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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JAMES SCOTT, Defendant and Appellant.	B276990 (Los Angeles County Super. Ct. No. NA098295)

APPEAL from the judgment of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Affirmed and remanded.

Tanya Dellaca, 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, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Anthony James Scott (appellant) was convicted by a jury of special circumstance murder, among other charges, in connection with a home invasion robbery. Appellant contends reversal is warranted due to insufficient evidence, errors in evidentiary rulings, prosecutorial misconduct, and ineffective assistance of counsel. We find none of these grounds warrant reversal. However, we remand the case to the trial court for resentencing. The judgment is otherwise affirmed.

PROCEDURAL BACKGROUND

Appellant was charged by information with six felony counts: first degree murder with a "robbery/murder" special circumstance (count 1; Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(17))[1]; first degree robbery (counts 2-3; §§ 211, 213, subd. (a)(1)(A)); attempted first degree robbery (counts 4-5; §§ 211, 213, 664); and illegal possession of a firearm by a convicted felon (count 6; § 29800, subd. (a)(1)). Firearm enhancements were also alleged as to counts 1 through 5. (§ 23153, subds. (b)-(d).) It was further alleged that appellant had suffered two prior strikes within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12), and he had had five prior state prison commitments within the meaning of section 667.5, subdivision (b).

Appellant was found guilty of all counts and the special circumstance and all other special allegations were found to be true. The trial of the alleged prior convictions and prior prison terms had been bifurcated and the jury found them true as well. Probation was denied and appellant was sentenced to a term of 50 years, plus consecutive terms of life imprisonment without the

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1 All statutory references will be to the Penal Code unless otherwise stated.

possibility of parole and 225 years to life. He was granted 969 days of presentence custody credits.

Appellant filed a timely notice of appeal.

STATEMENT OF FACTS

The evidence produced at trial established the following.

Percipient Witnesses

Lillian B. was in her apartment with Ronald W., J.S., Corey H., and Deon H., in the early morning hours of January 21, 2013, watching movies and drinking.[2] Jerome W. was asleep in a back bedroom. People came and went throughout the evening for "transactions," leading J.S. to believe drug transactions were taking place in the apartment, though the others denied this occurred.

All of the people in the apartment were from the same neighborhood. Ronald had been at the apartment in the past to lift weights and hang out. Ronald testified that he had seen appellant lifting weights at that address within one week of January 21, 2013.

At approximately 3:00 a.m., Lillian opened her door in response to a knock. Two men pushed their way into the apartment. Both men had their faces covered. The second man was wearing a dark do-rag or scarf over his face and wearing gloves with a "Steelers" logo. Ronald testified that he had seen

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[2] Rule 8.90(b)(4) of the California Rules of Court directs us to protect the privacy interests of victims of crime by referring to them by first name and last initial or by initials only if the first name is unusual. As a result, we refer to the victims in this matter by their first names or initials, with no disrespect intended.

appellant wearing a black do-rag in the past, in a display of gang colors.

The first man, who did not have a gun, came into the room and sat down on a chair. The second man waved a gun at the victims and said something to the effect that "this is a robbery" and "give it up" and instructed everyone to get on the ground and to take everything out of their pockets. J.S. recalled that the gunman also demanded the "pack," which, she testified, meant drugs. Also according to J.S., the gunman never asked either woman for money. The gunman told J.S. to close her eyes and turn her head, which she did.

Corey knelt on the ground next to the couch and gave the robbers between $40 and $80. Ronald handed the gunman money but did not recall how much money it was. He denied kneeling. It did not appear Deon had anything taken from him and the coroner recovered $76.71 from his pockets.

The first man got up and turned on the lights because Ronald was not cooperating. The gunman immediately turned them off again. Ronald briefly cooperated, but then jumped up and pushed the first man against the gunman. He grabbed the barrel of the gun and began struggling with the gunman. The gun discharged once during the struggle. The gunshot hit Deon in the face and he died from that wound. According to J.S., who had opened her eyes, the gunman's face remained covered throughout the struggle. Jerome emerged from the bedroom after the gunshot.

Corey joined the struggle after the gun went off and attempted to get the gun. The man with the gun was outside the door at that point. Ronald lost his grip on the gun, and it

ultimately ended up in Corey's possession. The gunman ran away and Corey gave chase.

Lillian also went outside and saw Corey, who asked her to hold the gun for him. Lillian threw the gun into the grass because she was frightened and on probation for transportation of drugs. The police later asked her to retrieve the gun but she was unable to find it, despite the assistance of several police officers, a forensic team, and a metal detector.

Jerome called 911. Corey, Lillian, and J.S. all testified that they did not see the gunman's face due to it being covered. Ronald, however, testified that he saw the covering come off the gunman during the struggle and was able to see his face. Ronald stated that he had grown up with appellant and that appellant was not the man he saw that night. Both Corey and Ronald left because they did not want to deal with the police.

Physical Evidence

Officer Kevin Chang of the Long Beach Police Department was the first officer at the scene. He saw a clear plastic bag with an off-white powder in it and a black glove laying on the ground as he walked up to the apartment. The baggie had red stains on it. Officer Chang also found a do-rag near the apartment. J.S. identified the do-rag as the scarf that the gunman had been wearing. Ronald told J.S. that the scarf had come off. J.S. had not seen these items when she had walked up to the apartment earlier.

DNA Evidence

The do-rag, baggie, and black Steelers glove were booked into evidence. The red stains on the baggie showed positive for Corey's blood on a presumptive test. DNA from the do-rag

showed appellant as the major contributor and Corey as the minor contributor.

DISCUSSION

1. Trial Issues

a. The Evidence Is Sufficient to Establish That Appellant Was the Gunman

Appellant contends there was insufficient evidence to sustain his conviction because no one identified him as one of the perpetrators and in fact, Ronald, who had known appellant for 20 years, saw the gunman's face and expressly testified that appellant was not the gunman. The evidence presented at trial, however, substantially supports the jury's determination that appellant was the gunman because appellant's DNA was found on the do-rag worn by the gunman. DNA evidence, standing alone, is sufficient to sustain a conviction on appeal. (E.g., *People v. Nelson* (2008) 43 Cal.4th 1242.) That is the case here.

In reviewing the record for sufficiency of the evidence, we employ the familiar rule that the record must be reviewed in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 87.) "An appellate court called upon to review the sufficiency of the evidence supporting a judgment of conviction of a criminal offense must, after a review of the whole record, determine whether the evidence is such that a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. [Citations.] The standard of appellate review is the same in cases in which the People rely primarily on circumstantial evidence. [Citation.] Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other

innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.] 'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.' [Citation.]" (*People v. Bean* (1988) 46 Cal.3d 919, 932--933.)

Here, every witness testified that the gunman was wearing a dark or black do-rag when he entered that apartment. J.S. testified, without objection, cross-examination, or contradiction on this point, that the do-rag found by the police was actually the one worn by the gunman. Ronald confirmed the gunman had his do-rag torn off his face during the struggle. Further, the gunman was wearing black "Steelers" gloves and such a glove was found on the same path as the do-rag, along with the baggie containing Corey's blood. All of this evidence–the location of the do-rag near the Steeler's glove and the baggie–ties the do-rag to Lillian's apartment and to the perpetrators. This is sufficient evidence to justify the jury's verdict.

Appellant attempts to nullify the DNA evidence, arguing no one could determine when the DNA was deposited on the do-rag or how it got there. Given that he had been at Lillian's apartment the week before to lift weights, he theorizes that the DNA could have been transferred to the do-rag at that time. However, there is no evidence that appellant wore *that particular* do-rag at any point in the past. The best the evidence could have shown was that appellant wore black do-rags, sweated during

workouts, and, presumably, deposited his DNA through the perspiration. Even assuming that appellant perspired on this particular do-rag, that does not aid him. *This* do-rag was specifically identified by J.S. as having been worn by the gunman. The do-rag was not present on the walkway when J.S. came to the apartment and, as discussed above, it was found among other items clearly connected to the robbery when she was leaving.

The only scenario where this could have benefited appellant would have been if there was evidence that some third person had gotten a do-rag on which appellant had perspired, worn it during the robbery, and left it on the walkway on the way out. There is no evidence that even suggests this and appellant never proffered the possibility. Thus, there is no innocent explanation for appellant's DNA being on the do-rag found by the police.

Appellant further attempts to discredit the DNA evidence by relying on *Mikes v. Borg* (9th Cir. 1991) 947 F.2d 353 (*Mikes*) for the proposition that there is insufficient evidence from which a rational trier of fact could reasonably conclude that contact with an object could not have occurred other than in connection with the crime. *Mikes*, being a decision of an intermediate federal court, is not binding authority on this court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292; *People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1076.) Even so, *Mikes* is distinguishable.

In *Mikes*, a homicide victim was found dead in the basement of his shop. The defendant's fingerprints were lifted from the crime scene, along with many others which could not be identified. However, two of the five fingerprints on the murder weapon belonged to the defendant. In reversing the denial of

habeas corpus, the Ninth Circuit noted that the key question in "fingerprint only" cases[3] is whether the evidence establishes that the defendant was present at the scene of the crime when the crime occurred, observing: "in fingerprint-only cases in which the prosecution's theory is based on the premise that the defendant handled certain objects *while committing the crime in question,* the record must contain sufficient evidence from which the trier of fact could reasonably infer that the fingerprints were in fact impressed at that time and not at some earlier date. [Citations.] In order to meet this standard the prosecution must present evidence sufficient to permit the jury to conclude that the objects on which the fingerprints appear were inaccessible to the defendant prior to the time of the commission of the crime." (*Mikes, supra,* 947 F.2d at pp. 356-357.)

Following the analysis in *Mikes,* the issue becomes whether the evidence is sufficient to establish that appellant was in contact with the do-rag at the time of the commission of the offenses in this case. We find that it is. There was overwhelming direct evidence that established that the do-rag found on the walkway to Lillian's apartment was worn by the gunman, as we discuss above.

We also do not find that Ronald's testimony that appellant was not the gunman negates the DNA evidence supporting the

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[3] The case at bench involves DNA, not fingerprints as in *Mikes*. While it has been suggested that the analysis in *Mikes* applies equally to "DNA only cases," (e.g., *Duvardo v. Giurbino* (N.D.Cal 2009) 649 F.Supp.2d 980, 987-988), the parties have not briefed this issue except to mention it in passing. Therefore, without deciding the issue, we will assume that *Mikes*'s analysis applies to this DNA case for the purposes of this opinion.

jury's verdict. Although he testified he saw the gunman's face, knew appellant, and stated that appellant was *not* the gunman, he also told the police that he was unable to see the suspects' faces and could not make an identification. It is the role of the jury, not a reviewing court, to resolve such inconsistencies. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 ["Resolution of conflicts and inconsistencies in the testimony is the *exclusive* province of the trier of fact." (Italics added.)].) The jury resolved this inconsistency against appellant and we will not reweigh the evidence.

b. The Evidence Is Sufficient to Sustain the Convictions of Attempted Robbery

Appellant also challenges on substantial evidence grounds his attempted robbery of Lillian and J.S. Applying the same standard of review as described above, we find sufficient evidence supports the jury's verdict. The evidence proved that appellant waved a gun around and demanded property from all the people present, including Lillian and J.S., which is sufficient to sustain a conviction for attempted robbery. (*People v. Bonner* (2000) 80 Cal.App.4th 759.)

Further, the evidence established that the suspects demanded the "pack," or drugs, be given to them. Since there was substantial evidence that Lillian's apartment was being used as a "drug house," the demand for the drugs would have been directed at her. Again, viewing the evidence in the light most favorable to the verdict, we conclude that attempted robbery charges as to Lillian and J.S. were supported by that evidence.

People v. Ugalino (2009) 174 Cal.App.4th 1060 (*Ugalino*), the case relied upon by appellant, is distinguishable on these facts. There, the victim sold marijuana out of an apartment he

shared with several people. During one of the marijuana transactions, a regular customer pulled a gun and told the victim, "[y]ou're getting jacked," and "give me the weed." One of the roommates was present and was told, at gunpoint, to get on the floor. The Court of Appeal held, under the circumstances of that case, the evidence did not support a conviction for the attempted robbery of the roommate because there was no evidence of a property demand from him and no evidence that he had a "special relationship" with the drug dealer victim that would have given him an interest in the drugs, making him an additional victim to the robbery. (*Id.* at pp. 1064-1065.)

Ugalino is distinguishable on several grounds. First, the suspects demanded property from all of the people there when they entered Lillian's apartment. Unlike *Ugalino*, the property demand was not directed at a single discreet person. Second, the evidence established the perpetrators demanded the drugs in the apartment, a demand which would have been directed at Lillian, who rented the apartment and sold drugs out of it.

c. Appellant Was Not Prejudiced by Reference to the Anonymous Telephone Calls

Appellant apparently came to the attention of the police through two anonymous telephone calls. There was no pretrial motion to exclude any reference to these calls. Appellant argues that a brief mention of these anonymous telephone calls requires reversal both because of prosecutorial misconduct and ineffective assistance of his trial counsel. We disagree.

i. Proceedings Below

The following exchange occurred during Detective Zottneck's testimony, after he described taking an "oral swab" from appellant:

"Q. [By the Prosecutor]: Why is it that you went to take [an] oral swab of Anthhony [*sic*] Scott?

"A. We received two anonymous calls - - ."

Defense counsel immediately objected and asked to approach the bench. At sidebar, the prosecutor and defense counsel advised the court that the police received anonymous tips suggesting that appellant and another person were responsible for the crimes in this case. As a result, the police conducted a DNA test on the mouthpiece from the breathalyzer test appellant took following his arrest for violating a Long Beach alcohol control ordinance. The search warrant for a formal swab was obtained when the DNA taken from the mouthpiece suggested that appellant's DNA was on the do-rag found at the crime scene.

Defense counsel moved for a mistrial on the ground the evidence of two anonymous tips would allow the jury to improperly conclude that there was additional evidence implicating appellant in the crimes. Appellant's motion for a mistrial was denied and the trial court admonished the jury:

"I will tell you right now as I stated previously that the question is not evidence. Only the answer is. The objection has been sustained.

"If the witness made any statements pursuant to the question that particular answer is stricken. As I indicated previously, if I strike it you are to act it as though you had not heard of it."

The court's pre-deliberation jury instructions repeated the points that questions are not evidence and that the jury could not consider any answer that was stricken from the record.

ii. Analysis

Appellant contends the prosecutor's question constituted prosecutorial misconduct and that his trial counsel's failure to secure a ruling excluding the admission of such evidence was ineffective assistance of counsel. We find that any error here does not warrant reversal because it was harmless.

Our standard of review for claims of ineffective assistance of counsel and prosecutorial misconduct are substantially the same. In the case of an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Likewise, if a reviewing court finds prosecutorial misconduct, it must determine whether a result more favorable to the defendant was reasonably probable absent the misconduct. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071; *People v. Welch* (1999) 20 Cal.4th 701, 752-753; *People v. Bolton* (1979) 23 Cal.3d 208, 215, fn. 4.) Given the circumstances, we find it is not reasonably probable that appellant would have received a more favorable outcome.

First, the evidence against appellant was extremely strong. Leaving out the calls, the jury had appellant's DNA on a clothing article found at the crime scene that was inextricably linked to the gunman. Further, Detective Zottneck's truncated testimony did not reference appellant in connection with the calls. Thus, the brief mention of anonymous telephone calls did not alter the strength of the evidence in any way.

Moreover, the record discloses the question and partial answer that followed imparted almost no factual material to the jury. The jury did not learn about the contents of the anonymous telephone calls. It is nothing more than speculation to assume that the anonymous callers named appellant as a suspect in this case.

Finally, the jury was repeatedly instructed that the question was not evidence, that both the question and partial answer were stricken, and that neither of them could be considered for any purpose. "A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' [Citation.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934-935; *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437.)

Appellant makes much of the trial court's comment that, "Once it [*sic*] rung it's difficult to unring it." This is not that "exceptional case" where the proverbial bell cannot be "unrung" by instructions. Unlike such cases as *People v. Navarrete* (2010) 181 Cal.App.4th 828, in which a police officer referred to the defendant's suppressed statement, the partial answer elicited from Detective Zottneck provided no direct link between appellant and the crimes in this case. It was simply not so powerfully incriminating that a juror would be unable to disregard it.

In any case, read in context, the trial court's comment regarding "unringing the bell" was not directed at the partial response, but, rather, to the prosecutor's representation that the

answer was not being presented for its truth but was proffered to explain the detective's actions in having appellant arrested. The trial court ultimately dealt with the issue properly by precluding the People from going into the question of why appellant was arrested and striking the small portion that was said in front of the jury.

Appellant also argues that the trial court committed prejudicial error by denying his motion for mistrial made during the sidebar. Rulings on mistrial motions are reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 283; *People v. Haskett* (1982) 30 Cal.3d 841, 854.) Because we find no prejudice resulted from this brief stricken statement, we find the trial court did not abuse its discretion in denying the motion for mistrial.

e. Appellant Was Not Denied His Right to Present a Defense

At trial, Ronald testified on cross-examination that he had seen appellant lifting weights in the backyard of Lillian's residence within a week of the robbery. During that same cross-examination, he also testified that he and appellant wore bandanas to display gang colors. The trial court sustained a relevance objection when defense counsel asked Ronald whether he and appellant wore anything on their heads to control sweating while working out. On redirect examination, Ronald testified that he had seen appellant wearing a black rag but did not connect it to working out.

Appellant argues that sustaining the objection to his attorney's question about wearing head covering to control sweat denied him an opportunity to present an alternative explanation for his DNA being on the do-rag found at the crime scene.

Appellant's defense was that he was not one of the men who committed the crimes at Lillian's home on January 21, 2013. In pursuing this defense, he attempted to explain how his DNA was deposited on the do-rag that was both found at the crime scene and identified by J.S. as having been worn by the gunman.

Respondent argues that appellant waived the issue because the area of inquiry was beyond the scope of direct examination and his counsel did not make an offer of proof. (See *People v. Foss* (2007) 155 Cal.App.4th 113, 127.) We need not reach the waiver issue or the issue of whether the trial court abused its discretion in sustaining the objection because appellant was not prejudiced by the exclusion of that testimony.

The do-rag found on the walkway to Lillian's apartment was inextricably linked to the gunman. As previously discussed, not only was it found in close proximity to a baggie which possibly contained drugs taken from Lillian's apartment and a "Steelers" glove, similar to the one worn by the gunman, J.S. testified that the recovered do-rag was *the one* worn by the gunman. There were only two DNA specimens on it: appellant's and Corey's, and Corey was injured during the struggle for the gun and bled on the baggie that was taken from Lillian's home.

There was no benefit to appellant from being further linked to the do-rag. The evidence was overwhelming that that do-rag had been worn by the gunman. Further evidence establishing that it was appellant's would have been damaging, not helpful. Exclusion of that damaging evidence certainly did not prejudice appellant.

For the same reason, we do not credit appellant's assertion that he received ineffective assistance of counsel for failing to follow up on Ronald's testimony that he and appellant wore black

rags. As discussed above, no benefit could have inured to appellant from being linked to the do-rag when it was identified as being the one worn by the gunman. It can hardly be ineffective assistance of counsel to fail to ask questions that would tie him to it further, particularly when prior questions tied him to the black do-rags in the context of gang attire.

2. Search and Seizure Issues

Appellant argues that his February 7, 2013 arrest for violating Long Beach Municipal Code section 9.22.010[4] was illegal and that the evidence obtained as a result of that arrest, his DNA samples, should have been suppressed pursuant to section 1538.5 as fruits of the unlawful arrest. We disagree.

a. Factual Background

It was stipulated that appellant's detention and arrest were not pursuant to an arrest or search warrant.

i. Underlying Facts

On February 7, 2013, Long Beach Police Department Sergeant Gabriel Carrillo saw appellant standing alone on the corner of 21st Street and Cerritos, which is an area that is claimed by the Crips criminal street gang. Sergeant Carrillo's interest in appellant was at the behest of Detective McGuire, who was investigating appellant as a suspect in a gang-related murder. Appellant was holding a bottle of cognac and Sergeant Carrillo believed that he was in violation of Long Beach Municipal Code section 9.22.010. Although Sergeant Carrillo did

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[4] Long Beach Municipal Code section 9.22.010 provides: "No person shall transport into or drink or consume any alcoholic beverage in any public place except upon the premises licensed under an on-sale or on-sale general license under the State Alcoholic Beverage Control Act."

not recall seeing appellant actually drink from the bottle, he believed this ordinance made it a misdemeanor to consume alcohol in a public place or to transport it unsealed.

Sergeant Carrillo called appellant over to his police car. Appellant displayed no objective symptoms of intoxication but smelled of alcohol. Appellant was then detained.

Sergeant Carrillo testified that his intention in subsequently taking appellant to the police station was to administer an alcohol breath test and determine his level of intoxication and whether he had been drinking from the cognac bottle. He did so and the resulting breathalyzer test showed that appellant had a 0.08 and 0.07 blood alcohol level.

Sergeant Carrillo collected the mouthpiece that appellant had used to take his breathalyzer test and booked it into evidence. Sergeant Carrillo testified that the mouthpiece was booked as part of the misdemeanor arrest and the DNA sampling for the murder investigation was "co-incidental [*sic*]" to that.

On cross-examination, Sergeant Carrillo admitted that he had written two police reports regarding appellant's arrest. One of the reports dealt with the misdemeanor arrest and the other with a murder arrest.

Appellant admitted that he had a bottle of cognac by his feet when he was approached by Sergeant Carrillo, but testified that he had had the bottle for approximately 10 minutes and had not opened it or drunk from it. He had, however, been drinking at home prior to that.

ii. The Trial Court's Ruling

Appellant's counsel moved to suppress the DNA evidence obtained from appellant's breathalyzer test on the ground it was the fruit of an illegal stop and arrest. After oral argument, the

trial court determined that Long Beach Municipal Code section 9.22.010 remained a viable ordinance, which was not unconstitutional. The trial court ruled:

> "The Long Beach Muni Code specifically states 9.22.010, 'transport or drinking or consumption of any alcoholic beverage in public area is a misdemeanor.'
>
> "So, that's what [the] officer relied on. Clearly, there is [an] inference it was transportation because [appellant] testified to that, that he walked from a certain location to another location.
>
> "But if it is, in fact, unconstitutional, the officer still relied on that statute, so there is a good faith doctrine. But I will make a ruling that there is sufficient evidence to indicate that [appellant] either drink [*sic*] or consumed alcohol. . . ."

b. Standard of Review

" 'In California, issues relating to the suppression of evidence derived from governmental searches and seizures are reviewed under federal constitutional standards.' [Citations.] ' " 'We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.' " ' [Citations.]" (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212 (*Macabeo*).)

c. The Motion to Suppress Was Properly Denied

The motion to suppress was properly denied because the officer could reasonably rely on the express terms of the

ordinance prohibiting "transportation" of alcoholic beverages.[5] The evidence demonstrates appellant was on public property at the time of his detention and arrest. He admitted he had an open bottle of cognac with him and that he had been drinking at home prior to that. It was reasonable for Sergeant Carrillo to rely on Long Beach Municipal Code section 9.22.010's prohibition against transporting alcoholic beverages into a public place to detain and arrest appellant.

Our conclusion rests on the United States Supreme Court's ruling in *Illinois v. Krull* (1987) 480 U.S. 340, 347 (*Krull*). The *Krull* court explained, "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure. [Citations.] The

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[5] Despite our holding today, we believe reliance on the statute will be unreasonable in the future. California Constitution, article XX, section 22, purports to preempt local ordinances aimed at the manufacture, sale, purchase, possession, and transportation of alcoholic beverages. Local ordinances that target possession have been ruled preempted and that holding may be extended to ordinances regulating transportation of alcoholic beverages in the future. (*People v. Ramirez* (1994) 25 Cal.App.4th Supp. 1, 2.) Appellant argues that the portion of Long Beach Municipal Code section 9.22.010 that purports to criminalize transportation of alcoholic beverages is preempted by state law and therefore, unconstitutional. We need not reach this issue, however, given our holding that the exclusionary rule does not apply. (*Community Redevelopment Agency of the City of Hawthorne v. Force Electronics* (1997) 55 Cal.App.4th 622, 630 ["Constitutional issues will be resolved only if absolutely necessary and not if the case can be decided on any other ground."].)

Court has stressed that the 'prime purpose' of the exclusionary rule 'is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' [Citation.]" (*Krull,* at p. 347.) The application of the exclusionary rule is limited to situations in which the deterrent effect will be achieved. (*Ibid.*)

After weighing whether the rule's deterrent effect will be achieved against the costs of withholding reliable information from the truth-seeking process, the *Krull* court declined to suppress evidence obtained by an officer who reasonably relied on a statute that was later found to be unconstitutional. (*Krull, supra,* 480 U.S. at p. 348.) The court explained, "If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." (*Id.* at p. 350.) Thus, "the question whether the exclusionary rule is applicable in a particular context depends significantly upon the actors who are making the relevant decision that the rule is designed to influence." (*Id.* at p. 360, fn. 17.) This general concept was explained by the California State Court in *Macabeo, supra,* 1 Cal.5th at page 1223, as including an inquiry into what a reasonably well-trained officer would know under the circumstances.

Applying *Krull* to the facts of this case, we likewise decline to apply the exclusionary rule in a situation where Sergeant Carrillo acted in good faith in relying on the express terms of Long Beach Municipal Code section 9.22.010, an ordinance which no court has declared unconstitutional or preempted. Indeed, at least two unpublished cases from this court have at least tacitly

approved of *exactly* the type of search conducted in this case, based on the application of Long Beach Municipal Code section 9.22.010, to facts that are indistinguishable from the facts of this case in any meaningful way. (See *People v. Enosa* (April 3, 2010, B214532) 2010 WL 1444661; *People v. Gomez* (Dec. 14, 2009, B213960) 2009 WL 4757230.)[6]

Although these decisions do not directly address the preemption issue, they would suggest to a "reasonably well-trained" Long Beach Police Department Officer that searches conducted pursuant to Long Beach Municipal Code section 9.22.010 have the imprimatur of this court. While these unpublished decisions are not binding legal authority under rule 977, of the California Rules of Court, we find that a "reasonably well-trained" officer could "reasonably rel[y]" on them and that the deterrent purpose of the exclusionary rule would not be served by applying any determination regarding the preemption of Long Beach Municipal Code section 9.22.010 retroactively. (*Davis v. United States* (2011) 564 U.S. 229, 248.) The Court of Appeal's observation in *People v. McNeil* (2002) 96 Cal.App.4th 1302, that "officers cannot generally be expected to question the judgment of legislative bodies," (*id.* at p. 1308), should apply equally to decisions of appellate courts. Given the circumstances

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6 We are aware that rule 977, of the California Rules of Court, prohibits the citation or reliance upon an unpublished decision. In this case, we are neither citing nor relying on these decisions as authority for any legal proposition or rule. We simply acknowledge their existence. (See *People v. Hill* (1998) 17 Cal.4th 800, 847, fn. 9.)

of this case, the trial court properly denied the suppression motion on this ground.[7]

3. Sentencing

There are two sentencing issues in this case: (1) whether the matter should be remanded to the trial court to allow it to exercise its discretion to strike appellant's section 667.5, subdivision (b), "prior prison term" enhancements; and, (2) whether the matter should be remanded to the trial court to allow it to exercise the discretion now provided by section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (2017-2018 Reg. Sess.), to strike or dismiss one or more of the section 12022.53 firearm allegations that were found true by the jury. We find remand is appropriate to resolve both issues.

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[7] The trial court also denied the motion to suppress on the ground that the evidence supported the conclusion that appellant was consuming alcohol in a public place. This finding is unsupported by the record. Violation of Long Beach Municipal Code section 9.22.010 is a misdemeanor. Sergeant Carrillo admitted he did not actually see appellant drink anything despite smelling alcohol on his person. Appellant denied drinking in public, but admitted drinking at home. Thus, his arrest based on drinking in public was in violation of the long-standing rule that an officer cannot detain or arrest a person for a misdemeanor not committed in his or her presence. (§ 836, subd. (a)(1); see *Coverstone v. Davies* (1952) 38 Cal.2d 315, 321-322 [the discussion of the historical roots of this rule].) Despite the trial court's error in denying the motion to suppress on this ground, we affirm based on the holding in *Krull,* as discussed above. (*People v. McDonald* (2006) 137 Cal.App.4th 521, 529 [appellate court may affirm the trial court's ruling on a motion to suppress if it "is correct on any theory of the law applicable to the case."].)

a. The Section 667.5, Subdivision (b), Prior Prison Term Enhancements

Appellant contends, respondent concedes, and we agree that the trial court erred in "staying" the section 667.5, subdivision (b), prior prison term enhancements. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241-1242.) Appellant urges us to rule that the trial court exercised its discretion to not punish appellant for these prior prison terms and to strike them on our own motion. Respondent argues that we should not substitute our discretion for that of the trial court's and should remand the matter for resentencing so that the trial court may properly exercise its discretion.

We choose the latter approach because we are remanding this matter to the trial court to allow it to exercise its discretion under the recent amendment to section 12022.53, subdivision (h). The prior prison term enhancements may enter into the trial court's calculus as to how to proceed on resentencing.

b. The Section 12022.53 Firearms Enhancements

On January 1, 2018, Senate Bill No. 620 took effect, which amends section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. The amendment grants the trial court discretion to strike or dismiss an enhancement imposed under section 12022.53. (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under section 12022.53, subdivision (h), may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (*People v. Brown* (2012) 54 Cal.4th 314, 323; see *In re Estrada* (1965) 63 Cal.2d 740, 742-748.) The appeal in this case was not final on January 1, 2018. (See *People v. Vieira*

(2005) 35 Cal.4th 264, 305-306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 [" 'The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.' "].) Respondent concedes that the amendment to section 12022.53, subdivision (h), applies to this case.

Respondent relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) to argue that remand is unwarranted because there is no reasonable possibility the court would exercise its new discretion to strike the firearm enhancement. In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence and indicated it would not have exercised its discretion to lessen the sentence. (*Id.* at p. 1896.) Thus, the Court of Appeal found it was unnecessary to remand to allow the trial court to exercise its discretion since it was obvious that it would not do so. (*Ibid.*)

We disagree with respondent's position that there is no reasonable possibility that the trial court would exercise its discretion to reduce the punishment in this case. Therefore, we remand the matter to the trial to allow it to exercise its discretion in regards to the firearms enhancements.

As respondent correctly observes, the facts of this case are egregious and appellant has a substantial criminal record. However, the evidence presented at trial establishes that appellant fired a single gunshot. While the "true" findings on the section 12022.53, subdivisions (c) and (d), enhancements include a jury determination that appellant "intentionally" fired the shot, the evidence also established that the single gunshot occurred

during a struggle for the gun. The five consecutive 25-years-to-life sentences for the section 12022.53, subdivision (d), allegations resulted in a sentence of 125 years to life. Given the discretion to do so, the court might choose to exercise its discretion to either strike or dismiss some or all of the enhancements or their punishments or impose a lesser sentence for one or more.

Accordingly, we remand to allow the trial court the opportunity to exercise its new discretion under subdivision (h) of section 12022.53. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257.) On remand, the court may exercise its discretion under section 12022.53, subdivision (h), to strike all of the firearm enhancements or impose any one of the enhancements. If the court chooses to impose a firearm enhancement, it must strike any enhancement(s) providing a longer term of imprisonment, and impose and stay any enhancement(s) providing a lesser term. (§ 12022.53, subds. (f) & (h).)

For example, the court may choose to impose the 25-year-to-life enhancement under section 12022.53, subdivision (d). If so, it should impose and stay the enhancements under subdivisions (c) and (b). If the court imposes the 20-year enhancement under subdivision (c) of section 12022.53, it must then strike the 25-year-to-life enhancement under subdivision (d), and impose and stay the 10-year enhancement under subdivision (b). Moreover, any enhancement imposed under section 12022.53 must be imposed consecutively rather than concurrently.

In addition, the trial court has discretion to strike only the punishment for the enhancement. (§ 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443-1446.) "In determining whether to strike the entire enhancement or only

the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428.) If the trial court exercises its discretion to strike only the punishment, the firearm enhancement will remain in the defendant's criminal record.

DISPOSITION

The matter is remanded to the trial court for resentencing with directions to: (1) either impose or strike the section 667.5, subdivision (b), prior prison term enhancements; and, (2) exercise its discretion pursuant to the Senate Bill No. 620 amendment to section 12022.53, subdivision (h), to strike, dismiss, or impose the various firearms enhancements pursuant to section 12022.53, subdivisions (b), (c), and (d). The judgment is otherwise affirmed.

HALL, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

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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.