Filed 9/26/18 P. v. Patten CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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

THE PEOPLE, Plaintiff and Respondent, v. STEVEN GILBERT PATTEN, Defendants and Appellants.	B281573 (Los Angeles County Super. Ct. No. MA065378)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed with directions.

Melissa L. Camacho-Cheung, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven Gilbert Patten (defendant) appeals from the judgment entered upon his conviction of assault, animal cruelty, resisting an executive officer, and vandalism. He contends that the trial court erred in overruling his *Wheeler/Batson* objection to the prosecutor's peremptory juror challenges,[1] as well as in failing to instruct the jury sua sponte on self-defense in relation to the animal cruelty charge, and in giving an erroneous flight instruction (CALCRIM No. 372). Defendant also requests remand for resentencing under the recent amendment to the firearm enhancement statutes (Sen. Bill No. 620), and correction of a clerical error in the abstract of judgment. We direct the trial court to prepare an amended abstract of judgment which correctly reflects the trial court's oral pronouncement of sentence; however, finding remand for resentencing unnecessary and no merit to defendant's remaining contentions, we affirm the judgment.

BACKGROUND

In a second amended consolidated information, defendant was charged with eight felonies (counts 1-4 & 6-9) and two misdemeanors (counts 5 & 10), as follows: count 1, assault with a firearm in violation of Penal Code section 245, subdivision (a)(2);[2] count 2, cruelty to an animal, in violation of section 597, subdivision (a); count 3, resisting an executive officer (Deputy Stover), in violation of section 69; count 4, assault with force likely to cause great bodily injury on a peace officer (Deputy Stover), in violation of section 245, subdivision (c); count 5, vandalism with under $400 of damage, in violation of section 594,

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1 See *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

2 All further statutory references are to the Penal Code, unless otherwise indicated.

subdivision (a); counts 6, 7, 8, and 9, resisting an executive officer (Deputies Deschamps, Haven, Macias, and Lanigan, respectively), in violation of section 69; and count 10, being under the influence of PCP in violation of Health & Safety Code section 11550, subdivision (a). The information additionally alleged as to counts 1 and 2 that defendant personally used a firearm within the meaning of section 12022.5, subdivision (a), and as to counts 6 through 9, that defendant was released on bail at the time of the offenses within the meaning of section 12022.1.

Prior to trial, count 10 was dismissed in the interests of justice pursuant to section 1385. At the close of the prosecution's case the defense motion for judgment of acquittal of count 9, pursuant to section 1118.1 was granted. A jury convicted defendant as charged of counts 1 through 5. As to counts 6 and 8, the jury found defendant guilty of the lesser included offense of misdemeanor resisting a peace officer in violation of section 148, subdivision (a). Defendant was acquitted of count 7. The firearm enhancement allegations as to counts 1 and 2 were found true.

On March 17, 2017, the trial court sentenced defendant to a total prison term of 16 years 4 months. Selecting count 2 (animal cruelty) as the base term, the court imposed the high term of three years, plus the high term of 10 years for the firearm enhancement. As to count 1 (assault with a firearm) the court imposed two years four months, comprised of one-third the middle term of two years, plus one-third the middle firearm enhancement of four years, to run consecutively. As to count 4 (assault on Deputy Stover), the court imposed a consecutive term of one-third the middle term for a total of one year four months. The court imposed two years as to count 3 (resisting arrest -- Deputy Stover), and stayed the term pursuant to section 654. As to each of counts 5, 6, and 8, the court imposed a concurrent sentence of 364 days in jail. Defendant was ordered to pay

mandatory fines, fees and victim restitution. He was given 395 days of combined presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The shooting and defendant's arrest

On February 16, 2015, at approximately 5:00 a.m., defendant's wife, Jo Ann Patten[3] called 911. The recorded call was played for the jury during her trial testimony. Jo Ann told the 911 operator, "I have someone in the backyard with a gun . . . . Please hurry up. I'm hiding in my closet." The operator asked how she knew he had a gun, Jo Ann replied, "Be headed [*sic*] on me and I locked him out. Hurry up." Jo Ann named defendant as her husband and as the person with the gun, and said he was in the backyard in his underwear. Asked whether he had used the weapon, Jo Ann replied, "No, hurry up please . . . I've been hiding in the closet he might find me." She said she thought defendant was drunk, but did not know.

Los Angeles County sheriff's deputies arrived five to ten minutes after the call. Jo Ann spoke to Deputy Andrea Lefebvre about what had occurred. Deputy Lefebvre testified that Jo Ann, crying and very upset, said that defendant had consumed beer before going to sleep, later woke her up by taking her blankets off, and then asked her several times to tell him the truth about her underwear. Jo Ann told the deputy that when she told defendant to leave her alone, she felt something against her head. She felt the object and determined that it was a gun pointed at the back of her head. Defendant told her to get up and

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[3] At trial, defendant's wife stated her name as Jo Ann Patten, although she is named in the information as Jo Ann Ancar. We will refer to her simply as Jo Ann to avoid confusion. We mean no disrespect.

go downstairs. He followed her with one hand on her shoulder while holding the gun with his other hand pointed at her head. In the backyard she saw the gun and was extremely afraid of defendant. She told the deputy that she managed to slip back inside, shut and lock the sliding glass door, leaving defendant outside. She then called 911, and hid in a closet until the deputies arrived.

In contrast, at trial Jo Ann testified that she and defendant went to bed that night around midnight after having a few drinks, and at that time, had words, not a quarrel, but a "debate" about her having changed her underpants. Defendant woke her later, "talking out of his head," and demanded several times that she tell him the truth. Jo Ann then felt something metal pressing the back of her head. She denied it was a gun, and claimed it was a flashlight. She also claimed that defendant woke her up because their dog Boston, a pit bull, was barking. The couple also then owned a Chihuahua. Jo Ann testified that after defendant fetched her revolver[4] and a flashlight, she followed him downstairs, while Boston barked as though "in a rage." She claimed that when defendant went outside, she closed the sliding patio door in such a way that it locked accidentally. She heard defendant yelling, "Stop it. Stop it," and calling out to her. Jo Ann claimed that after she saw the dog continuously jumping up on defendant, she called 911 from the closet.

Deputy Lefebvre testified that when she and another deputy first arrived at the residence defendant came outside through the front door, wearing only his underwear. The

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[4] Jo Ann said the gun had been left to her by her father, and she had never before seen defendant with a gun. She added that she had forgotten they owned a gun, and did not know where the gun was kept.

deputies entered, cleared the house, searched for weapons, and then went into the backyard through a sliding patio door. Deputy Lefebvre saw a dog lying motionless on the patio bleeding from its head, with a revolver next to the dog. She found five expended shell casings inside the gun.

Deputy Lefebvre questioned defendant after he waived his *Miranda* rights.[5] Defendant admitted that he shot the dog. Deputy Lefebvre saw no injuries on defendant, such as scratches, bite marks, abrasions, bleeding, or puncture wounds. The deputy accompanied animal control officers when they examined the back yard, including a dog house where they found a second, smaller dog who appeared to be hiding there. Though she could not recall with certainty, she did not believe that dog was dead. She observed animal control remove the body of the larger dog, and she wrote in her report that only one dead dog had been removed.

The parties stipulated that veterinarian Misty Hirshbein performed a necropsy on the nine-year-old pit bull mix, and determined the animal died of three gunshot wounds to the head.

Defendant was cooperative with deputies when he was detained and compliant when they transported him to the station and booked him. Sometime later as Deputies Stover and Mendoza were escorting defendant to a different cell in the booking area, defendant became uncooperative. He tackled Deputy Stover, ran out of the cell, and was eventually subdued and handcuffed with the help of other jail personnel. Once secured in a cell, defendant got up and hit the cell window so hard that it cracked.

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[5] See *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445.

Incident of March 11, 2015

About three weeks later, on March 11, 2015, Deputy Michael Deschamps and his partner were called to defendant's home late at night after a neighbor heard a woman screaming inside the home. Deputy Deschamps knocked loudly on defendant's door, announced the deputies' presence, and defendant's wife answered. She denied any disturbance, said she was fine and declined his offer of help. She claimed that she and her elderly mother were alone in the house. Deputy Deschamps testified that when he asked about defendant by his name, defendant's wife became hesitant, appeared to be nervous and scared. She then said he was "back there," indicating with her hands and head toward the back yard. Deputy Deschamps went to the side of the dark house and illuminated defendant with his flashlight. Defendant was crouched down, seeming to hide behind a planter. The deputy told defendant to go through the house to the front. Defendant complied.

Defendant approached the deputies from inside the house with his hands in his pockets. He was told to remove his hands from his pockets. Defendant refused several commands and then became combative. Additional deputies were called to the scene. Eventually pepper spray and a Taser gun were used to subdue defendant.

Defense evidence

Defendant testified that on February 16, 2015, he was awakened in the middle of the night by his dog barking "viciously" outside. Defendant thought there might be a coyote or raccoon, as two of their chickens had been eaten previously by some such predator. After smoking a cigarette and watching TV news, the barking continued, prompting defendant to look out the window. He could not see the dog. Assuming the dog was disturbed by a raccoon or prowler, defendant got the gun from a

trunk at foot of the bed, a flashlight from the dresser, and tried to wake his wife. She was slow to wake, so he pulled the sheet off and suggested they go downstairs together to check out the barking. Once downstairs he told Jo Ann to call the police. Defendant denied having put a gun to his wife's head, and claimed that it was "a lie" and just "allegations."

Defendant testified that when he opened the sliding door, the Chihuahua did not come running in as he usually did, which made defendant curious, so he went to the doghouse, flashed the light, and determined that the Chihuahua was dead. Asked in cross-examination why his wife had not mentioned in her testimony that the Chihuahua was dead, even when defense counsel had the opportunity to ask her, defendant explained, "You said he wasn't going to ask the questions. I told him, but he didn't want to." On redirect, defendant claimed that his wife did testify that she no longer had the Chihuahua and that the dog was dead.

Defendant testified that the pit bull was still barking while defendant checked on the Chihuahua, and then came running toward defendant, who told him to be quiet and lie down. The pit bull charged defendant, baring his fangs. Defendant was scared and tried to talk to the dog who jumped on and bit defendant on his arm, leaving bite marks on his right hand. When the dog again jumped at him, defendant fell to the ground. Defendant demonstrated the marks on his hand, and the court stated that it could not tell whether they were bite marks. Defendant claimed he bled from the bite in the hand, but not much, because it was just a "flesh wound." He did not mention it to the deputies who arrested him and did not ask for medical attention, though at Central Jail he received an antibiotic ointment he rubbed on his arm.

Defendant testified that when he was on the ground the pit bull's fur stood on end, his fangs were bared, and he put his paws on defendant's chest. Defendant fired his gun once but missed the dog, who came back looking as though he was going to attack defendant in the neck, so defendant fired a second round, hitting the dog. Since the dog looked like he was suffering, and because defendant loved his dog, defendant crying, decided to end his dog's suffering. Defendant was surprised when the dog bit him, as the dog had been his loving and affectionate pet for about three years, was considered part of the family, and had never before bared his fangs. Despite this, defendant claimed he knew that the dog was coming for his jugular vein just before defendant shot. Defendant explained, "I know my dog. I know, but he showed me love and affection."

Defendant denied that his wife locked the sliding door behind him that night. He said he was able to come back into the house after he shot the dog, but did not do so until police arrived. Defendant stayed with the dog, rubbing and caressing him. He was kneeling, crying, beside the dog when he heard a command that he come out with his hands up. He called to wife to bring him a pair of pants, which he put on before going outside. He denied that he was dressed only in his underwear when he went to the front of the house.

Defendant admitted that he banged on the jail window, but explained that he wanted his phone call and it was the only way to get the jailer's attention. Defendant claimed that he acted properly, that he was "[c]ool, like a cucumber," and treated the deputy with tremendous respect.

As to the evening of March 11, 2015, defendant believed that his neighbor called the police because of a dispute over a car, that the police used force for no reason, and that false charges were brought against him.

Prosecution rebuttal

Deputy Lefebvre testified that during her February 16, 2015 interview of defendant, she asked whether the dog had bitten him. He replied, "No. I was too fast, and I shot him first." Defendant also told her that he fired just one shot.

Defense surrebuttal

Defendant testified that he did not tell Deputy Lefebvre that the dog did not bite him, or that he was too fast and shot first, or that he shot the dog once. Defendant claimed that Deputy Lefebvre never interviewed him, and that he was not interviewed by any other deputy. He claimed to have volunteered the statement that he was scared because the dog was showing his fangs, but Deputy Lefebvre asked him no questions.

DISCUSSION

I. *Wheeler-Batson* objection

Defendant contends that after the prosecutor exercised peremptory challenges against the only two African-American prospective jurors on the panel, the trial court erred in overruling his *Wheeler/Batson* objection.

The use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias "violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.]" (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).) In reviewing a *Wheeler/Batson* objection, the trial court ordinarily engages in a three-stage inquiry: "First, the party objecting to the strike must establish a prima facie case by showing facts sufficient to support an inference of discriminatory purpose. [Citation.] Second, if the objector succeeds in establishing a prima facie case, the burden shifts to the proponent of the strike to offer a permissible,

nonbiased justification for the strike. [Citation.] Finally, if the proponent does offer a nonbiased justification, the trial court must decide whether that justification is genuine or instead whether impermissible discrimination in fact motivated the strike. [Citation.]" (*People v. Reed* (2018) 4 Cal.5th 989, 999 (*Reed*), fn. omitted, citing *Johnson v. California* (2005) 545 U.S. 162, 168.)

During the first stage, it is presumed that the prosecution uses its peremptory challenges in a constitutional manner. (*Wheeler, supra*, 22 Cal.3d at pp. 278-281.) To rebut that presumption and establish a prima facie case of discrimination, the moving party is required to produce sufficient evidence to show that "'the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citations.]" (*Johnson v. California*, *supra*, 545 U.S. at pp. 168, 170; see also *People v. Thomas* (2012) 53 Cal.4th 771, 793-794.) Only after a prima facie showing is made will the burden shift to opposing counsel to articulate a race neutral reason for the challenge. (*Batson, supra*, 476 U.S. at p. 94; *Lenix, supra*, 44 Cal.4th at pp. 612-613.)

After an almost full day of voir dire involving a panel of 35 prospective jurors, the trial court invited peremptory challenges. The prosecution challenged five prospective jurors, including originally designated Nos. 2 and 11, whom counsel stipulated were the only African-American jurors in the panel. Based on that fact alone defense counsel objected to the peremptory challenges, and made the following argument: "I guess the justification is on [the prosecutor] to prove it from all the questions that were asked and answered that did not seem that there would be justification to get rid of all Black people. Those two specifically were the only two we have in court." After the trial court overruled the *Batson-Wheeler* objection, the prosecution challenged a sixth and final prospective juror.

The trial court ruled that although African-Americans were a cognizable group for purposes of a *Wheeler-Batson* objection, defendant had not made the required prima facie showing. The court stated that it had considered the totality of the circumstances and found that the defense had failed to raise a "reasonable inference" that the peremptory challenges were made on the basis of group bias. However, the court later reasoned that defendant had failed to show a "strong likelihood" that any prospective juror had been challenged based upon group association. Because the court initially applied the appropriate reasonable-inference standard, and the mention of the outdated strong-likelihood test created an uncertainty, "we independently determine whether the record permits an inference that the prosecutor excused jurors on prohibited discriminatory grounds. [Citation.]" (*People v. Carasi* (2008) 44 Cal.4th 1263, 1293; see also *Reed, supra*, 4 Cal.5th at p. 999.)

"Although we examine the entire record when conducting our review, certain types of evidence are especially relevant. These include whether a party has struck most or all of the members of the venire from an identified group, whether a party has used a disproportionate number of strikes against members of that group, whether the party has engaged those prospective jurors in only desultory voir dire, whether the defendant is a member of that group, and whether the victim is a member of the group to which a majority of remaining jurors belong. [Citation.] We may also consider nondiscriminatory reasons for the peremptory strike that 'necessarily dispel any inference of bias,' so long as those reasons are apparent from and clearly established in the record. [Citation.]" (*Reed*, *supra*, 4 Cal.5th at pp. 999-1000.)

Defendant does not contend that the questioning of the two African-American prospective jurors was desultory or

perfunctory, and although defendant was African-American, he made no showing below and makes no assertion here that any crime victim was a member of the group to which a majority of remaining jurors belonged. The racial makeup of other jurors and victims was not in evidence. Defendant instead focuses on the fact that the prosecution's two challenges eliminated all of the African-Americans in the venire, and he argues that there was a disproportionate number of strikes against members of that group (two out of five strikes at the time of the objection). Defendant contends that this evidence was sufficient to raise an inference of discrimination, because the prosecutor struck the only African-American prospective jurors on the panel, and because the questions asked of the two jurors and their answers provided no justification for their removal.

"[A]lthough a prosecutor's excusal of all members of a particular group may establish a prima facie discrimination case, especially if the defendant belongs to the same group, this fact alone is not conclusive. [Citations.]" (*People v. Hoyos* (2007) 41 Cal.4th 872, 901.) In particular, "[t]his numerical showing alone . . . falls short of a prima facie showing [where] the small number of African-Americans in the jury pool makes 'drawing an inference of discrimination from this fact alone impossible.' [Citations.]" (*People v. Harris* (2013) 57 Cal.4th 804, 835; see also *People v. Parker* (2017) 2 Cal.5th 1184, 1212 (*Parker*).) Such is the case here. Without more, no inference of bias arises solely from the prosecutor's challenge of the only two African-American prospective jurors in the entire venire. (See *Parker* at p. 1212.)

For the same reason, we reject defendant's suggestion that the number of strikes against African-Americans was disproportionate because the prosecution had used two of his five peremptory challenges against them at the time of the objection. When the sample size is small and the number of challenges used

is more than twice those used against a group, or the group's proportion in the entire pool of jurors subject to peremptory challenge is small (such as two out of 22), the small sample size provides insufficient information for a comparison. (See *Parker*, *supra*, 2 Cal.5th at p. 1212, fn. 12.) Again, such is the case here. There were two African-American prospective jurors in a venire of 35, and the challenges of non-African-American prospective jurors were more than twice those of African-American prospective jurors.

We also reject defendant's argument that the questions asked of the two jurors and their answers provided no justification for their removal. The trial court's in-depth questioning of the prospective jurors left little for either counsel to ask, and included many questions regarding whether any of them or their close relatives had been accused of, charged with, or convicted of a crime, had been victims of a violent crime or threat of violence, or had a negative experience with law enforcement. Such experiences provide nondiscriminatory bases for peremptory challenges. (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1123-1124 [incarcerated relative, negative experience with law enforcement]; *People v. Montes* (2014) 58 Cal.4th 809, 855 [negative experience with law enforcement]; *People v. Turner* (1994) 8 Cal.4th 137, 170, [anti-law enforcement feelings expressed]; *People v. Wheeler, supra*, 22 Cal.3d at p. 275 [crime victim]; *People v. Jordan* (2006) 146 Cal.App.4th 232, 256-257 [crime victim, ambivalent feelings about law enforcement].) The answers provided by the challenged jurors expressing such nondiscriminatory reasons were "apparent from and 'clearly established' in the record [citations] and . . . necessarily dispel any inference of bias. [Citations.]" (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*).) This is demonstrated by the trial court's express factual findings, as well as our own review of the

record.[6] As the trial court noted in finding no prima facie showing, prospective juror No. 2 stated that her sister and her child's father were killed by gunfire and her grandmother had been shot. The trial court also noted, prospective juror No. 11 stated that her son had been arrested on drug charges and was convicted of assault with a deadly weapon with great bodily injury. Also her first cousin was murdered and the perpetrator was never caught. The court concluded there were "race-neutral reasons for excusing" those jurors.

Defendant argues that it was error for the trial court to suggest nondiscriminatory reasons for the challenges, but should first have required the prosecutor to provide race-neutral reasons. On the contrary, in finding no prima facie showing, the trial court ordinarily declares its views at that first stage, without first soliciting an explanation for the challenge. (See *Scott*, *supra*, 61 Cal.4th at p. 387, fn. 1.) As defendant recognizes, it is during the *second* step, *after* the burden has shifted, that the prosecutor is required to provide reasons for the challenges. (See *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1159.) The second step was not reached here, and the burden did not shift, as defendant failed to make a prima facie showing by raising a reasonable inference of discrimination. It was thus appropriate for the trial court to make express factual findings. (*Parker*, *supra*, 2 Cal.5th at p. 1213.)

Defendant contends that the trial court made a third-stage ruling when it stated: "I'm going to deny the motion. I denied it preliminarily. There's no prima facie case. For the record, I allowed counsel to make his representations, and for appeal purposes, if I am incorrect, based on those, I am finding that

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[6] Our review revealed that all six of the prosecutor's challenged prospective jurors had more or recent such experiences as compared to those ultimately seated.

there was no bias for those jurors." Because this ruling came after the court found no prima facie case and after inviting the prosecutor to state his reasons for the challenges, defendant suggests that we must proceed directly to review of the ultimate question of purposeful discrimination; and he argues that we must begin by examining the sincerity of the prosecutor's reasons. Defendant argues that the prosecutor's reasons were "flimsy" and shown to be pretextual when considered with the two African-American jurors' answers to other questions.[7]

Contrary to defendant's reasoning, we proceed to a third-stage review when the trial court solicits the prosecutor's reasons *without* first ruling on whether defendant made a prima facie showing. We do not proceed to the third step where the trial court has determined, as it did here, that no prima facie case of discrimination exists, but nevertheless allows or invites the prosecutor to state reasons, and then finds no purposeful discrimination. (*Scott*, *supra*, 61 Cal.4th at pp. 390-392; see *People v. Hardy* (2018) 5 Cal.5th 56, 76.) The only exceptions that might require a third-stage review under the latter circumstances would arise only if we disagreed with the trial court's first-stage ruling, or in the rare instance when the prosecutor's reasons are discriminatory on their face. (*Scott*, at pp. 390-392.) As we agree with the trial court's first-stage ruling, the prosecutor's reasons are irrelevant unless they are facially or

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[7] The prosecutor stated that in addition to the juror responses cited by the court in finding no prima facie case, he challenged the two jurors and one other because they appeared to hesitate when he asked whether they could find defendant guilty if he were to prove his case beyond a reasonable doubt. The prosecutor also said that prospective juror No. 2 gave several of what he construed as "caveats" to her making a finding of guilt, and that No. 11 gave a similar response.

inherently discriminatory. (*Ibid*.) The issue in this case is thus not whether the reasons are trivial or flimsy, or whether there is evidence of pretext, but whether the reasons stated are facially or inherently discriminatory. (*Id*. at pp. 390-392.)

We conclude that such reasons are not facially or inherently discriminatory, and as defendant's attack on these reasons relies on comparisons and inferences, he has not demonstrated otherwise. We therefore do not proceed beyond upholding the trial court's ruling that defendant failed to make a prima facie showing of discrimination.

II. Self-defense instruction

Defendant contends that the trial court erred in failing to instruct the jury sua sponte on self-defense in relation to the animal cruelty charge, and that the error resulted in a violation of his constitutional rights to present a defense and to due process.[8]

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[8] The trial court denied defendant's request for a self-defense instruction in relation to the alleged use of force against the deputies.

Defendant did not request a self-defense instruction relating to animal cruelty, and without objection or discussion, the court read CALCRIM No. 3403, a necessity instruction, as follows: "The defendant is not guilty of cruelty to an animal if he acted because of legal necessity. In order to establish this defense, the defendant must prove that: 1. He acted in an emergency to prevent a significant bodily harm or evil to himself; 2. He had no adequate legal alternative; 3. The defendant's act did not create a greater danger than the one avoided; 4. When the defendant acted, he actually believed that the act was necessary to prevent the threatened harm or evil; 5. A reasonable person would also have believed that the act was necessary under the circumstances; and 6. The defendant did not substantially contribute to the emergency. The defendant has the burden of proving this defense by a preponderance of the evidence. This is

Trial courts have a sua sponte duty to instruct on a defense "'if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 157.) Respondent agrees that self-defense may apply to a charge of animal cruelty. (See *People v. Lee* (2005) 131 Cal.App.4th 1413, 1427-1429 (*Lee*) ["courts have uniformly recognized that a person has a right to use reasonable self-defense when confronted with an aggressive dog"].) Respondent also agrees that substantial evidence supported giving such an instruction, but contends that the omission was harmless.

Respondent argues that the issue was necessarily resolved adversely to defendant under the necessity instruction, as the defenses are similar. If the trial court had instructed the jury regarding reasonable self-defense, it would have told the jury to determine "whether defendant . . . reasonably believed he was in imminent danger of violence, reasonably believed the immediate use of force was necessary to defend himself, and used no more force than was reasonably necessary to defend against the threat. [Citation.]" (*People v. Hernandez* (2011) 51 Cal.4th 733, 747, citing CALCRIM No. 3470.)

Defendant disagrees, noting that although the instructions are similar, the defendant bears the burden to prove a necessity defense by a preponderance of the evidence, while the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. Quoting from *Lee, supra*, 131 Cal.App.4th at page 1429, defendant asserts: "The difference in the burdens of

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a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true."

proof means the jurors might have found self-defense even if they did not find necessity." From this quote, defendant concludes that, in this case as in *Lee*, the fact that the jury rejected a necessity defense does not prove that they would have rejected a defense of self-defense. While we agree that such fact alone is not conclusive, we observe that the different burdens prejudiced the defendant in *Lee* because the evidence was closely balanced and there were weaknesses in the prosecution's case (*Lee*, *supra*, pp. 1430-1431); whereas here, the prosecution's case was strong and the evidence refuting any claim of self-defense was overwhelming.

A finding of either self-defense or necessity would have required the jury to believe defendant's story regardless of the applicable burden of proof, and defendant's testimony was so fraught with inconsistencies and improbabilities, and sufficiently contradicted as to make any rational juror reject it.[9] Most significantly, the jury found beyond a reasonable doubt that defendant assaulted Jo Ann with a firearm. The jury thus necessarily disbelieved defendant's story and believed the version which Jo Ann told the 911 operator and Deputy Lefebvre: that defendant woke her up, demanded an explanation of her change of underwear, put a gun to her head and guided her downstairs to the patio door, where she managed to lock him out of the house and then hide in a closet. No barking dog was mentioned in that version.

Defendant claimed that the dog's barking woke him, and because the dog was barking so "viciously," defendant suspected a predator or prowler. However, rather than check, defendant

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[9] When sentencing defendant to the high term, the trial court found that defendant had been "completely [i]ncredible" and "dishonest with the jury"; and that "[t]he jury clearly rejected his theory that the dog was attacking him with the fangs."

smoked a cigarette and watched television. Only after this bit of relaxation did defendant deem the barking so urgent that he looked out the window, and seeing nothing, felt the necessity of his wife's gun, a flashlight, and the company of his wife to check the backyard. As respondent observes, this reaction was completely inconsistent with defendant's initial blasé behavior.

Defendant's claim of an unprovoked attack by the dog was also inconsistent with defendant's description of the dog as a loving and affectionate pet for three years, a friendly, happy part of the family who had never before bared his fangs. Defendant even varied the location of the bite he claimed to have received: first the arm, and then the hand. Defendant claimed that the wound was sufficiently serious to bleed a little and to leave a scar lasting the two years between the incident and trial. However, he did not mention any injury to the deputies when he was arrested, and Deputy Lefebvre testified that she saw none. Moreover, when defendant admitted to Deputy Lefebvre that he had shot the dog, he denied that the dog had bitten him, adding that he "was too fast and . . . shot him first."

Defendant's attempt to suggest that the pit bull killed the Chihuahua was without corroboration. Despite the pit bull's vicious barking and threatening behavior, defendant claimed the dog waited until defendant finished inspecting the doghouse, lifting the Chihuahua's head, and determining that the smaller dog was dead, before launching his attack. When the prosecutor asked defendant why Jo Ann had not testified that the Chihuahua was dead or was even asked by defense counsel, defendant replied, "I told him, but he didn't want to." Defendant then claimed that Jo Ann had testified that the Chihuahua was dead, although she had not. Deputy Lefebvre inspected the doghouse, thought she saw the dog alive and hiding, and reported that animal control removed just one dead dog from the home.

In addition to finding defendant guilty of assaulting Jo Ann with a firearm, other verdicts demonstrated that the jury found defendant to be unbelievable. The jury found beyond a reasonable doubt that defendant violently resisted Deputy Stover and assaulted him with force likely to cause great bodily injury, despite defendant's testimony that he acted properly, that he was "[c]ool, like a cucumber," and that he treated the deputy with "tremendous respect." The jury found beyond a reasonable doubt that defendant resisted Deputies Deschamps and Macias in the performance their duties, despite defendant's testimony that they used force for no reason and his claim that false charges were brought against him.

The California Supreme Court has not yet determined which test of prejudice applies to the failure to instruct sua sponte on an affirmative defense in a criminal case: the test of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), which applies to federal constitutional error; or the test of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*), applied to state law error. (See *People v. Salas* (2006) 37 Cal.4th 967, 984.) Under *Chapman*, constitutional error is reversible unless found to be harmless beyond a reasonable doubt, while under *Watson*, reversal is not required unless it is reasonably probable that the defendant would have obtained a more favorable result had the error not occurred. We need not choose; given the state of the evidence here, and the jury's rejection of defendant's obvious fabrications, we are confident beyond a reasonable doubt that the result would not have been different if a self-defense instruction had been given.

III. Flight instruction

Defendant contends that the trial court erred in instructing the jury with CALCRIM No. 372, as follows: "If the defendant fled or tried to flee *immediately after the crime was committed*,

that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." (Italics added.) Defendant contends that the error requires reversal of counts 6 and 8, misdemeanor resisting a peace officer.

Defendant points out that the only evidence of flight was the testimony of Deputy Deschamps that on March 11, 2015, after he and his partner knocked on defendant's door and announced themselves, and *before* the crime of resisting an officer had been committed, he found defendant apparently hiding in the dark behind a planter beside the house. Thus, defendant argues, the instruction erroneously instructed that an attempt to flee *immediately after the crime was committed* may show a consciousness of guilt.

Respondent acknowledges that the flight instruction was incorrectly modified, as the trial court had intended to instruct, "'immediately after the crime is committed *or officers arrived at the home*.'" (Italics added.) Respondent points out that a flight instruction may be given where flight is not immediate, and even weeks later if the defendant knows that he is suspected of having committed a crime. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1020-1021.)[10] "In general, a flight instruction 'is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.' [Citations.]" (*People v.*

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10 Where the prosecutor relies on evidence of flight immediately after the commission of a crime or after the defendant is accused of a crime to show consciousness of guilt, an instruction substantially in the language given here is required. (See § 1127c.)

Bradford (1997) 14 Cal.4th 1005, 1055.) The circumstances are sufficient if they "suggest 'a purpose to avoid being observed or arrested.' [Citations.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Although the circumstances showed a purpose to avoid arrest, the instruction given here could not be construed as referring to the resisting arrest charges, as they had not yet occurred. "An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury. [Citations.]" (*People v. Brock* (2006) 143 Cal.App.4th 1266, 1277.) We review an inapplicable or unsupported flight instruction under the *Watson* test for prejudice, reversing only if a result more favorable to defendant would have been reasonably probable absent such an error. (*People v. Silva* (1988) 45 Cal.3d 604, 628; see *Watson*, *supra*, 46 Cal.2d at p. 836.) Under that standard, any error was harmless here.

"Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Here, the trial court instructed the jury with CALCRIM No. 200, including the following language: "Some of these instructions may not apply, depending on your findings about the facts of [the] case. Do not assume just because I give a particular instruction that I'm suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." This instruction mitigated any prejudicial effect of giving the inapplicable instruction. (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472; see *People v. Saddler* (1979) 24 Cal.3d 671, 684 [same under CALJIC No. 17.31].) In addition, the flight instruction did not tell the jury there was evidence of flight or require any conclusion from the jury, but merely *permitted* the

jury to use flight to infer a consciousness of guilt *if it found* that defendant immediately fled the scene after the crime. We presume the jury correlated and followed these instructions, did not construe the flight instruction as referring to a crime not yet committed, and thus disregarded the inapplicable flight instruction.

Defendant contends that prejudice was exacerbated by the prosecutor's closing argument in which he told the jury that after Deputy Deschamps knocked, defendant ran, "[a]nd jury instruction 372 allows you to consider that as consciousness of guilt." The prosecutor did not tell the jury that the circumstances showed that defendant was conscious of having committed any of the as yet uncommitted crimes, and the prosecutor's argument does not demonstrate that the jury was misled or confused. "'A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged.". . .' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 327 (*Bolin*).)

In any event, as respondent argues, if the instruction had not been given, the prosecutor would probably still have summarized the evidence which showed that when the deputies arrived with lights and sirens, loudly knocked at the door and announced themselves as law enforcement, defendant went to the side of the house and hid behind a planter. The instruction served to *protect* defendant from any such argument, by informing the jury that evidence of flight alone cannot prove guilt. "'The cautionary nature of [consciousness of guilt] instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory. [Citations.]' [Citation.]" (*Bolin, supra*, 18 Cal.4th at p. 327.)

In sum, we discern no reasonable probability of a different result if the trial court had omitted the instruction.

IV. Discretion under section 12022.5

Defendant requests remand for resentencing under the January 1, 2018 amendment to section 12022.5. (See Stats. 2017, ch. 682, § 1.) The trial court imposed firearm enhancements on defendant's sentence pursuant to section 12022.5, when the imposition of such enhancements was mandatory. As of January 1, 2018, section 12022.5, subdivision (c), grants the trial court the discretion to strike the enhancements in the interest of justice pursuant to section 1385. The grant of discretion to strike firearm enhancements in the amended statute applies retroactively to all nonfinal convictions. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 506-507.)

Respondent acknowledges the amendment applies retroactively to defendant, but argues that remand for resentencing is not required because the record shows the trial court would not have exercised its discretion in defendant's favor even if it had known it had the discretion to do so. In general, when new statutory discretion is applied retroactively or the trial court was otherwise unaware of its discretion, a defendant is entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record. [Citation.]" (*Ibid.*)

The general rule is not without exception. Considering a retroactive amendment to the Three Strikes law, the California Supreme Court held that remand for resentencing may be

"denied if the record shows that the sentencing court . . . clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations. [Citation.]" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13.) Thus, where the trial court's comments or actions clearly indicate that remand would be an "'idle act,'" remand may be denied. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901; see also *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) This exception applies equally to the amendment to section 12022.5, but only if "the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.]" (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see also *People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

We agree with respondent that the comments and actions of the trial court in sentencing defendant falls within the exception to the general rule requiring remand. Selecting count 2 (animal cruelty) as the base term, the court imposed the high term of three years, plus the high term of 10 years for the firearm enhancement. In doing so, the court noted that defendant had admitted firing the weapon three times, and had lied to the jury about the behavior of the dog. With regard to the high term as to the firearm enhancement in particular, the court stated:

> "For the high term and for the basis for the high term of the weapons allegation, the fact that he not only displayed it, but he used it. He fired it, not once, not twice, but admittedly three times, and he did that in a residential neighborhood when others were arguably around. They may not have been in the backyard with him at the time, but his wife was in and around at that time, and he took advantage of the killing of that animal that was helpless at the time, and he admitted the killing."

In addition, the court chose to run count 1 consecutively to count 2, and expressly configured the sentence so that defendant would serve his terms in prison, not jail. If the trial court had found the firearm enhancements inappropriate, it had the discretion to impose the low term on the counts 1 and 2 offenses and on the two firearm enhancements, which would have resulted in a sentence which would have eliminated the effect of the enhancements.[11]

Defendant contends that this case is comparable to *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1080-1081 (*Billingsley*), where the appellate court remanded for resentencing despite the trial court's refusal to run the enhanced sentence concurrently and the following comments: "'[T]his is not the kind of case I would stay the gun allegation. I have no say as to the actual penalty for that particular allegation. It's set at 20 years, but as far as staying or striking the allegation, the court does not have authority to do so, nor would it do so under the circumstances of this case.'" (*Id.* at p. 1080.)

We do not find *Billingsley* comparable. There, the appellate court noted that the trial court thought the case "'could have been a lot worse,' . . . did not express an intention to impose the maximum possible sentence [and] also expressed concern the consequences for Billingsley's sentence were 'unfortunate' and 'tragic.' [Citation.]" (*Billingsley*, *supra*, 22 Cal.App.5th at p. 1081.) Here, in contrast, the court imposed the maximum sentence on counts 1 and 2, as well as the maximum enhancements, and stated its reasons. The court did not express

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[11] Section 12202.5, subdivision (a), provides for a sentence enhancement of 3, 4, or 10 years; section 245, subdivision (a)(2), provides for a sentence of two, three, or four years; and section 597, subdivision (d), provides for a sentence of 16 months, or two or three years, in accordance with section 1170, subdivision (h).

sympathy for defendant or indicate that the consequences of defendant's sentence were unfortunate or tragic. On the contrary, the court's comments and maximum terms make it very clear that the court would not have exercised its discretion to strike the firearm allegations, and that remand would be an idle act.

V. Error in the abstract of judgment

Defendant requests correction of clerical error in the abstract of judgment with regard to count 1. The trial court sentenced defendant to a consecutive middle term of one year as to the violation of section 245, subdivision (a), plus the middle term of one year four months for the firearm enhancement of section 12022.5, subdivision (a), for a total of two years four months. The abstract of judgment shows a term of two years four months as to the offense, *plus* the enhancement of one year four months, but places the enhancement in parentheses, apparently indicating a concurrent enhancement.

Respondent agrees that this court should correct the abstract to reflect the oral pronouncement of a sentence of one year for the offense on count 1, plus a consecutive enhancement of one year four months. We grant the request. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

DISPOSITION

The superior court is directed to prepare an amended abstract of judgment reflecting the trial court's oral pronouncement of sentence of one year for the offense on count 1, plus a consecutive enhancement of one year four months, and to forward certified copies to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT