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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. DAVID M. CONTRERAS, Defendant and Appellant.	B237675 (Los Angeles County Super. Ct. No. TA115285)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen Joseph Webster, Jr., Judge. Affirmed as modified.

Susan E. Nash, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

In an 11-count information filed by the Los Angeles District Attorney, defendant and appellant David M. Contreras was charged with the murder of Tesha Contreras (Tesha; Pen. Code, § 187, subd. (a)),[1] four counts of possession of a firearm by a felon with priors (§ 12021, subd. (a)(1)), and six counts of possession of an assault weapon (§ 12280, subd. (b)).[2] As to count 1, it was further alleged that appellant personally discharged and used a firearm. (§ 12022.53, subds. (b) & (c).) As to all counts, it was further alleged that appellant suffered prior convictions of a serious or violent felony (§§ 1170.12, subds. (a)-(d); 667, subds. (a)(1), (b)-(i), 667.5, subd. (b)). Appellant pleaded not guilty and denied the allegations.

Trial was by jury. The jury found appellant guilty of second degree murder and the other counts as charged, and found the firearm allegation to be true. During a bifurcated proceeding, the trial court found the prior strike allegations to be true.

Appellant was sentenced to a total term of 300 years to life. The trial court ordered him to pay a $200 victim restitution's fine (§ 1202.4, subd. (b)), a $30 court construction fee, a $40 court security fee (§ 1465.8, subd. (a)(1)), a $40 criminal conviction assessment (Gov. Code, § 70373), and imposed but stayed a $200 parole revocation fine (§ 1202.45). He was also ordered to pay a restitution award of $621,504.10 to Savannah Contreras (Savannah), appellant and Tesha's young daughter, and $77,472.60 to the State Victim Compensation Board (VCB). Appellant was awarded 385 days of custody credit.

Appellant timely filed a notice of appeal. On appeal, appellant argues: (1) The trial court erred in admitting an undated photograph of appellant holding a gun; (2) The trial court abused its discretion in denying appellant's motion to dismiss the prior strikes; (3) The case must be remanded for resentencing because the trial court mistakenly

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The information was later amended to change count 3 to a violation of section 12021, subdivision (a)(1). Count 11 was dismissed.

believed that it did not have the discretion to impose concurrent sentences on the possession counts; (4) Appellant's sentence constitutes cruel and unusual punishment; (5) The trial court's restitution award constitutes an abuse of discretion and violates appellant's right to due process; and (6) The trial court improperly sentenced appellant for possession of an assault weapon on count 3.

We agree with the parties that the trial court improperly sentenced appellant for possession of an assault weapon on count 3. We also find that the trial court erred by failing to impose additional mandatory assessments and fines. Therefore, we correct the sentence. Upon remand, we direct the trial court to modify the abstract of judgment to reflect appellant's conviction on count 3 for possession of a firearm (as opposed to an assault weapon) by a felon in violation of section 12021, subdivision (a)(1), and to reflect $300 in a court facilities assessment and $400 in court security fees. In all other respects, the judgment is affirmed.

FACTUAL BACKGROUND

Prosecution Evidence

The victim is shot; authorities arrive at the house

On November 12, 2010, at approximately 10:20 or 10:30 p.m., appellant called 9-1-1. He told the 9-1-1 operator that an "accident just happened," and repeatedly said that his wife had been shot. When the operator asked him who shot her, appellant replied, "This is an accident. Discharge of a firearm." Appellant denied that he shot his wife, and claimed that he did not know who shot her. He asked for paramedics to come to his house.

Deputy Sheriff Juanita Suarez arrived at appellant's house. Deputy Suarez used her patrol car's PA system to announce her presence to the occupants inside the house, and she requested that they come outside. When she received no response to her announcements, she approached a vehicle that was parked in the driveway. At that point, the front door opened and appellant stepped out of the house, where he stood for approximately one minute.

As appellant walked down a ramp leading to the front door, Deputy Suarez ordered him to show his hands. He walked down the ramp and said, "I thought she was a burglar. I was on the bed laying down and she startled me." Appellant also said, "I shot my wife. It was an accident. She's on the floor."

While Deputy Suarez was searching appellant, she noticed that his hands were bloody. She also noticed a "pungent odor" of an alcoholic beverage emanating from his breath and his person. During the search, appellant told Deputy Suare, "I was watching T.V. She went to the store. I'm worried. Please help her."

As Deputy Suarez escorted appellant to the patrol car, he said, "I was on my bed cleaning my gun. I only had one beer." Deputy Suarez described appellant's demeanor as "very monotone" and "very, very cool." She did not notice any blood on his clothes.

Deputy Suarez placed appellant inside the patrol car and returned to the house. She entered the house and saw Tesha inside a bedroom. The deputy saw a wound on Tesha's left arm near her breast. Tesha was on her knees and resting on the back of her heels. Her neck, hands, and arms were covered in blood. She looked at herself and slowly moved her hands and arms. The paramedics arrived, placed her on a stretcher, and escorted her out of the house.

Deputy Suarez saw a shotgun leaning against a wall in the bedroom. She also noticed that the television was off. The deputy is familiar with the type of equipment used to clean guns, and she did not find any gun cleaning equipment in the bedroom. She did not consider WD-40 as something that could be used to clean a gun, and she had never heard of it being used for that purpose.

Tesha is taken to the hospital

Dr. Diane Birnbaumer, an emergency room physician at Harbor UCLA Medical Center, treated Tesha when she arrived at the emergency room. Tesha suffered from two gunshot wounds: a wound to her armpit area and another large, gaping wound in her chest wall that was bleeding profusely. The wound to her armpit area was higher than her chest wound. Dr. Tina Nguyen, another emergency room physician, asked Tesha, "What happened?" Tesha then became unresponsive and stopped breathing.

Dr. Scott Bricker, a trauma surgeon, also treated Tesha at the hospital. He found a small lead shot from a shotgun in her body. He opined that the wound from her bicep was at a downward angle relative to her body, and that the wound appeared to have been inflicted at a close range. Dr. Bricker also found a piece of plastic shotgun wadding lodged in her spine. He believed that assuming that Tesha had been standing up, there was no possibility that the shooter was lower than her.

Later, Tesha was pronounced dead.

Authorities search appellant's house

At approximately 3:30 a.m. the next morning, Los Angeles County Sheriff Detective Boyd Zumwalt arrived at appellant's house. Inside the garage, he found the following items (among other things): a Volunteer Enterprises .45-caliber semiautomatic rifle, two SKS assault rifles; an Eagle Arms AR15 assault rifle; a nine-millimeter Cobray Mac 11 semiautomatic pistol; an Intertech nine-millimeter pistol; and an Intertech nine-millimeter TECDC 9. Inside the house, the following items were recovered: a Mini 14 with a 30-round magazine; a loaded Glock .45, which was inside the nightstand of the bedroom shared by appellant and Tesha; and leaning against the bedroom wall was a single-shot .410 shotgun. The shotgun's muzzle was pointed down and its breach was closed. The shotgun had three live rounds and contained an expended .410 shell. It also had "blood swipes" on it. In total, 34 guns were recovered from the house and garage. Detective Zumwalt did not notice any sort of gun cleaning material or anything related to gun cleaning material.

A phone, later determined to be the telephone that appellant used to call 9-1-1, was also recovered from the bedroom where Tesha was shot. Some of the text messages found on the phone referred to ammunition clips.

Autopsy

Dr. Daniel Augustine, a Los Angeles Department of Coroner Deputy Medical Examiner, performed Tesha's autopsy. He noted an entry wound located on Tesha's upper left arm. This wound was oval-shaped, and there was no searing or burning on the edges of that wound. A second wound was below the first wound, and the edges of that wound were tattered, torn, and irregular. Dr. Augustine opined that a shotgun was involved. He explained that a "satellite" wound consists of perforations to the skin caused by small pellets from a shotgun. Such a wound would result if the firing distance was approximately four to five feet. Dr. Augustine did not see any evidence of a satellite wound. Based on the appearance of the wound, Dr. Augustine determined that the shotgun was fired at Tesha from a distance of zero to two feet. He also determined that the course of the shot had a slight downward trajectory. He opined that the downward trajectory of the shot was consistent with the victim being on her knees and below the shooter. One photograph of Tesha's body depicted rods inserted into her body that indicated a downward trajectory of the projectile.

Dr. Augustine determined the cause of death to be a shotgun wound to the chest.

Testimony from a criminalist

Manuel Munoz, a Los Angeles County Sheriff Department criminalist, examined the Harrington Richards .410-bore shotgun used to kill Tesha. He determined that the trigger pull for the shotgun was four and half pounds. The shotgun was also equipped with a number of internal safeties that prevented it from firing unless a continuous pressure was applied to the trigger. The shotgun also required that the user manually cock the hammer rearward to fire the gun.

Mr. Munoz also explained that birdshot are small lead pellets used for shooting bird and clay targets. He testified that the farther the birdshot travels, the larger the "spread" will be. A shot that travels a short distance will result in a tight spread, and

longer distances will result in a more open spread pattern. The measurement of the spread was critical to determining the distance between the shotgun's muzzle and its target. Mr. Munoz determined that this distance was between one and four feet. He opined that the distance was closer to one foot based on, among other things, the tight diameter of the spread pattern, how the plastic wadding was embedded in Tesha's spine, and how the lead shot was lodged in Tesha's shoulder.

Testimony from Tesha's sister

Diane Castillo, Tesha's sister, testified that she spoke with appellant about some firearms that were located in the garage of his house. In 2009, appellant asked Ms. Castillo to store some boxes of weapons at her apartment; later appellant and Tesha brought the weapons to Ms. Castillo's apartment. When Ms. Castillo asked appellant where he got the guns, he replied that he got them in exchange for favors. She also stated that, approximately six or seven times, she saw appellant lying in bed with a gun next to him. She described the guns as "long guns," and similar to the one depicted in one of the People's exhibits.

Although she was aware that Tesha owned guns, she did not know whether Tesha liked them. Tesha practiced shooting at a firing range.

Testimony from Tesha's mother

Betty Gutierrez believed that Tesha did not really like guns. She was aware that Tesha had purchased a Mini 14 for her daughter Savannah, who was two-and-a-half years old at the time. Tesha and appellant did not get along prior to the day of the shooting, and Tesha was unhappy and under stress.

Prior Felony Stipulation

The parties stipulated that appellant had a prior felony conviction.

Defense Evidence

Anthony Heredia (appellant's former brother-in-law), Georgiana Contreras (appellant's sister), Joseph Flores (appellant's cousin), and Shelena Wilkerson (family friend) testified that appellant and Tesha had a good relationship. Mr. Heredia never saw appellant with any guns. But, he stated that Tesha was a gun collector, that she had taken

him out on more than one occasion to show him guns in the garage, and that she went to the firing range. Ms. Contreras and Ms. Wilkerson testified that they did not see appellant carrying any firearms during Savannah's birthday party.

Bonafacio Parra, Tesha's grandfather, who owned and lived in the house with appellant and Tesha, testified that on the night Tesha was shot, he awoke to the sound of a gunshot. He did not hear any yelling or screaming.

Yumi Kim, an employee of Southern California Sharpshooters, testified that Tesha purchased a Walther P22 on January 17, 2009.

Judith Trujillo, a custodian of records for Turners Outdoorsman, testified that Tesha purchased several firearms on separate dates.

Patricia Fant, a forensic firearms examiner, testified that WD-40 can be used for the purpose of lubricating a weapon. Although she had heard that some people used WD-40 to clean firearms, she would not use it for that purpose.

Robert Lio, a fingerprint expert, testified that no fingerprints were found on the guns that were examined.

Rebuttal Evidence

On rebuttal, Ms. Gutierrez testified that she sent a photograph to the prosecutor at 7:00 p.m. the night before. The photograph is undated and Ms. Gutierrez did not know who took it. It shows appellant carrying a gun inside the bedroom where Tesha was shot.

Ms. Gutierrez recognized appellant as the person depicted in the photograph. She knew that the photograph was taken in the bedroom of appellant's house. Although the nightstand depicted in the photograph was in a different location than on the night of November 12, 2010, she was certain that the room was the one in which appellant and Tesha lived.

DISCUSSION

I. *The Challenged Photograph was Properly Admitted*

Appellant argues that his convictions must be reversed because during the People's rebuttal case, the trial court admitted into evidence an undated photograph of appellant carrying a gun inside the bedroom where Tesha was shot. Specifically, he

claims that the trial court abused its discretion by admitting the photograph without a proper foundation. He also asserts that even if the photograph was admissible, it should have been excluded under Evidence Code section 352 because the prejudicial effect of the photograph outweighed its probative value. Finally, he suggests that the prosecutor committed misconduct during closing argument.

A. Proceedings below

Following the completion of the defense case, defense counsel objected to the People's request to call Ms. Gutierrez as a rebuttal witness. Defense counsel argued: "During portions of the testimony yesterday Ms. Gutierrez was in the gallery while testimony was being heard [during the defense case]. I would argue that that disqualifies her from being able to testify on rebuttal." The prosecutor disagreed and argued that even assuming Ms. Gutierrez was in the gallery, her rebuttal testimony would be limited to a photograph. Defense counsel argued that Ms. Gutierrez's presence in the gallery while testimony was being heard "taint[ed]" her testimony and caused her to become a "biased witness." Defense counsel also argued that his "second objection" was based on the "delayed discovery" of the photograph. The prosecutor responded that it was not late discovery because, among other things, the photograph was not in possession of the People until the previous night.

After hearing argument, the trial court allowed Ms. Gutierrez to testify as a rebuttal witness. It explained: "The . . . important issue is that this was [a] rebuttal [witness] against evidence, against what [the defense witnesses] testified to yesterday. That's what's important. It has nothing to do with [Mr.] Munoz and this doctor. It's [the defense witnesses who] said [appellant] never touched guns. That's what's important. [¶] . . . [¶] And I might also indicate, she was not in court yesterday to hear any of this testimony."

Ms. Gutierrez then testified about the photograph.

During the People's closing argument, the prosecutor directed the jury's attention to the photograph, arguing: "And then, of course[,] we also know [that appellant was in possession of the guns] because [of] the picture of [appellant] with the gun. This is a

picture that was—that confirms Ms. Castillo's statement that she has indeed seen [appellant] with a gun, even though he's not supposed to have a gun. [¶] And what's interesting about that picture, is if you look at that picture, he's actually holding a Glock in that picture. You will have that evidence. You'll have that in evidence. And the reason why you can tell it's a Glock, is because [of] the shape, the square shape and the round body. And when you look at that picture, you can clearly tell it's a Glock. [¶] Well, guess what, this Glock, count 2, this was found in his bedroom in that sock drawer, the lower sock drawer. So that's another reason why we know that he was possessing firearms, even though he obviously is not supposed to because of his felony conviction."

Later, defense counsel objected to the People's request to admit the photograph into evidence. In particular, defense counsel asserted that the photograph was not authentic, that there was no evidence as to when it was taken or by whom, that the photograph was on printer paper rather than photographic paper, and that it appeared to have been "photo shopped." The trial court overruled the objection, stating: "[T]here's . . . nothing that suggests that this is altered or that there's any particular reason why it shouldn't be admissible. She indicated what it is. You can argue whatever you want to argue. But it seems to the court that based upon what the court received in evidence, there's no real basis that it shouldn't be admitted. Goes more to weight than admissibility."

B. Appellant fails to show that the photograph was admitted without a proper foundation

"Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401, subd. (a); see also *People v. Beckley* (2010) 185 Cal.App.4th 509, 514.) A "[w]riting" includes a photograph. (Evid. Code, § 250.) "The admissibility of authenticated photographs of places, persons, or things relevant to an issue is well established." (2 Witkin, Cal. Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence, § 14. p. 24.) "To authenticate a photograph, a foundation must be laid by showing that the picture is a faithful representation of the objects or persons depicted. The showing must be made by a competent witness who can testify to personal

knowledge of the correctness of the representation. But it is not essential that the photographer be produced; any witness with that personal knowledge may lay the foundation." (*Id*. at § 16, p. 27.) A photograph may be authenticated by the testimony of any person who has personal knowledge of what the photograph represents. (1 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) Authentication and Proof of Writings, § 30.28, p. 669.) "The essential element is that it be shown in some way that the picture does correctly depict what it purports to show, in other words that it be verified or authenticated as a genuine picture of what it purports to depict." (*People v. Doggett* (1948) 83 Cal.App.2d 405, 409.)

A trial court's ruling on the substantiality of foundational evidence is reviewed for abuse of discretion. (*Alvarado v. Anderson* (1959) 175 Cal.App.2d 166, 178.)

Here, there was sufficient foundation to admit the challenged photograph. Ms. Gutierrez testified that she was the one who sent the photograph to the prosecutor the prior evening. She recognized appellant as the person depicted in the photograph. She knew that the photograph was taken in the bedroom in the home where appellant and Tesha lived.

Furthermore, Detective Zumwalt testified that a Glock .45-caliber firearm, loaded with live rounds, was found in a nightstand in the bedroom shared by appellant and Tesha. The challenged photograph apparently depicted not only appellant carrying the same Glock, but also the same nightstand where the Glock was found.

Finally, the jury viewed numerous photographs of the home's interior, including the interior of the bedroom where Tesha was killed. To the extent that the challenged photograph varied in some manner from other photographs of the crime scene, the jury viewed all the photographs at trial and was able to compare them to determine whether they were taken at the same time and place. (*People v. Mayfield* (1997) 14 Cal.4th 668, 747 [rejecting claim that the prosecution failed to authenticate a videotape depicting the crime scene because, inter alia, the jury could compare the videotape to photographs taken within hours or a few days after the crime].)

In urging reversal, appellant relies heavily upon the fact that the photograph was undated. But, appellant does not direct us to any legal authority requiring that a photograph be dated in order for it to be authenticated. The weight to give Ms. Gutierrez's testimony and the timing of the photograph were matters for the jury to decide. (*People v. Lindsay* (1964) 227 Cal.App.2d 482, 501.)

C. Appellant fails to show that the photograph should have been excluded under Evidence Code section 352

Appellant argues alternatively that the photograph should have been excluded because its prejudicial effect outweighed its probative value. (Evid. Code, § 352.) As the People correctly point out, appellant forfeited this argument by not raising it in the trial court. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) While appellant did identify other objections, and characterized his challenge to the prosecution's recalling of Ms. Gutierrez and the introduction of the photograph as his "biggest objection of the trial," he never asserted an objection under Evidence Code section 352. "[T]o the extent [appellant] asserts a different theory for exclusion than he asserted at trial, that assertion is not cognizable [on appeal]." (*People v. Partida* (2005) 37 Cal.4th 428, 438.)

Even if this argument had not been forfeited, it is still meritless.

"'The rules pertaining to the admissibility of photographic evidence are well-settled. Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence. [Citations.]' [Citation.]" (*People v. Heard* (2003) 31 Cal.4th 946, 972–973.)

The trial court has discretion to exclude relevant evidence under Evidence Code section 352 if its probative value is outweighed by a danger of undue prejudice, is merely cumulative to other evidence, or will consume an undue amount of time. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281.) Likewise, the admission of rebuttal evidence is a matter for the sound discretion of the trial court. (*People v. Kelly* (1990) 51 Cal.3d 931, 965.)

Here, Mr. Heredia testified that he never saw appellant with any guns. Similarly, Ms. Contreras and Ms. Wilkerson testified that they did not see appellant with a firearm during Savannah's birthday party. This evidence raised the inference that appellant did not possess firearms and supported the defense theory that the guns actually belonged to Tesha. To rebut that evidence, the prosecutor offered the challenged photograph into evidence—to present evidence that appellant did possess firearms, as charged in counts 2 through 10. Thus, there was no abuse of discretion.

Moreover, the photograph was relevant to show that appellant had access to guns and, in particular, the Glock .45-caliber firearm that was the basis for count 2. The gun depicted in the photograph was similar to the Glock that was found in the nightstand of the bedroom shared by appellant and Tesha. Even if the Glock depicted in the photograph was not the same as the Glock that served as the basis for count 2, evidence of weapons or ammunition other than that used in the crime can be probative. (See *People v. Neely* (1993) 6 Cal.4th 877, 896.)

Finally, the probative value of the photograph was not outweighed by a danger of undue prejudice. It was not unduly inflammatory or likely to engender an emotional response by the jury (*People v. Branch, supra*, 91 Cal.App.4th at p. 286) because the jury was already well-aware that appellant handled and was familiar with firearms. Indeed, appellant's defense to the murder charge centered on the argument that he was cleaning his shotgun with WD-40 when he accidentally shot Tesha.

D. Any error was harmless

Under Evidence Code section 353 and section 13 of article VI of the California Constitution, a judgment shall not be set aside for the erroneous admission of evidence

unless the error resulted in a miscarriage of justice. (*People v. Breverman* (1998) 19 Cal.4th 142, 172–173.) Under the miscarriage of justice standard, a defendant is not entitled to reversal unless but for the complained of error, there is a reasonable probability that the defendant would have received a better result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Any error was harmless under this standard. The inflammatory effect that the challenged evidence may have had on the jury was completely overshadowed by, among other things, the detailed evidence of the senseless and execution-style shooting of Tesha. Overwhelming evidence established that Tesha was below appellant and close to him when she was shot. Dr. Bricker, the trauma surgeon who treated Tesha at the hospital, opined that the wound from her bicep was at a downward angle relative to her body and that the wound appeared to have been inflicted at close range. He also opined that, assuming the victim had been standing up, there was no possibility that the shooter was lower than her. Similarly, Dr. Augustine, who performed Tesha's autopsy, determined that the shotgun was fired at Tesha from a distance of zero to two feet. Dr. Augustine also determined that the course of the shot had a slight downward trajectory. He opined that the downward trajectory of the shot was consistent with the victim being on her knees and below the shooter. Mr. Munoz, the criminalist who examined the shotgun used to kill Tesha, opined that the distance between appellant and Tesha at the time she was shot was closer to one foot based, among other things, on the tight diameter of the spread pattern, how the plastic wadding was embedded in Tesha's spine, and how the lead shot was lodged in Tesha's shoulder. Finally, it was undisputed that appellant lied during the 9-1-1 call by denying that he shot her, and the evidence was highly inconsistent with his claim that he was cleaning his gun when the shooting occurred. In sum, there is no reasonable likelihood that appellant would have received a better result if the challenged evidence had been excluded. Thus, any alleged error was harmless (*People v. Watson*, *supra*, 46 Cal.2d at p. 836), and any alleged federal constitutional error was harmless beyond a reasonable doubt (*Chapman v. California* (1967) 386 U.S. 18, 24).

E. No prosecutorial misconduct

Appellant argues that the prosecutor committed misconduct during closing argument.

Preliminarily, we note that appellant forfeited this argument on appeal by failing to object below. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Samayoa* (1997) 15 Cal.4th 795, 814.) Appellant also neglected to ask for an admonition from the trial court that would have cured any alleged misconduct. Our analysis could stop here. (*People v. Green* (1980) 27 Cal.3d 1, 35.)

Regardless, the appellate record does not support any contention that the prosecutor's alleged misconduct violated appellant's state and federal constitutional rights to due process and a fair trial. "[T]he prosecutor has a wide-ranging right to discuss the case in closing argument." (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) "A prosecutor's conduct violates the [Constitution] when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) "Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Ibid*.) In assessing the prosecutor's remarks, we view them in the context of the argument as a whole. (*People v. Lucas* (1995) 12 Cal.4th 415, 475.)

Here, the prosecutor's remarks about the gun depicted in the photograph were properly based on the evidence. During trial, Detective Zumwalt testified that a Glock .45-caliber firearm, loaded with live rounds, was found in a nightstand in the bedroom shared by appellant and Tesha. It was not misconduct for the prosecutor to argue that the challenged photograph depicted not only appellant carrying the same Glock, but also the same nightstand where the Glock was found.

Even if the prosecutor's remarks were improper, when the prosecutor's argument is viewed in context, we readily conclude that the challenged remarks were not prejudicial. (*People v. Haskett* (1982) 30 Cal.3d 841, 866 [prosecutorial misconduct will

lead to reversal only when it is "'reasonably probable that a result more favorable to the defendant would have occurred'" in the absence of the improper conduct].) The prosecutor's closing argument spanned 34 pages in the reporter's transcript. The challenged remarks consist of, at most, five sentences. Moreover, the jury was instructed not to "let bias, sympathy, prejudice, or public opinion influence [its] decision." We presume that the jury followed the trial court's instruction. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.) And, given the overwhelming evidence of appellant's guilt, any reasonable jury would have reached the same verdict in the absence of the allegedly improper remarks. (*People v. Hines* (1997) 15 Cal.4th 997, 1036–1038.)

II. *The Trial Court did not Abuse its Discretion in Refusing to Dismiss Appellant's Prior Strike*

Appellant argues that the trial court's denial of his *Romero*[3] motion was an abuse of discretion. In a related argument, he contends that the trial court's failure to dismiss at least one of his prior strikes violated his right to due process.

A. Relevant facts

In his written *Romero* motion, appellant argued that his prior strikes[4] should be dismissed pursuant to section 1385. He raised many of the same arguments at the sentencing hearing. The trial court denied appellant's motion, reasoning: "It just seems to the court that [appellant] really has just not led a crime-free life. He's just [led] a life that has just continued to escalate from one crime to the next culminating in this tragic killing of his wife. [¶] And so it seems to the court—I looked at this like basically tried to evaluate it top, bottom and sideways and everything in the middle to try and come up with what I believe would be fair to both the People of the State of California as well as to [appellant], it just seems that it's somewhat—how should I put it—rather difficult

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3 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

4 Appellant's two strikes are for displaying a firearm (§ 417.3) and for possession of a firearm by a felon for a gang-related purpose (§§ 12021, subd. (a)(1); 186.22, subd. (b)).

because of the nature of the crime, because of his priors, and because of basically the complete and total circumstance of this particular case."

B. Discussion

Under the Three Strikes law, a trial court may use section 1385 to strike a prior strike in "furtherance of justice." (*Romero*, *supra*, 13 Cal.4th at p. 504.) The "'furtherance of justice' requires consideration both of the constitutional rights of the defendant and *the interests of society*." (*Id*. at p. 530.) The interests of society, as set forth in California Rules of court, rule 4.410, include protecting society, punishing appellant, and deterring appellant and others from committing future offenses. (See also *People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review a trial court's refusal to dismiss any prior convictions for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376, 378.)

Here, the trial court did not abuse its discretion in denying appellant's *Romero* motion. In so ruling, the trial court noted appellant's lengthy criminal history. Appellant's overall record and his recidivism support the trial court's order. (See, e.g., *People v. Strong* (2001) 87 Cal.App.4th 328, 338; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.)

Citing *People v. Benson* (1998) 18 Cal.4th 24, 36 (*Benson*) and *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1215 (*Burgos*), appellant contends that the trial court based its discretion in failing to dismiss one of the strikes because the two strikes were so closely connected as to have risen from a single act. We are not convinced.

In *Benson*, *supra*, 18 Cal.4th 24, the Supreme Court held that when a defendant has previously suffered two qualifying strike convictions, one of which was stayed pursuant to section 654, both convictions are properly treated as strikes for future sentencing purposes. (*Benson*, at pp. 26–27.) The court explained: "[A] trial court retains discretion in such cases to strike one or more prior felony convictions under section 1385 if the trial court properly concludes that the interests of justice support such action." (*Id*. at p. 36.) The court also noted that "[b]ecause the proper exercise of a trial court's discretion under section 1385 necessarily relates to the circumstances of a

particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Benson*, at p. 36, fn. 8.)

In *Burgos*, the appellate court found the trial court had abused its discretion in declining to strike one of defendant's prior strike convictions for robbery and carjacking. (*Burgos*, *supra*, 117 Cal.App.4th at p. 1216.) The *Burgos* court read the *Benson* footnote to "strongly indicate[] that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos*, at p. 1215.) The court emphasized, however, "not only did the two prior convictions arise from the same act, but, unlike perhaps any other two crimes, there exists an express statutory preclusion on sentencing for both offenses." (*Id*. at p. 1216 [citing § 215, subd. (c)].)

Appellate decisions since *Burgos* have analyzed whether it categorically held one of two strikes arising from a single act must be dismissed or whether that is simply one factor the trial court should consider in exercising its discretion. (See, e.g., *People v. Scott* (2009) 179 Cal.App.4th 920, 931 (*Scott*).) While finding *Burgos* itself not entirely clear on the point, these decisions have rejected the proposition that a trial court lacks discretion under similar circumstances. In *Scott*, for example, the court held that "the 'same act' circumstances posed by robbery and carjacking cases provide a factor for a trial court to consider, but do not mandate striking a strike." (*Ibid*.) This issue is now pending in the Supreme Court. (*People v. Vargas* (2012) 206 Cal.App.4th 971, review granted Sept. 12, 2012, S203744.)

However the Supreme Court resolves the question whether a trial court must dismiss one of two strike convictions for carjacking and robbery, we conclude that, in light of appellant's criminal history, the trial court did not abuse its discretion in denying

appellant's *Romero* motion. (*Benson*, *supra*, 18 Cal.4th 24; *People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

III. *The trial court properly imposed consecutive sentences for counts 2 through 10*

Appellant argues that this case must be remanded for resentencing because the trial court mistakenly believed that it did not have the discretion to impose concurrent sentences on the possession counts.

By failing to raise this objection below, appellant forfeited it on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

Even if appellant did not forfeit this argument, it still lacks merit. Appellant was sentenced pursuant to the Three Strikes Law. (§ 667, subds. (b)-(i).) The Three Strikes law allows the trial court to impose concurrent, rather than consecutive, sentences for crimes committed "on the same occasion." (§§ 667, subds. (c)(6) & (c)(7), 1170.12, subds. (a)(6) & (a)(7); *People v. Lawrence* (2000) 24 Cal.4th 219, 222–223.)

There is nothing in the appellate record that indicates that the trial court did not understand its discretion or that it believed consecutive sentences were mandatory for all counts. (Evid. Code, § 664; *People v. Fuhrman* (1997) 16 Cal.4th 930, 944; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 994–995.) To the contrary, in sentencing appellant to consecutive sentences, the trial court cited to the California Rules of Court for imposing consecutive rather than concurrent sentences, as required by section 667, subdivision (c)(6). We therefore conclude that resentencing is not required.

IV. *Appellant's sentence does not constitute cruel and unusual punishment*

Appellant argues that his sentence violates the prohibitions against cruel and unusual punishment.

Cruel and unusual punishment is prohibited by the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution. "'Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 568–569.) "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed

facts must be viewed in the light most favorable to the judgment. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.)

Appellant's sentence is not disproportionate to the crimes committed. As set forth above, appellant used a shotgun to commit a brutal execution-style murder of his wife. Furthermore, despite being a felon, appellant was in possession of no fewer than four firearms and six assault rifles that were located within his home or garage. It follows that the third-strike sentence is not grossly disproportionate to his crimes. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 77; *Ewing v. California* (2003) 538 U.S. 11, 29–30.)

We reach the same conclusion under the California Constitution. Cruel or unusual punishment occurs under the California Constitution only when the punishment is so disproportionate "that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

In order to determine the proportionality of a given punishment, we apply the three-pronged test set forth in *In re Lynch*: First, we examine the nature of the offense and offender with particular regard to the degree of danger he presents to society. Second, we compare the challenged punishment with punishments for more serious crimes in the same jurisdiction. Third, we compare the challenged punishment with punishments for the same offense in other jurisdictions. (*In re Lynch*, *supra*, 8 Cal.3d at pp. 425–427.)

Appellant unquestionably presents a danger to public safety. His prior criminal record and the instant offenses warrant a significant period of incarceration. And, his sentence, as a recidivist, is not disproportionate to other sentences for recidivists, both in and out of this jurisdiction.[5] (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826–827.)

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[5] In his appellate briefs, appellant did not even attempt to compare his sentence to other offenses or with other punishments. This constitutes "a concession that his sentence withstands a constitutional challenge on either basis. [Citation.]" (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.)

V. *The restitution award is affirmed*

Appellant contends that the trial court's restitution award constituted an abuse of discretion and violated his right to due process. Specifically, he claims that the calculation of lost earnings was made without an adequate factual basis. He also asserts that even assuming the restitution award was supported by a factual basis, the trial court improperly equated "loss of economic support" with the amount of "lost future earnings." Finally, he argues that the restitution hearing did not meet the notice and hearing requirements of due process.

A. Relevant facts

During appellant's sentencing hearing on December 1, 2011, the prosecutor asked the trial court that the People's "restitution packet" be submitted into the record. Defense counsel requested a date for a restitution hearing, and a date was set. Defense counsel stated that he did receive documentation regarding restitution and asked that the People provide him with any additional documentation as soon as possible. The following colloquy then occurred:

"[THE PROSECUTOR]: I should also inform counsel that that restitution amount will probably increase again, and the statutory mandatory—the maximum statutory claim cap is $70,000, so it may go up again. [¶] This basically has to do with the benefits received by the daughter that [appellant] is leaving behind.

"[THE COURT]: So this is a continuing amount of benefit that she receives; is that what you're saying?

"[THE PROSECUTOR]: Yeah, there is a cap of $70,000. Right how $56,912 are used. The available credit now is $13,087. And so I'm just informing both court and counsel that that amount will probably increase, if I'm correct. Yes, I'm correct."

The parties then agreed to litigate the issue at a future restitution hearing.

Approximately five months later, on May 11, 2012, the restitution hearing was held. The trial court began the hearing by stating that it received a document from the People requesting restitution from the VCB. The trial court asked defense counsel whether he had had the opportunity to review that document. Defense counsel replied:

"I did receive this document this morning. I've had a chance to peruse it. It's only a three-page document."

The trial court then invited comments from counsel. Defense counsel argued: "If the court is inclined to impose this restitution amount . . . I think this is just like grabbing a number out of thin air and just imposing it for punitive purposes solely. I would object to imposition of that." Defense counsel stated that although he understood the funeral expense, he did not understand the other sums. He also objected based on "notice in regard to the $621,504.10." The trial court granted the prosecutor's request to have Krystyna Dailey testify at the hearing.

Ms. Dailey, a restitution specialist with the district attorney's office, testified that she prepared the three-page request for restitution and provided a copy to defense counsel and the court. A restitution amount of $77,472.60, plus 10 percent interest, was requested for the VCB. An additional restitution amount of $621,504.10, plus 10 percent interest, was requested for Savannah. Ms. Dailey explained that the latter amount was based on the VCB's calculation that used Tesha's wages as indicated on her 2009 tax return. Tesha's earnings of $58,750.64 were reduced by $10,164 (social security), which equals $48,586.64. That amount was multiplied by the number of years until Savannah turned 18 years old, which equals $621,504.10.

On cross-examination, Ms. Dailey testified that none of the numbers listed in the restitution packet was prepared by her. Rather, the "verification unit" is responsible for verifying all the losses incurred by the victim by calling the mortuary, obtaining employment verification, and determining the calculation of the support loss. Ms. Dailey testified that that was done in this case.

Defense counsel indicated that he would not be calling any witnesses at the hearing.

The trial court then heard argument. Defense counsel argued that the request for restitution should be denied because the People did not call any witnesses who actually "prepared the numbers."

Ultimately, the trial court granted the restitution request in its entirety, stating: "[B]oth sides have had an opportunity to call witnesses if, in fact, they wanted to call witnesses. The People called one, defense didn't call any. We put this matter over specifically for this hearing, giv[ing] both sides an opportunity to subpoena witnesses if you felt—each side felt that was material and necessary. [¶] The court has read and considered these documents. The court does, first of all, believe with respect to the first amount of money that [$]77,472.60, that seems to be realistic. [¶] The [$]70,000 has to do with support loss. Funeral expenses of $7,472.60 is really pretty much in the low end these days, unless the decedent is cremated. That seems to be a pretty standard amount, even on the low end. And it seems to be that's the calculations with respect to her loss of earnings for the next—until she's an adult. And the $621,504 figure seems to be somewhat calculated by experts. That's their job to do. [¶] The court is going to make a finding that the Victim's Compensation Board—that the restitution be made to the Victim Compensation Board in the sum of $77,472.60 plus ten percent interest from the date of sentencing, which I believe in this case was . . . December 1st, 2011. As well as the amount of $621,504.10 plus interest of ten percent from the date of sentencing."

B. The restitution amount was supported by an adequate factual basis

Restitution orders are reviewed for abuse of discretion. (*People v. Giordano* (2007) 42 Cal.4th 644, 663 (*Giordano*).) "Under this standard, while a trial court has broad discretion to choose a method for calculating the amount of restitution, it must employ a method that is rationally designed to determine the surviving victim's economic loss. To facilitate appellate review of the trial court's restitution order, the trial court must take care to make a record of the restitution hearing, analyze the evidence presented, and make a clear statement of the calculation method used and how that method justifies the amount ordered." (*Id*. at pp. 663–664.)

A restitution claimant bears the burden of establishing "an adequate factual basis for the claim." (*Giordano*, *supra*, 42 Cal.4th at p. 664.) "Once the victim has made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate

that the amount of loss is other than that claimed by the victim." (*People v. Prosser* (2007) 157 Cal.App.4th 682, 691.)

In support of his claim that the restitution amount was not supported by an adequate factual basis, appellant argues that the documents submitted at the hearing did not prove that Tesha ever earned over $50,000 per year, no tax returns were submitted, no employer was called to testify, and it was not possible to identify Tesha's employer from the VCB's documents. But, appellant overlooks the fact that section 1202.4 "does not, by its terms, require any particular kind of proof." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.) The VCB documents sufficiently established the victim's economic losses. (*People v. Cain* (2000) 82 Cal.App.4th 81, 87 [statements of claims from VCB are inherently reliable].) And, Ms. Dailey's testimony constituted a factual basis for the requested restitution amounts. (*People v. Prosser*, *supra*, 157 Cal.App.4th at pp. 690–691.)

C. Appellant fails to show that the trial court improperly equated loss of economic support with the amount of lost future earnings

Relying upon *Giordano*, *supra*, 42 Cal.4th 644, appellant argues that the trial court improperly equated "loss of economic support" with the amount of "lost future earnings." Specifically, he claims that the $621,504.10 awarded to Savannah for loss of economic support was miscalculated because it simply represented the wages that Tesha would have earned but for her death, rather than the portion of her income that she would have contributed to Savannah's support.

Appellant's argument fails for at least two reasons. First, as set forth above, once the victim made a prima facie showing of economic loss, the burden shifted to appellant to disprove the amount of loss claimed. (*People v. Taylor* (2011) 197 Cal.App.4th 757, 761.) The VCB's documents, coupled with Ms. Dailey's testimony and the lack of any evidence that Tesha's income would have been used for any purpose other than to support Savannah (*Giordano*, *supra*, 42 Cal.4th at p. 666) proved the economic loss. The burden then shifted to appellant to disprove that loss. He has not done so.

Second, even if the trial court's methodology in setting the restitution amount was imprecise, appellant was still required to establish that using a different method would have resulted in a lesser amount of restitution than that ordered by the trial court. (*Giordano, supra*, 42 Cal.4th at p. 666.) Again, he did not do so.

D. The restitution hearing complied with due process

Appellant argues that the restitution hearing did not meet the notice and hearing requirements of due process because defense counsel did not receive copies of the restitution documents until the morning of the hearing. But, appellant ignores the fact that five months before the restitution hearing, the prosecutor asked that the People's restitution packet be submitted into the record and defense counsel acknowledged receiving the restitution documentation. And, at the May 11, 2012, hearing, the trial court asked defense counsel whether he had had the opportunity to review the document submitted that morning. He replied that he did. While defense counsel later complained that he did not receive the itemized documents until that same day, he never requested a continuance or indicated that he needed more time to prepare. Thus, no due process violation occurred.

Finally, for the reasons set forth above, we reject appellant's claim that the information provided in support of the restitution request was insufficient.

VI. *The sentence on count 3 is modified*

Appellant argues that the trial court improperly sentenced him for possession of an assault weapon on count 3. The People concede that this claim has merit.

The amended information initially charged count 3 as possession of an assault weapon in violation of section 12280, subdivision (b). Later, the amended information was again amended to change count 3 to possession of a firearm by a felon, in violation of section 12021, subdivision (a)(1). The jury convicted appellant of this count as amended. Nevertheless, the trial court sentenced appellant on count 3 on the original charge of possession of an assault weapon. This sentence is erroneous.

This court may correct on appeal an unauthorized sentence if the correction involves no resolution of disputed facts. (*People v. Scott, supra*, 9 Cal.4th at p. 354.)

Accordingly, the matter is remanded to the trial court with instructions to amend the abstract of judgment to reflect appellant's conviction on count 3 for possession of a firearm by a felon in violation of section 12021, subdivision (a)(1).

VII. *Additional Mandatory Assessments and Fines*

Appellant was convicted of 10 offenses. At sentencing, however, the trial court imposed only one court facilities assessment pursuant to Government Code section 70373 and only one court security fee pursuant to section 1465.8, subdivision (a)(1).

As to appellant's 10 convictions, $300 in court facilities assessments should have been imposed. These fees are to be imposed as to each count of conviction, including the stayed counts. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 370–371; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3.) Because this assessment is mandatory, this court may impose the assessment and amend the abstract of judgment accordingly. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272, 274.)

Furthermore, section 1465.8, subdivision (a)(1), requires the sentencing court to impose a mandatory court security fee for each conviction. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865.) Thus, a $40 court security fee on each count (for a total of $400) must be imposed.

DISPOSITION

The judgment is affirmed as modified. The matter is remanded to the trial court with directions to amend the abstract of judgment to reflect appellant's conviction on count 3 for possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). The judgment is also modified to include a $300 court facilities assessment and a $400 court security fee. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J*.
FERNS

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.