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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARSHON WEBB, Defendant and Appellant.	B285826 (Los Angeles County Super. Ct. No. BA432191)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed and remanded with directions.

Edward J. Haggerty, 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, Margaret E. Maxwell and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Arshon Webb appeals from his judgment of conviction of one count of murder, one count of attempted murder, and one count of unlawful possession of a firearm. Webb contends the court made several evidentiary errors, improperly instructed the jury, and abused its discretion in denying his motion to dismiss a prior strike offense. He also asserts his trial counsel was constitutionally ineffective in failing to request a special jury instruction. We affirm Webb's convictions and remand for the trial court to exercise its discretion under Senate Bill No. 620 which amended Penal Code sections 12022.5, subdivision (c), and 12022.53, subdivision (h)[1], effective January 1, 2018, whether to impose firearm enhancements under section 12022.53. Further, in accordance with our opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), on remand the trial court should allow Webb to present evidence of his inability to pay the court facilities and operations assessments the court imposed. The trial court should also consider whether to allow Webb to present evidence of his inability to pay the $2,000 restitution fine and the parole revocation fine in the same amount imposed by the court. In all other respects, we affirm.

FACTUAL BACKGROUND

Daryl Gatewood, Anthony Wayne Simon and Simon's brother Anthony Charles rode motorized bicycles together every weekend. The three friends regularly rode their bicycles to a bicycle shop on Central Avenue to get parts. On August 23, 2014, the three were en route to the bicycle shop, heading north on

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[1] All undesignated references to code provisions are to the Penal Code.

Central Avenue, when Simon saw a group of young men and women congregated near a wall in a restaurant parking lot at the intersection of Central Avenue and 54th Street. The spot was a known hangout for members of the Blood Stone Villains, or BSV's, a subset of the Bloods gang that claimed the area as part of its territory. Charles and Gatewood rode through the intersection, but Simon got caught at the stoplight. Two men approached Simon and asked, "Hey, where you from?" Simon interpreted the question to be asking if he had a gang affiliation. Simon responded that he "wasn't from nowhere," meaning he had no gang ties. The light turned green and Simon continued to the bicycle shop.

The three friends returned from the bicycle shop along the same route, going south on Central Avenue. As the men approached the same intersection near the wall, they slowed down for the stoplight. Simon saw a man wearing red run across the street from the group of people standing in the restaurant parking lot. The man had something in his hand, which Simon initially thought was a bottle that the man intended to throw. As the stoplight turned green and Gatewood accelerated through the intersection, the man waited for Gatewood to pass by, then extended his arm and pointed a gun in Gatewood's direction. The man shot Gatewood three times in the back from about 25 feet away. Gatewood fell off his bicycle.

After shooting Gatewood, the gunman approached Simon. Simon stopped his bicycle, put his hands up, and looking directly at the shooter, said, "I don't gang, I don't bang, I don't bang, we don't bang." As they remained face-to-face, the gunman fired twice directly at Simon. One of the shots hit Simon in the leg and he flipped off his bicycle. From the ground, Simon saw the

gunman running northbound on Central Avenue. Simon survived but Gatewood died from his gunshot wounds.

Surveillance video played for the jury showed a man wearing a white shirt and red sweatpants standing with a group next to the parking lot wall. The man could be seen on the video running across the street and firing at the two bicycle riders, as the rest of the group scattered. Video also captured another man from the group by the wall running towards Gatewood's bicycle and riding away on it.

The police were unable to find the gunman after he fled and never recovered the firearm or Gatewood's bicycle. Because the gunman was seen running up Central Avenue to 52nd Place, the police concluded he may have hidden in one of the properties on 52nd Place.

Los Angeles Police Detective Jose Calzadillas investigated the shooting. Within several weeks of the shooting, Calzadillas created a six-pack photographic lineup that included Tyshaun Jordan, a man who lived on the block of 52nd Place where the gunman may have hidden and who previously had been arrested. When Simon was shown the lineup that included Jordan (but not Webb, who had not yet been identified as a suspect), Simon identified Jordan as looking like the gunman. However, when Calzadillas showed the same set of photographs to eyewitness Debbie Pinker, Pinker immediately recognized Jordan as a high school classmate and stated he was not the shooter and she would have recognized him right away if he had been the shooter. Calzadillas's interview with Pinker, along with his interview of Jordan, helped convince him Jordan was not the shooter. Calzadillas continued his investigation to identify the gunman.

Calzadillas then received information that a BSV member who went by the moniker Duse Face was involved in the shooting. Calzadillas subsequently learned that Duse Face was Webb. Calzadillas put together another six-pack photographic lineup that included Webb's photograph. After several witnesses identified Webb as the shooter from the lineup, he was arrested on December 15, 2014. When the police searched Webb's residence, they found no physical evidence tying him to the shootings.

PERTINENT PROCEDURAL HISTORY

A. *The Charges Against Webb*

Webb was charged with one count of murder (§ 187, subd. (a); count 1), one count of attempted premeditated murder (§§ 664, 187, subd. (a); count 2), two counts of possession of a firearm after being adjudged a juvenile court ward for a violation of section 211 (§ 29820, subd. (b); counts 3 and 5) and one count of carrying a loaded, unregistered firearm (§ 25850, subd. (a); count 4). The information further alleged that during the commission of counts 1 and 2, Webb personally used and intentionally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b)-(d). As to all counts, it was further alleged that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. It was further alleged Webb had suffered a serious or violent felony adjudication as a juvenile within the meaning of section 667.5, subdivisions (b)-(j) and section 1170.12.

Prior to trial, Webb moved to sever the trial on counts 4 and 5, and the court granted the request. The court later dismissed those counts upon the prosecution's motion at the time of sentencing.

B. *The Prosecution's Evidence at Trial*

1. Witness Identifications

a. Simon's Identification

At trial, Simon described the shooter as a dark-skinned African-American man wearing red pants and a white shirt. Simon stated he himself was six feet three inches, and the shooter was shorter than him and probably would have come up to his nose if they were standing next to each other.[2]

Simon identified Webb in court as the shooter. Simon also indicated he had identified Webb as the shooter at the preliminary hearing a year and a half earlier. According to Simon, Webb looked different at trial than at the time of the shooting, as Webb now had "dreads" whereas he previously had a short haircut.[3]

Simon testified about a six-pack photographic lineup shown to him on September 8, 2014 that did not include Webb but instead included Jordan's photograph. Simon had picked

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[2] Webb is six feet two or three inches tall.

[3] Calzadillas similarly testified that the first time he met Webb, on December 15, 2014, Webb was skinnier and his hair was short. A comparison of Webb's booking photograph from December 15, 2014 with one taken approximately one month before the trial commenced in January 2017 showed Webb had grown his hair long and put on a substantial amount of weight, drastically altering his appearance.

Jordan's photograph, remarking, "It's him [the shooter] or maybe he has an evil twin." Simon was "fairly certain" of his identification on that date.

Simon was shown a different six-pack lineup on November 5, 2014 that included Webb, and initially he told the police he did not see the shooter among the men depicted in the photos. After being prompted by the police to continue examining the photos, he looked at them for approximately 15 more minutes before circling Webb's photograph and stating that Webb looked like the shooter but with a "cleaner cut," meaning he did not have facial hair and had a shorter haircut at the time of the shooting. Simon testified at trial that he had stalled in making the identification to the police after he recognized Webb because he "didn't want to do this whole process." However, ultimately he identified Webb because Gatewood deserved to have his killer held accountable. Simon testified he was sure that Webb was the shooter, not the original man (Jordan) he had previously identified.

On cross-examination, Simon acknowledged he told the police the day of the shooting, two days after the shooting, and again on September 8, 2014 that the shooter was light-skinned. He had also described the shooter at the preliminary hearing as light-skinned. He acknowledged he may have told the police that the shooter was approximately five feet ten inches tall or shorter.

b. Charles's Identification

Charles testified that when Simon was shot, Charles was approximately 20 feet away from the gunman. From his stopped bicycle, Charles observed the shooter for approximately seven seconds as he held Simon at gunpoint.

Charles testified he did not get a good look at the shooter's facial features. He said the gunman had a skin tone similar to his own, which he described as dark. He stated the shooter was shorter than six feet three inches. He identified Webb in court as the shooter, but said his hair was different and he looked bigger than at the time of the shooting. Charles also identified Webb as the perpetrator at the preliminary hearing. On September 8, 2014, Charles did not identify anyone in the six-pack photographic lineup that included Jordan but not Webb. In the second lineup, shown to Charles in November 2014, Charles circled Webb's and one other man's photos in a six-pack lineup and stated he was certain one of them was the shooter.

A recording of Charles's 911 call was played for the jury, in which Charles described the shooter as a light-skinned African-American man in a white top and red pants. He also told the police on the day of the shooting that the shooter was approximately five foot six or seven inches tall, and he told the police several days later that the shooter was shorter than he was (at six feet one inch tall).

c. Pinker's Identification

Pinker testified that she witnessed the shooting from 10 to 18 feet away. As the motorized bikes went by, she saw the shooter step out from the direction of the group of men hanging out by the wall and fire shots at one of the bikers. After the shooting, Pinker had a telephone conversation about what she had seen with her sister's boyfriend, Aaron Jones. Pinker testified she did not voluntarily tell the police what she had witnessed and she wanted to stay out of it. However, the police sought her out and she met with them on November 4, 2014. On that date, Pinker identified Webb from a six-pack photographic

lineup as looking familiar to her and most closely resembling the shooter. She ruled out the other men in the lineup because their facial features did not resemble the shooter's. Her written comment was that Webb was the only man who "looks familiar from that day" but she was "not sure." Pinker testified she was shown another photographic lineup that included a photo of Jordan, whom she knew as an acquaintance in high school. She told the police Jordan was not the shooter.

Pinker testified she made eye contact with the shooter for approximately one second. However, she testified she did not clearly see his face because she was not wearing glasses at the time. Although she had a prescription for glasses since the age of five and needed them to see the board in high school, she did not own glasses at the time of the shooting. She stated people's faces were blurry when she was not wearing glasses and she could only see their "overall appearance." She remembered the shooter was wearing red and was a dark-skinned African-American with short hair. She acknowledged previously describing the shooter as a tall, dark-skinned African-American man. At trial, she stated she considered anyone taller than five feet seven inches to be tall, and she did not remember the shooter being as tall as six feet three inches. At trial, Pinker did not identify anyone in the courtroom as the shooter.

2. Jail Call Recordings

Audio recordings and transcripts were introduced into evidence of two telephone calls that Webb made from jail on the day of his arrest to a woman he called "Tonia." During the first recorded call, the woman asked Webb, "I asked you the other day. . . . 'Are you still on the run?' And then you said they're not worried about you." Webb responded by whispering, "[I]t was

like this, Blood. It was them guys, what we did, it was that nigga, the dude got hit, the bike (Inaudible)." April Carlos, the transcriptionist who transcribed the jail calls, testified that the whispered portion was only decipherable using special equipment and after listening to the recording multiple times.

In the second recorded jail call, the woman asked Webb, "Why is the phone in your name if you knew you was gonna run?" She also said, "Then somebody told on you then," to which Webb replied, "Yeah, man."

3. Calzadillas's Videotaped Interview with Jones

Jones lived in the neighborhood where the shooting occurred and knew Simon from riding motorized bicycles with him. He arrived at the scene of the shooting minutes after it took place and spoke briefly to Simon.

Calzadillas interviewed Jones on November 3, 2014.[4] Calzadillas testified that Jones came forward to speak with him after seeing a flyer asking for information about the shooting, and Jones was cooperative and forthcoming. At the beginning of the interview, Jones pulled up a photograph of Webb (whom he knew only as Duse Face) on his phone and said Duse Face was involved in the shooting. Jones stated he had shown the photograph of Webb to Pinker and she had identified Webb as the

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[4] Jones was found not to be available for trial. A portion of the videotaped interview was played for the jury and the transcript of that portion was introduced into evidence and provided to the jury. Calzadillas also testified about Jones's statements to him during the interview. The jury was instructed to consider Jones's statements in the interview not for their truth, but rather to determine whether to believe Jones's subsequent testimony at the preliminary hearing.

shooter. When Jones viewed the surveillance video of the shooting, Jones stated that the man wearing the red pants and white shirt looked like Duse Face. Jones also told Calzadillas that three weeks earlier he had overheard Duse Face talking to a member of a neighboring gang about the shooting. Jones heard Duse Face say, "Shit's gonna get hot over here man." Duse Face then said, "I had to lay a nigga down," which Jones understood to mean to kill someone.

4. Jones's Preliminary Hearing Testimony and Webb's Jail Call Regarding Jones's Testimony

After Jones was served with a subpoena to attend the preliminary hearing, he did not appear on the first day and Calzadillas had to contact him to tell him it was mandatory for him to appear the following day. Jones then appeared and testified. However, the prosecution was unable to secure his attendance for the trial one and a half years later. After the court determined the prosecution had exercised due diligence to ensure Jones's attendance at trial, the court found Jones was unavailable and permitted portions of Jones's preliminary hearing testimony to be read into the record at trial.

In his testimony at the preliminary hearing, Jones stated he did not want to come to court and only came because of the subpoena. He denied knowing or recognizing a man named Duse Face and stated the police had brought up Duse Face in their interview. He denied identifying Duse Face in a photograph or pointing him out on the surveillance video. He also testified he lied about overhearing Webb discuss the shooting and Webb's involvement. After the prosecution played the video of Jones's interview with the police, Jones testified he was pressured and threatened into making statements identifying Webb. Jones also

stated he feared for his safety and that his life was on the line, and that people associated with Webb whom he feared had approached him on the street about this case.

A recording of a jail call between Webb and a woman on June 4, 2015, the date of the preliminary hearing at which Jones testified, was introduced into evidence. The prosecution argued Webb and the woman were discussing Jones's recantation at the hearing earlier that day. During the recorded call, Webb referenced that "the one we really need to worry about" "saved me." "[H]e came in there and . . . God worked. God worked for me." The woman responded, "It's a reason why it worked, though, you know, we on the phone, you feel me?" Webb responded, "Yeah, that's why I ain't sayin' too much." The woman replied, "Yeah, it's a reason. He came through, one time, the guy. You feel me?" Webb responded, "Yeah."

5. Gang Evidence

Evidence was introduced that Webb frequently posted on Facebook about his allegiance to BSV. Webb also had gang tattoos on his body, including the letters BSV across his chest. The prosecution's gang expert opined that Webb was a BSV member.

Presented with a hypothetical mirroring the facts of the shooting, the prosecution's gang expert testified that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members. The expert testified that in gang lingo, "to lay someone down" is to shoot them or assault them so that they end up lying unconscious on the ground. The gang expert also testified that in his experience, witnesses are often reluctant to come forward to

the police in gang violence cases because they fear retaliation. Calzadillas testified it is also common for witnesses in gang cases to recant their stories once they come to court.

C. *Defense Evidence at Trial*

Abel Garcia, who witnessed the shooting, testified that he looked at the gunman for approximately four seconds. He recalled the gunman as being a tall and slim African-American man with dark skin and very short hair. Garcia saw the side of the shooter's face. He told the police he did not get a good look at the gunman's face. When later shown the first six-pack photographic lineup that included Jordan and not Webb, he identified Jordan as looking like the shooter, based on his haircut and the thinness of his face. When shown the second six-pack that included Webb on another occasion, he did not identify Webb as the gunman.

D. *Jury Verdict, Webb's Admission of Prior Strike Offense and* Romero *Motion*

During their deliberations, the jury requested and were provided a readback of Jones's testimony at the preliminary hearing. The jury also requested to listen to the audio recordings of the jail calls made by Webb.

Approximately one hour after being provided the audio recordings, the jury indicated it had reached a verdict. It found Webb guilty of first degree premeditated murder, attempted premeditated murder, and unlawful firearm possession. The jury found true as to the first two offenses the allegation that Webb personally used and intentionally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)) and found true the allegation that all three crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)).

In a bifurcated proceeding, Webb waived his right to a jury trial on the prior sustained delinquency petition for a felony offense and admitted he had suffered a serious or violent felony adjudication as a juvenile within the meaning of the three strikes law.

Before sentencing Webb, the court denied Webb's motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) to strike this prior strike adjudication. The court concluded leniency was not warranted given Webb had committed the prior robbery offense only three and a half years earlier, and given that Webb's current crimes were "as horrible as it gets."

E. *Sentencing*

The court sentenced Webb on count 1 for first degree premeditated murder to 25 years to life, doubled under the three strikes law, plus 25 years to life for the firearm-use enhancement pursuant to section 12022.53, subdivision (d). As to count 2 for attempted premeditated murder, the court imposed a consecutive sentence of 15 years to life doubled under the three strikes law, plus an additional 25 years to life for the section 12022.53, subdivision (d) enhancement. As to count 3 for unlawful firearm activity, the court selected the middle term sentence of two years doubled under the three strikes law, plus three years for the gang enhancement, to be served concurrently with the sentence imposed in count 2.

The court imposed a restitution fine of $2,000 (§ 1202.4, subd. (b)), and imposed and suspended a corresponding $2,000 parole revocation fine (§ 1202.45). The court also ordered Webb to pay $5,000 in victim restitution and $930 for funeral expenses. Further, the court imposed a court operations assessment of $40

for each count (§ 1465.8, subd. (a)(1)) and a court facilities assessment of $30 for each count (Gov. Code, § 70373, subd. (a)(1)). Webb did not object to the imposition of these fines and assessments or request a hearing to determine whether he had the ability to pay them.

Webb timely appealed.

DISCUSSION

I. *The Court Did Not Err in Ruling Jones Was Unavailable at Trial*

Webb contends the trial court erred in finding the prosecution had exercised reasonable diligence to secure Jones's attendance at trial, such that the court found Jones was unavailable and admitted his preliminary hearing testimony along with his prior inconsistent statements made to law enforcement. Based on our independent review of the evidence presented at the due diligence hearing conducted by the trial court, we uphold the trial court's finding of due diligence.

A. *Evidence at Due Diligence Hearing*

After the preliminary hearing at which Jones testified on June 4, 2015, Webb's trial date was continued numerous times. On November 7, 2016, defense counsel moved to continue the trial to January 2017. The matter was continued to December 7, 2016, with January 6, 2017 being the last day that the trial could commence consistent with Webb's speedy trial right. On January 3, 2017, the prosecution sought a one-day continuance because the prosecution had been unable to serve Jones with a subpoena to appear at trial. The court continued the matter to January 11, 2017.

On January 11, 2017, the first day of trial, the prosecution indicated it had been unable to locate and serve Jones and requested the court conduct a hearing to determine if the prosecution had exercised due diligence in attempting to secure Jones's attendance at trial. The prosecution called Calzadillas, district attorney investigator Steve Sabosky, and Jones's great aunt, Patricia Moats, to testify, and the following evidence was elicited.

The prosecution began efforts to locate Jones on December 22, 2016. At that point, it had been over a year since Calzadillas had spoken to Jones. Calzadillas unsuccessfully searched for social media accounts associated with Jones. Calzadillas also searched multiple databases, including the Department of Motor Vehicles database, which listed Moats's residence on 52nd Street as Jones's home address. None of the databases revealed any other addresses for Jones.

Calzadillas went to Moats's home and spoke with Jones's uncle, who informed him Jones was at work. Calzadillas left his contact information and business card with the uncle so that Jones could contact him, but Calzadillas never heard from Jones. Calzadillas returned to the residence a few days later and spoke with Moats, who said Jones was at work. Calzadillas again left his business card and contact information and asked Moats if she knew where Jones was staying, where he worked, or what his phone number was. Moats said she did not have any of that information, and she did not provide any other information to help Calzadillas find Jones. On January 4, 2017, Calzadillas visited the residence a third time and spoke with Moats. She informed Calzadillas that Jones had not been home and he was aware the police were trying to find him. Calzadillas testified a

night watch detective also went to Moats's residence on three different occasions late in the evening to attempt to serve Jones with a subpoena.

On December 28, 2016, Calzadillas called an old number he had for Jones, and Jones answered. Jones remembered Calzadillas and the case. Calzadillas advised Jones that the trial date was approaching and Calzadillas needed to give him some papers from the court. Jones refused to state where he was living or working and refused to meet with Calzadillas. He told Calzadillas he was not going to come to court and wanted nothing to do with the case. He hung up on Calzadillas. Calzadillas attempted to call the same number on several other occasions, but the call always went to voicemail. Calzadillas left several voicemails up until the first day of trial, but Jones never responded.

Calzadillas located an address in San Pedro connected to Jones's girlfriend. When Calzadillas visited the address, he spoke with the girlfriend's sister, who stated Jones was aware they were looking for him. She believed Jones was hiding and would not go to court. She stated Jones had stayed at her residence "off and on" for a few nights at a time but had not been there for "a couple months." Subsequently, Calzadillas also spoke to Jones's girlfriend's mother, who stated Jones and his girlfriend had been hiding out in different hotels.

Sabosky testified he began trying to locate Jones on January 3, 2017. His services were requested approximately four days earlier, but he and his fellow investigators were out for the holidays. Sabosky searched multiple databases and checked to see if Jones was in custody or in a local hospital. He also ran an unsuccessful license plate search on the vehicle that had been

associated with Jones. He began calling and texting Jones from different phone numbers but got no response.

The only addresses that came up for Jones were the residence on 52nd Street and another address on 53rd Street, but when Sabosky visited the latter address, a female resident stated she had lived there for two years and did not know Jones. A search using Jones's girlfriend's information likewise did not yield any other addresses.

Sabosky called the employer listed for Jones's girlfriend, but the employer refused to provide information about whether the girlfriend worked there. Sabosky did not visit the business to try to find her because he knew it was a "really large complex."

Sabosky found Facebook profiles for Jones and his girlfriend, but neither one had been active since November 2016. Sabosky also visited four motels near Moats's residence and showed a photograph of Jones to the managers, who did not recognize Jones and said he was not staying at the motels.

On January 4, 2017, Sabosky visited the home on 52nd Street and spoke with Moats, who told him Jones lived there sporadically and was probably at work. Moats denied knowing where Jones worked or having his phone number.

On January 5, 2017, Sabosky set up surveillance of the residence on 52nd Street, beginning at 5:30 a.m. He saw a vehicle parked on the lawn that had not been there previously. He ran a computerized check of the license plate and discovered the car was registered to Jones's girlfriend. Sabosky tried to park as close as possible to the car so he could see anyone who got into it. At approximately 6:30 a.m., while it was raining hard, someone wearing a hoodie over his or her head quickly exited the front door, got into the car, and speedily exited the driveway and

drove off. Sabosky could not tell if the driver was a man or a woman. Sabosky had to make a U-turn and was not able to catch up to the car; he got in a small accident trying to do so and had to abandon his attempt to follow the car.

The morning of the trial, January 11, 2017, Sabosky went to the residence again before 6:00 a.m. and saw a woman and a man standing on the front lawn. Sabosky pulled over quickly and approached the house, but by then only the man was outside. The man identified himself as Jones's father, Lawrence. Lawrence denied Jones was home and said he had not seen him in quite a while. Lawrence became uncooperative when Sabosky asked where else Jones could be.

Moats testified Jones had lived with her "off and on" for the past two years and received mail at her home. She said he sometimes stayed for about a month, and then he would be gone for two to three months. She did not know where he stayed when not with her. As of January 11, 2017, she had not seen Jones in approximately three weeks. The last time she saw him he was leaving for work, and he did not return. She had not spoken to Jones since. She told Jones's father, who also lived with her, that the police were looking for Jones. Moats did not know Jones's telephone number or where he worked. Moats did not believe the police or the investigator asked her for the names or addresses of any other family members. She thought Jones's mother, sister, and younger brother might live in Los Angeles County, but she did not know where.

B. *Trial Court's Finding that Prosecution Exercised Due Diligence*

Following the prosecution's presentation of evidence of its search for Jones, defense counsel argued the prosecution had not

exercised due diligence in trying to locate him. She argued law enforcement waited until the 11th hour to begin efforts to secure Jones's attendance at trial, only beginning their search approximately two weeks before the trial date.

The trial court found the prosecution had satisfied its burden to show Jones was unavailable by demonstrating that multiple law enforcement personnel had made "a serious effort" to locate Jones. The court found Moats was "less than forthcoming" when questioned, and that Jones's family had been "less than helpful" to law enforcement's efforts to locate Jones. The court found it incredible that Jones's family members did not know where he worked.

C. *Legal Analysis*

"A criminal defendant has a state and federal constitutional right to confront witnesses, but the right is not absolute. If a witness is unavailable at trial and has given testimony at a previous court proceeding against the same defendant at which the defendant had the opportunity to cross-examine the witness, the previous testimony may be admitted at trial." (*People v. Sánchez* (2016) 63 Cal.4th 411, 440 (*Sánchez*).) A court may find a witness is unavailable if "the declarant is . . . [a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

"In a criminal case, the prosecution bears the burden of showing that the witness is unavailable and, additionally, that it made a 'good-faith effort' [citation] or, equivalently, exercised reasonable or due diligence to obtain the witness's presence at trial. [Citations.] [¶] '[T]he term "due diligence" is "incapable of

a mechanical definition," but it "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'" [Citation.] Relevant considerations include the timeliness of the search, the importance of the witness's testimony, and whether leads were competently explored." (*Sánchez, supra,* 63 Cal.4th at p. 440.) Additional factors include whether the prosecution "'reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available'" and "'whether the witness would have been produced if reasonable diligence had been exercised.'" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

"The reviewing court defers to the trial court's determination of the historical facts if supported by substantial evidence, but it reviews the trial court's ultimate finding of due diligence independently, not deferentially." (*Sánchez, supra,* 63 Cal.4th at p. 440; see *People v. Cromer* (2001) 24 Cal.4th 889, 900-901 [appellate courts apply a deferential standard of review to trial court's factual findings regarding prosecution's efforts to locate the absent witness, while independently reviewing whether the efforts "demonstrate prosecutorial due diligence in locating the absent witness"].)

Webb contends the prosecution did not exercise due diligence to secure Jones's attendance at trial both because it did not make reasonable, timely efforts to find and serve Jones, and because it did not maintain contact with Jones after the preliminary hearing to prevent him from becoming absent. In arguing the prosecution did not demonstrate reasonable diligence because it failed to maintain contact with Jones, Webb relies on *People v. Louis* (1986) 42 Cal.3d 969, 991 (*Louis*), which held: "The obligation to use reasonable means to procure the presence

of the witness has two aspects. The more obvious is the duty to act with due diligence in attempting to make an absent witness present. Less obvious, perhaps, but no less important 'is the duty to use reasonable means to prevent a present witness from becoming absent.'" However, "[s]ubsequent cases have limited the holding in *Louis* to its peculiar facts." (*People v. Thomas* (2011) 51 Cal.4th 449, 502.) Those unique facts present in *Louis* included that the witness who disappeared before trial had been in custody but was released on his own recognizance over a weekend, despite his lengthy criminal history, habitual failure to appear in court, and well-known unreliability. (*Louis*, at pp. 989-991.) The Supreme Court has clarified since *Louis* that the prosecutor is required to take adequate preventative measures to stop a witness from disappearing only when there is knowledge of ""'a substantial risk'" that an "'important witness would flee.'"" (*People v. Friend* (2009) 47 Cal.4th 1, 68; see *People v. Wilson* (2005) 36 Cal.4th 309, 342.) In the absence of such special circumstances, the prosecution has no obligation "to keep 'periodic tabs' on every material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to . . . simply 'disappear,' long before a trial date is set." (*People v. Hovey* (1988) 44 Cal.3d 543, 564.)

Here, "the record does not reflect that the prosecutor had any knowledge of or reason to know of a substantial risk that [Jones] would flee or otherwise disappear." (*People v. Friend, supra*, 47 Cal.4th at p. 68.) Although Jones's appearance at the preliminary hearing was involuntary and he testified he was afraid for his safety, he did in fact appear at the preliminary

hearing. And before that time, he had been a cooperative witness who sought out the police to tell them he had material information about the shooting.

Further, the record reflects that Jones knew that law enforcement was looking for him and he was hiding out to avoid testifying at trial. Even if the prosecution had kept tabs on Jones after the preliminary hearing, there is no reason to assume he would not have disappeared closer to the trial date.

We also conclude the prosecution's efforts to find and serve Jones were sufficiently timely and extensive to constitute due diligence to secure his attendance at trial. Although Jones plainly was an important witness for the prosecution, attempting to find and serve him two weeks before the trial date was not unreasonable, given the prosecution had no reason to suspect that Jones would disappear. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 675-676 [finding law enforcement began to search for a witness "a reasonable period of time before the trial was to commence" when the search began "approximately two weeks before the date set for the start of the trial"]; *People v. Hovey, supra,* 44 Cal.3d at p. 564 [due diligence found where investigators began search for witness approximately one month before trial]; *People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1238-1239, disapproved on other grounds by *Cromer, supra*, 24 Cal.4th at p. 901 fn. 3 [reasonable diligence found when the search for the witness started one week before trial].)

In addition, two detectives and a district attorney investigator engaged in an exhaustive search for Jones during those two weeks. They conducted database and social media searches, visited three possible addresses, repeatedly questioned relatives and conducted surveillance at the main address that

had consistently shown up as Jones's address, tracked down Jones's girlfriend's relatives, and searched nearby hotels and hospitals. (See *People v. Bunyard* (2009) 45 Cal.4th 836, 855 [prosecution was reasonably diligent where officers "repeatedly check[ed the witness's] last known address, and areas he was known to frequent"]; cf. *People v. Cromer, supra*, 24 Cal.4th at p. 904 [prosecution failed to exercise reasonable diligence where prosecution made no serious attempt to locate witness until approximately one month before trial, delayed following up on promising information about the witness's location, and never spoke to the witness's mother, the person most likely to know the witness's whereabouts].) Importantly, Calzadillas spoke with Jones, who made clear he was not interested in being found and would not attend the trial. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706 [prosecution showed due diligence in trying to secure a witness's presence at trial, in part, because "it is fairly clear [the witness] purposely made herself unavailable"].) Accordingly, we conclude the prosecution exercised reasonable diligence to secure Jones's attendance at trial such that the trial court properly found him unavailable and admitted his preliminary hearing testimony.

II. *The Trial Court Did Not Abuse Its Discretion in Permitting Transcriptionist to Testify as to Contents of Webb's Recorded Jail Call*

A. *Admission of Recording, Transcript and Transcriptionist's Testimony*

Carlos prepared a transcript of a recording of a jail call Webb made on the day of his arrest to a woman he called Tonia. Within a longer transcription of the full conversation, Carlos transcribed whispered sentences by Webb as stating, "It was

them guys, what we did. It was that nigga, the dude got hit, the bike." Outside the presence of the jury, Carlos told the court initially she could not discern what had been whispered. But then she used a special software that canceled out the background noise, and with the aid of special headphones, she was able to understand what Webb said after playing that portion of the recording over and over again.

The court listened to the recording approximately four times with the aid of the software and the headphones and could discern the words, "The dude got hit." Defense counsel listened to the recording and said she heard the word "hit" clearly, but "[t]hat was about it."[5]

The prosecutor requested that she be permitted to play the recording for the jury with Calzadillas on the stand to authenticate the recording. Then Carlos would testify that she created the transcript with no prior information about the case, using special headphones and gear to listen to the recording and make her transcription. The prosecutor argued that Carlos would essentially be testifying as a translator of sorts, whose opinion from having listened to the tape repeatedly could be useful to the jury. However, "[t]he jury can take it for what it's worth."

Defense counsel objected that if Carlos were permitted to testify, the jury would rely on her testimony as to what she heard on the tape even if the jury itself was unable to hear those words. Defense counsel did not object to the transcript itself being

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[5] The record is unclear as to whether defense counsel listened to the recording more than once.

provided to the jury and did not object to the admission into evidence of the transcript.

The court admitted into evidence the audio recording and the transcript. The court also ruled that Carlos could testify as to what she deciphered on the recording. The court found the situation to be somewhat analogous to having an interpreter translate a language that the jury does not understand, except that instead of requiring the jury to accept the translation, the jury could assign whatever weight they believed was appropriate to the testimony of Carlos. The court conditioned its ruling admitting the recording, the transcript, and Carlos's testimony on the special software and the headphones being made available if the jury should request them during their deliberations.

Carlos then testified before the jury. She stated that since graduating from court reporting school 16 years earlier, she had transcribed thousands of transcripts from audio files. Before transcribing the jail call by Webb, Carlos was not provided any information about the case.

Carlos testified it was difficult for her to hear what was being said during the short whispered portion of the recording. She used enhancing software and special headphones to enable her to hear what was whispered after listening to the whispered portion at least 20 times. She testified she heard the following being whispered: "It was them guys, what we did, it was that nigga, the dude got hit, the bike."

Following Carlos's testimony, the court advised the jury that it would be provided the opportunity to listen to the recording and have access to the headphones and "enhanced listening material" that Carlos relied upon. The transcript of the calls was distributed to the jury and the audio recording played

for them. At the close of the trial, the court instructed the jury that they could consider the opinions of expert and non-expert witnesses but were not required to accept their opinions as true or correct, and could disregard any opinion they found unbelievable, unreasonable or unsupported by the evidence.

The jury was permitted to view the transcript of the jail call while deliberating. During their deliberations, the jury requested to hear the audio recording of the call. Carlos was summoned back to court to provide the jurors with the software and headphones necessary to listen to the whispered portion of the tape. An hour after they were provided the tape and equipment, the jury indicated they had reached a verdict.

B. *Legal Analysis*

Webb contends the trial court erred in allowing Carlos to testify about what she heard and transcribed upon listening to the whispered portion of Webb's jail call. We disagree.

"[A]s a foundation for its admission, the accuracy of the transcript of a tape recording must first be established. While ordinarily a trial judge will listen to [an audio] recording to determine the accuracy of the transcription [citation], this procedure does not constitute the exclusive method for establishing its authenticity."" (*People v. Ketchel* (1963) 59 Cal.2d 503, 518, overruled on other grounds by *People v. Morse* (1964) 60 Cal.2d 631.) For instance, sometimes a police officer testifies to the accuracy of a transcription. (*Ketchel,* at p. 518.)

It is not uncommon for some portions of audio recordings to be difficult to understand when played without interruption, but to become "distinguishable and understandable on a continuous playing of the recording." (*People v. Albert* (1960) 182 Cal.App.2d 729, 742.) Discerning what has been said after repeatedly

listening to the recording is "the justifiable purpose of the transcript." (*People v. Polk* (1996) 47 Cal.App.4th 944, 955.) In this case, the whispered portion of the recording was not audible without using special equipment and listening to the recording numerous times. The trial court did not abuse its discretion in determining the transcriptionist was the proper witness to establish the accuracy of her transcription by testifying about how she deciphered the whispered words.

Moreover, even assuming the trial court erred in permitting the transcriptionist to testify, any error was harmless. First, Webb did not object at trial (and does not argue on appeal) that the court should not have admitted into evidence the transcript that included the whispered portion of the recorded jail call. He does not contend that the whispered portion was so inaudible as to preclude transcription or contend the transcription was inaccurate or misleading in any respect. The jury had that transcribed portion before it in black and white, and Webb fails to establish any prejudice from Carlos testifying as to how she came to decipher that portion in the transcript. Second, during their deliberations, the jury requested to be provided the audio recording, demonstrating that they did not give undue weight to Carlos's testimony about what Webb whispered during the telephone call from jail. Rather, it appears the jury used the audio recording to determine for themselves what Webb said. (*Jaramillo v. Scribner* (E.D. Cal., May 18, 2009, Civil No. 1:07-0935 JTM (RBB)) U.S. Dist. Lexis 46807 *33 ["it was up to the jury to examine the tape, witness testimony, and [the] transcription[] to determine what was said and to weigh the evidence"].) Webb has not shown a reasonable probability of a more favorable verdict if Carlos had not testified. (*People v.*

McDaniel (2019) 38 Cal.App.5th 986, 1005 [evidentiary errors are evaluated under "reasonable probability" standard of prejudice].)

III. *The Trial Court Acted Within Its Discretion in Excluding Statements by a Non-Testifying Witness*

Webb contends the trial court erred by ruling that defense counsel could not question Calzadillas to elicit statements made to him by a non-testifying witness, Rodolfo Esquivel. According to Webb's counsel, Esquivel witnessed the shooting and two days afterwards described the gunman as being an African-American male who was approximately five feet nine inches tall with a light complexion. Two weeks after the shooting, when shown the six-pack photographic lineup that included Jordan but not Webb, Esquivel identified Jordan as looking like the shooter. The defense moved to admit Esquivel's statements to Calzadillas as third-party culpability evidence.[6] Recognizing these out-of-court statements by Esquivel could not be admitted for their truth, the defense argued they were admissible for the purported non-hearsay purposes of (1) their effect on the hearer, Calzadillas, who acted on Esquivel's statements by requesting a warrant issue for Jordan; and (2) challenging the quality and credibility of the investigation by law enforcement in this case. The defense theory was that Calzadillas ruled out Jordan as a suspect too quickly after Pinker said he was not the gunman, when a thorough investigation may have shown Jordan was the shooter.

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6 Webb does not explain why the defense did not call Esquivel as a witness to testify to his descriptions of the shooter and his identification of Jordan.

The court determined there was no way the jury would consider Esquivel's identification of Jordan "for anything but the truth of the matter asserted," which would have been an improper purpose. Thus, the court did not permit the defense to recall Calzadillas as a witness in order to elicit Esquivel's statements and identification. We find no abuse of discretion in the court's ruling. (See *People v. Clark* (2016) 63 Cal.4th 522, 572 ["[t]he trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence"].)

Although the court did not explicitly engage in the requisite weighing of probative value against undue prejudice under Evidence Code section 352, we infer it performed this analysis before ruling the evidence would not be admitted.[7] "[A] trial court need not expressly state that its ruling is based on a weighing of prejudice against probative value so long as the record otherwise shows 'that the trial court understood and undertook its obligation to perform the weighing function prescribed by Evidence Code section 352.'" (*People v. Triplett* (1993) 16 Cal.App.4th 624, 628-629; accord, *People v. Prince* (2007) 40 Cal.4th 1179, 1237; *People v. Waidla* (2000) 22 Cal.4th 690, 724.) In its motion to admit Esquivel's statements, the

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7 Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

defense acknowledged the admission of the evidence "should be evaluated by the Court for relevance and also any risks of undue prejudice pursuant to Evidence Code section 352." Given the defense's invocation of Evidence Code section 352 in its motion (which the court stated it had read), it may be inferred that the court's ruling precluding the testimony incorporates its analysis under Evidence Code section 352. (*People v. Carter* (2005) 36 Cal.4th 1114, 1152 [given the trial court's indication it had reviewed the parties' briefing addressing admissibility of the evidence under Evidence Code section 352, "the weighing process contemplated by Evidence Code section 352 may be inferred"].)

If Esquivel's statements to Calzadillas were considered only for the purported purposes for which the defense offered them, the probative value of the evidence was low. Defense counsel was permitted to cross-examine Calzadillas extensively about the detective's early investigation in the case, initial focus on Jordan, and then ruling out of Jordan as a suspect after interviewing Pinker. In his closing argument, Webb's counsel focused a great deal on the fact that multiple witnesses (Simon and Garcia) had identified Jordan early on from a photographic lineup, and he argued that Calzadillas had rashly eliminated Jordan as a suspect. Thus, the evidence from Esquivel would have been cumulative, and its exclusion did not prevent Webb's counsel from advancing the theory that the police may have let the real killer go.

Further, the danger that the jury would be confused and misled by the introduction of Esquivel's statements was high. As the trial court found, admitting Esquivel's statements would pose a substantial risk that the jury would misunderstand the limited purpose for which they were admitted and would instead consider

them for an improper purpose, i.e., for their truth. Had the evidence been highly probative, the trial court more properly should have admitted the evidence and given a limiting instruction. (*People v. Hendrix* (2013) 214 Cal.App.4th 216, 247 ["[a] limiting instruction can ameliorate [Evidence Code] section 352 prejudice by eliminating the danger the jury could consider the evidence for an improper purpose"].) But given the low evidentiary value of Esquivel's statements, the court did not abuse its discretion by excluding them altogether. (Cf. *People v. Robinson* (2011) 199 Cal.App.4th 707, 716 [trial court did not abuse its discretion under Evidence Code section 352 in admitting evidence that "was probative and necessary to the jury's consideration of the case, and not outweighed by a substantial danger that the jury would consider it for improper purposes"]; *People v. Miller* (2014) 231 Cal.App.4th 1301, 1311 ["in applying [Evidence Code] section 352 to out-of-court statements admitted as expert basis evidence, 'probative value' . . . of the inadmissible evidence . . . must be weighed against the risk that the jury will view and use this inadmissible evidence for an improper purpose, i.e., as substantive evidence against the defendant"].)[8]

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[8] Because the trial court merely applied the ordinary rules of evidence to exclude cumulative evidence that was of low probative value, Webb does not have a meritorious argument that he was denied his right under the federal Constitution to present a defense. (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999 ["In general, the '"[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' [Citations.] We have recognized, however, that Evidence Code section 352 must yield

IV. *The Trial Court Did Not Err in Instructing the Jury That It Could Consider the Eyewitnesses' Level of Certainty as to Their Identification of the Gunman*

Webb contends the trial court erred in instructing the jury with CALCRIM No. 315, the pattern instruction regarding eyewitness identifications, which directs the jury in relevant part: "In evaluating identification testimony, consider the following questions: [¶] . . . [¶] How certain was the witness when he or she made an identification?" According to Webb, a growing body of research demonstrates "no correlation between reliability and the confidence of a witness's identification."

Webb's trial counsel did not object to the jury instruction. The People contend Webb has thus forfeited his claim, and we agree. "If [Webb] had wanted the court to modify the instruction, he should have requested it. The trial court has no sua sponte duty to do so." (*Sánchez, supra,* 63 Cal.4th at p. 461.) As in *Sánchez,* "it is not clear [Webb] would want the modification" because "[t]his case involved many identifications, some certain, some uncertain. [Webb] would surely want the jury to consider how *uncertain* some of the identifications were. . . ."[9] (*Id.* at

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to a defendant's due process right to a fair trial and to the right to present all relevant evidence *of significant* probative value to his or her defense"].)

[9] We reject Webb's contention that all the eyewitnesses identifying Webb as the gunman were "certain" of their identifications. When Pinker picked Webb's photograph from a lineup, she told the police she was not sure of her identification; moreover, at trial she did not identify him as the shooter. And while Charles stated he was certain of his in-court identifications

p. 462; see *ibid*. ["telling [the jury] to consider this factor could only benefit defendant when it came to the uncertain identifications, and it was unlikely to harm him regarding the certain ones"].)

Even if Webb had not forfeited the argument, the California Supreme Court has already rejected it. In *Sánchez*, the court recognized that "some courts have disapproved instructing on the certainty factor in light of the scientific studies." (*Sánchez, supra*, 63 Cal.4th at p. 462.) Nonetheless, the Supreme Court found no error resulting from the trial court's instruction with CALCRIM No. 315's predecessor, CALJIC No. 2.92, which instructs the jury to consider "the extent to which the witness is either certain or uncertain of the identification" when assessing the accuracy of an eyewitness identification. The court held, "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. (*People v. McDonald* (1984) 37 Cal.3d 351, 369.) In *People v. Wright* (1988) 45 Cal.3d 1126 [(*Wright*)]. . . [w]e specifically approved CALJIC No. 2.92, including its certainty factor. (*Wright*, at pp. 1144, 1166 [appendix].) We have since reiterated the propriety of including this factor. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232.)" (*Sánchez*, at p. 462.)

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of Webb, he had circled photographs of both Webb and another man in the November 2014 six-pack lineup, suggesting he was not certain of his identification of Webb at that time.

The Supreme Court granted review in *People v. Lemcke*, on October 10, 2018, S250108, to consider the following issue: Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights? However, until the Supreme Court rules otherwise, *Sánchez* remains good law by which we are bound. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, we find no error in the trial court's instruction with CALCRIM No. 315.

V. *Defense Counsel Was Not Constitutionally Ineffective for Failing to Request CALCRIM No. 315 Be Modified*

Webb contends the jury's instruction with CALCRIM No. 315 was insufficient because they were not specifically instructed to consider "[w]hether the witness had, at any other time, identified another person as the perpetrator." Webb asserts a modification of CALCRIM No. 315 to add this factor was necessary in his case given the evidence that one of the prosecution's eyewitnesses, Simon, initially identified Jordan as looking like the shooter when shown a six-pack photographic lineup that included Jordan but not Webb.

The jury was instructed under CALCRIM No. 315: "You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. [¶] In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions,

distance, and duration of observation? [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] *Did the witness ever fail to identify the defendant?* [¶] *Did the witness ever change his or her mind about the identification?* [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty." (Italics added.)

The trial court also instructed the jury with CALCRIM No. 226, which provides in pertinent part: "In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony," including whether the witness made "a statement in the past that is consistent or inconsistent with his or her testimony."

Webb acknowledges that his trial counsel did not object to or request a revision of the CALCRIM No. 315 instruction. He also admits the trial court had no sua sponte duty to modify CALCRIM No. 315. (*People v. Ward* (2005) 36 Cal.4th 186, 213; see *Sánchez, supra*, 63 Cal.4th at p. 461 ["[i]f [Webb] had wanted

the court to modify the instruction, he should have requested it"].) He contends, however, that the failure by his trial counsel to request a modification of CALCRIM No. 315 constituted ineffective assistance of counsel. Webb's contention is meritless.

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel.' [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391; see also *Strickland v. Washington* (1984) 466 U.S. 668, 694.) "A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted." (*People v. Mattson* (1990) 50 Cal.3d 826, 876.)

The California Supreme Court has approved CALCRIM No. 315's predecessor, CALJIC No. 2.92, as "clearly focusing the jury's attention" on "'the factors that affect eyewitness identification testimony, as they relate to reasonable doubt.'" (*Wright*, *supra*, 45 Cal.3d at p. 1143.) Although *Wright* suggests

the pattern instruction may need to be tailored to take into account the evidence presented at trial, it does not support Webb's argument that his counsel should have requested a specific instruction that the jury consider whether the witness had previously identified another person as the perpetrator.[10] (*Id.* at p. 1141.)

A trial court need not give a pinpoint instruction that is duplicative. (*People v. Harris* (2013) 57 Cal.4th 804, 853; see *People v. Hartsch* (2010) 49 Cal.4th 472, 500 [trial court need not give pinpoint instruction that "merely duplicates other instructions"].) The additional factor that Webb suggests his counsel should have requested would have been duplicative of other factors included in CALCRIM Nos. 315 and 226 with which the jury was instructed. Taken together, CALCRIM Nos. 315 and 226 advised the jury to consider whether a witness ever failed to identify the defendant, changed his or her mind about the identification, or made a statement in the past that is inconsistent with his or her testimony. Those admonitions

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[10] Webb mischaracterizes *Wright* as holding that it was error for the trial court to refuse to add to CALJIC No. 2.92 the specific additional instruction that the jury consider whether the witness had made a prior identification inconsistent with his or her identification at trial. In *Wright* the jury was *not* instructed with CALJIC No. 2.92 or another instruction that listed multiple factors for the jury to consider in weighing the reliability of an eyewitness identification, and the Supreme Court merely held it was error for the trial court to refuse the defense's request for instructions that included these factors. (*Id.* at pp. 1139, 1149-1150.)

incorporated the notion that the jury should consider whether a witness had previously identified someone other than Webb.

Webb's trial counsel likely reached the same conclusion. Even assuming arguendo his counsel did not have a tactical reason for not requesting the modification, it is not reasonably probable that the trial court would have granted a request for a largely duplicative instruction.

Further, because the requested additional factor was "put before the jury at trial by means of several vehicles: cross-examination, counsel's arguments, and the instructions the court gave," it is not reasonably probable that the jury would have reached a verdict more favorable to Webb had the modified instruction been given. (*Wright*, *supra*, 45 Cal.3d at p. 1146.) As in *Wright*, the instructions that were given "directed the jury's attention to the issue of the reliability of the identifications, and generally covered the areas on which defendant's requested instruction focused." (*Id.* at p. 1150.) *Wright* determined that the court's instruction that the jury consider "'any statement previously made by a witness that is either consistent with any part of his or her testimony or *any statement which is inconsistent with any part of the witness' testimony*" adequately covered the issue of prior inconsistent or erroneous identifications. (*Id.* at pp. 1149-1150.) CALCRIM No. 226, with which the jury here was instructed, included this same admonition. Moreover, unlike in *Wright*, the trial court in this case gave the CALCRIM No. 315 instruction that told the jurors to consider numerous factors affecting the reliability of the identifications.

Wright further held that defense counsel's "extensive cross-examination and arguments further amplified the instructions given, and placed before the jury the factors specifically enumerated in the requested instruction." (*Wright, supra*, 45 Cal.3d at p. 1150.) Similarly here, Webb's trial counsel cross-examined Simon and other witnesses at length about their previous identifications of people other than Webb, and she devoted much of her closing argument to the point. Accordingly, it is not reasonably probable that giving the modified instruction would have led to a more favorable verdict for Webb.

VI. *The Court Did Not Abuse Its Discretion by Declining to Strike Webb's Prior Conviction*

Webb asserts the trial court erred by denying his *Romero* motion to strike his prior strike offense, consisting of his 2010 juvenile adjudication for robbery.[11] Webb argues he did not fall within the spirit of the three strikes law, relying on the following

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[11] Webb also challenges the use of this prior non-jury, juvenile adjudication as a strike to significantly increase his prison sentence, contending such use violates his Fifth, Sixth, and Fourteenth Amendments due process and jury trial rights. However, he recognizes we are bound by the California Supreme Court's decision in *People v. Nguyen* (2009) 46 Cal.4th 1007, 1019, holding that "the Fifth, Sixth, and Fourteenth Amendments . . . do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication that the defendant, while a minor, previously engaged in felony misconduct, where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to jury trial."

factors: (1) he was only 16 years old when he committed his one prior serious or violent felony; (2) since turning 18 he only had one misdemeanor charge for domestic violence (besides the current charges in connection with the shooting)[12]; (3) he had lived with his mother at the same residence for the previous 12 years; and (4) he did not have a history of substance abuse.

A trial court may exercise its discretion to strike a prior conviction in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530; *People v. Williams* (1998) 17 Cal.4th 148, 151-152.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, at p. 161; see *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) We review the trial court's ruling for an abuse of discretion – that is, the defendant must show the court's decision "is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony*, at pp. 374, 377.) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of

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[12] Webb turned 18 on June 29, 2013. The shooting occurred approximately 14 months later, on August 23, 2014.

its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [ ] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case." (*Id.* at p. 378.)

Here, the trial court articulated rational grounds for declining to strike Webb's prior convictions, concluding leniency was not warranted given Webb had committed the prior robbery offense only three and a half years earlier and Webb's current crimes were "as horrible as it gets." Because "the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law," we affirm the trial court's ruling. (*Carmony, supra,* 33 Cal.4th at p. 378.)

VII. *A Limited Remand Is Required for the Trial Court To Exercise Discretion as to Imposition of Section 12022.53 Enhancements*

At the time of Webb's sentencing, imposition of firearm enhancements of 25 years to life on counts 1 and 2 pursuant to section 12022.53, subdivision (d), was mandatory. In October 2017 the Legislature passed Senate Bill No. 620, which took effect on January 1, 2018. Section 12022.53, subdivision (h), now 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. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

Section 12022.53, subdivision (h), as amended, applies retroactively to Webb because his sentence was not final before it came into effect. (E.g., *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091; see *People v. Brown* (2012) 54 Cal.4th 314, 323-324; *In re Estrada* (1965) 63 Cal.2d 740, 745.) The People concede, and we agree, the case must be remanded to allow the trial court to exercise its discretion whether to impose firearm enhancements under section 12022.53.

VIII. *On Remand Webb Shall Be Afforded the Opportunity to Request a Hearing on his Ability To Pay the Assessments and Fines Imposed*

Webb requests we remand the case for the trial court to conduct an ability-to-pay hearing in accordance with our opinion in *Dueñas, supra*, 30 Cal.App.5th 1157, because he was indigent at the time of sentencing. The court imposed a court facilities assessment of $30 for each count (Gov. Code, § 70373, subd. (a)(1)) and a court operations assessment of $40 for each count (§ 1465.8, subd. (a)(1)). The court also imposed a restitution fine of $2,000 (§ 1202.4, subd. (b)) and imposed and suspended a corresponding $2,000 parole revocation fine (§ 1202.45).

In *Dueñas*, *supra*, 30 Cal.App.5th 1157, this court concluded "the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed . . . upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution." (*Id*. at p. 1168.) Thus, we held the trial court must conduct an ability-to-pay hearing to ascertain a defendant's present ability to pay

before it imposes these assessments. (*Ibid.*) Further, although section 1202.4, subdivision (c), bars consideration of a defendant's inability to pay when imposing a restitution fine unless the court is considering imposing more than the minimum fine required by statute, in light of the due process issues we held "the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172.)

The People contend Webb forfeited the issue because he did not object to the imposition of the fines and assessments or request a hearing to determine whether he had the ability to pay them. However, at the time Webb was sentenced, *Dueñas* had not yet been decided and "no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*).) "When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (*Ibid.*; see also *People v. Santos* (2019) 38 Cal.App.5th 923 [forfeiture doctrine did not apply because *Dueñas* holding was not reasonably foreseeable]; *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 [same]; contra, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [same]; *People v. Aviles* (2019) 39 Cal.App.5th 1055 [same].) As in *Castellano*, we decline to find Webb forfeited his constitutional

challenge to the imposition of the court facilities assessments and court operations assessments.

We reject the People's contention Webb has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the assessments. As we explained in *Castellano*, "the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.) On remand, Webb shall be afforded the opportunity to request an ability-to-pay hearing as to the assessments imposed under section 1465.8 and Government Code section 70373.

The People correctly contend that at the time of sentencing, Webb had a right under section 1202.4, subdivision (d), to challenge imposition of his restitution fine and the parole revocation restitution fine, based on an inability to pay, because the court imposed an amount more than the $300 statutory minimum. (§ 1202.4, subd. (d).) Because Webb had the opportunity to object on the ground of his inability to pay, the People contend we should not remand for an ability-to-pay hearing as to these fines.

Although Webb failed in the trial court to challenge imposition of the $2,000 restitution fine and parole revocation restitution fine, "neither forfeiture nor application of the forfeiture rule is automatic." (*People v. McCullough* (2013) 56 Cal.4th 589, 593; accord, *In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["application of the forfeiture rule is not automatic," although "the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an

important legal issue"].) Because we are remanding in any event for the court to consider whether to strike the firearm enhancements and to hold an ability-to-pay hearing as to the assessments, we decline to apply the forfeiture doctrine, and we leave it to the trial court's discretion whether to consider Webb's ability to pay the $2,000 restitution and parole revocation restitution fines on remand. As the Supreme Court explained in *In re S.B.*, the purpose of the forfeiture rule "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B.,* at p. 1293.)

The People are correct Webb must in the first instance request an ability-to-pay hearing and present evidence of his inability to pay the assessments. As we explained in *Castellano*, "[c]onsistent with *Dueñas*, a defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*Castellano*, *supra*, 33 Cal.App.5th at p. 490.)

DISPOSITION

The matter is remanded for the trial court to conduct a new sentencing hearing to exercise its discretion with respect to imposition of the firearm enhancements under section 12022.53. On remand the trial court should allow Webb to request a hearing and present evidence demonstrating his inability to pay the assessments imposed by the court, and consider whether to allow Webb to present evidence of his inability to pay the restitution fine and parole revocation fine. If Webb demonstrates his inability to pay the court facilities assessment and the court operations assessment, the court must strike the assessments. If

the trial court determines Webb does not have the ability to pay the restitution fine and parole revocation restitution fine, it must stay execution of the fines. In all other respects the judgment is affirmed.

STONE, J.*

We concur:

ZELON, Acting P. J.

SEGAL, 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.