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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. VINCENT ANTHONY TATUM, Defendant and Appellant.	B284525 (Los Angeles County Super. Ct. No. TA130524)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed in part as modified and remanded with directions.

Danalynn Pritz, 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, Susan Sullivan Pithey and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vincent Anthony Tatum appeals from the judgment of conviction entered after a jury found him guilty of the murder of Victor Valentine (Pen. Code, § 187, subd. (a); count 1)[1] and the attempted willful, deliberate, and premeditated murder of Devin Lowe (§§ 187, subd. (a), 664; count 2). The jury further found true the allegations that in the commission of the offenses, Tatum used and discharged a firearm, causing great bodily injury (§ 12022.53, subds. (b), (c) & (d)). In a bifurcated second phase of the trial, the court found true the allegation Tatum suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12). The court sentenced Tatum to consecutive terms of 50 years to life on count 1 and 14 years to life on count 2; it further imposed two firearm enhancements of 25 years to life under section 12022.53, subdivision (d).

On appeal, Tatum claims: (1) his murder conviction must be deemed second degree murder; (2) the trial court erroneously failed to instruct sua sponte on voluntary manslaughter and attempted voluntary manslaughter as lesser included offenses; (3) he was denied effective assistance of counsel and his right to due process by his trial counsel's failure to object to prosecutorial misconduct; (4) the trial court erroneously denied his mistrial motion based on witness testimony he had a gang nickname; (5) the trial court erroneously received inadmissible hearsay evidence; (6) cumulative prejudicial error occurred; (7) remand is necessary so the court can exercise its discretion to strike the firearm use enhancements pursuant to Senate Bill No. 620; and (8) the trial court violated his right to due process by imposing a

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[1] Unless otherwise indicated, subsequent section references are to the Penal Code.

restitution fine and two assessments without determining his ability to pay.

The People agree, and we concur, that Tatum's murder conviction must be deemed second degree murder. We find no reversible error with regard to the remaining count of conviction. We vacate Tatum's sentence and remand for resentencing, in order for the court to resentence Tatum on the second degree murder conviction and to exercise its discretion regarding the firearm use enhancements.

BACKGROUND

A. People's Evidence

1. *Victim Testimony About the October 17, 2013 Shooting*

Devin Lowe and Victor Valentine were brothers, and had been friends with Tatum. At some point, however, Tatum became "jealous" of Lowe and how Lowe's life was going, and began a pattern of harassment. For a few months, Tatum called Lowe at night and played music over the phone. Tatum would also drive up and down the street where Lowe lived. Tatum did similar things to Valentine. According to Lowe, Tatum threatened him directly; Tatum also told other people he was going to do something to Lowe. Tatum often carried weapons. Lowe once felt threatened when Tatum showed Lowe a gun and then started playing with it.

A few days before October 17, 2013, Tatum followed the brothers on and off a freeway. Tatum drove alongside Lowe's car, pointed his finger at the brothers, and said something to them. Lowe could not hear what Tatum said, as the car windows were closed.

On October 17, 2013, Lowe was at his aunt's house waiting for Valentine to give him a ride to the gym. Valentine arrived about 7:55 a.m. Lowe was still inside the house when he heard a car traveling very fast and erratically up and down the street. Lowe looked out a window and saw Tatum in a Camaro. Tatum was driving around "aggravating [Valentine]." Tatum then drove away.

Lowe went outside. He saw Valentine sitting inside a Toyota Camry, wearing bright orange basketball attire. Lowe understood that Valentine and Tatum "had got into it," and Tatum had challenged Valentine to come and fight at 121st Street. Lowe got into the front passenger seat of the Camry. He did not see a weapon inside; Valentine never carried one. Lowe did not have a weapon.

Valentine drove to 121st Street, which was about five minutes away. Lowe and Valentine got out of the Camry and stood on the sidewalk talking to Anthony Reed, a neighborhood acquaintance. Lowe did not see a weapon on Reed.

Tatum drove up, travelling about 85 miles per hour in a residential zone. He parked, got out of his car, and either said "Yeah, I got y'all, man. Yo, what's up?" or something like "I got you now." Lowe saw a bulge in Tatum's shirt and asked if he had a weapon. Tatum brandished a black gun with a long clip. Valentine told Tatum to put the gun down, because the object was to fight. Lowe told Valentine, "He ha[s] a gun. Let's go."

Tatum yelled angrily, "Fuck ya'll." Lowe said something about money, and Tatum responded, "I got a lot of money. Y'all fools broke." Lowe told him, "I got a job, too. I got money, too." Lowe also told Tatum, "Well, if you got money, give me my

money. You owe me." Tatum had owed Lowe money for some time.

When Lowe and Valentine got back into their Camry, Tatum rammed the car's rear passenger side and shot out a rear tire. Valentine tried driving away. Tatum shot Lowe, and then shot Valentine. The Camry crashed into a white car across the street. Tatum proceeded to circle the Camry, shooting into it over 20 times.

Lowe, who survived the attack, was struck in his right eye, chest, left arm, right little finger, left thigh, and four times in the stomach. Valentine, who was killed, was shot in the face, in both forearms, twice in the chest and once in the back.

2. *Neighbor Testimony*

Catherine Sherman was at a residence on 121st Street near Avalon Boulevard between 8:30 a.m. and 9:00 a.m. on October 17, 2013. She saw four men standing in a driveway about four houses away, arguing loudly. Sherman identified one of the four men, who then crossed the street, as Anthony; she had known him from the neighborhood since he was young. Sherman did not know the other three men. One of the unknown men was wearing a dark T-shirt and dark jeans. Another of the unknown men was tall and wearing a bright orange sweat suit.

Sherman went inside the house but kept the door open. She could still hear the men arguing loudly, but she could not hear what they were saying. The argument lasted five to 10 minutes. Sherman peeked out the door and saw one of the taller men crossing the street. Sherman saw another one of the men walking away from a car while talking to the car's occupants. Someone in the car screamed, "You gonna give me my damn money." The man who was walking away from the car pulled a

gun from the right side of his waistband, turned around, and shot out the car's rear passenger side tire. Sherman slammed the door shut and got on the floor. She then "heard a bunch of gunfire . . . ."

After the shooting, Sherman told a detective that the gunman wore a black shirt and black pants, was in his 40's,[2] and was five feet eight to five feet, ten inches tall. The gunman had dark skin and was bald or had short hair, and was shorter than the two tall men.

3. *The Investigation*

Los Angeles County Sheriff's Deputy Eric Espinoza was called to the scene of the shooting at about 8:30 a.m. He saw a Camry on the north side of the street that had collided with a white Cadillac. Lowe was in the front passenger seat. He told Deputy Espinoza that he had been talking to a friend at the location. Tatum drove up in a Camaro, yelled "Fuck [y]a'll," and "just started shooting" at Lowe with a black semiautomatic handgun. Lowe told the deputy he was not affiliated with a gang and did not know if Tatum was.

When Sergeant Troy Ewing of the sheriff's department arrived at the scene, he saw a Camry riddled with bullet holes. Based on Sergeant Ewing's observations, it appeared the Camry backed up at a high rate of speed, went up onto the curb, and struck a tree. The Camry then drove forward, struck one car, and continued to move forward until it struck the Cadillac and stopped. The path of the shooting, as shown by the bullet casings

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[2] According to Lowe, at the time of the shooting, he was in his early 30's, and Valentine was in his late 30's; Lowe guessed that Tatum was in his early 50's.

at the scene, started at the tree and ended where the Camry stopped. Twenty-one nine-millimeter casings were found at the scene, all fired from one gun. The bullet holes and trajectories were consistent with the shooter circling the Camry, starting from the front driver's side, and shooting while the Camry was moving. Eleven bullets and/or bullet fragments were recovered from the Camry. The bullets were fired from a nine-millimeter Glock pistol.

The day after the shooting, Lowe gave Sergeant Ewing his phone, which contained Tatum's phone number. Tatum's number was listed under the contact name "Rat." Records showed the account subscriber for Tatum's phone number was purportedly someone named Kevin Green, but the address listed for Green was fictional. "Anji Roc" was listed as another subscriber on the account. Other evidence indicated this individual was Tatum's girlfriend.

Sergeant Ewing reviewed text messages and calls involving Tatum's phone number to confirm it belonged to Tatum. The name Vincent Anthony Tatum appeared once, and the name Vincent eight times. The nickname "Rat" showed up six times. The phone records showed that on September 17, 2013, someone sent a text from (323) 448-7720 to Tatum's phone. The text said, "Do you still need that peace [*sic*]? From du!" Sergeant Ewing opined "piece" was slang for a gun. The records reflected only one call from Tatum's phone to Lowe's phone, at 1:00 a.m. on October 13, 2013. On October 17, 2013, the account was closed.

A Los Angeles County Sheriff's Department crime analyst reviewed cell tower information for Tatum's phone number. The records showed Tatum's cellphone was used near multiple locations between 7:34 a.m. and 8:34 a.m. on October 17, 2013.

Calls made at 8:09, 8:17, and 8:34 a.m. occurred within about three-quarters of a mile of 622 East 121st Street in Los Angeles, the scene of the shooting. The 8:27 a.m. call happened about a quarter of a mile from the address where the shooting occurred.

Sergeant Ewing reviewed calls made from Tatum's phone around the time Ewing believed the murder occurred. Three outgoing calls were made to (323) 448-7720, the number from which Tatum received the text about the "peace." One was made at 8:27 a.m., and two at 8:34 a.m., about 10 seconds apart.

4. *Tatum's Arrest*

Los Angeles Police Department Officer Oscar Arias was on patrol on November 27, 2013, when he saw Tatum and a woman in a car. When stopped, Tatum falsely identified himself as Anthony Reed. Because Tatum did not match the physical description for Reed, Tatum was taken in for fingerprinting. At that point, it was discovered there was a warrant for Tatum's arrest, and he was arrested for murder.

B. Defense Evidence

At trial, Tatum presented an alibi defense. His primary witness was an individual named Major Goulsby. Tatum frequently worked for Goulsby, who owned a plumbing company. In November 2013, law enforcement told Goulsby that Tatum was charged with murder. Goulsby replied he knew nothing about it and had not seen Tatum. One month later, in December 2013, Goulsby told a defense investigator that on October 17, 2013, Goulsby and Tatum were together all day.

At trial, Goulsby testified that between 7:00 a.m. and 7:30 a.m. on October 17, 2013, he saw Tatum at the plumbing company's office at 6526 Fifth Avenue. Tatum was there until 9:00 a.m. At 9:00 a.m., Goulsby and Tatum went to do plumbing

work at Fred's Burgers, located at 2424 West Slauson Avenue. According to Goulsby, Tatum was on the job at Fred's Burgers the rest of the day.

Robert Pierce also testified for the defense. Pierce had known Tatum since around 2006, and Tatum had worked at a car dealership owned by a friend of Pierce. About 8:30 a.m. on October 17, 2013, Pierce was on or near 121st Street to give a credit application to a woman named Coco. Someone told Pierce that Coco lived on the south side of the street.

Pierce testified that he and Coco were outside her house when he saw men arguing next door. Tatum was not one of the men. Pierce heard shooting and two cars collide. When the shooting started, everyone ran into the house. At trial, the prosecutor asked Pierce if he was able to see the shooter. Pierce testified he saw a man running. The man was darker than Pierce, about five feet eight inches tall, and had short hair.

Pierce stated on direct that he had spoken to Tatum's girlfriend once, in February 2017, and had no previous interaction with her. On cross-examination, Pierce acknowledged he sold a car to Tatum's girlfriend in 2013. Pierce testified he did not think selling Tatum's girlfriend a car qualified as "interacting," because he did not communicate with her by telephone.

C. Rebuttal Evidence

Tatum's phone records showed that Tatum and Goulsby exchanged multiple calls between August 15 and October 17, 2013. At 8:09 a.m. on October 17, Goulsby called Tatum; Tatum did not answer. The analyst who reviewed the cell tower information testified that none of the calls made from Tatum's

phone on October 17, 2013 could have been made from the location of Fred's Burgers.

Sherman testified she was very familiar with the area of 121st Street near Avalon Boulevard. Sherman knew of no one named "Coco" in that area. Sergeant Ewing learned about Coco a month or two before trial. He went to the area of 622 East 121st Street to find her. Sergeant Ewing went to several houses, including the one Pierce had identified as the one to which he went, but was unable to find anyone named Coco.

DISCUSSION

A. The Murder Conviction Must Be Deemed Second Degree Murder

The parties agree, and we concur, that Tatum's murder conviction must be reduced to second degree murder. Murder is distinguished into first and second degrees. (§ 189.) Section 1157 provides: "Whenever a defendant is convicted of a crime . . . which is distinguished into degrees, the jury . . . must find the degree of the crime . . . of which he is guilty. Upon the failure of the jury . . . to so determine, the degree of the crime . . . of which the defendant is guilty, shall be deemed to be of the lesser degree."

Our Supreme Court has held "application of [section 1157] turns only on whether the jury specified the degree in the verdict form." (*People v. McDonald* (1984) 37 Cal.3d 351, 382, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; see also *People v. Beamon* (1973) 8 Cal.3d 625, 629, fn. 2.) "Even if it is obvious that the jury intended to find [the greater degree], the *McDonald-Beamon* rule focuses exclusively on the actual verdict and does not take into account any extrinsic

evidence or findings. [Citations.]" (*In Re Birdwell* (1996) 50 Cal.App.4th 926, 930.)

The jury here was instructed on both first and second degree murder. The verdict form for count 1 did not contain options for selecting between the two, and did not include any language equivalent to first degree murder such as a reference to the murder being committed willfully, deliberately, and with premeditation. Accordingly, the People concede, and we agree, the *McDonald-Beamon* rule applies here.

We therefore deem Tatum's murder conviction to be for second degree murder. Because the matter will also be remanded for the court to exercise the sentencing discretion granted to it pursuant to Senate Bill No. 620, as discussed *infra*, we agree with the People that the trial court will have an opportunity at that time also to reconsider its sentencing choices based on the reduction of the first degree murder conviction to second degree murder.

B. The Trial Court Did Not Err in Failing To Instruct Sua Sponte on Voluntary Manslaughter and Attempted Voluntary Manslaughter

Tatum claims the trial court erroneously failed to instruct sua sponte on voluntary manslaughter, and attempted voluntary manslaughter, as lesser included offenses of murder (count 1) and premeditated attempted murder (count 2), respectively. As substantial evidence did not support giving such instructions, we reject this claim of error.

1. *Applicable Law*

" 'In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes

giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged. [Citation.]' " (*People v. Moye* (2009) 47 Cal.4th 537, 548.) " '[T]he existence of "any evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.]' " (*Id.* at p. 553, italics omitted.) When determining whether substantial evidence supports such an instruction, we view the evidence in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1139.)

" ' "Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)" [Citation.]' " (*People v. Moye*, *supra*, 47 Cal.4th at p. 549.) A lack of malice may be found " ' "when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)) . . . . Because heat of passion . . . reduce[s] an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter of [this form] is considered a lesser necessarily included offense of intentional murder [citation].' [Citation.]" (*Ibid.*, italics omitted.) Attempted voluntary manslaughter, which is an attempted intentional killing without malice, is similarly a lesser included offense of premeditated attempted murder. *(*See *People v. Barton* (1995) 12 Cal.4th 186, 199; *People v. Van Ronk* (1985) 171 Cal.App.3d 818, 824-825.)

The heat of passion theory contains both objective and subjective components. (*People v. Moye*, *supra*, 47 Cal.4th at p. 549.) " ' "To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.' " [Citations.] . . . The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]' [Citation.]" (*Id.* at pp. 549-550.)

The subjective component of heat of passion requires a showing that the defendant "killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." [Citations.]' [Citation.]" (*People v. Moye*, *supra*, 47 Cal.4th at p. 550.) The subjective component is not met where " ' "sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return." ' " (*Ibid.*)

2. *There Was Not Substantial Evidence To Support Giving a Heat of Passion Instruction*

Tatum first argues he was entitled to a heat of passion instruction based on incidents which showed Tatum and Lowe

had an acrimonious relationship for several months prior to the shooting. Tatum states: "According to Lowe, Tatum threatened him with a gun, he prank[] called his cell phone, and at some point Tatum followed Lowe and his brother on and off the freeway and pulled up beside them yelling and shaking his finger at them, but Lowe could not hear what Tatum was saying because his car windows were rolled up." While a series of events over time can be provocatory conduct, "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the *victim* . . . ." (*People v. Moye*, *supra*, 47 Cal.4th at pp. 549-550, italics added.) As shown by Tatum's own recitation, the pre-October 17, 2013 provocative acts came from Tatum and not the victims, and thus did not support a heat of passion instruction.

Tatum also argues he was entitled to a heat of passion instruction based on the events of October 17, 2013. This claim fails for similar reasons. The evidence showed that Tatum challenged Valentine to fight.[3] The events that ensued led to the shooting. When a defendant challenges a person to fight and the latter responds without actual or apparent deadly force (as was

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[3] Tatum asserts that Lowe previously testified Valentine was the one who challenged Tatum to a fight. This misrepresents Lowe's prior testimony. Lowe previously testified "my brother asked [Tatum] do he want to fight, because he kept acting like he wanted to fight my brother. And [Tatum] said, yeah, he wanted to fight. So he said, 'We'll go on 121st' . . . ." It is unclear whether the "he" who said "We'll go on 121st" was Tatum or Valentine. Regardless, Lowe's prior testimony is consistent with Tatum being the one that fomented the fight on October 17, 2013, and that Valentine accepted Tatum's challenge to fight.

the case here), the victim's response is not sufficient provocation to invoke heat of passion. (See *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1310-1313.) The reason for this rule is one of relative culpability: " 'If the defendant causes the victim to commit an act which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked.' " (*Id.* at p. 1312.)

The sequence of events at 121st Street showed it was Tatum that provoked and escalated the incident. After challenging Valentine to fight, Tatum brought a semiautomatic handgun to what was supposed to be a fistfight. Upon seeing the gun, Valentine asked Tatum to put the gun down, and Lowe told Valentine they should leave. Both brothers then went to the Camry. The only arguably provocative act by either victim was Lowe screaming "You gonna give me my damn money." Even if one put aside Tatum's instigation of the events at 121st Street, this demand for repayment of money owed by Tatum was not sufficient to require giving a heat of passion instruction. Viewed in the light most favorable to Tatum, Lowe's words were at worst merely insulting or disrespectful. As the primary case on which Tatum relies recognizes, a wealth of authority holds that in the absence of any other sufficiently threatening behavior (as was the case here), "insults alone are insufficient to constitute adequate provocation." (*People v. Millbrook*, *supra,* 222 Cal.App.4th at pp. 1142 [collecting cases].)

In short, there is no substantial evidence the killing of Valentine and the shooting of Lowe were the result of provocation by the victims sufficient to support the giving of a heat of passion instruction. The trial court therefore did not err in failing to instruct the jury sua sponte on voluntary manslaughter and

attempted voluntary manslaughter. (*People v. Moye*, *supra*, 47 Cal.4th at pp. 548-549.)

C. Tatum Did Not Receive Ineffective Assistance of Counsel

Tatum claims he received ineffective assistance of counsel and was denied his right to due process by his counsel's failure to object to alleged prosecutorial misconduct during trial. Tatum asserts the misconduct included the prosecutor's failure to control Lowe as a witness, improper references to "murder" and the "murder book," and comments during the prosecutor's closing argument that improperly called defense witnesses liars and shifted the burden of proof. We find no prosecutorial misconduct, and conclude Tatum was not deprived of the effective assistance of counsel or denied his right to due process.

1. *Applicable Law*

" 'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.) We will reverse a conviction on direct appeal for ineffective assistance of counsel only if the record affirmatively discloses that counsel had no rational tactical purpose for his or her act or omission. (*People v. Vines* (2011) 51 Cal.4th 830, 875-876, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104.) Where "a valid possible explanation" exists for counsel's action or failure to act, a defendant fails to establish

ineffective assistance of counsel. (*People v. Diaz* (1992) 3 Cal.4th 495, 563.)

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

2. *Alleged Failure to Control Lowe's Testimony*

Tatum first alleges the prosecutor committed misconduct by eliciting inadmissible information from Lowe that Tatum sold drugs, that Tatum always kept weapons, and that Tatum "had it in" for Lowe and Valentine. He further claims the prosecutor improperly elicited testimony from Lowe that "Rat" was Tatum's gang name.

(a) *Alleged Misconduct from Statements Regarding Drugs, Guns, and Animus Towards Lowe and Valentine*

Tatum contends the prosecutor allowed Lowe to volunteer inadmissible testimony that Tatum was a drug dealer, and always carried weapons. "A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement.

[Citation.]" (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.) However, if the prosecutor has no basis for anticipating the response at issue, no prosecutorial misconduct occurs. (*People v. Valdez* (2004) 32 Cal.4th 73, 125; *People v. Earp* (1999) 20 Cal.4th 826, 865.)

Lowe testified he and Tatum were close friends, but Tatum changed that. When the prosecutor asked why, Lowe replied: "[Tatum] was jealous. He wanted to sell drugs and things like that . . . . I was working, so that's what." Tatum fails to demonstrate the prosecutor had any basis to anticipate Lowe's statement that Tatum wanted to sell drugs. (*People v. Earp*, *supra*, 20 Cal.4th at p. 865.) Accordingly, the prosecutor did not commit misconduct in asking why Lowe and Tatum became antagonistic, and getting an unanticipated response. As no misconduct occurred, defense counsel was not ineffective for failing to object (which in any event defense counsel could have rationally concluded would only highlight what was otherwise an offhand comment from a witness obviously hostile to Tatum).

Tatum similarly complains of his counsel's failure to object when Lowe volunteered inadmissible testimony that Tatum always kept weapons. The assertion that this was prosecutorial misconduct borders on the frivolous. The prosecutor posed to Lowe a series of questions effectively asking if Tatum ever had a weapon on him in Lowe's presence before October 17, 2013. Lowe indicated that Tatum did. The prosecutor then asked Lowe to elaborate on any specific incident Lowe recalled, and Lowe responded Tatum "always kept weapons with him all the time." Recognizing the answer was nonresponsive, the prosecutor redirected Lowe back to his personal observations, asking if Tatum ever showed Lowe a weapon, to which Lowe responded

affirmatively by describing his observations of Tatum playing with guns at Tatum's house and Lowe feeling threatened by that gunplay. A witness giving a prosecutor a nonresponsive answer, followed by the prosecutor following up to get a responsive answer, is not misconduct. Nor was the nonresponsive answer prejudicial, as the evidence showed Tatum did in fact have guns with him on multiple occasions.

Tatum's contention that it was misconduct for the prosecutor to ask: "So is it fair to say [Tatum] kind of had it in for you and [Valentine]?" to which Lowe answered "Yes," is similarly groundless. This question came after Lowe testified about Tatum's past harassing conduct towards Lowe and Valentine. To sum up that testimony with a leading question may have been objectionable on the grounds it was leading, but Lowe was an emotional and difficult witness. Tatum cannot fairly criticize the prosecutor for asking open-ended questions to which Lowe volunteered nonresponsive information, while at the same time claiming it was misconduct to ask a leading question to sum up evidence already adduced to minimize the risk of a nonresponsive answer. In any event, the prosecutor's question was a fair summary of the evidence showing Tatum's animosity to the brothers, and defense counsel made a reasonable tactical decision not to object that the question was leading, and thereby give the prosecutor and Lowe an opportunity to reemphasize the point through additional questioning.

(b) *Lowe's Testimony that Tatum Had a Gang Nickname*

Tatum claims the prosecutor committed misconduct by eliciting testimony from Lowe about Tatum's gang nickname. Prior to Lowe's answer volunteering Tatum's gang nickname,

Lowe watched a video showing sheriff's deputies at the scene asking Lowe who shot him, in which he was sitting next to his brother's lifeless body. The video was difficult viewing for Lowe. The court paused the proceedings so Lowe could compose himself, as Lowe was obviously emotional and crying.

Shortly after this video was shown, Lowe was shown a list of contacts from his phone. One of the names listed was "Rat." The following exchange then occurred between the prosecutor and Tatum: "Q. Is that a real person named Rat? [¶] A. Yes. [¶] Q. Okay. And who is Rat? [¶] A. Vincent Anthony Tatum. [¶] Q. Is that a nickname that you call him by? [¶] A. No, that's his gang name."

Tatum's claim of ineffective assistance ignores that his trial counsel immediately objected to this testimony, and further moved for a mistrial. The court sustained the objection and admonished the jury "This [case] has nothing to do with gangs." The jury was then excused. Tatum erroneously asserts that the prosecutor "never claimed to have cautioned or warned Lowe not to mention objectionable gang evidence." The prosecutor, however, represented to the trial court that she "did admonish this witness that we were not going to talk about gangs or anybody involved." When the prosecutor asked about the nickname, she did not expect it "was going to prompt that response"; she thought Lowe was going to testify that "people around" Lowe knew Tatum as "Rat."

The prosecutor argued admonishment and an instruction would sufficiently cure any prejudice, and a mistrial was not necessary. Tatum's trial counsel conceded she did not think the prosecutor had known Lowe would make the gang reference, as

Lowe had not done so at the previous trial.[4] Nonetheless, defense counsel claimed a mistrial was necessary, because "there is no way to unring that bell."

The court denied the mistrial motion. It noted that Lowe was emotional and his gang reference was inadvertent, that Lowe did not say Tatum was an active gang member, and that the court had told the jury the case had nothing to do with gangs. The court then further instructed the jury that "this is not a gang case. You will not hear any evidence that Mr. Tatum is or ever was a gang member. You will not hear any evidence that this was a gang-related crime. You are to disregard any reference that you heard to gangs or hear[ ] as to gangs." In its final instructions to the jury, the court told the jury that it must disregard stricken testimony and not consider it.

In sum, the record shows that defense counsel objected to the testimony, and the objection was sustained. Defense counsel then made a motion for a mistrial, which was denied.[5] As

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[4] Tatum was convicted in a prior trial, but his conviction was reversed in *People v. Tatum* (2016) 4 Cal.App.5th 1125 on an issue unrelated to those presented in this appeal.

[5] We reject Tatum's argument that the court abused its discretion in denying his mistrial motion. A mistrial motion should be granted only when a defendant's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) " ' "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." ' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 714.) Here, the trial court sustained the objection to Lowe's single, brief reference that Tatum had a gang name, and immediately admonished the jury. "Juries often hear unsolicited

defense counsel took appropriate steps to address Lowe's unexpected testimony, her performance was not deficient. (*People v. Johnson*, *supra*, 60 Cal.4th at pp. 979-980.)

3. *References to "Murder" and the "Murder Book"*

Tatum objects to several references by the prosecutor to the word "murder" during her questioning of witnesses. Tatum first claims it was misconduct for the prosecutor to ask, during the direct examination of the arresting officer, if the officer discovered "that Mr. Tatum had a warrant for his arrest in connection with the murder" and to refer to "the detective that was investigating the murder." These references did not constitute an impermissible expression of a personal belief in Tatum's guilt. There was no dispute a murder took place—the question at trial was whether Tatum was responsible for it. The prosecutor's question simply reflected that a warrant had been issued for Tatum's arrest when the police detained Tatum (explaining why he was taken into custody), and that the detective at issue was investigating what he believed to have been a murder. (Cf. *People v. Edwards* (2013) 57 Cal.4th 658, 742

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and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured. [Citations.]" (*People v. Martin* (1983) 150 Cal.App.3d 148, 163; see also *People v. Franklin* (2016) 248 Cal.App.4th 938, 955 ["it is only in the 'exceptional case' that any prejudice from an improperly volunteered statement cannot be cured by appropriate admonition to the jury"].) This is not such an exceptional case. The trial court did not abuse its discretion in sustaining the objection, admonishing the jury, and denying the mistrial motion.

[referring to the defendant as the " 'killer' " did not express a personal belief as to his guilt].)

The same is true of the prosecutor's examination of the Metro PCS records custodian who testified regarding the records for Tatum's phone number. During cross-examination of this witness by defense counsel, a question was posed about when triangulation to determine a phone's location was possible. During redirect, the prosecutor posed a question asking if triangulation was possible a year after a hypothetical murder. There is no reasonable likelihood the jury interpreted this question as expressing the prosecutor's personal belief in Tatum's guilt. (*People v. Bennett* (2009) 45 Cal.4th 577, 596, 612; *People v. Osband* (1996) 13 Cal.4th 622, 720.) Instead, the jury would have understood the reference as phrased to a hypothetical murder, and part of an effort to explain why the custodian of records could not determine a person's location based on year-old phone records. No ineffective assistance of counsel resulted from failure to object to this question. (*People v. Johnson*, *supra*, 60 Cal.4th at pp. 979-980.)

Finally, during cross-examination, Lowe was asked why he had not called the police after the freeway incident. On redirect, the prosecutor followed up by asking "Was that the only time that Mr. Tatum harassed you before he murdered your brother and shot you?" Lowe replied no. Tatum's counsel objected to the use of the word "murder," and the court sustained the objection, stating, "It's argumentative." The prosecutor continued the redirect examination, establishing that Tatum had harassed Lowe many times. As defense counsel objected to the prosecutor's question, there was no ineffective assistance of counsel.

Tatum next alleges that the prosecutor's references to the "murder book" during questioning expressed personal belief in Tatum's guilt.[6] Tatum insists "[t]he name plainly implies that the prosecution already determined [Tatum] was guilty of murder, even before the case went to trial, because they prepared their 'murder book.' "

Tatum concedes "murder book" is the colloquial name for the law enforcement investigation file containing materials concerning a homicide investigation. (See *In re Miranda* (2008) 43 Cal.4th 541, 550.) There is no reasonable likelihood the jury interpreted the complained-of references in the manner Tatum suggests. As noted above, there was no dispute that Valentine was murdered. A reference to an investigative file regarding Valentine's murder did not independently prejudge or suggest that Tatum (or anyone else) was the killer, and defense counsel was not ineffective for failing to object to those references. (*People v. Johnson*, *supra*, 60 Cal.4th at pp. 979-980; *People v. Bennett*, *supra*, 45 Cal.4th at pp. 596, 612; *People v. Osband*, *supra*, 13 Cal.4th at p. 720.)

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[6] In particular, Tatum complains that during the prosecutor's direct examination of Sherman, the prosecutor twice sought to refresh Sherman's memory with her prior statements, and referred to the "murder book." Each time, the court told Sherman to read the document to herself and turn it over when she was finished. Thereafter, during the prosecutor's direct examination of the arresting officer, the prosecutor attempted to refresh his memory with a report at "page 22 of the murder book." The court then noted, "And the witness is reviewing a report."

4. *Prosecutorial Argument Regarding the Veracity of Defense Witnesses*

Tatum claims the prosecutor committed misconduct in arguing that Tatum's alibi witnesses were liars who committed perjury. During her closing argument, the prosecutor commented concerning Goulsby: "And we know from [the crime analyst]'s testimony that [Tatum]'s phone was pinging [five miles from Goulsby's company and six miles from Fred's Burgers]. The phone is over five miles away when Mr. Goulsby is calling [Tatum] at 8:09 a.m. But Mr. Goulsby came in here, took an oath to tell you the truth, and sat there and lied to you when he told you [Tatum] was at [Goulsby's] work site. He was at my job. We got in my car together at 9:00 a.m. and we went to Fred's Burgers. He lies. He lies. Because the phone records don't."

The prosecutor later asked rhetorically why Goulsby did not say that Tatum was with Goulsby on October 17, 2013, when Goulsby was initially interviewed by law enforcement in November 2013. The prosecutor explained: "Because a lie hadn't been formulated yet. Because the lie was formulated later. Because on December 27th, 2013, when the defense investigator comes to speak to him, all of a sudden the memories come flowing in."

The prosecutor then argued the fact that Pierce frequently communicated with Tatum "shows that Mr. Pierce . . . has a motive to lie. This is his friend. This is someone that sent him a great deal of business." The prosecutor observed that Pierce had testified he had interacted with Tatum's girlfriend only once, when he spoke to her on the phone in February 2017. She also recalled that she had confronted Pierce with a document reflecting that he had sold a car to the girlfriend in March 2013.

The prosecutor argued, "So what is it? Does [Pierce] just have a lapse of memory or is he lying? And if he's lying why is he lying about this? Why is this a detail that he needs to lie about? Why does he lie about knowing who she is? Why does he lie about selling her a car in 2013?"

The prosecutor later told the jury: "[Y]ou're the trier of fact, you have to make the decision about who is telling you the truth and who is lying. Who are you going to believe and . . . who are you going to disbelieve. So ask yourselves who has a motive to lie? Mr. Pierce? Mr. Goulsby? Yeah. . . . I'm not saying that you just disbelieve Mr. Pierce and Mr. Goulsby because they are friends of Mr. Tatum. I'm saying you should disbelieve them because everything about their statements had a ring of dishonesty. From the fact that they didn't come forward to the fact that they lie about key facts, and even [unimportant] ones. They don't even know what to tell the truth about and what to lie about. They're caught up in their own web of lies."

A prosecutor enjoys wide latitude in arguing a case to the jury. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) "A prosecutor's 'argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom.' [Citation.]" (*People v. Edwards*, *supra*, 57 Cal.4th at p. 736.) In particular, "the prosecutor is entitled to comment on the credibility of witnesses based on the evidence adduced at trial. [Citation.] [Sh]e may characterize testimony as perjurious if the evidence so warrants. 'The words "lie" and "perjury" are the expressions commonly used to describe willfully false testimony, and there is no reason why a prosecutor must resort to circumlocutions when

discussing this distasteful but pertinent subject.' [Citations.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 529.)

Here, the prosecutor's remarks were fair comment on witness credibility based on the evidence. The cell tower records—technical documents without motive or bias—indicated Tatum was not where Goulsby claimed. Pierce's testimony about "Coco" was called into question by two other witnesses, and his claim never to have interacted with Tatum's girlfriend was belied by documentary evidence he sold a car to her. Notwithstanding Tatum's suggestions to the contrary, the prosecutor's comments never referred to defense counsel and the prosecutor never said the defense investigator solicited false testimony. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 183-184.) In the absence of improper argument, defense counsel was not ineffective in failing to object. (*People v. Johnson*, *supra*, 60 Cal.4th at pp. 979-980.)

During the defense closing argument, Tatum's counsel argued Pierce's testimony was credible because his description of the shooter was consistent with Sherman's description. During rebuttal argument, the prosecutor responded by saying "Well, is it any wonder why [the testimony is consistent]. These are public proceedings open to everyone. There's transcripts. [Pierce] certainly communicates with Mr. Tatum's girlfriend. She could have certainly told [Pierce], hey, this is the description that's out there. FYI, when you go make a statement, this is what you want to say. . . . It's not like it was top secret and no one had access to it."

Tatum insists, "to the extent the prosecutor's statements implied that the defense provided Mr. Pierce with the transcripts," the prosecutor was improperly accusing the defense of fabricating a defense and suborning perjury. Tatum also

argues that "if the prosecutor was only referring to Mr. Pierce lying under oath, committing perjury, it was misconduct." These claims miss the mark. The prosecutor did not suggest the defense provided transcripts to anyone, and there is no reasonable likelihood the jury interpreted the prosecutor's remarks as accusing Tatum or defense counsel of fabricating a defense or suborning perjury. (See *People v. McDowell* (2012) 54 Cal.4th 395, 438 [question on appeal is whether there is a reasonable likelihood the jury interpreted the statements in the manner suggested]; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269 [same].) The prosecutor simply pointed out the defense claim that consistencies between the testimony of Pierce and Sherman were not necessarily informative, because information about what was said at trial was publicly available to everyone, including Tatum's girlfriend, and those persons could have shared information. To the extent the prosecutor suggested Pierce committed perjury, that was fair comment on the evidence for the reasons stated above.

5. *Alleged Improper Shifting of the Burden of Proof*

Tatum urges that the prosecutor erred by "shift[ing] the burden to the defense to create reasonable doubt by producing more witnesses." He cites the prosecutor's comments during closing argument that Goulsby testified that the plumbing at Fred's Burgers was a major undertaking and, although Tatum did not "have the burden," he should have called witnesses from Goulsby's office or Fred's Burgers to corroborate Tatum's presence at those locations.

"[I]t is neither unusual nor improper to comment on the failure to call logical witnesses." (*People v. Gonzales* (2012) 54

Cal.4th 1234, 1275.) Moreover, "in general, a jury's consideration of the defense's failure to call logical witnesses is proper and does not impermissibly shift the burden of proof." (*People v. Alaniz* (2017) 16 Cal.App.5th 1, 7.) The prosecutor's argument on the failure to Tatum to call anyone other than Goulsby from the office location or the worksite was proper, and no ineffective assistance of counsel resulted from failing to object.

6. *No Prejudice Resulted*

Finally, we note that the court instructed the jury using CALCRIM No. 222 that neither what the attorneys said, nor their questions, were evidence; the jury was not to assume something was true just because an attorney asked a question that suggested it was true; and if the court sustained an objection, the jury was to ignore the question. We presume the jury followed these instructions (*People v. Prince* (2007) 40 Cal.4th 1179, 1295) which cured any conceivable harm from the allegedly improper questions and argument from the prosecutor (cf. *People v. Osband*, *supra*, 13 Cal.4th at p. 717).

D. Admission of the September 2013 Text Message Was Not Reversible Error

Tatum contends the September 17, 2013 text message to Tatum's phone number asking "Do you still need that peace [*sic*]" was hearsay, and the trial court erred in admitting it as an adoptive admission. We need not resolve whether the text message was admissible for the truth of the matter asserted, because even if it was not an adoptive admission, any error was harmless. Even if the admission of certain evidence is erroneous, reversal results only if the "error[] complained of resulted in a miscarriage of justice." (Evid. Code, § 353, subd. (b).) A miscarriage of justice results only when it is reasonably probable

the defendant would have received a more favorable result absent the erroneous admission of the evidence. (*People v. Munoz* (2019) 31 Cal.App.5th 143, 168.)

Whether or not Tatum in fact needed a gun one month before the October 17, 2013 shooting was not an issue of importance in the case. Nothing in the text message suggested that Tatum needed a gun for any reason connected to Valentine or Lowe. Regardless of the text message, there was undisputed evidence that Tatum was frequently seen with guns and had access to them. Tatum's defense was not that he had no access to or interest in firearms—it was that he was not the shooter, and was elsewhere at the time of the murder. Given the tangential relevance of the text message and examining the record as a whole, we see no reasonable probability that Tatum would have been acquitted had the text message not been admitted. (*People v. Munoz*, *supra*, 31 Cal.App.5th at p. 168.)

E. Cumulative Error

Tatum contends the cumulative effect of the errors in his case require reversal of the judgment. " 'Under the cumulative error doctrine, the reviewing court must "review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." ' [Citation.] 'The "litmus test" for cumulative error "is whether defendant received due process and a fair trial." ' [Citation.]" (*People v. Mireles* (2018) 21 Cal.App.5th 237, 249.)

Any errors in this case were relatively minor, and they were either cured by jury instructions or not prejudicial. Moreover, the evidence against Tatum was relatively strong, and his alibi evidence was suspect at best. It is not reasonably

probable that the results would have been any different had there been no error. (*People v. Mireles*, *supra*, 21 Cal.App.5th at p. 249.) Tatum received due process and a fair trial, and we accordingly reject Tatum's claim of cumulative error.

F. The Matter Must Be Remanded for Resentencing Under Senate Bill No. 620

Tatum's sentences on counts 1 and 2 included section 12022.53, subdivision (d) enhancements of 25 years to life. He claims, the People concede, and we agree that the matter must be remanded so the trial court can exercise its discretion whether to strike those enhancements pursuant to Senate Bill No. 620.

At the time of Tatum's 2017 sentencing hearing, section 12022.53, subdivision (d), provided for a mandatory, consecutive 25 year to life term of imprisonment for a defendant convicted of murder or attempted murder who "personally and intentionally discharge[d] a firearm and proximately cause[d] great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice." (See *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363.)

Senate Bill No. 620 amended section 12022.53, subdivision (h), effective January 1, 2018. (Stats. 2017, ch. 682, § 2.) The amended subdivision (h) provides: "The 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 this section. . . ." This amendment applies retroactively to cases not yet final on appeal. (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1114.) Because we must remand for resentencing on count 1, the court should also consider whether

to exercise its discretion pursuant to section 12022.53, subdivision (h) when resentencing Tatum.[7]

G. The Trial Court Did Not Err in Imposing a Restitution Fine and Court Assessments

At the August 16, 2017 sentencing hearing, the trial court imposed, without objection, the statutory minimum restitution fine of $300 (§ 1202.4, subd. (b)(1)), a court operations assessment of $40 (§ 1465.8, subd. (a)(1)), and a criminal conviction assessment of $30 (Gov. Code, § 70373).[8] Tatum requests that we reverse these amounts because the trial court did not first ascertain his ability to pay them, relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We decline to do so.

The People argue that Tatum's failure to object below to the fines and assessments, or to raise the issue of inability to pay, caused him to forfeit any such argument on appeal. The Courts of Appeal are divided on the issue of forfeiture in these circumstances. (Compare *People v. Johnson* (2019) 35 Cal.App.5th 134, 138 [no forfeiture] and *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 [same], with *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [forfeiture] and *People v.*

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[7] Tatum contends the current abstract of judgment contains errors needing correction. As we are vacating Tatum's sentence on count 1 and remanding for resentencing on that count as well as pursuant to Senate Bill No. 620, the trial court can ensure the new abstract of judgment accurately reflects whatever sentence is imposed.

[8] While Tatum did not object or raise any issue regarding his ability to pay the statutory fine and fees, he did argue he was unable to pay the $48,201.72 in restitution imposed, plus 10 percent interest from the sentencing date.

Frandsen (2019) 33 Cal.App.5th 1126, 1154-1155 [same].) We find it unnecessary to weigh in on this debate because in our view *Dueñas* was wrongly decided. (*People v. Kingston* (2019) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 1038] (*Kingston*); see also *People v. Caceres* (2019) 39 Cal.App.5th 917.)[9]

In *Kingston*, we agreed with the opinion of our colleagues in Division Two of this district in *People v. Hicks*, *supra*, 40 Cal.App.5th 320 that, contrary to the analysis in *Dueñas*, "due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant's incarceration." (*Kingston*, *supra*, ___ Cal.App.5th at p. ___ [2019 Cal.App. LEXIS 1038 at p. *9], citing *Hicks*, *supra*, at pp. 325-326.) Here, the "imposition of the [restitution fine] and fees in no way interfered with [Tatum]'s right to present a defense at trial or to challenge the trial court's rulings on appeal . . . . And their imposition did not result in [Tatum]'s incarceration." (*Kingston*, *supra*, at p. ___ [2019 Cal.App. LEXIS 1038 at pp. *13-*14].)

Tatum still has a number of years remaining on his indeterminate sentence to make bona fide efforts to repay the restitution fine and assessments, including from prison wages. At this point in time, due process does not deny Tatum the opportunity to try to satisfy these obligations. (*People v. Hicks*, *supra*, 40 Cal.App.5th at p. 327.) The trial court accordingly did not violate Tatum's due process rights by imposing the restitution

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[9] Other courts have also disagreed with *Dueñas*. (See *People v. Allen* (2019) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 1040]; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068; *People v. Kopp* (2019) 38 Cal.App.5th 47, 93-98.

fine and assessments without first ascertaining his ability to pay them.

DISPOSITION

The judgment of conviction is modified to provide that the murder conviction on count 1 is for the second degree murder. As so modified, the judgment of conviction is affirmed. The matter is remanded to the trial court for it to resentence Tatum on count 1, and to consider whether to strike one or both of the firearm enhancements in view of Senate Bill No. 620. The trial court shall thereafter amend the abstract of judgment, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, 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.