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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALLIS TROY COLEMAN,

Defendant and Appellant.

B270939

Los Angeles County
Super. Ct. No. TA133501

APPEAL from a judgment of the Superior Court of
Los Angeles County, Kelvin D. Filer and John J. Cheroske,
Judges. Affirmed and remanded with directions.

Mark R. Yanis, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Shawn McGahey Webb and Ilana Herscovitz,
Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In a single trial, a jury convicted defendant of first-degree murder, which arose out of a shooting that occurred in June 2005, as well as assault with a firearm, criminal threats, possession of a firearm by a felon, and possession of ammunition by a felon, all of which arose out of an incident that occurred in May 2014. Defendant argues: (1) insufficient evidence supports the jury's finding of premeditation and deliberation; (2) the court abused its discretion when it allowed the prosecution to join the June 2005 murder charge with the charges arising out of the May 2014 incident; and (3) even if the court's ruling joining the two sets of charges was proper when it was made, the joinder of the charges nevertheless violated defendant's due process rights. After this matter was submitted, we requested supplemental briefing from the parties to address another issue—whether the recent enactment of Senate Bill No. 620 (SB 620) requires us to remand this matter to allow the trial court to exercise its sentencing discretion under Penal Code¹ sections 12022.5 and 12022.53.

As we will explain, substantial evidence supports the jury's finding of premeditation and deliberation. We also conclude the court properly joined the June 2005 murder charge with the charges arising out of the May 2014 incident. Accordingly, we affirm the judgment of conviction. However, we remand the matter for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 12022.5 and 12022.53.

¹ All undesignated statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

1. The June 2005 murder

1.1. The shooting

Around 8:00 p.m. on June 20, 2005, defendant got into an argument with Semaj Henry, known as “Spook,” in the street of the 1500 block of East 101st Street in Los Angeles. Defendant stood outside a dark SUV, on the driver’s side, while Henry sat inside the car. Several neighbors heard or saw defendant arguing with Henry. One neighbor, Tommy Beard, saw defendant walk away from the SUV during the argument, enter a nearby house, and then return to the SUV, at which point he said to Henry, “ ‘You think I’m kidding with you? You think I’m playing with you?’ ” Defendant then fired two shots from a gun into the car, striking Henry once in the back and once in the back of the right arm. After firing the shots, defendant pushed Henry out of the driver’s seat, got into the SUV, and drove out of the neighborhood. Henry bled to death in the street several minutes after defendant shot him.

About a minute or two after firing the second shot at Henry, defendant returned to a home on the same block where the shooting occurred and where his then-wife, Tamecia Citizen, was staying. Defendant told Citizen, “ ‘Go ahead, call them, call them.’ ” He then drove away in a 2005 Ford Explorer that Citizen’s mother had recently rented.

1.2. The investigation

On June 23, 2005, Citizen reported to the Los Angeles Police Department (LAPD) that defendant had driven to her apartment complex armed with a weapon. She directed the police to defendant, who was sitting in the Ford Explorer he had used to flee the scene of the shooting. When they arrested him, defendant told the officers, “ ‘The gun’s in the car.’ ” One of the officers

found a loaded 9-millimeter “blue steel” gun in the car’s center console. The officers also found blood stains on the left rear seat containing DNA matching that of Henry to a certainty of one in 300 quintillion.

After arresting defendant, the police interviewed Citizen. Earlier that day, defendant told Citizen that he shot Henry. When the officers asked Citizen if defendant told her why he shot Henry, she replied, “[defendant] said he [Henry] was over there. . . . [¶] He said he got there, they were there. He never told me why. He just said—the guy was like befriended him. Like—whatever—like we don’t even talked. Apparently they hadn’t talked. . . . [¶] He said he’s never over there.” Citizen told the officers defendant had not seen Henry for a long time before the shooting: “Like everybody was away and all of a sudden he just happened to be over there, and he’s never over there.” Citizen continued, “[defendant] didn’t tell me exactly what moves he made but he did tell me that’s why he went down on him, basically. He was too busy hollering at me. . . . [¶] He says, ‘I know you was working with Dino.’ And you was working with [Henry].” When asked whether defendant had spoken about his confrontation with Henry at the car, Citizen responded, “he said, ‘I don’t do nothing to nobody, unless somebody done something to me.’ This is what he’s telling me. He’s thinking somebody trying to do something to him. . . . [¶] He said [Henry] got in the car—this is after—I don’t know what exactly words they had, you know, because he didn’t tell me what words were said. He got in the car with him, or whatever . . . [¶] He popped him. He shot him. That is what he told me. That’s what he told me.” Defendant also told Citizen that Henry was “[i]nvolved in this whole conspiracy,” for which defendant blamed Henry and “several other people.” Citizen did not explain what “conspiracy” defendant was talking about.

On June 23, 2005, a medical examiner with the Los Angeles County Coroner's Office conducted an autopsy on Henry's body. Henry suffered two gunshot wounds. One bullet, which was found under Henry's collarbone, entered the right side of Henry's back, broke his spine and spinal cord, and perforated his left lung. The second bullet, which was recovered near the elbow in Henry's right arm, entered through the back of Henry's right forearm, breaking the arm. Henry also suffered scrapes to his face, which were consistent with someone hitting his head on the ground. Henry bled to death from the gunshot wounds.

A forensic technician with the LAPD conducted a comparison of the gun recovered from the Ford Explorer and the bullets recovered from Henry's body. Although the technician could not conclude the bullets were fired from the gun, the bullets and the gun shared several similar characteristics, including: (1) the same barrel and cartridge caliber; (2) the same number of "land/groove" markings; and (3) the direction of thrust of the bullet matched the direction of thrust of the gun's barrel.

The People initially charged defendant with murder in 2005 or 2006, but the trial court dismissed the case following a preliminary hearing. The People did not further pursue the murder charge for nearly a decade.

Around 2015, the People reopened their investigation into Henry's murder. During this investigation, detectives and a prosecutor interviewed Beard. Beard recognized the shooter as someone who used to live across the street in "Miss Citizen's house" and was married to Citizen's daughter. According to Beard, the shooter "apparently [] went to get the gun or whatever" when he went to the nearby house during the argument with Henry. Beard believed the shooter and Henry were arguing "about a girl or something." Beard was unable to

identify defendant in a six-pack photographic lineup, and he could not later identify defendant as the shooter at trial.

2. The May 2014 domestic violence incident

2.1. Evidence of prior domestic violence

In August 2013, Teaunia Davis, defendant's girlfriend, reported to the Santa Ana Police Department that defendant had physically assaulted her in July 2013. Defendant had accused Davis of cheating on him after he saw a photograph of her on social media in which it appeared she had her arm wrapped around another man, who had been cropped out of the photograph. Defendant became agitated and asked Davis to undress in front of him so that he could "search her body, entire body, as if he was looking for another man's hands on her body." When Davis pushed defendant's hands away, he became angry and started to strangle her with both his hands until she passed out.

After Davis regained consciousness, defendant pushed her on the bed, jumped on top of her, and punched her in the temple, again causing her to lose consciousness. When Davis came to a second time, she told defendant she would call the police. Defendant strangled her again, causing her to lose consciousness a third time. When Davis regained consciousness, she stopped resisting defendant until he stopped attacking her.

On August 17, 2013, Davis went to a hospital emergency room in Los Angeles, where she received treatment for a "closed head injury causing vomiting and persistent headaches." Davis underwent a CT scan and was prescribed Vicodin, Zofran, and Acetaminophen for her injuries.

A social worker interviewed Davis at the emergency room. Davis reported that defendant had "choked her to the point of passing out" on one occasion, punched her during an earlier

incident, and punched her in her sleep during a third incident. Davis told the social worker she was scared for her safety.²

2.2. The 2014 charged domestic violence incident

In May 2014, Davis lived with her four children and one grandchild in a duplex in Los Angeles. Around 6:30 a.m. on May 24, 2014, defendant went to Davis's home. Defendant got into bed with Davis and showed her a video of a woman trying to jump on a man's neck. After defendant started playing the video a second time, he punched Davis in the nose and face with a closed fist and drew a black semiautomatic handgun, which he pointed at Davis's chest and stomach. Defendant then grabbed Davis by the hair and started yelling at her, " 'Bitch, you think I'm playing. Bitch who is this nigger?' "

After Davis stood up, defendant pointed the gun at the left side of her waist. As he pointed the gun at Davis, defendant said, " 'Bitch, you think I'm playing with you, tell me the truth, I'm going to ask you one time and one time only.' " When Davis told defendant she did not know who the woman in the video was, he asked her, " 'Bitch, do you want to lose your neck? Tell me the truth.' " Defendant continued to point the gun at Davis, moving it between her waist, stomach, chest, neck, and head. Davis was terrified because she believed defendant would shoot her.

As defendant walked around the room speaking to himself, Davis acted like she needed to get ready for a wedding and snuck out to the bathroom. Defendant followed Davis to the bathroom, where he cornered her and said, " 'Bitch do you want to lose your neck, tell me the truth.' " Davis told defendant she loved him and

² At trial, Davis recanted the statements she made to the Santa Ana Police Department and the social worker about defendant's prior abuse.

asked if he loved her, to which he replied, “ ‘no.’ ” Defendant eventually calmed down and went back to the bedroom to lie down on the bed. Davis left the house and hid in a nearby alleyway until the police arrived.

Davis’s daughter, Roneshia Corsey, heard defendant and Davis arguing from her bedroom. Using a fake name, Corsey called 911, and reported that defendant was threatening her mother with a gun. Davis’s other daughter, who was also in the home, recalled Davis waking her and telling her to leave the house with Davis’s four-year-old granddaughter.

LAPD officers responded to Davis’s home shortly after Corsey’s 911 call. When the officers knocked on the front door to Davis’s home, no one answered. They later found Davis waving at them from behind a car about 75 yards away. Davis, who appeared nervous, told the officers she was the person involved in the 911 call.

After backup arrived, the officers surrounded Davis’s home and called defendant’s name. When defendant appeared at the front door, the officers took him into custody. Davis appeared relieved and thanked the officers after defendant was arrested.

With Davis’s consent, the officers searched the home and recovered two semiautomatic handguns and a box of live ammunition from a laundry hamper. Both guns were loaded.

3. The charges, jury trial, and sentencing

In June 2014, the People filed an information in Case Number TA133501 (June 2014 information), charging defendant with four offenses arising out of the May 24, 2014 incident: assault with a firearm (§ 245, subd. (a)(2)—count 1); possession of a firearm by a felon (§ 29800, subd. (a)(1)—count 2); criminal threats (§ 422, subd. (a)—count 3); and possession of ammunition

by a felon (§ 30305, subd. (a)(1)—count 4).³ As to the first three offenses, the People alleged defendant personally used a firearm during their commission (§§ 1203.06, subd. (a)(1) & 12022.5, subd. (a)). The People further alleged as to all four offenses that defendant had suffered five prior convictions for which he had served prison terms (§ 667.5, subd. (b)).

In February 2015, the People tried defendant on the counts charged in the June 2014 information. Davis did not testify at the trial, so the prosecution introduced Davis’s testimony from defendant’s preliminary hearing. The court declared a mistrial after the jurors could not reach a verdict on any of the counts. As to counts 1 and 2, the jury deadlocked 10 votes to 2 in favor of acquittal, and as to counts 3 and 4, the jury deadlocked 9 votes to 3 in favor of acquittal. The court denied defendant’s motion to dismiss the June 2014 information, concluding the prosecution would likely be able to present additional evidence on retrial, including live witnesses.

In April 2015, defendant pled no contest to count 3 (criminal threats) during the retrial on the offenses charged in the June 2014 information. Under the terms of the plea agreement, the People were to dismiss counts 1, 2, and 4, as well as the prior prison term allegations, charged in the June 2014 information, and the court was to sentence defendant to two years in state prison with credit for time served. The court later allowed defendant to withdraw his plea after defendant learned the People were separately pursuing charges against him for the 2005 murder of Henry.

On July 16, 2015, the People filed a single-count information in Case Number TA137173 (July 2015 information),

³ We sometimes collectively refer to counts 1 through 4 charged in the June 2014 information as the “domestic violence” charges.

charging defendant with Henry's murder. The People alleged three personal use of a firearm allegations against defendant, including one alleging defendant personally and intentionally discharged a firearm causing Henry's death (§§ 667.5, subd. (c)(8) & 12022.53, subds. (b), (c), (d)). The People further alleged that, in 1992, defendant had suffered a prior conviction for negligent discharge of a firearm (§ 246.3), a serious or violent felony under the Three Strikes Law.

In September 2015, the People moved to join the murder charged in the July 2015 information with the four offenses charged in the June 2014 information. Defendant opposed the People's motion. He argued the evidence relevant to the murder charge would not be cross-admissible in a trial involving the four charges arising out of the May 2014 incident, the murder charge would inflame the jury with respect to the other charges, and the two sets of charges were independently weak.

On October 1, 2015, the court granted the People's motion to consolidate. That same day, the People filed an amended information in Case Number TA133501, adding the murder charge as count 5 along with the enhancements alleged in the July 2015 information.

On February 1, 2016, during jury selection in the underlying trial, defendant asked the court to reconsider the October 1, 2015 ruling granting the People's motion to consolidate. Defense counsel argued joinder of the 2005 murder with the counts arising out of the 2014 incident would unfairly bias the jury's perception of defendant as to both sets of crimes. In support of this argument, counsel informed the court that 30 jurors had answered "yes" to a juror survey question asking whether the jurors' perception of the case would be biased if they knew defendant was charged with a crime that had been committed more than 10 years ago. Counsel claimed, "I believe

that those answers . . . show[] he's a person who doesn't change, he's around crime. Things of that nature. So I just think that is further proof that they cannot be unbiased and see these two things separately." The court denied defendant's request for reconsideration of the October 1, 2015 ruling.

The jury convicted defendant of counts 1 through 5, and it found true the firearm enhancement allegations as to counts 1, 3, and 5. Prior to sentencing, the People moved to dismiss defendant's prior conviction allegations. The court dismissed all of defendant's prior conviction allegations "pursuant to Penal Code section 1385, and also since the People indicated they are unable to proceed or do not desire to proceed at this time."

After hearing statements from Henry's sister and mother, the court sentenced defendant to a total term of 53 years to life in state prison, consisting of 25 years to life on count 5, plus 25 years to life for the personal and intentional discharge of a firearm causing death enhancement under section 12022.53, subdivision (d), attached to count 5, plus the midterm of three years on count 1, all of which the court imposed as consecutive terms. As to counts 2 through 4, the court imposed the midterm of two years in prison for each substantive crime, each of which was to run concurrently with the 53 years to life term the court imposed on counts 1 and 5. The court also imposed but stayed two four-year terms (i.e., the middle terms) for the firearm enhancements under section 12022.5, subdivision (a), attached to counts 1 and 3.

Defendant filed a timely notice of appeal.

DISCUSSION

1. Substantial evidence supports defendant's first-degree murder conviction.

Defendant contends insufficient evidence supports the jury's finding that he premeditated and deliberated before killing Henry. We disagree.

1.1. Standard of review

When reviewing the sufficiency of the evidence to support a conviction, we review the entire record to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) The record must contain substantial evidence—" 'that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*Ibid.*) We review the record in the light most favorable to the judgment and presume the existence of every fact the jury reasonably could deduce from the evidence. (*Ibid.*) " 'This standard applies whether direct or circumstantial evidence is involved.' [Citation.]" (*Ibid.*) We do not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) " ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) Therefore, before we may set aside the judgment, it must be clear that " ' "upon no hypothesis whatever is there sufficient substantial evidence to support it." ' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

1.2. The law of premeditated and deliberate murder

Murder committed by a “willful, deliberate, and premeditated killing” is murder in the first-degree. (§ 189.) To sustain a conviction for first-degree murder, the prosecution must prove more than that the defendant intended to kill his victim. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224 (*Cole*).)

“Deliberation” is the careful weighing of considerations when forming a course of action, and “premeditation” means the defendant thought over his course of action in advance. (*Ibid.*) The process of premeditation and deliberation does not require any extended period of time. (*Ibid.*) “ “ “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.’ ” ’ [Citation.]” (*Ibid.*)

In *People v. Anderson*, the California Supreme Court identified three categories of evidence that courts generally look at to determine whether a killing was premeditated and deliberate: “(1) facts about how and what [the] defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as ‘planning’ activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of ‘a pre-existing reflection’ and ‘careful thought and weighing of considerations’ rather than ‘mere unconsidered or rash impulse hastily executed’ [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed

according to a ‘preconceived design’ to take his victim's life in a particular way for a ‘reason’ which the jury can reasonably infer from facts of type (1) or (2).” (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).)

Anderson did not “‘purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.’ [Citations.]” (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) These categories are therefore not dispositive. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) When the record discloses evidence in all three categories identified in *Anderson*, the verdict generally will be sustained. (*People v. Stiteley* (2005) 35 Cal.4th 514, 543.) When evidence of all three categories is not present, courts “‘require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.’ [Citation.]” (*Cole, supra*, 33 Cal.4th at p. 1224.)

1.3. Analysis

The record in this case contains all three categories of evidence identified in *Anderson*. With respect to planning activity, there was evidence that defendant retrieved the murder weapon shortly before he killed Henry. Beard told the police that he saw defendant walk away from the argument with Henry, enter a nearby house, and then return to the car in which Henry was sitting. According to Beard, it appeared that defendant went to Citizen’s house to retrieve a gun. Shortly after returning from Citizen’s house, defendant asked Henry, “‘You think I’m kidding with you? You think I’m playing with you?’” and then shot Henry twice, once in the back and once in the back of the arm. Based on this evidence, especially the short amount of time between when defendant returned from the house and when he shot Henry, the jury reasonably could have inferred that defendant went to the

house to retrieve the murder weapon. (See *People v. Wharton* (1991) 53 Cal.3d 522, 547 [that the defendant retrieved the murder weapon after arguing with the victim is evidence of planning activity]; *People v. Manriquez* (2005) 37 Cal.4th 547, 577–578 (*Manriquez*) [evidence that the defendant left and returned with gun used to kill the victim supports a finding of premeditation and deliberation].)

As to motive, Citizen and Beard made statements to the police suggesting that defendant had a reason to kill Henry based on something that defendant believed Henry had done in the past. Citizen reported that defendant had told her after the shooting that he blamed Henry for some sort of “conspiracy.” He also told Citizen that he thought “somebody [was] trying to do something to him,” and that he wouldn’t do something to someone, “unless somebody done something to me,” suggesting that defendant had a reason to shoot Henry. Although Citizen did not explain what “conspiracy” defendant thought Henry was involved in or what defendant believed Henry had “done” before the shooting, she did tell the police that defendant had accused her of “working with” Henry. Beard also told the police that he believed defendant was arguing with Henry “about a girl or something” shortly before the shooting. (*People v. Hyde* (1985) 166 Cal.App.3d 463, 478 [evidence of the defendant’s desire to exact revenge on the victim supports an inference of motive for premeditation and deliberation].)

Finally, the manner in which defendant killed Henry supports a finding of premeditation and deliberation. At the time defendant fired both shots, Henry was in a vulnerable position; he was unarmed and sitting inside a car. Henry also either had his back to defendant or attempted to turn away from defendant at the time of the shooting, as both bullets entered Henry’s body from behind. (See *People v. Silva* (2001) 25 Cal.4th 345, 369 [“The

manner of killing—multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant—is entirely consistent with a premeditated and deliberate murder”]; *Manriquez, supra*, 37 Cal.4th at p. 578 [firing multiple shots at close range at an unarmed victim’s back supports a finding of premeditation and deliberation]; *People v. Brito* (1991) 232 Cal.App.3d 316, 323 [shooting a victim in the back who was trying to flee from the inside of a car supports a finding of premeditation and deliberation].)

In sum, the jury’s finding that defendant premeditated and deliberated before killing Henry is supported by substantial evidence. While there also was evidence that could support a finding that defendant harbored a different mental state, we are not permitted to resolve such evidentiary conflicts on appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

2. The trial court did not err by consolidating the murder charge with the charges arising out of the domestic violence incident.

Defendant next contends that the court abused its discretion when it consolidated the two sets of charges. We disagree.

2.1. Applicable law and standard of review

Under section 954, the prosecution may charge in the same accusatory pleading “two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses.” (§ 954; *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) “The legislative preference for consolidation under either of the two circumstances set forth in section 954 is intended to promote judicial efficiency.” (*People v. Landry* (2016) 2 Cal.5th 52, 75.)

A defendant must make a “‘clear showing of prejudice to establish that the trial court abused its discretion’” in permitting the charges to be joined. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*), italics omitted.) A court's decision to join multiple charged offenses or deny a motion to sever those offenses “amounts to a prejudicial abuse of discretion if the “trial court's ruling “falls outside the bounds of reason.” ’ ” [Citation.] In making that assessment, we consider the record before the trial court when it made its ruling. [Citation.]” (*Ibid.*) “The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence.’ [Citations.]” (*Id.* at p. 1221.)

We consider the following factors when reviewing a court's decision to allow the prosecution to join multiple charged offenses: “‘(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case.’ [Citations.]” (*Alcala, supra*, 43 Cal.4th at pp. 1220–1221.) “Although cross-admissibility ordinarily dispels any inference of prejudice [citation], the absence of cross-admissibility does not by itself demonstrate prejudice.” (*People v. Mendoza* (2000) 24 Cal.4th 130, 161 (*Mendoza*), superseded by statute on other grounds as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 63, fn. 8.) Thus, to establish prejudice, “‘defendant must show more than the absence of cross-admissibility of evidence.’ [Citation.]” (*People v. Grant* (2003) 113 Cal.App.4th 579, 587 (*Grant*).)

2.2. The trial court did not abuse its discretion in allowing the prosecution to join the two sets of charges.

At the outset, we note that the murder charge and the domestic violence charges involve the same class of crimes. That is, assault with a firearm (count 1), possession of a firearm by a felon (count 2), criminal threats (count 3), possession of ammunition by a felon (count 4), and murder (count 5) are offenses which possess common characteristics or attributes. (See *People v. Landry, supra*, 2 Cal.5th at p. 76 [holding that murder, assault by a prisoner, and possession of a weapon by a prisoner all qualify as assaultive crimes for purposes of section 954].) We now turn to the four factors outlined in *Alcala* to determine if the court erred by joining the two sets of charges.

As for the first factor, the People do not dispute that the evidence relevant to each set of charges was *not* cross-admissible. As noted, however, a lack of cross-admissibility does not mean the court erred in allowing the prosecution to join the two sets of charges. (*Mendoza, supra*, 24 Cal.4th at p. 161.) As for the fourth factor, none of defendant's charges carried the death penalty, nor did the joinder of the charges convert the matter into a capital case. (See *Alcala, supra*, 43 Cal.4th at p. 1221.) Accordingly, we must determine whether the court abused its discretion in joining the two sets of charges under the remaining factors—the likelihood that joining the charges would unusually inflame the jury and the relative weakness of the two sets of charges.

Defendant argues that joining the domestic violence charges with the murder charge likely inflamed the jury because the domestic violence evidence was more detailed and graphic than the evidence relevant to the murder charge. Defendant also argues that the domestic violence evidence showed he had a propensity to carry guns and engage in violent acts involving

guns, which was “the essence of the charge in the murder count.” We are not persuaded. Both sets of charges involved similar conduct by defendant—that is, both sets involved the defendant brandishing a firearm and making verbal threats to the victim. Although the evidence relevant to the domestic violence charges was more detailed than the evidence used to prove the murder charge, nothing about the domestic violence evidence was likely to inflame the jury. Specifically, defendant’s conduct at issue in the domestic violence charges was not significantly more egregious than his conduct in killing Henry. (See *People v. Soper* (2009) 45 Cal.4th 759, 780 [joinder of assaultive crimes involving similar and equally egregious conduct was not likely to unusually inflame the jury].)

We also find both sets of charges were relatively strong and that the “spillover effect” of joining the charges did not alter the outcome of some or all of the charges. To be sure, the People acknowledge that the evidence with respect to the domestic violence charges was weak at the time they first tried defendant in February 2015 because they could not secure live testimony from the percipient witnesses to those crimes. As the court recognized after declaring a mistrial in defendant’s first trial, however, the People likely would have been able to—and ultimately did—secure live testimony from the percipient witnesses in a subsequent trial on the domestic violence charges. Thus, the fact that the People were unable to secure a conviction during the February 2015 trial does not mean that the evidence of the domestic violence charges introduced at the underlying trial was necessarily weak.

In fact, the evidence used to prove the domestic violence charges at the underlying trial was strong. Several of the individuals who witnessed the May 2014 incident testified. Although all of those individuals denied seeing defendant engage

in any criminal conduct, the People introduced strong impeachment evidence—the witnesses’ statements to the police and 911 operators made shortly after defendant assaulted Davis in May 2014, as well as Davis’s testimony at the preliminary hearing on the domestic violence charges. Several of those out-of-court statements, particularly Davis’s statements to the police, described in significant detail defendant’s assault. The People also were able to introduce evidence of defendant’s prior July 2013 assault on Davis, which described in great detail defendant engaging in conduct similar to that which he engaged in during the May 2014 assault.

Likewise, the People’s case against defendant for Henry’s murder was strong. Although none of the witnesses identified defendant as the murderer at trial, several of their statements to the police during the investigation of Henry’s murder establish defendant killed Henry. Citizen told the police that defendant had confessed to her that he killed Henry; Beard, a neighbor who witnessed the murder, told the police that he recognized the shooter as a man who frequented Citizen’s home; the police found defendant several days after the shooting in the Ford Explorer that he used to flee the scene of the murder and which contained blood matching Henry’s DNA; and the police found a gun in the Ford Explorer that shared several characteristics similar to the bullets recovered from Henry’s body.

In short, we conclude the court acted within its discretion when it granted the People’s motion to join the murder and domestic violence charges and later denied defendant’s motion to reconsider that ruling. We now turn to an analysis of whether joinder of the charges nevertheless resulted in gross unfairness that violated defendant’s due process rights.

2.3. Joinder did not violate defendant's due process rights.

“Even if a trial court’s severance or joinder ruling is correct at the time it was made, a reviewing court must reverse the judgment if the ‘defendant shows that joinder actually resulted in “gross unfairness” amounting to a denial of due process.’ [Citation.]” (*Mendoza, supra*, 24 Cal.4th at p. 162.) “‘[E]rror involving misjoinder “affects substantial rights” and requires reversal . . . [if it] results in actual prejudice because it “had substantial and injurious effect or influence in determining the jury’s verdict.” ’ [Citation.]” (*Grant, supra*, 113 Cal.App.4th at p. 587, quoting *U.S. v. Lane* (1986) 474 U.S. 438, 449 [106 S.Ct. 725, 88 L.Ed.2d 814].) To succeed on a claim that joinder resulted in gross unfairness in violation of the defendant’s due process rights, the defendant must demonstrate a reasonable probability that the joinder tainted the jury’s verdicts. (*People v. Merriman* (2014) 60 Cal.4th 1, 49.)

For the same reasons discussed above, nothing about the nature of the evidence relevant to both sets of charges unduly prejudiced defendant at trial. Neither set of charges was unusually more inflammatory than the other, and both sets of charges were relatively strong. In addition, we note there would have been little danger of the jury confusing the evidence presented in support of the murder charge with that used to prove the domestic violence charges. The People used two prosecutors in the underlying trial; one to present evidence of the murder charge and the other to present evidence of the domestic violence charges. For the most part, the evidence was presented in distinct phases at trial, with the murder evidence presented first and the domestic violence evidence presented last. Moreover, both sets of charges involved distinct sets of witnesses, none of which overlapped.

Defendant argues he was prejudiced by the joinder of the murder charge with the domestic violence charges because the trial court did not issue any meaningful instructions limiting the jury's consideration of the evidence relevant to the murder charge when evaluating the domestic violence charges. Defendant claims this issue was compounded by the fact that the court instructed the jury it could consider evidence of the uncharged July 2013 domestic violence incident only in connection with the assault with a firearm and criminal threats counts. According to defendant, by not issuing a similar instruction prohibiting the jury from considering the evidence of the June 2014 domestic violence incident when evaluating the murder charge, the court implied the jury could consider that evidence in determining whether defendant committed the murder.

We reject defendant's claim that any of the court's individual instructions, or that the instructions when viewed as a whole, implied the jury could consider the evidence of one set of charges when evaluating the other set. In this case, the court instructed the jury with CALCRIM Number 3515, which provides: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." In addition, at two points during the trial, the court gave instructions limiting the jury's consideration of the evidence of uncharged domestic violence to the domestic violence charges. Before the prosecution introduced evidence of the uncharged incidents, the court instructed the jury as follows: "If you decide the defendant committed the uncharged offense or committed the uncharged acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant had the intent that's necessary to be guilty of count 1, which is the assault with the firearm that allegedly occurred on May 24. Now, do not conclude

from this evidence that the defendant has bad character or that he is disposed to commit a crime.” Later, when instructing the jury after the parties rested, the court gave CALCRIM Number 852, which similarly informed the jury it could consider the evidence of defendant’s prior uncharged acts of domestic violence in determining whether defendant committed assault with a firearm and criminal threats.⁴

Based on these instructions, as well as the others provided by the trial court, we do not find it reasonably likely the jury

⁴ Specifically, the court instructed the jury in relevant part: “If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit . . . and did commit [t]he offenses charge[d] in counts 1 and 3, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the offenses charged in counts 1 and 3. The People must still prove each charge and allegation beyond a reasonable doubt.”

Although this instruction did not include the optional language expressly prohibiting the jury from considering the evidence of uncharged acts of domestic violence for any other purpose, defendant never asked the court to give that portion of the instruction. (See *People v. Lee* (2011) 51 Cal.4th 620, 638 (*Lee*) [“A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal”]; see CALCRIM Number 852 [the last sentence prohibiting the jury from considering the evidence of uncharged offenses for any other purpose must be requested by the parties].) In any event, as noted, the court included similar language when it instructed the jury immediately before the prosecution presented the evidence of defendant’s uncharged acts of domestic violence.

would have believed it could consider the evidence relevant to the domestic violence charges when determining whether defendant committed the murder charged in count 5 and vice versa. Again, the instructions informed the jury that each charge must be considered separately and that the evidence of the uncharged acts of domestic violence could only be considered in connection with the charged domestic violence offenses. Nothing in the instructions provided to the jurors suggests that they could consider the evidence relating to the domestic violence charges in determining whether defendant committed the murder. Further, based on the fact that the People presented the evidence of the murder and domestic violence charges as distinct sets of incidents at trial, the jurors likely would not have misunderstood the court's instructions as permitting them to consider the evidence relevant to one set of charges in determining whether defendant was guilty of the offense or offenses charged in the other set.⁵

Finally, defendant argues that the prosecutor's closing argument improperly conflated the evidence relevant to each set of charges and encouraged the jury to consider all of the evidence together when determining whether defendant committed each of

⁵ We note that this case is distinguishable from *Grant, supra*, 113 Cal.App.4th at p. 579, a case defendant relies on to argue he was prejudiced by the court's joinder of the murder and domestic violence charges. Unlike the defendant in *Grant*, who requested, but was denied, instructions limiting the jury's cross-consideration of evidence relevant to joined offenses, defendant in this case never requested such instructions be given. (See *id.* at pp. 591–592.) As the court in *Grant* noted, courts must give such instructions only if requested by the parties. (*Id.* at p. 591.) Because defendant did not request an instruction limiting the jury's cross-consideration of the evidence relevant to the murder and domestic violence offenses, he cannot now complain that the fact that the court did not give such instructions was error. (*Lee, supra*, 51 Cal.4th at p. 638.)

the charged offenses. Although the prosecutor made some remarks during his closing argument that compared the two sets of charges, those statements did not result in “gross unfairness” violating defendant’s due process rights.

Throughout most of the closing argument, the prosecutor discussed the domestic violence and murder charges separately and in turn. For example, the prosecutor began his argument by first discussing the evidence of the uncharged acts of domestic violence from the July 2013 incident followed by the evidence of the charged May 2014 incident. The prosecutor emphasized that the evidence of the uncharged acts was relevant only to determining whether defendant committed the charged acts of domestic violence. The prosecutor then transitioned to a discussion of the evidence relevant to the murder charge, before returning to a brief discussion of the evidence relating to the May 2014 domestic violence incident. The prosecutor followed a similar pattern in discussing the elements of the offenses and applying the evidence to those elements.

At times, however, the prosecutor made statements comparing the evidence of the murder and domestic violence charges. For example, when discussing the manner in which defendant shot Henry, the prosecutor stated: “Much in the same way that Ms. Davis was trapped when the defendant had his hands around her neck. Mr. Henry was trapped in the backseat of that Explorer.” Later, toward the end of his argument, the prosecutor compared the two victims—Henry and Davis—arguing defendant engaged in similar patterns of threatening his victims: “These two people are separate[d] by about nine years. They have one profound experience in common. Each of them. On each experience [defendant] wanted them to know he was serious. Telling Ms. Davis, ‘you want to lose your neck?’ And Mr. Henry, ‘you think I’m kidding?’ Each of those people unarmed,

defenseless, and each of those people—Ms. Davis wondering if that moment was going to be her last. And Mr. Henry’s experience, that last moment at the hands of the defendant. When we’re talking about what happened to Ms. Davis, when we’re talking about what happened to Mr. Henry[,] we’re talking about the height of senselessness. Just pure senselessness.”⁶

We acknowledge that some of the prosecutor’s statements may have suggested to the jury that it could consider the evidence relevant to the murder charge in determining whether defendant committed the domestic violence charges. (See *Grant*, *supra*, 113 Cal.App.4th at pp. 590–591.) On balance, however, in light of the strength of both sets of charges and the court’s instructions, those statements did not result in “gross unfairness” violating defendant’s due process rights. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [jurors are presumed to understand and follow the court’s instructions].)

3. Remand for a new sentencing hearing is necessary in light of SB 620.

As noted above, we requested the parties to submit supplemental letter briefs addressing whether this matter should be remanded for the trial court to exercise its sentencing discretion to impose or to strike defendant’s three firearm enhancements under newly-amended sections 12022.5 and 12022.53. At the time it sentenced defendant, the court was required to impose any firearm enhancements found true under those sections. (See former §§ 12022.5, subd. (c) [“Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section.”];

⁶ Defendant did not object to any of these statements.

12022.53, subd. (h) [same], both statutes amended by Stats. 2017, ch. 682, § 2.) After SB 620 went into effect on January 1, 2018, however, sentencing courts have newfound discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), to “strike or dismiss an enhancement otherwise required to be imposed by” those statutes if doing so would be “in the interest of justice pursuant to Section 1385.” (§§ 12022.5, subd. (c), 12022.53, subd. (h).)

In their letter brief, the People concede SB 620 applies retroactively to defendant’s non-final judgment but argue remand is unnecessary because no reasonable court would exercise its discretion under sections 12022.5 and 12022.53 to strike the firearm enhancements in this case. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) [remand is unnecessary where the trial court makes clear that had it been aware of its discretion to strike the defendant’s prior convictions, it would not have done so].) The People explain that although Henry’s mother asked the court at the sentencing hearing to “have mercy on [defendant],” the court imposed the full sentence requested by the prosecutor—i.e., 53 years to life in prison. The People also highlight the court’s statements at the sentencing hearing describing the circumstances in aggravation. Based on the court’s statements and the decision in *Gutierrez*, the People argue “there is no indication that the court would have stricken the enhancements,” and, for that reason, remand is unnecessary.

We do not agree that remand is unnecessary. This case is distinguishable from *Gutierrez*, in which the sentencing court made clear that even if it had discretion to impose a lesser sentence, it would not have done so. (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) There, the court explicitly stated that it “‘agree[d] with [the prosecutor]’” that “‘there really isn’t any good cause to strike’” the defendant’s prior convictions under

section 667.5, subdivision (b), concluding that the defendant was the “ ‘kind of individual the law was intended to keep off the street as long as possible.’ ” (*Gutierrez*, at p. 1896.) Here, the court merely noted the circumstances in aggravation to support imposing the sentence recommended by the People. The court did not, however, state that even if it had discretion to strike defendant’s firearm enhancements, it would not have done so. Instead, in imposing the 25 years-to-life enhancement under section 12022.53, subdivision (d), the court noted that the enhancement was “mandatory.” (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228 “[W]hen the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.”].) In addition, when it imposed the firearm enhancements under section 12022.5, subdivision (a), the court imposed the middle term of four years, rather than the high term of 10 years (see § 12022.5, subd. (a)), suggesting the court did not intend to impose the maximum possible sentence on defendant.

In light of the foregoing, we conclude the trial court should be afforded the opportunity to exercise its recently established sentencing discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h). In remanding the matter for a new sentencing hearing, we offer no opinion on how the court should exercise its discretion under those statutes.

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h), as amended by SB 620.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.*

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