Filed 10/9/18 P. v. Jelks CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. KELVIN JELKS, Defendant and Appellant.	B280897 (Los Angeles County Super. Ct. No. BA418329)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals and Edmund Willcox Clarke, Jr., Judges. Affirmed in part, reversed in part, and remanded.

Karyn H. Bucur, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Kelvin Jelks (defendant) was convicted of second degree robbery (Pen. Code, § 211[1]), and assault with a semiautomatic firearm (§ 245, subd. (b)). On appeal, defendant contends: (1) the police's photographic lineup violated his due process rights; (2) his statement made to a police officer at the hospital was inadmissible because it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (3) the trial court erred by denying his new trial motions based on ineffective assistance of counsel; (4) this court should conduct an independent review of the sealed transcript of the trial court's in camera hearing conducted pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); and (5) the matter should be remanded to the trial court to allow it to exercise its discretion to strike the firearm enhancements. We affirm the convictions but reverse the sentence and remand for the trial court to determine whether to strike the firearm sentencing enhancements.

BACKGROUND

Roberto Hernandez worked at the Rodriguez Recycling Center, located at 4363 South Avalon Boulevard. Hernandez generally opened the business every morning. On November 12, 2013, Joseph Tarver, a customer and self-described, occasional volunteer at the recycling center, arrived at the recycling center before Hernandez came to open up the business. While Tarver was waiting, defendant, whom Tarver had never seen before, walked past Tarver and headed toward Vernon Avenue. They acknowledged one another with a nod.

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

Hernandez eventually arrived at the recycling center and was carrying a bag that contained a laptop computer, approximately $1,700 in cash, a notebook, and purchasing reports. While Hernandez was opening the door to the business, defendant approached him and said, "Give me, mother fucker, bag."

Defendant then grabbed Hernandez's bag and ran on Avalon Boulevard toward Martin Luther King Boulevard. Tarver was standing next to Hernandez during the robbery. Tarver saw defendant point a gun at Hernandez.

Hernandez and Raul Justiniano, another employee at the recycling center, chased after defendant. While being pursued, defendant turned and shot Hernandez. The bullet went through Hernandez's left leg and entered his right leg. Hernandez was "face-to-face" with defendant when he was shot and saw defendant for "a few seconds." Hernandez was taken to the hospital for the gunshot wound.

At the hospital, Hernandez spoke to the police and told them that the shooter had a tattoo under his left eye. The police thereafter showed Hernandez a photographic lineup of six individuals (six-pack). Hernandez circled picture number two and identified the person in the picture (which was defendant) as the one who had shot him. Hernandez also subsequently identified defendant as the shooter in court at the preliminary hearing and at trial.

When the police interviewed Tarver on the day of the robbery, Tarver told the police that the robber was black, had a tattoo on his face, and had darker skin than Tarver. That same day, the police also showed Tarver a six-pack photographic lineup identical to the one shown to Hernandez. Tarver circled

defendant's photo in picture number two. At trial, Tarver testified that he chose that photo because it "definitely" looked like the person who had robbed Hernandez.

Los Angeles Police Department Officer Brendy Ponce was the investigating officer in this case. During his investigation, he recovered from the roof of a nearby church Hernandez's bag containing his laptop computer and receipts from Rodriguez Recycling. This location was close to defendant's residence at 1588 E. Martin Luther King Boulevard.

Los Angeles Police Department Officers Ramon Melendez and Manuel Gutierrez were on patrol in their marked patrol car the morning of the robbery and shooting. When they received a radio communication about an assault with a deadly weapon that had just occurred in the area of Avalon Boulevard and Vernon Avenue, they responded to the call. Officer Melendez saw a black male wearing a black sweater, which matched the description of the subject given during the radio communication. Officer Melendez looked directly at the suspect and recognized him as defendant because Officer Melendez had encountered defendant in the neighborhood about five times previously, including a 10-minute conversation with defendant on one occasion.

After the officers made eye contact with defendant, defendant crouched down in front of a parked car. Officer Gutierrez then exited the patrol car, identified himself, and ordered defendant to put up his hands. Defendant ran northbound up an alley. Officer Gutierrez and Officer Melendez followed defendant in the patrol car but lost sight of defendant by the time they reached the end of the alley.

On the day of the robbery and shooting, Los Angeles Police Department Officer Clifford Chu was working with a K9 unit and

assisted in the investigation. Officer Chu found a black sweatshirt in the vicinity of the incident, specifically the 600 block of 41st Place, between Avalon Boulevard and McKinley Avenue. DNA was subsequently recovered from the sweatshirt. The major DNA profile recovered from the item matched defendant's DNA profile, which only appears in approximately one in ten trillion individuals.

Los Angeles Police Department Officer Jason Schwab was also working with a K9 unit on the day of the robbery and shooting. When Officer Schwab and his police dog, JoJo, responded to the area, JoJo alerted to a white van that was parked in a driveway. Officer Schwab ordered the person inside the van to surrender. After five minutes or less, defendant opened the front door of the van. Officer Schwab warned defendant that if he tried to flee, he would deploy his dog. Defendant stepped out of the van, showed his hands to the police, and ran away. Per Officer Schwab's command, JoJo went after defendant, struck defendant in the chest, knocked him to his knees, and bit defendant's pant leg pocket. Defendant surrendered, and the police took him into custody.

After his arrest, defendant was taken to the hospital for treatment of the dog bite wound he sustained. At the hospital, Los Angeles Police Department Officer Tenorio asked defendant how he was feeling. Defendant replied, "I fucked up on Vernon."

Defendant was charged in an amended information with one count of second degree robbery in violation of section 211 (count one) and one count of assault with a semiautomatic firearm in violation of section 245, subdivision (b) (count two). As to count one, the information alleged firearm enhancements pursuant to section 12022.53, subdivisions (b) through (d) and, as

to count two, a firearm enhancement pursuant to section 12022.5. As to both counts, the information alleged that defendant had suffered one prior "strike" conviction as defined by sections 667, subdivision (d), and 1170.12, subdivision (b)), one prior serious felony conviction as defined by section 667, subdivision (a)(1), and that he had served one prior prison term as defined by section 667.5.

Defendant proceeded to trial, at which his counsel principally argued to the jury, "This case is about mistaken identification . . . ." In the defense case, the defendant called one witness–Dr. Mitchell Eisen, a psychologist with expertise in memory and suggestibility.

Following trial, the jury found defendant guilty of all counts and found that the special allegations were true. Defendant admitted his prior convictions. The trial court sentenced defendant to state prison for a term of 40 years to life. Defendant timely appealed.

DISCUSSION

I. Photographic Lineup

Defendant argues the six-pack shown to Hernandez and Tarver violated his due process rights in that it was unduly suggestive and led to an unreliable identification of defendant as the robbery suspect. Defendant thus contends the trial court erred by denying his motion to suppress evidence of the photographic lineup. Defendant further contends any in-court identification of defendant as the robbery suspect was tainted by the unduly suggestive photographic lineup. We reject these contentions.

In order to determine whether a photographic identification procedure was so unreliable as to violate a defendant's due process rights, the court must ascertain: "(1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances. [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942 (*Gonzalez*).) The defendant bears the burden of demonstrating that there was an unreliable identification procedure. (*Ibid.*) With respect to the first issue, the question is whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select the defendant. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990 (*Cunningham*); see also *People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052 (*Brandon*) ["Generally, a pretrial procedure will only be deemed unfair if it suggests in advance of a witness's identification the identity of the person suspected by the police"]) With respect to the second issue, "there must be a 'substantial likelihood of irreparable misidentification' under the 'totality of the circumstances' to warrant reversal of a conviction on this ground." (*Cunningham, supra,* 25 Cal.4th at 990.)

"A claim that an identification procedure was unduly suggestive raises a mixed question of law and fact to which we apply a standard of independent review, although we review the determination of historical facts regarding the procedure under a deferential standard." (*People v. Clark* (2016) 63 Cal.4th 522, 556-557.)

With respect to whether the photographic lineup was unduly suggestive, defendant specifically claims his photograph "stands out" from the other five photos because his photo depicts "the darkest male wearing a white t-shirt and a very large

distinctive tattoo under his left eye," whereas "[t]he remaining five photographs depict individuals with much lighter complexions with smaller or no apparent tattoos." Because of these claimed differences, defendant argues the six-pack "ma[d]e the resulting identification of [defendant] virtually inevitable."

We have reviewed the photographic lineup in this case and do not find it to be unduly suggestive. To the contrary, all six individuals appear to be black males, have short hair and similar facial hair, are of the same general age, height, weight and build, and generally resemble one another. One male has light-colored skin (picture 3); three males have skin that is darker than the male in picture 3 (pictures 1, 4 and 5); one male has dark skin (picture 6); and defendant (picture 2) has skin slightly darker than the male in picture 6. All six males are wearing solid-colored casual clothing: two of the individuals are wearing dark or black t-shirts or sweatshirts (pictures 1 and 4); two are wearing a grey hooded sweatshirt (pictures 5 and 6); one is wearing a blue hooded sweatshirt (picture 3); and defendant (picture 2) is wearing a white t-shirt. All six males have one or more tattoos or similar markings on their faces. Contrary to defendant's claim, the facial tattoos or other markings appear to be of similar size for all six males. The male in picture 1 and defendant (picture 2) have a tattoo under their left eyes. The male in picture 3 has tattoos above his left and right eyes. The male in picture 4 has a tattoo between his eyebrows and appears to have a tattoo under his right eye and a tattoo near the corner of his left eye. The male in picture 5 has a tattoo above his right eyebrow and appears to have a mark on the corner of his right eye. The male in picture 6 appears to have a mark under his right eye.

Because we find defendant's photograph is generally similar to that of the other five photographs, we find no due process violation. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217 (*Johnson*) [finding photographic lineup not unduly suggestive where "[a]ll of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other"]; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 520 ["[A] photographic identification is sufficiently neutral where the persons in the photographs are similar in age, complexion, physical features and build (small differences in stature do not matter), and where the photograph of the accused does not stand out"].)

The mere fact that defendant identifies some differences between his photo and some of the other photos does not alter our conclusion. In considering and rejecting due process challenges to photographic lineups, our Supreme Court has observed that "[b]ecause human beings do not look exactly alike, differences are inevitable." (*Gonzalez, supra,* 38 Cal.4th at p. 943.) Indeed, our Supreme Court has stated explicitly that "there is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*People v. Blair* (1979) 25 Cal.3d 640, 661, superseded by statute on other grounds, as stated in *People v. Lissauer* (1985) 169 Cal. App. 3d 413, 497.) Rather, "[t]he question is whether anything caused defendant to 'stand out' from the others in a way that would suggest that the witness should select [defendant]." (*Gonzalez, supra,* 38 Cal.4th at p. 943.) Here, defendant's white t-shirt, somewhat darker complexion, and facial tattoo do not impermissibly suggest such a result, particularly in light of the various similarities among all six photographs. (See, e.g., *ibid.*

[photographic lineup not impermissibly suggestive, where defendant was the only one wearing "gang-type" clothing, because "nothing about defendant's clothing suggested his photograph should be selected"]; *Cunningham, supra,* 25 Cal.4th at pp. 989, 990 [photographic lineup not suggestive where defendant's photograph "was similar to that of the others" in several respects, even though defendant's photograph was "the only one in which the subject had three of the features noted by the eyewitnesses–glasses, a goatee, and a suit and tie"]; *Johnson, supra,* 3 Cal.4th at p. 1217 ["Minor differences in facial hair among the participants did not make the lineup suggestive"]; *People v. Gordon* (1990) 50 Cal.3d 1223, 1243 [lineup not unduly suggestive where all participants "bore a general resemblance to one another; although defendant was the tallest"].)

Because we hold that the photographic lineup was not unduly suggestive and unnecessary, we do not need to determine whether the identification was reliable under the totality of the circumstances. (*People v. Thomas* (2012) 54 Cal.4th 908, 930; *Johnson, supra,* 3 Cal.4th at p.1218.)[2] Furthermore, because "we

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[2] We note several factors indicating Hernandez's and Tarver's selection of defendant from the six-pack was reliable. (See *People v. Thomas*, *supra*, 54 Cal.4th at p. 930 [listing factors].) Both had a reasonable opportunity to observe the suspect: Hernandez was "face-to-face" with the shooter and observed him for "a few seconds"; Tarver saw the suspect on the morning of the robbery as they nodded to one another, and he was standing next to Hernandez during the robbery. Both Hernandez's and Tarver's descriptions of the suspect to police were accurate: Tarver described the suspect as black with darker skin than Tarver and having a tattoo on his face; Hernandez said the suspect had a tattoo under his left eye. A short time period elapsed between the incident and the identifications: Hernandez

conclude [defendant] has not met his burden of proving the photographic lineup was unfair and unduly suggestive . . . [¶], his contentions concerning the tainted in-court identifications . . . also fall." (*Brandon, supra,* 32 Cal.App.4th at p. 1052.)

II. Defendant's Statement to Officer Tenorio

Defendant contends his statement that "I fucked up on Vernon" in response to Officer Tenorio's question at the hospital about how defendant was feeling was inadmissible because it was obtained in violation of *Miranda, supra,* 384 U.S. at p. 436. We disagree.

"To protect the constitutional privilege against self-incrimination, the *Miranda* rule requires that before the police may question the defendant during a custodial interrogation, the defendant must be advised of the right to remain silent and to an attorney and that any statements made may be used against him or her in court." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 86 (*Andreasen*).) "The prophylactic *Miranda* protections are triggered only if a defendant is subjected to a custodial interrogation. [Citation.] Interrogation refers not only to express questioning, but also to its functional equivalent; i.e., '"any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are

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and Tarver picked defendant's photo from the six-pack on the day of the robbery. Both witnesses indicated certainty about their identification of the suspect: Hernandez testified that he selected defendant's photo because "[t]he person that is on the picture resembles the one that stole from me and shot at me"; Tarver testified that "Yes, definitely" the person in the photo he picked committed the robbery.

reasonably likely to elicit an incriminating response from the suspect.'" [Citation.] However, not all police questioning of a person in custody constitutes interrogation. [Citation.] . . . [¶] [C]asual conversations or 'small talk' unrelated to the offense do not typically constitute a *Miranda* interrogation. [Citations.]" (*Id.* at pp. 86-87, fn. Omitted.) This is because interrogation for purposes of the *Miranda* rule "refers to questioning initiated by the police or its functional equivalent, not voluntary conversation." (*People v. Gamache* (2010) 48 Cal.4th 347, 387 (*Gamache*).) "Consequently, the police 'may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.' [Citation]." (*Id.* at p. 388.)

"On appeal from the denial of a *Miranda* exclusionary motion, we defer to the trial court's factual and credibility findings if supported by substantial evidence, and independently determine whether the challenged statements were illegally obtained." (*Andreasen, supra,* 214 Cal.App.4th at p. 88.)

Here, there is no dispute defendant had not been given *Miranda* warnings prior to declaring "I fucked up on Vernon." There is also no dispute that defendant was in custody at the hospital when Officer Tenorio asked the question about how defendant was feeling. Thus, as the trial court observed, "The issue before the court, it seems to me, is whether . . . the question was reasonably calculated to elicit incriminating information." As to that issue, the trial court continued, "And for a number of reasons, really, I don't think that's the situation. There was no discussion or any invitation on the part of the officer to engage the defendant in any discussion relating to the case, other than

his physical sense–his physical condition after this dog attack." We agree with the trial court.

Under the circumstances, while sitting at the hospital awaiting treatment for a recent dog bite, the officer's single question about how defendant was feeling falls within the type of "casual conversation" or "small talk" not subject to the *Miranda* rule.[3] In context, such a benign inquiry cannot reasonably be viewed as calling for an incriminating response. (See *Andreasen, supra,* 214 Cal.App.4th at p. 84 [while waiting for evidence technician to arrive, lengthy conversation about defendant's tattoos, sports, his talent as a musician, music defendant liked, gambling, where defendant grew up, and defendant's pets did not implicate *Miranda*]; *People v. Mobley* (1999) 72 Cal.App.4th 761, 790-792 (*Mobley*) ["small talk" to "lighten things up" during transport of suspect to jail was not interrogation where there was no showing the officer "should have known his casual remarks would have encouraged [defendant] to make incriminating statements"], overruled on another ground in *People v. Trujillo* (2006) 40 Cal.4th 165, 181, fn. 3.)

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[3] Defendant's reliance on *People v. Elizalde* (2015) 61 Cal.4th 523 is therefore misplaced. To begin with, *Elizalde* grappled with whether routine booking questions may be subject to *Miranda*, not small talk or casual conversations with the police. Moreover, the *Elizalde* court held that booking questions about gang membership or affiliation are subject to *Miranda* because they are "reasonably likely to elicit an incriminating response potentially exposing [the suspect] to prosecution for the crime of gang participation [citations] and the enhanced punishment [citations]." (*Id.* at p. 540.) There is no such reasonable likelihood of an incriminating response to the question of how one is feeling while waiting for treatment at the hospital.

Indeed, defendant's incriminating statement that "I fucked up on Vernon" (in other words, did something bad in the vicinity of the recycling center) was, as the trial court observed, "somewhat of a non-sequitur." Officer Tenorio's innocuous question, as the trial court found, was not designed to elicit incriminating admissions. Moreover, under the circumstances, we do not find Officer Tenorio "should have known" his question "would have encouraged [defendant] to make incriminating statements." (*Mobley, supra,* 72 Cal.App.4th at p. 792.) Just because defendant gave an incriminating answer to an unrelated question renders neither the exchange an interrogation nor defendant's response inadmissible. (*Andreasen, supra*, 214 Cal.App.4th at p. 87 ["The fact that information gathered from . . . routine questions or casual conversations turns out to be incriminating does not alone render the statements inadmissible"]; see also *Gamache, supra,* 48 Cal.4th at pp. 384, 388 [*Miranda* not implicated where murder suspect stated "I fucked up. I knew better. I should have used a .45." in response to deputy's inquiry about defendant's prior military service].)

Accordingly, we find no error with respect to the admission of defendant's response to Officer Tenorio's question at the hospital.

III. Motions for New Trial

Defendant contends the trial court erred by denying his motions for new trial, arguing that defendant's trial counsel was ineffective in two respects: (1) failing to present testimony from witnesses Tiana Pratt, Houston Jones, and John Price; and (2) "prevent[ing] [defendant] from testifying on his behalf." We find no error.

A. *Relevant Background*

Defendant filed his first motion for new trial *pro per* on April 19, 2016, raising numerous claims as the basis for a new trial, including the failure to present testimony from Pratt, Jones, Price, and defendant.[4] The trial court denied that motion. On January 18, 2017, defendant through his appointed counsel filed a second motion for new trial, again contending trial counsel was ineffective by failing to present testimony from the three purported "alibi witnesses" and defendant. The trial court denied the second motion.

In connection with his first motion, defendant submitted declarations from Pratt, Jones, and Price. Pratt stated she was with defendant on the date of the robbery, claiming defendant "was never out of my sight (November 12, 2013), from between 6 or 6:30 am until sometime after the noon hour." Pratt specifically claimed she was with defendant at McDonald's for breakfast immediately after picking him up from his home that morning. Jones stated that on "an unknown date," he witnessed a robbery at the recycling center on Avalon and recognized the robber as "a member of the Avalon Crip street gang," as opposed to defendant, whom Jones met in jail and recognized from the neighborhood. Price stated he saw defendant around 6:30 am at McDonald's on the day of the robbery. Moreover, Price stated that defendant's father is a member of "30 Piru, a Blood street gang," that the recycling center is located "deep into Crip territory," and that, accordingly, defendant "would be spotted there easily and killed instantly" if he had been in the vicinity. Price also stated that

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[4] Defendant does not contend on appeal that the trial court erred by denying the request for new trial with respect to any of the other grounds raised in defendant's *pro per* motion.

defendant keeps some of his clothes at Price's home, that Price saw police carry out from his yard what appeared to be several items of clothing, and that "I don't believe it" that the police recovered a "jacket" belonging to defendant on the street because "the jacket was more likely found on my back porch."

Defendant also submitted with the first motion his own declaration in support of a new trial. In it, defendant stated that he advised his trial counsel that he wanted to testify but that she advised him against it, purportedly telling defendant he "had already messed up the case enough and that she was not going to let [defendant] mess it up anymore." Defendant further elaborated he would have testified, among other things: that he never previously met Officer Melendez prior to the date of the robbery, that he did not attempt to flee, that he left his black sweater at Price's house, that he did not rob or shoot Hernandez, and that he did not make any incriminating statement to Officer Tenorio at the hospital.

Seemingly in anticipation of the claims of ineffective representation that might one day come, during a closed *ex parte* hearing in the midst of trial, defendant's trial counsel explained her reasons for not having particular potential witnesses testify. Concerning Jones, trial counsel stated: "I interviewed him, your Honor. He claims that he was an eyewitness at an unknown date, unknown time, to a robbery that occurred right at the Rodriguez Recycling. He saw the whole thing and that [defendant] wasn't it, and the only reason they came into contact was because they ran into each other in custody. [¶] I interviewed him thoroughly about details of the case . . . . I believe that he is not credible." Indeed, trial counsel added: "I actually interviewed [Jones] myself to make sure that the details

that he talks about are not the details of this robbery. . . . I mean I don't know whether he's making it up, or he witnessed another robbery. I don't know. But it ain't this robbery."[5] Moreover, trial counsel noted that "Jones, just so the court knows, has so many prior felony convictions which would have then required that the court give the evaluation, the credibility of the witness instruction on prior convictions. And since there are no prosecution witnesses with that background, I didn't really want him to be our star witness." Similarly, with respect to Pratt, trial counsel explained: "So I separately from my investigator, pretty much interviewed her thoroughly. I also find her not credible because there are details that she talks about that are inconsistent with what she had told me previously. . . ."

In addition to finding Jones and Pratt not credible based on having personally interviewed them, trial counsel explained that she also made the tactical choice not to have either testify in light of the prosecution's evidence of a recorded jail call between defendant and an unknown female made some time after defendant's arrest in this case. During that recorded call, defendant referred to having someone named "Wang Thang" to "get the jury" because "[m]aybe he can act like he seen the whole thing go down." Defendant told the female, "You know how to come up with a story." Thus, trial counsel told the court during the closed hearing: "And I'm making a strategic decision not to call [Jones] in light of the phone calls that are going to be played which imply that [defendant] is trying to come up with some alibi

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[5] We note that, in this declaration, Jones states he saw such robbery on an unknown date "about a year ago." But Jones signed his declaration on October 6, 2015, and the robbery in this case occurred almost two years earlier on November 12, 2013.

witnesses. I think that would be devastating to the case, so I'm making a strategic call not to call them." Indeed, trial counsel reiterated a second time: "I'm just making a strategic decision that in light of the phone call. These two witnesses, I think would be detrimental. I wanted to put that on the record."

As for defendant's decision not to testify, during the closed hearing, trial counsel also told the trial court: "I talked with [defendant]. [Defendant] is going to assert his right to remain silent and not testify."

After hearing from trial counsel at the closed hearing, the trial court explicitly confirmed with both defendant and his counsel that they had discussed these matters and that defendant agreed with them:

> THE COURT: . . . [H]ave [you] discussed all of these things with [defendant]?
>
> [TRIAL COUNSEL]: Yes.
>
> THE COURT: And this meets with his approval?
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> [TRIAL COUNSEL]: Yes. Even though I believe it's counsel's decision to make strategic calls.
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> THE COURT: It is. It is. But it's always nice if he understands and actually is on board as far as these decisions are concerned. Strategically they're clearly solid assessments that you have made. Yes. [¶] So he agrees?
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> DEFENDANT JELKS: (Nods head)
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> THE COURT: He indicated yes. Okay. All right.

Later on, with the prosecutor present but outside the presence of the jury, the trial court again confirmed that defendant had chosen not to testify:

> THE COURT: There's an issue regarding the defendant testifying, where he's–
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> [TRIAL COUNSEL]: Very quickly, your Honor. I advised him that he has a right–Mr. Jelks, you need to listen. He has a right, absolute right to testify, not to testify, and, based on advice of counsel, has chosen to remain silent, your Honor.
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> THE COURT. Okay. Anything further on that?
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> [TRIAL COUNSEL]: He has to say "Yes." Did you say yes, Mr. Jelks?
>
> DEFENDANT JELKS: Yes.

B. *Analysis*

When the trial court has denied a motion for new trial based on an ineffective assistance of counsel claim, we apply a standard of review applicable to mixed questions of law and fact, upholding the trial court's findings if supported by substantial evidence and reviewing de novo the question of whether the established facts demonstrate counsel was constitutionally ineffective. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725.)

A trial court has "authority to grant a new trial on the ground of inadequate representation of counsel," even though it is not one of the enumerated grounds in the statutory provision (§ 1181) for ordering a new trial. (*People v. Fosselman* (1983) 33 Cal.3d 572, 577-578; *People v. Callahan* (2004) 124 Cal.App.4th

198, 209.) To prevail on such a motion, defendant bears the burden to "show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates" and that "counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." (*People v. Fosselman, supra,* 33 Cal.3d at p. 581.) In cases where counsel's acts or omissions do not amount to the withdrawal of a defense, the defendant may alternatively show "that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings." (*Id.* at p. 584.) When evaluating a trial court's decision on a defendant's motion for new trial, "[r]eviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*Id.* at p. 581.) "In all other cases, the conviction will be affirmed and the defendant relegated to habeas corpus proceedings at which evidence dehors the record may be taken to determine the basis, if any, for counsel's conduct or omission." (*Id.* at pp. 581-582.)

On the record before us, we cannot conclude there was no rational tactical purpose for trial counsel's decision not to introduce testimony from Pratt, Jones, Price, or defendant. Indeed, with respect to Pratt and Jones, the record is replete with reasonable justifications for trial counsel's decision not to call them as witnesses. Trial counsel explained on the record that she found neither credible after interviewing them, was particularly concerned about Jones testifying due to his numerous felony convictions, and made the "strategic decision" that their alibi testimony would be "devastating" and "detrimental" to the case in light of the prosecution's recording of

defendant's jail call suggesting defendant was in search of a witness who could "come up with a story" to exonerate him. The trial court agreed that these were "clearly solid assessments" by trial counsel, and defendant had indicated he understood them and was "on board" with such decisions.

Similarly, although trial counsel did not offer an explanation for deciding not to call Price as a witness, it certainly would have been a "solid assessment" for trial counsel to consider Price's testimony just as "devastating" to the defense case in light of defendant's jail call indicating he was looking for a witness to "come up with a story." Trial counsel might have reasonably viewed as precisely such a "story" Price's proffered testimony that he happened to remember seeing defendant at McDonald's on the morning of the robbery and that he believed the police somehow knew to take defendant's sweatshirt from his yard so that they could later plant it as evidence on the street. Further still, trial counsel may have rationally determined that eliciting the affiliation of defendant's father with the Bloods street gang would have been more inflammatory and prejudicial than any benefit it might have provided as an explanation for why defendant would not have committed the robbery in Crips territory.

As for defendant's decision not to testify, there are any number of rational reasons for trial counsel to have recommended it. Even crediting defendant's declaration that trial counsel told defendant he "had already messed up the case enough" and would "mess it up" more if he testified, we find that such advice would have been sensible under the circumstances. Given that defendant had already been caught on tape in a jail call discussing how he would try to "get the jury" by finding a witness to "come up with a story," trial counsel might of have reasonably

concluded defendant could have only made things worse by providing them with his "story" that was not credible. This might have been particularly so given defendant's proffered testimony was to, among other things, accuse Officer Melendez of lying about knowing him, claim he did not attempt to flee despite officers indicating otherwise, and argue that Officer Tenorio made up defendant's statement that "I fucked up on Vernon."

Notably, whatever the reasons for trial counsel advising defendant not to testify, defendant at the time found them sufficiently sound to indicate twice on the record that he accepted his counsel's advice and would not testify. In similar circumstances, where a defendant claimed he was deprived of his right to testify due to counsel's advice but first raised this with the court only after his conviction as a ground for a new trial, the court rejected the claim outright as untimely, explaining: "Defendant did not apprise the court he desired to testify at any time during the trial proceeding when the right could have been accorded him, instead he waited until an adverse verdict was rendered against him before advising the court he had really wanted to take the stand after all, then demanded a new trial—another chance before a new jury—on the ground his counsel had 'deprived' him of his right. The obvious unreasonableness of such an approach doubtless led to the established rule that a defendant who desires to take the stand contrary to the advice of his counsel must make proper and timely demand." (*People v. Guillen* (1974) 37 Cal.App.3d 976, 984-985.)

We similarly reject as untimely defendant's request for a new trial due to trial counsel's purported erroneous advice preventing him from testifying. Moreover, we find that the

record before us provides no basis for concluding there was no rational purpose for trial counsel's decision not to elicit testimony from Pratt, Jones, Price, or defendant and accordingly find no error with respect to the trial court's denial of defendant's motions for new trial based on ineffective assistance of counsel. (*People v. Fosselman*, *supra*, 33 Cal.3d at pp. 581-582.)

IV. *Pitchess* Discovery

Defendant requests that we conduct an independent review of the in camera proceedings undertaken by the trial court pursuant to defendant's *Pitchess* motion to determine whether the trial court properly exercised its discretion in ordering the disclosure of certain police personnel materials. The Attorney General does not oppose the request.

On February 13, 2015, defendant filed a pretrial discovery motion pursuant to *Pitchess*, *supra*, 11 Cal.3d 531 seeking the discovery of confidential personnel records for Los Angeles Police Department Officers Ralph, Ponce, Melendez, Gutierrez, Chu, Ahn, Angert, and Tenorio. The trial court granted the motion only as to Officers Chu, Ahn, Angert, and Tenorio, and "limited to . . . falsification in reports, false testimony, anything of that nature."

The trial court undertook an in camera hearing, at which the trial court reviewed confidential complaints concerning Officers Chu, Ahn, Angert, and Tenorio. The trial court found some of the material was discoverable and ordered the material disclosed to defendant's private investigator.

In accordance with defendant's request, we have reviewed the transcript of the in camera hearing constituting the "record of the documents examined by the trial court" to determine whether

the trial court abused its discretion in refusing to disclose contents of the officer's personnel records pursuant to *Pitchess, supra,* 11 Cal.3d 531. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) Having done so, we find no abuse of discretion in the trial court's decisions concerning which documents should have been disclosed, with the exception of one complaint concerning Officer Tenorio. (See *People v. Samuels* (2005) 36 Cal.4th 96, 110 [finding no abuse of discretion in declining to disclose certain contents of the officer's personnel files after independently examining the record of materials].)

The custodian of records for the Los Angeles Police Department characterized one complaint against Officer Tenorio as concerning an "arrest without cause and false report." After reviewing the complaint, the trial court ordered no disclosure, explaining only: "This [complainant] is a person with many suspicious cases of being a criminal street gang member who's carrying a gun under suspicious circumstances." We cannot tell from this record whether the complaint concerned allegations and/or findings of Officer Tenorio making a false report, which might have borne on his credibility and been used to impeach him. But even if we were to conclude the trial court abused its discretion in not ordering disclosure of this complaint, defendant would not be entitled to any resulting relief. (*People v. Gaines* (2009) 46 Cal.4th 172, 182 ["To obtain relief, then, a defendant who has established that the trial court erred in denying *Pitchess* discovery must also demonstrate a reasonable probability of a different outcome had the evidence been disclosed"].)

Here, Officer Tenorio did not testify at trial because the parties stipulated that he asked defendant at the hospital how defendant was feeling and that defendant responded that "I

fucked up on Vernon." Even assuming the disclosure of the complaint would have led to defendant not entering into such a stipulation, Officer Tenorio testifying as to his interaction with defendant at the hospital, and the jury disbelieving the officer's account of what was said, we find no reasonable probability of a different outcome at trial. Absent defendant's incriminating statement, there was other substantial and compelling evidence of defendant's guilt, including: (1) positive identifications by Hernandez and Tarver of defendant as the robber; (2) recovery of stolen items near defendant's residence; (3) reports the robber wore a black sweatshirt and the discovery of an abandoned black sweatshirt in the vicinity with defendant's DNA on it; (5) defendant's consciousness of guilt by fleeing from Officers Melendez and Guttierez when first encountered, as well as from Officer Schwab and police dog JoJo when later found hiding (CALJIC No. 2.52; *People v. Williams* (2013) 56 Cal.4th 630, 679); and (6) defendant's recorded jail call indicating he needed a witness to "come up with a story." Therefore, even assuming there was error with respect to the nondisclosure of the one complaint, we would not disturb defendant's convictions as a result. (*People v. Gaines, supra,* 46 Cal.4th at pp. 182-183.)

V. Discretion to Strike the Firearm Enhancements

Defendant contends that, in light of Senate Bill 620, the matter must be remanded to the trial court to allow it to exercise its discretion to strike the firearm enhancements imposed in the case. The Attorney General agrees, as do we.

Defendant's sentence includes a 25-years-to-life enhancement under section 12022.53, subdivision (d) on count 1 for personally discharging a handgun causing great bodily injury.

At the time of defendant's sentencing, trial courts did not have the authority to strike firearm enhancements proven under sections 12022.5 and 12022.53. (See §§ 12022.5, subd. (c), 12022.53, subd. (h).) Senate Bill 620, which became effective January 1, 2018, removed that prohibition, stating in both sections 12022.5 and 12022.53: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (*Ibid*.)

Because the judgment of conviction in defendant's case was not yet final when Senate Bill 620 took effect, the new statutory amendment applies retroactively to defendant. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507.) Accordingly, we reverse defendant' sentence and remand for a new sentencing hearing at which the trial court shall consider whether to strike the firearm enhancements pursuant to its newfound discretion conferred by Senate Bill 620.

DISPOSITION

The judgment is affirmed in part and reversed in part. We uphold the defendant's convictions and remand the matter to the trial court to allow it to exercise its discretion to strike the firearm enhancements.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

I concur:

MOOR, 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.

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BAKER, Acting P. J., Concurring in Part and Dissenting in Part

I concur in all but Part IV of the majority opinion (and the associated introductory and dispositional language). In addition to remanding to allow the trial court to consider exercising its recently conferred discretion to strike the firearm enhancements, I would remand for the further purpose of permitting the trial court to augment the record with the Officer Tenorio material it considered when ruling on defendant Kelvin Jelks's motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

The majority correctly notes there is an ambiguity in the record concerning one matter regarding Officer Tenorio's personnel file. Under the circumstances, I would adhere to the "better solution" described by our Supreme Court in *People v. Mooc* (2001) 26 Cal.4th 1216: "The uncertainty in the record would have justified remanding the case to the trial court with directions to hold a hearing to augment the record with the evidence the trial court had considered in chambers when it ruled on the *Pitchess* motion." (*Id.* at p. 1231.) The prejudice analysis the majority now engages in to avoid a remand of somewhat broader scope is inadvisable when there is a ready means of coming to a more informed conclusion regarding whether there was any error at all. (See generally *People v. Cahill* (1993) 5

Cal.4th 478, 503 ["[T]he improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence, and thus is much more likely to be prejudicial . . ."].)

BAKER, Acting P. J.