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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAIME WILLARD, Defendant and Appellant.	B278744 (Los Angeles County Super. Ct. No. GA 081825)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Affirmed in part and reversed in part with directions.

Tara Mulay, 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, Steven D. Matthews, and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jamie Willard challenges his convictions on two counts of attempted murder. He contends that his trial counsel provided ineffective assistance by failing to object to opinion testimony from a police witness regarding the reliability of witness perception and memory shortly after a traumatic event. In addition, Willard contends that he is eligible for resentencing pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill No. 620), which became effective after Willard's conviction, and which gives trial courts the discretion to strike certain firearm enhancements during sentencing. We affirm Willard's convictions but remand the case for resentencing regarding the firearm enhancements.

FACTS AND PROCEEDINGS BELOW

An information charged Willard with two counts of attempted premeditated murder of a peace officer in the performance of his duties (Pen. Code, §§ 187, subd. (a), 664, subds. (e) & (f) (counts 1 and 2)),[1] one count each of second degree burglary (§ 459 (count 3)), simple battery (§ 242 (count 4)), and assault with a deadly weapon (§ 245, subd. (a)(1) (count 5)), and two counts of assault on a peace officer with a semiautomatic weapon (§ 245, subd. (d)(2) (counts 6 and 7)). With respect to counts 1, 2, 6, and 7, the information alleged that Willard personally discharged a firearm and caused great bodily injury. (§ 12022.53, subd. (d).)

The trial court dismissed count 4 upon a motion from the prosecution. The jury found Willard guilty of counts 1, 2, 3, 6, and 7. On count 5, the jury found Willard guilty of the lesser included offense of simple assault. (§ 240.) The jury also found true the firearm allegations.

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

The court sentenced Willard to 80 years to life in prison for the two counts of attempted murder. In both cases, the court imposed a base sentence of 15 years to life, plus an additional 25 years to life for the firearm enhancement. The court ordered that Willard serve the sentences consecutively. In addition, the court imposed consecutive six-month sentences for counts 3 and 5. The court imposed sentences of 34 years to life for each of counts 6 and 7, but suspended the sentences pursuant to section 654.

A. Prosecution Evidence

On July 2, 2010, Willard was shopping at a Kmart in Burbank when a security guard noticed him behaving suspiciously, placing merchandise inside a bag and a cooler in his shopping cart. The security guard recognized Willard as someone who had previously shoplifted, and indeed, Willard was on bail from a previous shoplifting offense.

When Willard carried the merchandise out of the store without paying for it, the security guard and other store employees confronted him. Willard tried to flee, but when an employee blocked him, he head-butted the employee. The employees managed to detain and handcuff him, and took him to a loss-prevention office inside the store to wait for the police to arrive.

While inside the office, Willard complained that his handcuffs were too tight. The security guard removed one handcuff in order to loosen it, and Willard tried to flee, then picked up a nearby fire extinguisher and swung it at the security guard who was blocking his way.

At this point, two police officers from the Burbank Police Department, Officer Derek Green and Officer Alexander Gutierrez, entered the office. Willard's right hand was still free from the handcuffs, and he was standing and facing the door. Green pushed Willard against the wall, pointed his taser at him and ordered him

to sit. Willard sat down, and for the next 20 minutes his emotions appeared to change quickly and dramatically. At times he was quiet, even crying, and at other times he was boisterous, claiming he could not go to jail.

The two officers restrained Willard with double cuffs—two sets of handcuffs chained together behind his back. They walked Willard out of the store and to their police car. As Gutierrez began trying to put Willard into the car, Willard struggled. Gutierrez grabbed Willard and bent him over the trunk of his car.

According to Gutierrez, Willard then "lowered his center of gravity and pushed his butt back towards" Gutierrez, pinning him against the rear panel of the car. Gutierrez felt a tug on his belt, so he moved his hand to his gun and felt Willard's hand on the gun. Gutierrez, still pinned against the car, shouted, "He's got my gun. He's got my gun." Gutierrez then performed a maneuver to wrestle the gun away from Willard, but he lost control of the gun and saw Willard running toward a nearby grass median with the gun in his hand. Gutierrez ran toward Willard, who was trying to get a grip on the gun despite the double handcuffs. Gutierrez testified that Willard managed to point the gun at him, but Gutierrez got out of the line of fire and pushed Willard's shoulder back. Willard fired the gun.

Gutierrez got behind Willard and placed him in a bear hug. He managed to pull Willard's arm down so that the gun was pointed straight down. Gutierrez heard rapid gunfire and felt shrapnel hitting his body. Once the gunfire stopped, Gutierrez ripped the gun out of Willard's hand, took him to the ground, and began hitting him. Gutierrez tased Willard, but Willard continued to struggle until other officers nearby arrived and assisted. Gutierrez suffered bruises and two puncture wounds that required surgery to remove foreign objects from his body.

The other officer on the scene, Green, testified that he was at the front door of his own separate police car when he saw Gutierrez

and Willard beginning to struggle. He was walking around toward the commotion when he heard Gutierrez say, "He has my gun. He has my gun." Green saw Willard holding Gutierrez's gun. Green drew his own gun and called for help on the radio. As Gutierrez struggled to get his gun back, Willard pointed it at both Green and Gutierrez. Green testified that he believed that Willard was trying to kill both officers.

Green was only about five feet away from Willard, but he could not get a clear shot because Gutierrez had Willard in a bear hug. Willard managed to point the gun at Green and fired, hitting Green in his left hand. Green returned fire, aiming toward Willard's lower extremities in order to avoid striking Gutierrez. Green saw the gun go flying out of Willard's hands and saw Gutierrez on top of Willard and in control. Green estimated that only three seconds passed between the moment Gutierrez yelled "He has my gun," and the moment Willard shot Green. Green lost two metacarpal bones in his left hand as a result of the gunshot wound.

Several other witnesses who were in the Kmart parking lot at the time of the incident also testified. Frank E. testified that as he was pulling into the parking lot, he saw two police officers leading a suspect out of the store. He had just parked his car when he heard gunshots and a police officer yelling, "Help, help. He got my gun." Frank E. ran toward the scene and saw a police officer wrestling with a man on the ground. Frank E. yelled at the man to stop fighting and attempted to assist in handcuffing him, but the man continued to resist until other officers arrived on the scene.

Another witness, Andrew L., saw the two police officers leading a suspect out of the Kmart. The suspect began to resist, and one officer asked, "What are you doing?" The suspect managed to get some distance away from the officer, and Andrew L. heard someone shout "someone has a gun." Andrew L. ducked behind his car and very shortly afterward heard three shots fired. Only a few

seconds elapsed from the time Andrew L. saw Willard resisting to when he heard the shots fired.

A third witness, Joseph H., was walking toward his truck when he saw the two officers detaining Willard. He heard gunshots and dropped down under his truck to take cover.

B. Defense Evidence

Captain Michael Albanese of the Burbank Police Department testified for the defense. He arrived at the scene approximately five minutes after Green radioed for help. Albanese spoke with Gutierrez shortly after the incident, while Gutierrez was receiving treatment from paramedics. According to Albanese, Gutierrez told him at that time that Willard grabbed his gun and managed to pull it out of its holster. Gutierrez and Willard fought over the gun, and at some point, the weapon fired. Albanese testified that Gutierrez told him that he was not sure whether he or Willard fired the weapon.

DISCUSSION

Willard raises two contentions on appeal. First, he argues that his attorney provided ineffective assistance of counsel by failing to object to improper opinion testimony from Albanese regarding the credibility of statements made moments after a traumatic event. Next, Willard contends that he is entitled to a resentencing hearing in the wake of Senate Bill No. 620, which gave trial courts the discretion to strike firearm enhancements for purposes of sentencing. We find no merit in Willard's claim of ineffective assistance of counsel, but we agree that Willard is entitled to a new sentencing hearing.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Willard contends that, during cross-examination by the prosecution, Albanese offered improper opinion testimony that effectively vouched for the credibility of Green and Gutierrez's

testimony in court. Willard contends that his trial attorney rendered ineffective assistance of counsel by failing to object to this testimony. We disagree. We hold that Willard has failed to show either that his attorney's performance fell below a reasonable standard, or that Willard would have obtained a better result in his case if his attorney had acted as Willard suggests. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).) Consequently, Willard's claim fails.

A. Relevant Trial Proceedings

Albanese testified on direct examination that he spoke with Gutierrez approximately five minutes after the shooting. In that conversation, Gutierrez told Albanese that he and Willard had struggled over Gutierrez's weapon, and that he was not sure whether he or Willard had pulled the trigger. This contradicted Gutierrez's trial testimony, in which he said that Willard pulled the gun out of Gutierrez's holster and aimed it at him before firing.

During cross-examination, the prosecutor asked Albanese about the circumstances of his conversation with Gutierrez. Albanese said that Gutierrez "was in shock. His skin was ashen, and I wasn't sure if I was going to be able to get a statement from him."

The prosecutor went on to ask Albanese about Gutierrez's inconsistent statements: "Would it surprise you or mean anything to you if you were to learn that Officer Gutierrez mentioned to you he didn't know if he discharged a weapon at that moment, but later on that same day, he said that he did not discharge his weapon?"

Albanese answered, "No."

The prosecutor asked, "Why?"

Albanese stated, "It's been my experience—and again, I've been at a lot of incidents where deadly force has been used and where officers and civilians have been the victim of gunshot wounds and/or stabbings. In the moment, I have found that most of these

folks have focused on surviving and that their recall of the intimate details of the incident is not going to be complete. So I'm not surprised."

Shortly afterward, the prosecutor asked if it would surprise Albanese if different civilians described the same events differently. Defense counsel objected on grounds of speculation, and the trial court sustained the objection. The prosecutor asked, "Have you had experience with civilians in interviewing them and getting their description of traumatic events over [your] 40-plus-year career?"

Albanese answered, "Civilian and sworn personnel."

The prosecutor asked, "What is your experience with their perception of the same event?"

Albanese responded, "I'm guarded as to the information they provide because I know—my experience, they've been exposed to a horrific event. They've been traumatized, and their recall of the incident may be somewhat myopic. They may focus on one aspect of it in the entire incident. I'll use the North Hollywood Bank of America shoot-out [as an] analogy. We had 30-plus victims, and when I initially arrived, their initial rendering of what happened wasn't necessarily consistent, and they all essentially saw the same thing."

Other than the single objection on grounds of speculation, defense counsel did not object to any of this testimony.

B. The Law Regarding Ineffective Assistance of Counsel

In order to establish ineffective assistance of counsel, a defendant must show first, that his attorney's performance was deficient, and second, that those errors prejudiced him. (*Strickland*, *supra*, 466 U.S. at p. 687.) We "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (*Id.* at p. 690.) In applying this standard, we " ' "defer to counsel's reasonable

tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

C. Analysis

Willard argues that his trial counsel rendered ineffective assistance by failing to object on the ground that Albanese was offering inadmissible lay opinion testimony. In general, an " 'examiner's question asking a lay witness to testify to facts that the witness has not personally observed, or to state an opinion not based on his or her own observations, calls for speculation and conjecture by the witness and is prohibited by' Evidence Code sections 702 and 800." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 631.) Furthermore, a "[l]ay opinion about the veracity of particular statements by another is inadmissible on that issue. . . . With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence." (*People v. Melton* (1988) 44 Cal.3d 713, 744 (*Melton*).)

We are not persuaded that Albanese's testimony was improper under these principles. Although Albanese was not called specifically to testify as an expert witness, his testimony on cross-examination served that function. Unlike a lay witness, an expert is not limited to opinion testimony based solely on his or her own perception of events. (See Evid. Code, §§ 800, 801.) Instead, an expert may offer opinion testimony so long as it is "(a) [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) [b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801.) In expressing his opinion regarding the reliability of statements made in the wake of a tragedy, Albanese explicitly stated that he was relying on experience he gained dealing with traumatic events over the course of a police career that spanned nearly 40 years. Moreover, an " 'expert opinion may be admitted whenever it would "assist" the jury. It will be excluded only when it would add nothing at all to the jury's common fund of information, i.e., when "the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1300.) The mental state and behavior of a person who has recently experienced significant trauma is not a matter of common knowledge, such that Albanese's testimony would add nothing to the jurors' understanding.

Willard relies primarily on two cases for his argument that Albanese's testimony was improper: *Melton*, *supra*, 44 Cal.3d 713, and *People v. Sergill* (1982) 138 Cal.App.3d 34 (*Sergill*). But in

those cases, the testimony the courts found objectionable differed in important ways from Albanese's testimony here. In *Melton*, a witness told a defense investigator that someone other than the defendant had killed the victim in the case. The prosecution asked the investigator why the investigator had not followed up on the witness's claim. (*Melton*, *supra*, 44 Cal.3d at p. 742.) The purpose of the questioning was to suggest that the investigator himself did not believe the witness, and, thus, that the jury should disbelieve him as well. (*Id.* at p. 744.) The court held that this was improper lay opinion testimony, noting that the record did "not establish that [the investigator] is an expert on judging credibility, or on the truthfulness of persons who provide him with information in the course of investigations." (*Ibid.*)

Sergill involved a defendant convicted of forcibly orally copulating his eight-year-old niece. (*Sergill*, *supra*, 138 Cal.App.3d at p. 37.) The defendant called two police officers as witnesses to testify about discrepancies in the victim's statements. (*Id.* at p. 38.) During cross-examination, the prosecutor asked one of the officers whether he believed the victim was telling the truth. (*Ibid.*) The court held that this testimony was improper as either lay or expert opinion testimony. (See *id.* at pp. 39–40.) In particular, the court stated, "[W]e find no basis for admitting this opinion evidence as expert testimony. We find no authority to support the proposition that the veracity of those who report crimes to the police is a matter sufficiently beyond common experience to require the testimony of an expert. Moreover, even if this were a proper subject for expert testimony, nothing in this record establishes the qualifications of these officers as experts. The mere fact that they had taken numerous reports during their careers does not qualify them as experts in judging truthfulness." (*Id.* at p. 39.)

In this case, although Albanese's testimony was relevant to the question of witness credibility, the prosecutor did not ask Albanese whether he believed Gutierrez was telling the truth,

nor whether the civilian witnesses were credible. Instead, the prosecutor asked about how experiencing a traumatic event may affect witness perceptions, especially in the immediate aftermath of the event. We see no reason why this is not a proper subject for a police officer with decades of experience to offer expert testimony, any more than are the habits of gang members (see, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1120-1126) or the illegal drug trade. (See, e.g., *People v. Parra* (1999) 70 Cal.App.4th 222, 227.)

On this record, we have no basis of knowing whether the trial court would have qualified Albanese as an expert, and we can only speculate as to why Willard's trial attorney might have elected not to object to his testimony on these issues. (See Evid. Code, § 720, subd. (a).) For this reason, we cannot conclude that the performance of Willard's attorney fell below a reasonable standard. Furthermore, without some indication that Albanese would have been disqualified from testifying if Willard's attorney objected, Willard has not shown that there was a reasonable probability that he would have obtained a better result if his trial attorney had acted in the way Willard suggests. For both of these reasons, Willard's claim of ineffective assistance of counsel fails.

II. RESENTENCING PURSUANT TO SENATE BILL NO. 620

In October 2017, the Legislature enacted Senate Bill No. 620. The bill amended sections 12022.5 and 12022.53 of the Penal Code, which define enhancements for defendants who personally use a firearm in the commission of certain felonies. Under Senate Bill No. 620, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by" sections 12022.5 and 12022.53. (Sen. Bill No. 620, §§ 1 & 2, amending §§ 12022.5, subd. (c) and 12022.53, subd. (h).) Prior to the enactment of Senate Bill No. 620, these enhancements were mandatory, and the trial

court lacked the authority to strike or dismiss them. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363, citing former § 12022.53, subd. (h).)

The trial court imposed a 25-year enhancement pursuant to section 12022.53, subdivision (d) for each of Willard's attempted murder convictions because the jury found that Willard personally and intentionally discharged a firearm and proximately caused great bodily injury with respect to both attempted murder counts. The court imposed the same enhancements for each of Willard's convictions of assault on a peace officer with a semiautomatic firearm, but stayed those sentences pursuant to section 654. Although the court sentenced Willard prior to the January 1, 2018 effective date of Senate Bill No. 620, Willard contends that the law applies retroactively, and that he is entitled to resentencing. We agree.

Although the general rule is that the Penal Code does not apply retroactively (see § 3), an exception applies in cases in which the Legislature has amended the code to reduce the punishment for a specific offense. (*People v. Brown* (2012) 54 Cal.4th 314, 323 (*Brown*), citing *In re Estrada* (1965) 63 Cal.2d 740, 742-748.) In such cases, "we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date." (*Brown*, *supra*, 54 Cal.4th at p. 323, fn. omitted.) The Supreme Court has extended the *Estrada* holding to amendments that do not *necessarily* reduce a defendant's punishment, but which give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76; see also *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308.) Willard contends that under this case law, Senate Bill No. 620 applies retroactively to defendants in his position. The People concede that Willard is correct, and we agree.

Nevertheless, the People argue that we need not remand Willard's case for resentencing on the ground that, upon remand, the court would not exercise its discretion to reduce his sentence. The People cite *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), in which the defendant requested that his case be remanded to the trial court for resentencing after our Supreme Court decided in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 that trial courts have discretion to strike prior strikes in determining a defendant's sentence. The court in *Gutierrez* rejected the defendant's request, noting that "the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term . . . and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.)

The People argue that, by the same reasoning, there is no need to remand Willard's case. They point out that the court found that the aggravating factors in the case, including the high degree of violence and viciousness, "far outweighed" the mitigating factors. Even with respect to two counts of assault on a peace officer with a semiautomatic weapon (§ 245, subd. (d)(2)), in which the court stayed the sentences pursuant to section 654 because they embraced the same conduct as the attempted murder convictions, the court imposed the high term. Furthermore, the court ordered that Willard serve his sentences consecutively, rather than concurrently, resulting in a total sentence of 80 years to life, rather than 40 years to life. The People contend that, in light of these sentencing decisions, there is no realistic probability that the court would show leniency to Willard at resentencing.

We are not persuaded. In *Gutierrez*, the trial court stated during the initial sentencing hearing that " 'this is the kind of individual the law was intended to keep off the street as long as possible,' " and indicated that it would not have exercised its discretion to lessen the sentence. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) In the current case, although the trial court imposed longer prison terms where possible, the court did not state or imply that it would have imposed all of the firearm enhancements even if it had the discretion not to do so.

Furthermore, because the law at the time of sentencing did not allow the trial court to strike firearm enhancements, Willard did not have a reason to argue that the court should strike them. As our Supreme Court explained in a somewhat similar circumstance in *People v. Rodriguez* (1998) 17 Cal.4th 253, "[t]he evidence and arguments that might be presented on remand cannot justly be considered 'superfluous,' because defendant and his counsel have never enjoyed a full and fair opportunity to marshal and present the case supporting a favorable exercise of discretion." (*Id.* at p. 258 [requiring the presence of defendant and counsel at a hearing in which the court would determine whether it could reasonably exercise its discretion to strike a prior strike].)

DISPOSITION

The case is remanded for resentencing regarding the handgun enhancements. In all other regards, the judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, 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.