to the Black Hole, an after-hours club in Hollywood. Appellant paid for the group's admission into the club. Appellant's friend Paul Benoit, also known as "Little Smiley," joined them at the club shortly thereafter.

Louis Gutter and Lorenzo Smith also were at the Black Hole that morning. Both Gutter and Smith were members of the Five-Seven Neighborhood Crip gang. Smith removed his shirt, revealing his tattoos. Smith "banged on" appellant, asking where he was from. Appellant indicated he was with "Mob." Smith responded, "Fuck slobs." Appellant then shot Smith multiple times using a nine-millimeter handgun. He was seen holding a chrome nine-millimeter gun shortly after the shooting.

Smith died as a result of multiple gunshot wounds. Additionally, one of the rounds struck Adrian White in the wrist and lodged into his penis. White underwent multiple surgeries, requiring skin grafting and resulting in lost bone. Doctors also circumcised White to remove the bullet fragment from his penis.

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[2] In light of the common surname with appellant, we refer to Lawon Wagner by his first name.

White will continue to suffer medical consequences of the shooting for the remainder of his life.

Video evidence depicted appellant commiting the shooting. Lawon told detectives that appellant admitted to the shooting after they left the club. Appellant also instructed Lawon and the rest of the group not to "tell on me." Further, appellant's witness, Charmaine Jelks, testified that appellant was the person depicted in the video surveillance footage wielding a firearm.

The jury ultimately found appellant guilty on all three charges, and found all corresponding enhancement allegations to be true. After the verdicts were rendered, the trial court granted the People's motion to vacate the felon in possession verdict after discovering appellant was no longer a convicted felon.[3]

The trial court sentenced appellant to a total of 89 years to life. The sentence consisted of 25 years to life for murder, four years for mayhem, 10 years to life for the gang enhancement, and two consecutive 25-year terms for each of the firearm enhancements. Appellant filed a timely notice of appeal.

DISCUSSION

I

Appellant contends he was afforded ineffective assistance of trial counsel when his original attorney, Charles Frisco, Esq., failed to discover that his prior felony burglary conviction had been reduced to a misdemeanor, and to object to its use for impeachment.

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[3] Appellant's prior felony burglary conviction had been reduced to a misdemeanor.

A

Prior to trial, the court addressed whether appellant preferred the jury be told that his alleged prior conviction, in relation to the felon in possession of a firearm charge, was for burglary rather than an unspecified felony. Appellant stipulated the jury be informed of the specific prior conviction. The court advised the jury that appellant "was convicted of a felony violation of Penal Code section 459, commercial burglary, on October 31st, 2007, in Orange County." The court further instructed that this evidence was admitted solely for the purpose of proving appellant had a prior felony conviction with respect to the felon in possession charge, and admonished the jurors not to consider it for any other purpose.

Appellant testified in his own defense. During direct testimony, his attorney asked if he had suffered a conviction for commercial burglary in 2007. Appellant replied in the affirmative. On recross, appellant confirmed the burglary conviction was a felony. The court instructed the jury that it may consider appellant's prior conviction in evaluating his credibility.

It was later discovered that appellant's burglary conviction had been reduced to a misdemeanor in 2009, pursuant to subdivision (b) of section 17.[4] Following the jury verdicts, a new attorney was appointed to represent appellant. Appellant moved for a new trial arguing Mr. Frisco was ineffective when he stipulated to appellant's prior felony conviction.

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[4] Subdivision (b) of section 17 provides that the trial court may reduce a felony conviction to a misdemeanor when, among other circumstances, the defendant was punished other than by imprisonment in the state prison or county jail under subdivision (h) of section 1170.

Appellant called Mr. Frisco to testify at a hearing on the new trial motion. Mr. Frisco testified he had reviewed appellant's rap sheet, but a section 969(b) packet was not available. He did not recall obtaining the Orange County Superior Court records, nor did he recall appellant informing him about the subsequent reduction. Appellant's rap sheet did not reflect any reduction, but it did show that "probation was modified."

Appellant testified he informed counsel that his burglary conviction had been reduced. According to appellant, Mr. Frisco told appellant he was lying.

The parties stipulated appellant's burglary conviction had been reduced to a misdemeanor. The trial court granted the prosecution's motion to vacate the felon in possession of a firearm verdict in light of the reduction.

Regarding the new trial motion, the court concluded there was no reasonable probability of a different result absent counsel's failure to discover the redesignation of appellant's prior conviction. The court found the evidence against appellant was overwhelming in light of the witnesses' testimony and the surveillance footage. Specifically, the court concluded, "I don't think that the evidence was close. I don't know who could listen to that and look at those videos and think maybe he wasn't the shooter. . . ."

B

A criminal defendant has a constitutional right to the assistance of counsel. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 15.) This right entitles criminal defendants to competent and effective representation. (*McMann v. Richardson*

(1970) 397 U.S. 759, 771, fn. 14; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

A defendant seeking relief on the basis of ineffective assistance must show that counsel failed to act in a manner expected of reasonably competent attorneys, and that it is reasonably probable he would have received a more favorable result absent counsel's failings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 691–692; *People v. Fosselman* (1983) 33 Cal.3d 572, 583–584.)

As a witness, the defendant may be impeached with prior conduct involving moral turpitude in a criminal case. (*People v. Castro* (1985) 38 Cal.3d 301, 306; *People v. Wheeler* (1992) 4 Cal.4th 284, 290–296.) Witness credibility is subject to impeachment by showing that he or she had been convicted of any felony. (Evid. Code, § 788.) A misdemeanor conviction that reflects on the witness's veracity is admissible, but "is a less forceful indicator of immoral character or dishonesty than is a felony." (*Wheeler*, *supra*, at p. 296.)

Impeachment evidence is subject to the trial court's exercise of discretion under Evidence Code section 352.[5] (*People v. Castro*, *supra*, 38 Cal.3d at p. 306.) "Beyond this, the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad." (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.)

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[5] "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 substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

The trial court should consider whether the prior conviction reflects on the witness's veracity, its remoteness, 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. (*People v. Clark* (2011) 52 Cal.4th 856, 931.) A reviewing court ordinarily will uphold the trial court's exercise of discretion to admit or exclude impeachment evidence. (*Id.* at p. 932.)

C

Mr. Frisco had a duty to carefully investigate all defenses of fact and of law that may be available to appellant. (*In re Hill* (2011) 198 Cal.App.4th 1008, 1016.) This duty extended to appellant's prior conviction. (*In re Brown* (2013) 218 Cal.App.4th 1216, 1223.)

Mr. Frisco failed to discover that appellant's prior felony conviction had been reduced to a misdemeanor before it was used to impeach his testimony. Competent representation requires that counsel discover that his client's prior felony conviction had been reduced to a misdemeanor before it is used to impeach his testimony; this is an omission rendering the representation below that which is expected of a competent attorney in that respect**.** Appellant allegedly advised Mr. Frisco of the reduction, and his rap sheet reflected a modification to the judgment. Mr. Frisco should have investigated the issue on these facts.

Nevertheless, appellant does not establish that a more favorable outcome was probable had the trial court excluded this prior burglary conviction. Appellant's *conduct* stemming from the burglary was admissible to impeach his credibility, although the fact of his misdemeanor conviction was not. (*People v. Wheeler*, *supra,* 4 Cal.4th at pp. 293–295.) The court specifically advised the jury that appellant was convicted of commercial

burglary, as opposed to residential burglary, which reduced the chance of the inflaming or misleading the jury.

Most significantly, the evidence of appellant's guilt was overwhelming. Both Gutter and Benoit identified appellant as the shooter. Surveillance footage depicted him holding a firearm in the stairwell of the club immediately after the shooting; no other person was shown to have a gun in that footage. Appellant told Lawon that he shot Smith. Appellant also instructed Lawon and others in the group not to "tell on me." Even appellant's own witness, Jelks, identified him as the person holding a gun in the surveillance footage. Appellant repeatedly told Benoit he "fucked up" after the shooting, which implies guilt.

We conclude it is not reasonably likely appellant would have received a more favorable result if counsel had discovered that the burglary had been reduced to a misdemeanor, and lodged the appropriate objection below. (See *People v. Williams* (1988) 44 Cal.3d 883, 937 [appellant must establish a more favorable outcome is a "demonstrable reality"].)

II

Appellant contends the trial court erred by admitting Lawon's statements to police because they were procured by threats that Lawon would spend the rest of his life in prison. Appellant also argues that counsel was ineffective by failing to raise a timely objection on this basis.

A

Lawon initially told the detectives that appellant "didn't really say nothing," and that he had never seen him with a gun. When Lawon said he did not see the shooter, the investigating officer told him, "we're trying to think about who needs to stay in jail or prison forever or who needs to go home." The officer

pointed out that the surveillance footage showed Lawon looking up at appellant after the shooting, while appellant was holding a firearm, and that Lawon "do[es] not need to be a part of this." Lawon then acknowledged that appellant was holding a gun immediately after the shooting, but denied seeing the gun beforehand. The officer reiterated, "the whole thing's on video, all right? So you just got to be honest with us."

Lawon later changed his story, admitting he had seen the same gun at appellant's house. The officer reiterated he was just asking for honest information, and said "we can be done here in ten minutes or we could be here for ten hours." The second officer then said "[o]r you can – [¶] be here for the rest of your life." The detective advised Lawon against lying because they already had talked to a lot of people. Lawon reiterated he was not lying. In response, the officers told Lawon that not telling them pertinent information is "the same as lying." Lawon then told the officers appellant stepped back and started shooting after Smith uttered the expletive.

After a jury was selected, appellant moved to suppress Lawon's statements to police, arguing they were procured by threats that he could spend the rest of his life in prison if he did not cooperate. The parties and the court agreed that appellant had standing to challenge the voluntariness of Lawon's statements.

Appellant asserted the statements were involuntary because Lawon had been awake all night and the interviewing officers threatened him by saying: "we can be here for 10 minutes or 10 hours. You know, you could be here for the rest of your life. If you're lying, you're stuck." Appellant maintains he was faced with two choices—giving the same account and going to jail for

the rest of his life, or telling the officers what they wanted to hear.

Appellant suggested it would be necessary to hear testimony from the investigating officer. The court responded as follows: "We're not going to have testimony. This motion is untimely. You've had this case for a long time. And I allowed this [motion] to be made. And I sent the jurors home when we were ready to start with the idea that we were going to do it this afternoon. And, you know, there was ample opportunity." After watching a video of the interview and reading the interview transcript, the court denied appellant's suppression motion, finding Lawon was not coerced by the investigating officers.

B

"Defendants have limited standing to challenge the trial testimony of a witness on the ground that an earlier out-of-court statement made by the witness was the product of police coercion." (*People v. Williams* (2010) 49 Cal.4th 405, 452.) A defendant may assert a violation of his or her right to due process of the law and a fair trial based upon the coercion of a third party witness. (*Id.* at pp. 452–453.)

A confession may be found to be involuntary if extracted by threats, obtained by certain promises, or secured by the exertion of improper influence. (*People v. McWhorter* (2009) 47 Cal.4th 318, 347.) "A claim that a witness's testimony is coerced [] cannot prevail simply on grounds that the testimony is the 'fruit' of some constitutional transgression against the witness. Instead, the defendant must demonstrate how such misconduct, if any, has directly impaired the free and voluntary nature of the anticipated testimony in the trial itself. [Citations.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 444.)

Courts consider the totality of circumstances in determining whether a confession was involuntary. (*People v. Scott* (2011) 52 Cal.4th 452, 480.) We accept the trial court's factual findings that are supported by substantial evidence, but we conduct an independent review as to the voluntariness of the confession. (*Ibid*.)

C

Lawon's handcuffs were removed before the interview and he was given a fresh cup of water. The officers also offered him chocolate candy. Lawon was advised he had the right to remain silent and to the presence of counsel.

Lawon deflected the officers' questions throughout the interview, displaying no distress or intimidation. The officers repeatedly assured him that they were simply trying to discover the truth. According to the trial court, the video does not depict any change in Lawon's demeanor after the officers stated he could spend the rest of his life in prison if he did not cooperate.

It was not improper for the officers to point out the realities of Lawon's situation—that he could face life in prison if he was an accessory to the shooting. (*People v. Andersen* (1980) 101 Cal.App.3d 563, 583 [police commenting on the realities of the interviewee's legal position is not coercive].) Indeed, "[t]he business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means." (*People v. Jones* (1998) 17 Cal.4th 279, 297.)

To this effect, investigating officers are free to urge the subject to tell the truth. (*People v. Carrington* (2009) 47 Cal.4th 145, 174 [authorities may suggest that it is worse for an interviewee to lie in the face of evidence to the contrary]; *People v. Hill* (1967) 66 Cal.2d 536, 549 [same]; *People v. Williams*,

supra, 49 Cal.4th at p. 444 ["absent improper threats or promises, law enforcement officers are permitted to urge that it would be better to tell the truth"].)

Reviewing the totality of the circumstances, we conclude that Lawon's statements were free from unlawful coercion. Thus, evidence stemming from Lawon's interview was properly admitted at trial.

D

Appellant contends counsel provided ineffective assistance by failing to bring a timely motion to suppress Lawon's interview statements. According to appellant, if counsel had made the suppression motion prior to trial, he could have called the investigating officer to testify and presented additional evidence of coercion.

Where a claim of ineffective assistance of counsel is premised on the failure to file a timely motion to suppress evidence, the defendant must show (1) a failure to provide objectively reasonable representation, (2) that the motion would have been meritorious, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence. (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 375; *People v. Mattson* (1990) 50 Cal.3d 826, 876.)

We conclude a timely motion to suppress Lawon's statements would have been futile. As discussed *ante*, the evidence against appellant was strong. After watching a video of the interview, the trial court observed Lawon was "not upset" or "rattled", and "his demeanor isn't any different than it had been immediately before" the investigators said he could serve life in prison if he did not cooperate. The interview transcript does not contradict the trial court's observations.

Appellant fails to demonstrate the suppression motion would have been meritorious if counsel brought it in a timely manner, and the investigator was permitted to testify about the interview. (See *People v. Mattson, supra*, 50 Cal.3d at p. 876.) Nor does appellant bear his burden of demonstrating he would have achieved a more favorable verdict absent counsel's purported error.

III

Appellant was sentenced to 89 years to life, including two consecutive 25 years to life terms for personally and intentionally discharging a firearm and proximately causing great bodily injury. (§ 12022.53, subds. (a)(1), (2) & (d).) The trial court had no discretion to strike the enhancement at that time. (Former § 12022.53, subd. (h).)

In 2017, the Legislature enacted Senate Bill No. 620, which amended section 12022.53 to provide: "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." (§ 12022.53, subd. (h).) The amendment was effective on January 1, 2018. (Cal. Const. Art. 4, § 8, subd. (c)(1).)

Appellant contends he is entitled to retroactive benefit of Senate Bill No. 620 under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*). According to *Estrada*, when the Legislature amends a statute to reduce criminal punishment, it is presumed the statute applies retroactively to all cases that are not yet final on appeal, unless there is a showing of legislative intent to the contrary. (*Id*. at p. 745.)

Appellant's judgment is not yet final because his appellate remedies have yet to be exhausted. (*People v. Superior Court*

(*Rodas*) (2017) 10 Cal.App.5th 1316, 1325.) Thus, remand is required "unless the record shows that the sentencing court *clearly indicated* that it would not . . . have exercised its discretion to strike the allegations." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896, emphasis added.)

The Attorney General concedes Senate Bill No. 620 is retroactive but asserts remand is unnecessary because the record demonstrates the trial court would not have exercised discretion to strike the firearm enhancements. In support, the Attorney General cites the court's refusal to order concurrent sentences on counts 1 and 2. Further, the court found appellant acted "very maliciously and intentionally" when he shot the victims.

The trial court indicated it had no discretion to sentence appellant to anything less than 25 years as to the firearm enhancements on both counts. The judge also stated this was the first case involving a heinous crime in which he considered sentencing the defendant to less than the statutory maximum.

The court was clearly open to the possibility of granting some form of sentencing leniency if authorized to do so. Accordingly, remand is appropriate in order to allow the trial court to exercise its newly enacted discretion under subdivision (h) of section 12022.53. We express no opinion as to how the court should exercise its discretion.

IV

Appellant contends he is entitled to one additional day of custody credits.

Defendants are entitled to credit against his or her term for all actual days of confinement prior to sentencing. (§ 2900.5, subd. (a); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Appellant was arrested on May 5, 2011, and was sentenced on

April 25, 2017. The court asked counsel to calculate appellant's custody credits. Counsel indicated appellant had 2,182 days of actual credit, and the court awarded credit in accordance with counsel's calculation. The Attorney General concedes this calculation was off by one day, as appellant was in custody for 2,183 days.

We accept the Attorney General's concession. Accordingly, the trial court shall issue an amended abstract of judgment crediting appellant for 2,183 days of actual custody credit.

DISPOSITION

The matter is remanded for the trial court to exercise its discretion under subdivision (h) of section 12022.53, and with instructions to issue an amended abstract of judgment reflecting a total of 2,183 days of actual pre-sentence custody credits. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.