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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. LEEROY MILLER, Defendant and Appellant.	2d Crim. No. B276572 (Super. Ct. No. YA088086) (Los Angeles County)

Leeroy Miller appeals after a jury convicted him of second degree murder (Pen. Code,[1] § 187, subd. (a)) and found true the allegation that in committing the offense he personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)) (hereafter § 12022.53(d)). In a bifurcated proceeding, the trial court found true allegations that appellant had suffered four prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Appellant was sentenced to 70 years to life in state prison. He contends (1) the court erred in denying

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

his *Batson*/*Wheeler*[2] motion; (2) his attorney provided ineffective assistance; and (3) the court violated his constitutional rights by denying his post-trial request to discharge his retained counsel and obtain appointed counsel. In a supplemental brief, appellant claims he is entitled to a remand to permit the trial court to exercise its discretion whether to strike his section 12022.53(b) enhancement in light of Senate Bill 620, which became effective on January 1, 2018. We affirm.

STATEMENT OF FACTS

Prosecution

On the morning of August 5, 2013, Kurt Jackson was in his first-floor apartment in Inglewood when he heard several gunshots. Matthew Kassel, the apartment complex's property manager, was in his office down the hall from Jackson and also heard the shots. Jackson opened his door, looked out into the hallway, and saw a man walking away from him while tucking a handgun into the back of his pants waistband. Jackson asked, "What's going on?" The man turned around and Jackson recognized him as appellant, who lived on the third floor of the complex.

Kassel opened the door to his office and saw appellant approaching the elevator. Kassel asked appellant if everything was all right, and appellant calmly responded, "Everything is fine." In the meantime, Jackson looked down the hallway in the other direction and saw someone lying on the floor. He yelled out for Kassel to call 911. While Kassel was on the phone with the 911 operator, he looked at the apartment complex's surveillance cameras and saw appellant running down the stairs and out the door into the parking lot.

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[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).)

Jackson walked down the hallway and recognized the person on the floor as his friend Nathaniel Dillon, who lived in an apartment down the hall from appellant. Dillon had been shot twice and was gurgling and gasping for air. He was dead when the paramedics arrived.

Appellant was apprehended and directed police detectives to the front yard of a nearby residence where he had discarded a handgun in a bush. It was subsequently determined that the weapon was used to discharge the four expended cartridge casings found at the scene of the shooting.

Alicia Cox also lived in the apartment complex and managed the building before Kassel was hired. Cox knew Dillon before he moved into the building because his mother lived there. When Cox managed the building, appellant once complained to her that Dillon had stolen his hubcaps. Cox knew that appellant and Dillon each owned a gold, older-model Mercedes Benz, but she was suspicious of appellant's claim. On another occasion, appellant complained that someone had entered his apartment and moved papers around on his table. At one point, appellant changed the lock to his apartment and did not give Cox a key.

Cox knew that Dillon lived with his girlfriend and believed he had earned a living by selling scrap metal. Prior to his death, she never heard about him being involved in drug sales or prostitution.

Defense

Appellant testified in his own defense. At the time of his testimony, he was 70 years old. He admitted shooting Dillon, but claimed he acted in self-defense.

Appellant first met Dillon the first or second day after appellant moved into the building. Appellant saw Dillon walking around appellant's car and introduced himself. Dillon replied,

"How are you doing? My name is Bubba. I've been to prison." Appellant noticed that Dillon's car was almost identical to his and saw that one of its turn signal lights was missing.

A couple of days later, appellant hit a fire hydrant while driving his car. He noticed that his tail light was broken, but a passerby noted that there was no glass on the ground. After appellant purchased a new tail light for his car, he noticed that the taillight on Dillon's car was no longer broken.

On another occasion, Dillon told appellant "this [apartment complex] is my place. You see that woman there? If you want her, . . . I'll tell [her] . . . give him what he wants." Dillon added, "You want anything, see me. This is my place."

Appellant had complained to Cox about Dillon and other young people living in the building, which was supposed to be an apartment complex for seniors. He had also complained about drug activity and prostitution he had observed on the premises. On one occasion, he saw a woman performing oral sex on a man in the community room. He complained to Cox but nothing was ever done about it.

Appellant was afraid of Dillon. About a week before the shooting, appellant was walking toward his apartment when Dillon approached him, handed him a plastic bag, and said, "Hey man, next time I see you, I want you to use this, or . . . be shooting or moving." After appellant opened his front door, he opened the bag and found a gun wrapped in a sock. He interpreted Dillon's comment to mean that he had better move out of the building or Dillon would be shooting him. From Dillon's demeanor, appellant also interpreted the statement as a "gangster move, shot caller move." Appellant believed that Dillon was a member of the Crenshaw Mafia gang and that Jackson was his cohort. Appellant also believed that Dillon had entered his

apartment when he was not there because things were moved around when he returned and Dillon had once described a suit and watches appellant owned that Dillon had never seen.

On the day of the shooting, appellant was in the apartment complex's laundry room when he saw Dillon walk by. Appellant had the gun Dillon had given him because he feared Dillon was going to shoot him the next time he saw him. When the two made eye contact, Dillon smiled and continued walking. Appellant pulled out the gun, pointed it at Dillon, and pulled the trigger. A bullet fell out of the gun but the weapon did not fire. Dillon just kept walking as if nothing had happened. Appellant believed that Dillon was "going to get his stuff, get his people" and come after appellant.

After appellant "fumbled with the gun" in the first-floor laundry room and walked out into the hallway, Dillon—who was still walking away—turned and looked at appellant over his left shoulder. Appellant started firing at Dillon and emptied all four bullets in the gun. Dillon started to run, then fell as he turned around and started back toward appellant.

Appellant got on the elevator with the intent to go to his apartment and wait for the police to arrive. Once he was upstairs, he changed his mind and took the back stairs out into the parking lot. He had planned to drive to the police department and turn himself in, then decided to walk there instead. He did not want the police to shoot him, so he put the gun in the bushes of a nearby residence and walked into the police station. He later directed the police to the location of the gun.

DISCUSSION

Batson/Wheeler Motion

Appellant, an African-American, brought a *Batson/Wheeler* motion challenging the prosecution's exercise of peremptory challenges against three African-American prospective jurors. The trial court ruled appellant had made out a prima facie case of discrimination on the basis of race, but denied appellant's motion after finding that the prosecutor's stated reasons for exercising the challenges were both genuine and race-neutral. Appellant contends the court erred. We disagree.

The federal and state constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on their race. (*Batson*, *supra*, 476 U.S. at p. 97; *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Claims that challenges have been so used trigger a three-step inquiry. "First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Citation.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612-613.)

"'"In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly

within a trial judge's province."" [Citations.]" (*People v. Riccardi* (2012) 54 Cal.4th 758, 787, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1196.) "Accordingly, because the trial court is 'well positioned' to ascertain the credibility of the prosecutor's explanations and a reviewing court only has transcripts at its disposal, on appeal "'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal" and will not be overturned unless clearly erroneous.' [Citations.]" (*Ibid.*)

Appellant brought a *Batson/Wheeler* motion after the prosecutor used three of her first six peremptory challenges on Prospective Jurors 2731, 5561, 8427, all of whom are African-American. The prosecutor offered that Prospective Juror 2731 had stated he had been robbed of jewelry at gunpoint yet had failed to report the crime to the police. Although the prospective juror claimed he had not reported the crime because he was not physically injured and only material items were taken, the prosecutor inferred that his failure to report the crime "shows a lack of faith in law enforcement." The prosecutor added that "[w]hile none of his answers were offensive, I'm not comfortable with leaving him on the jury when he was subject to an assault with a deadly weapon, a serious crime, and didn't report that incident to the police."

The prosecutor explained that Prospective Juror 5561, a registered nurse, was excused due to her limited knowledge about mental health as well as her statement that "I can't say I have a lot of confidence currently in law enforcement based on what's going on in the news." Although the prospective juror went on to state she was willing to judge the case fairly, the prosecutor

believed that her stated lack of trust in law enforcement would extend to the prosecution.

The prosecutor excused Prospective Juror 8427 based on her response to the following hypothetical question: "[L]et's say last week you're in your office . . . . Monday morning you're in there, and a coworker of yours comes in, and we'll call her Jennifer. . . . After Jennifer, your coworker Mark comes in. He starts complimenting Jennifer, tells her, 'Jennifer, you look so good today. Your dress is so beautiful. Awesome job. Great outfit.' Then Tuesday rolls around, and he starts laying it on a little more thick. 'Jennifer, your hair is so beautiful. You look so great today. I really love that outfit, really compliments your figure.' Wednesday rolls around, Thursday. Again, he's really every single day laying it on a little thicker, brings her flowers on Thursday. By the time you hit Friday, you're in the lunchroom, and Mark goes up to Jennifer, and you hear Mark say, 'Hey, Jennifer can we grab some dinner? I'm hungry. Do you want to have dinner with me?' You witness this go down. You haven't talked to Mark about it at all. . . . [W]hat do you think is really going on there?"

After two prospective jurors stated their impressions that "Mark" was romantically interested in "Jennifer" and wanted to date her, the prosecutor asked the other prospective jurors to raise their hand if they thought "something else is going on." Prospective Juror 8427 raised her and responded: "If I was witnessing that, for me that comes off a lot stalker-ish. I don't hear Jennifer's side. I don't hear her conversating [*sic*] or replying back, so for me, that's stalker-ish, so the perception for me if I was on the outside looking in, and I'm not knowing what's the other side of the conversation, I would believe he was stalking her." This response led the prosecutor to excuse the juror

because "her reaction . . . that this individual, Mark, was a stalker . . . seemed a bit of a jump from the . . . facts and not a reasonable interpretation of the hypothetical she was given."

The court found the prosecutor had stated legitimate race-neutral reasons for exercising the peremptory challenges and accordingly denied appellant's motion. The court's findings in this regard are not clearly erroneous. The court properly accepted the prosecutor's conclusion that Prospective Juror 2731's failure to report a serious and violent crime reflected a lack of trust in law enforcement. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1125 (*Gutierrez*) ["If the prosecutor sincerely believed [the prospective juror] would be skeptical of the People's evidence, this . . . alone could justify the peremptory challenge"].) Moreover, Prospective Juror 5561 expressly admitted her distrust of law enforcement and was thus properly excused for the same reason. Finally, Prospective Juror 8427's response to the hypothetical question regarding "Mark" and "Jennifer" was patently unreasonable and supported an inference that she either would not or could not competently evaluate the facts and evidence presented at trial.[3]

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[3] Appellant asserts that the prosecutor's proffered reason for excusing Prospective Juror 8427 was pretextual because another prospective juror who was ultimately seated (Prospective Juror 3725) "had the same reaction to the hypothetical." The record does not support this assertion. Prospective Juror 3725 did not raise his hand when the prosecutor asked if anyone believed "something else is going on" other than "Mark" having a romantic interest in "Jennifer." Although Prospective Juror 3725 later vaguely offered that he was "with the woman over there" and that he thought "Mark" was "being a little aggressive towards her, in denial about her reaction," he did so *after* the prosecutor had offered additional facts to the hypothetical.

In arguing to the contrary, appellant essentially argues that the prosecutor's explanations for excusing the prospective jurors had to rise to the level of a challenge for cause. That is not the law. (*Batson, supra*, 476 U.S. at p. 97; *Gutierrez*, *supra*, 28 Cal.4th at p. 1122.) A juror may be excused even on a hunch. (*Gutierrez, supra*, at p. 1122.) Even a trivial reason that is genuine and group-neutral will suffice. (*People v. Arias* (1996) 13 Cal.4th 92, 136.) "When the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) "[T]he trial court is not required to make specific or detailed comments for the record to justify every instance in which a prosecutor's race-neutral reason for exercising a peremptory challenge is being accepted by the court as genuine." (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) The prosecutor's reasons were both plausible and factually supported, so appellant's *Batson/Wheeler* motion was properly denied.

Ineffective Assistance of Counsel

Appellant contends his trial counsel provided ineffective assistance by failing to offer evidence to support his opening statement assertion that Dillon was "running [a] certain area of drugs within the building" and "was also a person that was running some area of prostitution within the building." To prevail upon this contention, appellant bears the burden of demonstrating both deficient performance and prejudice, i.e., that it is reasonably probable he would have achieved a more favorable result absent the deficiency. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

Appellant fails to meet his burden on the first prong. In response to questioning by his attorney, appellant testified Dillon had told him (1) that he had been to prison; (2) that the apartment complex "is my place" and "we run this;" and (3) that appellant should see him if he wanted anything, including a woman. Appellant also testified that he had seen prostitution and other illicit activity taking place in the building, that he believed Dillon was a gang member and the gang's shot-caller at the complex, and that appellant feared he might be killed by Dillon or his gang when he shot him. This evidence is consistent with the challenged portion of counsel's opening statement.

Appellant also argues that counsel "should have secured the requisite witnesses or at least ensured that [appellant] would provide the necessary testimony" to support appellant's assertions before representing to the jury that such evidence would be offered. Appellant merely speculates that third-party witnesses could have supported his testimony. Moreover, counsel may have believed that eliciting more detailed testimony from appellant on this issue would have undermined his credibility and thus undermined his theory of self-defense. Because the record does not foreclose this possibility, appellant's claim of ineffective assistance fails. (*People v. Bona* (2017) 15 Cal.App.5th 511, 517; see also *People v. Stanley* (2006) 39 Cal.4th 913, 955 ["Foregoing the presentation of testimony or evidence promised in an opening statement can be a reasonable tactical decision, depending on the circumstances of the case"].)

Post-trial Motion to Discharge Retained Counsel

Appellant contends the court abused its discretion in denying his motion to discharge his retained counsel, Michael Curls. We conclude otherwise.

A criminal defendant has a Sixth Amendment right to discharge his retained attorney at any time—including during postconviction proceedings—with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975 (*Ortiz*); *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428; *People v Munoz* (2006) 138 Cal.App.4th 860, 869 (*Munoz*).) An improper denial of this right compels automatic reversal. (*Ortiz*, *supra*, at p. 988.) A trial court has discretion, however, to deny the request if it would significantly prejudice the defendant or if it is untimely, i.e., if it would result in "'disruption of the orderly processes of justice.'" (*Id.* at p. 982.) When deciding whether to grant such a request, the court must balance the defendant's interest in new counsel against the disruption that would result from the substitution. (*People v. Turner* (1992) 7 Cal.App.4th 913, 919.) Appellant bears the burden of showing that the denial of his request was an abuse of discretion. (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.)

Appellant was convicted on March 15, 2016. At his request, the matter was subsequently continued until June 14, 2016, for a court trial on the strike priors and for sentencing. At the outset of the continued hearing, appellant stated "I refuse to go any further with Mr. Curls" and asked the court to discharge Curls as his counsel and appoint a different attorney to represent him. Appellant explained that he had been unhappy with Curls's performance during trial and that Curls's failure to object after the prosecutor purportedly misstated the evidence was "what broke the camel's back." The court denied the request to discharge Curls as untimely.

The prosecution then stated it was ready to proceed with the court trial that day, which was a Tuesday, and that its fingerprint expert was present and ready to testify. The court noted it was currently presiding over another jury trial and that

"I have a jury waiting for me now, unfortunately." After appellant declined to admit his priors, the court stated, "We're 0 of 5. So unless he's willing to waive time, I need to do it within [that] period."

Curls offered that appellant "may be willing to waive time" and suggested that doing so would give him time to find another attorney to represent him. The court asked appellant, "So do you want to do your trial on the priors at sentencing on Friday, or do you want time to try to hire your own attorney?" Appellant replied, "Let me try to hire my own attorney." After the court asked appellant how much time he thought he needed, the prosecutor interjected: "Before the court grants the defendant's request for a continuance, the victim's next of kin is here and would like to be heard, which is her right . . . ." At the court's prompting, the prosecutor directed him to Dillon's sister, Lindsey Dillon, who was sitting in the audience.

The court stated: "All right. . . . Here is what I'll do. . . . When I deny your request for appointed counsel, I should also be denying your request for further retained counsel because I find it's untimely." The court then continued the matter to Friday for a court trial on the priors and for sentencing. At the Friday hearing, the priors were found true and the matter proceeded for sentencing. Prior to sentencing appellant, the court allowed Lindsay Dillon to give a victim impact statement.

The court did not err in denying appellant's request to discharge Curls. Appellant's reason for seeking to discharge Curls arose during closing arguments, yet he waited three months—until the continued date set for his sentencing—to make his request. Because appellant waited until his sentencing to make his request, the court could reasonably infer that the timing of the request reflected appellant's intent to delay the

proceedings rather than a genuine concern about the adequacy of Curls' representation. (See *Ortiz*, *supra*, 51 Cal.3d at p. 987.) Moreover, new counsel would have had to obtain and review the record of a lengthy murder trial. "[D]elay and public expense will often be the primary reasons for denying motions to replace counsel post trial. The defendant must always be required to justify this additional expense to the satisfaction of the trial court, *and such calls will always be within its broad discretion*." (*Munoz*, *supra*, 138 Cal.App.4th at p. 868, italics added.)

In addition, by the time appellant made his request, the prosecution was prepared to proceed with the court trial on the prison priors and its fingerprint witness was ready to testify. Perhaps more importantly, Dillon's sister Lindsay was also present in court and ready to give a victim impact statement. Any further delay of the proceedings for an indefinite period of time would have unfairly delayed Lindsay's right to speak out on behalf of her murdered brother. Under the circumstances, the court did not abuse its broad discretion in denying appellant's request as untimely. (*Ortiz*, *supra*, 51 Cal.3d at p. 982; *Munoz*, *supra*, 138 Cal.App.4th at p. 868; *People v. Jeffers*, *supra*, 188 Cal.App.3d at p. 850.)

Senate Bill 620

After the briefs were filed, appellant filed a supplemental brief contending he is entitled to resentencing pursuant to Senate Bill 620, which the Governor signed on October 11, 2017. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike an enhancement for personally and intentionally

discharging a firearm as provided in section 12022.53(d).[4] Subdivision (h) of section 12022.53 now states that "[t]he 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."

The People concede that the new law applies retroactively to defendants, like appellant, whose judgments were not final as of January 1, 2018. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75-78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) The People claim, however, that a remand for resentencing is unnecessary here because the record establishes the trial court would not have exercised its discretion to strike appellants' enhancements. They rely on the principle that remand is not required in these circumstances if "the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894,

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[4] Section 12022.53(d) provides in relevant part that any person who personally and intentionally discharges a firearm in the commission of a murder and thereby proximately causes great bodily injury or death "shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

1896 [addressing whether remand was necessary pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497].)

We agree that the record effectively shows the trial court would not have exercised its discretion to strike appellant's section 12022.53(d) enhancement. In sentencing appellant, the court declined to exercise its discretion to strike any of his strike priors. Moreover, the court emphasized that the evidence showed appellant "shot Mr. Dillon in cold blood" and stated that "basically the sentence is dictated to the court, and the court agrees actually with that sentence." It is thus clear the court would not have exercised its discretion to strike the enhancement. (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) "Under the circumstances, no purpose would be served in remanding for reconsideration." (*Ibid.*)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Scott T. Millington, Judge
Superior Court County of Los Angeles

Peter Gold, 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, Senior Assistant Attorney General, Stephanie A. Miyoshi, and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.