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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY TRAYVON WILLIAMS, Defendant and Appellant.	B257027 (Los Angeles County Super. Ct. No. NA096165)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed as modified.

Jasmine Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Zee Rodriguez and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Trayvon Williams (Williams) was convicted of first degree residential burglary in violation of Penal Code section 459.[1] In a bifurcated proceeding, Williams admitted various priors. He was sentenced to state prison for 39 years to life, calculated as follows: 25 years to life for the first degree residential burglary conviction; five years for each of two prior serious or violent felony convictions in case Nos. LA039685 and BA294146 pursuant to section 667, subdivision (a); and one year for each of four prison priors in case Nos. LA039685, BA261550,[2] BA294146 and SA074177 pursuant to section 667.5, subdivision (b). The trial court imposed a $10,000 restitution fine under section 1202.4, subdivision (b), and a corresponding $1,000 penalty assessment based on section 1464 and Government Code section 76000.

Williams now appeals.

He argues that the trial court erred when it failed to redact portions of his recorded interview in which police accused him of lying, and also when it gave the confession portion of CALJIC

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

[2] In 2004, in case No. BA261550, Williams was convicted of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a), a felony at the time, and of possession of cannabis in violation of Health and Safety Code section 11357, subdivision (a), a misdemeanor.

No. 2.70. According to Williams, these alleged errors prejudiced him, either separately or cumulatively.

Further, Williams contends that the trial court improperly used prior convictions and related prison terms from case Nos. LA039685 and BA294146 for two five-year enhancements under section 667, subdivision (a) and two one-year enhancements under section 667.5, subdivision (b). He advocates that we strike the two one-year enhancements imposed in connection with case Nos. LA039685 and BA294146 on the theory that each prior supports only one enhancement.

In addition, Williams claims that the trial court erred when it imposed two one-year prior prison enhancements in connection with case Nos. BA261550 and BA294146 because the sentences in those two cases were concurrent and he was therefore subject to only one enhancement pursuant to section 667.5, subdivision (b). He requests that one of those enhancements be stricken.

Finally, Williams requests that we strike the $1,000 penalty assessment that the trial court imposed pursuant to section 1464 and Government Code section 76000. He contends that the penalty assessment was error because it was based on a restitution fine, and those statutes do not apply to restitution fines.[3]

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[3] Williams also requests that we strike a prior prison enhancement based on his felony conviction for possession of a

We strike the prison prior enhancements (§ 667.5, subd. (b)) related to case Nos. LA039685 and BA294146, and we also strike the $1,000 penalty assessment. The judgment is modified to reflect these changes.

As modified, the judgment is affirmed.

FACTS

The Information

Williams was charged with receiving stolen property in violation of section 496, subdivision (a) and first degree residential burglary.

Trial and Conviction

At trial, the prosecution presented the following evidence:

On April 4, 2013, Shinobu Saito (Shinobu) and Yoko Saito (collectively Saitos) were living in a house in San Pedro. At 10:30 a.m., they locked the house and left for a doctor's appointment. Upon their return, they discovered that the bedroom window in back of their home was broken and "everything was scattered all over the floor and the bed." The following items had been taken: "a lot of wrist watches," a necklace, bracelets, coins, 60 one-hundred dollar bills ($6,000), and a flashlight with Shinobu's nickname, "Doc", etched on it.

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controlled substance (Health & Saf. Code, § 11350, subd. (a)) in case No. BA261550. As we shall discuss, that issue is now moot and therefore does not warrant consideration.

On the day of the burglary, at about 1:30 p.m., Los Angeles Police Department (LAPD) Officers David Vela and Drago Burecu pulled over a gold 2004 Cadillac Escalade (Escalade) in the area of Hill Street and 17th Avenue. There were two occupants. Williams was the driver. The officers asked the occupants to exit the Escalade. They complied.

Officer Vela noticed a bag containing what looked like "collector coins" in the center console. After searching the trunk, the police officers found a screwdriver, a black hooded sweatshirt, a black jacket, some gloves, a clear container with multiple watches, a few iPods and a black crowbar. They recovered a cell phone and $6,000 in U.S. currency from Williams's pants pocket. The currency consisted of "58 one hundred dollar bills in one clump and then two separate one hundred dollar bills[.]" The police officers contacted the burglary task force investigators and handed off the case.

During the ensuing search of the Escalade at a police station parking lot, police officers found a "punch tool and a radio scanner" inside a pocket in the front passenger door. The items were covered by a plastic piece "set over it so it looked just like a door." The radio scanner worked and was set to the frequency used by LAPD's Harbor Division in San Pedro. A canister of pepper spray was recovered from the center console. A pair of wire cutters were in a compartment behind one of the front seats.

Inside a box in the backseat, the police found a flashlight with the word "Doc" etched on it.

LAPD Sergeant Diane Maltos was asked to identify "common tools used in residential burglaries." She testified that punch tools were used to break windows to gain entry into homes, scanners were used to detect police in the area, gloves were used to conceal fingerprints, and pepper spray was used by burglars against people they encountered in homes. Sergeant Maltos described how teams of two to three residential burglars usually work when burglarizing a residence: one or two burglars will approach the residence while a third person will wait in a nearby vehicle; whoever approaches the residence will knock on the door and, if there is no answer, will move around to the back and enter from a side or rear window; the one who waits in a vehicle will listen to a scanner and alert the others by cell phone if the police have been notified and are coming to their location.

Michael Bosillo (Bosillo) testified as the custodian of records for Metro PCS cell phone company. Metro PCS is a "pay as you go" phone service that does not verify customer identification. He was shown a "two-page Metro PCS subscriber document" for cell phone number (818) 471-0672; the associated phone's international mobile equipment identifier (IMEI) was a serial number ending with "1328." That was the same IMEI serial number for the cell phone that was discovered on Williams

after the traffic stop. Bosillo explained that to make a cell phone call, the "mobile device" sends out a signal that is picked up by the "nearest and strongest tower. Once it hits that tower, then, that tower authenticates the call with a series of numbers. [¶] Once it does that it shoots it over to the switch and the switch is the gatekeeper." From there, the "switch" directs the call to its destination. Each tower has three to six sectors.

Bosillo identified a "call detail record" for (818) 471-0672 that showed the switch, sector and tower for each call. The record showed a call made on April 4, 2013, at 9:02 a.m., from switch one, sector five, tower 127, which was located near 336 North Gaffey Street, San Pedro. A second call at 9:04 a.m. triggered the tower located near 460 West 5th Street, San Pedro. At 11:19 a.m., there was a call that again triggered the tower near 336 North Gaffey Street, San Pedro. At 11:24 a.m., 12:00 p.m. and 12:02 p.m., there were calls that triggered the tower near 1707 South Gaffey Street, San Pedro. Last, at 12:06 p.m., there was a call that triggered the tower located near 336 North Gaffey Street, San Pedro.

LAPD Officer Eldin Stupar was the member of the Burglary Task Force assigned to the case. He went to the location of each cell phone tower triggered by calls connected to Williams's cell phone between 9:04 a.m. and 12:06 p.m. on the day of the burglary and calculated the distance between each cell

phone tower and the Saitos's home. The various towers were, respectively, 1.45 miles, 1.21 miles, 2.36 miles and 1.19 miles away. Based on the direction from which the calls "ping[ed]," Williams's phone could have been near the Saitos's home, near the towers or in between.

On April 4, 2013, at 7:20 p.m., Officer Stupar and Federal Agent Rosenberg interviewed Williams.

Williams confirmed that his cell phone number was (818) 471-0672. The interview was recorded. The jurors heard a recording of the interview and were provided with a transcript.

During the interview, Officer Stupar asked Williams what he was doing prior to the traffic stop. He said he picked up Anthony Jones (Jones) at about 10:30 to 11:00 a.m. at his mother's house on 56th Avenue between Hoover and Vermont. They drove straight to downtown Los Angeles and parked on Hill, somewhere between 6th and 8th Avenue. They walked around and went window shopping for jewelry and clothing because Williams was getting engaged. Officer Stupar asked Williams what clothing store he went to. He replied, "I don't remember the name. I just walked in, walked right out." At some point, according to Williams, he and Jones split up. Jones went to get something to eat, and Williams walked up and down Hill street. About 15 to 20 minutes later, he called Jones and said he was going back to his car. When Williams got there, Jones was

waiting with a plate of food. They got in Williams's Escalade and drove towards Olympic and Pico. Not long after that, they were pulled over near Hill and 17th Street.

Williams claimed he was a production assistant "on the side" who earned $200 a day. The Escalade belonged to his sister, and the $6,000 belonged to his girlfriend, who was also a production assistant. According to Williams, his girlfriend had borrowed some of the money from her father and brother, and the rest came from her bank account. Williams was supposed to use the money to buy her a car from a guy across the street from his aunt.

According to Williams, he was not a coin collector. He then said, "I had two coins in my pocket that you might say [are rare] coins . . . , but I got those when I . . . cashed my check at [Wal-Mart]." When asked about the coins found in a Ziploc bag in the center of the Escalade's console, he said, "What about them? It's just change[.] [I]t's collector coins?" Officer Stupar asked if Williams really thought it was "just change?" Then Officer Stupar said "they were silver dollar coins man, you don't see those around like that[.]" In response, Williams said, "They weren't real silver, not all of them[.] I was gonna go cash them in, I didn't think nothin' of 'em." He said the coins were his. Then he said he got the coins from his sister's piggy bank and he was going to cash them in for gas money. After he said his sister

could verify that the coins belonged to her, Officer Stupar asked for her cell phone number. Williams said, "I don't know it by heart, [but] if you grab my phone[,] I will give you the number out my phone. So if I call her, and I ask her about these coins, she'll . . . be able to tell me about those coins because they're very rare and it's not just like a penny[.]"

Officer Stupar said there were only coins in the Ziploc bag. Williams agreed, and said he did not put anything else inside. At that point, Officer Stupar stated: "Well what about the Canadian money that was in there and some foreign currency? It was like paper bills? They were inside the [Ziploc] bag and if you took those coins out your sister's piggy bank, and you put 'em in your [Ziploc baggie], you must have put, you had possession of the [Ziploc] bag. So you know what should be inside." In response, Williams stated: "All I grabbed, I'm being honest, I just grabbed the bag and left. I said, 'Can I get some change?' She said, 'Go in there in my piggy bank and grab the change, it's in the [Ziploc] bag.' I grabbed the bag, went in the car and went back into the house, grabbed my cigarettes and left."

At one point, Officer Stupar indicated that it did not make sense to him that there would be a Ziploc bag in a piggy bank. Williams said he just went into her room, grabbed the bag and left. When Officer Stupar said that "there's no piggy bank then[,] [t]here was just a [Ziploc] bag in the room," Williams stated: "So

basically her piggy bank is a basket with a bag on it with coins all in it." Williams averred that he did not notice the unusual size of the coins inside the [Ziploc] bag. He "promise[d]" that his sister would confirm his account of how he got the coins. Williams told the officers that he was "trying to keep it honest" with them.

Officer Stupar asked, "What's up with that police scanner dude?" Williams disclaimed any knowledge of it. When asked about the punch found inside of the Escalade, Williams said, "A punch?" Officer Stupar said, "Yeah[,] like a window punch." To that, Williams said, "You can run both of them for my fingerprints, my fingerprints aren't on there." He expressed surprise when asked about the screwdriver and two pairs of gloves.

About halfway through the interview, Officer Stupar told Williams "there were some discrepancies between what your friend told me and what you're telling me right now. And I have to believe somebody, I wanna believe somebody." Officer Stupar stated that "every day, someone lies to us" and asked Williams to tell him "exactly what happened." Williams retold his story, but when he was challenged and asked again what happened when he and Jones got out of the Escalade, Williams said, "We go and stop at a jeweler and that was it." Officer Stupar inquired about who went into the jewelry store. Williams said that he and Jones both went in, and then Jones ran out. According to Williams, he

spoke to a man that worked at the jewelry store. As for the name of the man and his shop, Williams could not recall. He said he went to that particular store because, nine years before, he had been told that he could get a good deal there.

On the heels of various questions, Williams explained the following: He went to the jewelry store to purchase a ring, and also to pawn a ring. He wanted a diamond bigger than the one he already had. Jones walked in for two minutes, and then walked out while Williams was at the counter. The man working in the jewelry store was short and white, and he had reddish brown hair and brown eyes. Then Williams said the man was about 5 feet 9 or 10. Williams knew that the man sold jewelry but did not know whether he also bought it.

At the end of the interview, Officer Stupar asked Williams whether he had been anywhere other than downtown Los Angeles that day. He said that after leaving his girlfriend's house, he dropped her daughter off at school and went to his cousin's house in Rancho Palos Verdes. Williams said he went back to his aunt's house and picked up Jones. From there, they went downtown.

Based on his training and experience, Officer Stupar testified that after people break into a home and take jewelry, they go to the jewelry store district to exchange the stolen jewelry for money.

After the case was presented, the trial court instructed the jury, inter alia, that Williams was charged with receiving stolen property and first degree residential burglary; if the jury found Williams guilty of first degree residential burglary, it did not need to deliberate further; if the jury found Williams not guilty of first degree residential burglary, it had to then deliberate further and determine whether he was guilty of receiving stolen property.

The jury found Williams guilty of first degree residential burglary.

Appeal

On June 18, 2014, Williams appealed. Subsequently, he filed a petition for writ of habeas corpus in case No. B264268.[4]

Williams's Proposition 47 Petition

After the voters passed Proposition 47,[5] Williams filed a petition for recall and resentencing with respect to his felony

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[4] Though the petition has been considered concurrently with this appeal, a separate order ruling on the petition will be filed in that matter.

[5] The voters approved Proposition 47 in November 2014. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).) It added section 1170.18, subdivision (a) of which provides: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the

possession conviction in case No. BA261550. On June 5, 2015, the trial court denied the petition without a hearing on the merits because the same issues were presented in Williams's appeal. Further, the trial court stated that it no longer had jurisdiction because more than 120 days had elapsed since judgment was entered.

Defense counsel did not appeal the order.

The Supplemental Petition for Writ of Habeas Corpus; Subsequent Proceedings

This appeal came on for oral argument in January 2016. At that time, we invited Williams to file a supplemental petition for writ of habeas corpus arguing that he had received ineffective assistance of counsel when defense counsel did not appeal the denial of his Proposition 47 motion.

Williams submitted a supplemental petition for writ of habeas corpus. We granted the petition, and issued a limited

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trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Section[] 11350. . . as [that] section[] ha[s] been amended or added by this act." When a person files a petition for recall, section 1170.18, subdivision (b) "requires the trial court to determine whether the prior conviction would be a misdemeanor under Proposition 47, in which case 'the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' [Citation.]" (*Diaz*, *supra*, at p. 1329.)

remand under *People v. Awad* (2015) 238 Cal.App.4th 215 for the trial court to consider the Proposition 47 motion on the merits. On May 13, 2016, the trial court granted the Proposition 47 motion and reduced Williams's felony possession conviction in case No. BA261550 to a misdemeanor and deleted the one-year prior. In addition, the trial court ordered the prison prior based on that conviction stricken.

DISCUSSION

I. Police Statements.

Williams argues that the trial court violated his right to due process by admitting his entire interview into evidence because it contained statements by Officer Stupar and Agent Rosenberg indicating their belief that Williams was lying. In the alternative, Williams argues that the trial court abused its discretion when applying the rule of completeness set forth in Evidence Code section 356.[6] These arguments have been forfeited because Williams is raising his objection for the first time on appeal. Regardless, any error was harmless.

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[6] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

A. *Relevant Proceedings*.

Prior to trial, defense counsel moved to exclude statements Williams made to the police based on a hearsay objection. The trial court ruled that if Williams had been properly admonished pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 478–479 (*Miranda*), then the statements were admissible as declarations against penal interest as well as declarations of a party opponent.

During trial, defense counsel submitted on the *Miranda* issue, and the trial court found no *Miranda* violation. Defense counsel argued that Williams's out-of-court statements were objectionable as hearsay, and then stated that "[a] lot of this is simply not relevant." Though defense counsel conceded the relevancy of "questions about the coins where [Williams] says the coins belonged to [his] sister and he borrowed them," defense counsel contended that Williams's statements about "where he is and what he is doing" were not relevant and were not admissible "as some type of adoptive admission[.]" Next, defense counsel argued that Williams's statements about $6,000 were inadmissible because "the particular $6,000 hasn't been identified," and Williams's statement that he got the money from his girlfriend did not qualify as an adoptive admission.

Continuing on, defense counsel stated, "One of the problems I have, when we do this, when a defendant makes a tape, gives an interview and it's recorded, . . . prosecutors

sometimes operate under the assumption that . . . if he has been Mirandized and it's a voluntary statement, then the whole thing comes in. . . ." The court replied, commenting, "Usually, it's the other way around, you have to let the whole thing come [in], even if [the] client is making exonerating statements, so defense [attorneys] want to, under the rule of completeness, keep it in. It's the other way around." Defense counsel said, "The court said it frankly better than I would have said it. I agree. [The prosecutor] has identified what she thinks is specifically relevant. I asked [for that information] before we started trial. . . . She said she would think about it. She said [she has] decided, I want to use the whole interview. [¶] I'm now posing the question to the court and counsel for the People: the entire interview?"

The prosecutor indicated that she wanted to play the entire interview. She had already redacted "any reference to a third strike." She explained, however, that "[Williams] talks about the money, the coins, where he is, and those are all statements against interest as well as admission[s] that[are] obviously refuted by the evidence, [and] I think [this evidence] shows his knowledge and his access to the car and being in possession of the car[.]"

Defense counsel argued that until Williams testified, "the only way some of this comes in is as admission[s]."

The trial court disagreed because Williams had been properly Mirandized. It added: "I have read through it and considered the tape and the information therein. The surplusage actually gives texture, under the rule of completeness of the comments made by [Williams]." In the trial court's view, the statements showed knowledge, motive and Williams's state of mind. The trial court noted defense counsel's objection and stated that the People could use "the entirety of the taped confession or admission."

Defense counsel objected that the admission of Williams's statements would violate his federal constitutional right to due process. The trial court stated that it disagreed. The jurors heard the recorded interview, which was conducted by Officer Stupar and Agent Rosenberg.

At the beginning of the interview, Williams was asked what he was doing before getting pulled over. He said he and his friend Jones were window shopping and they stopped at a clothing store.

The following exchanges ensued:

"[OFFICER STUPAR]: [T]here were some discrepancies between what your friend told me and what you're telling me right now. And I have to believe somebody, I wanna believe somebody. I don't have to[.]

"[WILLIAMS]: Yes sir.

"[OFFICER STUPAR]: I'm not gonna blow smoke up your ass, I don't have to but I wanna believe somebody. You know I have burglary tools inside somebody's car which is the car you're driving. You have burglary tools inside your car. We have the screwdriver, the punch, we got gloves, and we got coins that you're telling me you're gonna use to fill up with gas, dude. Come on.

"[AGENT ROSENBERG]: You've got money.

"[OFFICER STUPAR]: You've got $6,000 cash on you.

"[WILLIAMS]: Yes sir.

"[OFFICER STUPAR]: Do you know, do you see where I'm coming from?

"[WILLIAMS]: I see exactly where you're coming from.

"[AGENT ROSENBERG]: And we're here to get your story because we're the connect between you and the prosecutors. You know what I'm saying? Otherwise, I go straight to the prosecutors and what do I do all day? I listen to people lie to me. Right?

"[WILLIAMS]: Mm hm.

"[AGENT ROSENBERG]: I hear it every day, someone lies to us. So it kinda sets us straight when we get to hear someone else's story.

"[WILLIAMS]: Yes sir.

"[AGENT ROSENBERG]: You know what I'm saying? And so it's hard for us to swallow when we talk to 2 people and we have discrepancies. And yet we already know so much, and we have so many tools in our bank. I want you to tell me exactly what happened. Okay? Where you guys stopped, where you went, where you went downtown exactly, you know so we can get it straight and be done with this.

"[WILLIAMS]: Yes sir."

"[AGENT ROSENBERG]: So I know it's tough to talk to the cops. I know it's tough to talk to me, in the position I'm in, which sucks for me to hear but I . . . can't help you because there's too much we know that we can't do anything about, you know, with the statements that are said, you know what I'm saying? I'd hate for you to go with [Officer Stupar] tonight, think about it, that's yours just as much as it is ours. You know what I'm saying? So[.]

"[OFFICER STUPAR]: Help us help you.

"[WILLIAMS]: Yes sir.

"[OFFICER STUPAR]: Okay? I don't wanna beat around the bush anymore. I'm getting tired. I wanna go home. He wants to go home. You don't want to be in this position that you're in but you are in this position. So you understand, we have the upper hand here.

"[WILLIAMS]: Yes sir.

"[OFFICER STUPAR]: Okay? So I'm extending my hand, you need to unclench your fist first, do you understand?

"[WILLIAMS]: Yes sir?

"[OFFICER STUPAR]: Okay. You pick him up, you go to downtown LA, I'm gonna ask you one more time, I'm not gonna beat a dead horse here. Cuz that fuckin' horse is dead, right? You pick him up, you guys go to downtown LA. You guys get out of the car. What happens?

"[WILLIAMS]: We go and stop at a jeweler and that was it.

"[OFFICER STUPAR]: Okay so you guys stop at a jewelry store so there was no fucking clothing store over there.

"[WILLIAMS]: It was one.

"[OFFICER STUPAR]: I'm not gonna hold it against you that you lied to me earlier. Just so you know. I don't wanna put words in your mouth. I'm not gonna hold it against you whatever you told me earlier. Cuz what you told me earlier, I know it's a lie. Partially. I know that. That's why I'm gonna do it a 3rd time and I'm gonna be done. I'm not gonna waste your time. I don't want you wasting my time. Okay? You guys get out, you go into a jewelry store.

"[WILLIAMS]: Yes."

B. *Objections Forfeited.*

Williams did not object to statements made by the police officers during the interview. Consequently, he forfeited his

objections. (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Though Williams contends he preserved his objections, or that he was not required by case law to make them because objecting would have been futile, we cannot concur with these contentions.

Regarding his first contention, Williams relies on *People v. Partida* (2005) 37 Cal.4th 428, 438 (*Partida*). The *Partida* court held that if a defendant asserted an Evidence Code section 352 objection at trial and argued that certain evidence was more prejudicial than probative, he could argue on appeal that the asserted error "had the legal consequence of violating his due process rights." (*Partida*, *supra*, 37 Cal.4th at p. 439.) This holding offers Williams no benefit because, simply put, it is not on point. The record unequivocably establishes that he did not object to the statements by Officer Stupar and Agent Rosenberg. And even if he had objected based on Evidence Code section 352, he could not argue, as he does here, that the trial court abused its discretion under Evidence Code section 356.

As for Williams's second contention, we note that an objection will not be required if it would be futile, but only in unusual circumstances. (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 237.) Williams does not explain why an objection to the comments by the police officers who interviewed him would have been futile, or why this is an unusual circumstance. In our view, no futility appears. Even though the

trial court indicated that it planned to admit the whole interview for completeness, it was focused on providing a context for Williams's statements, not on whether the comments made by the police officers would result in an unfair trial, or whether allowing them in would be an abuse of discretion under Evidence Code section 356. (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 146.) If Williams had objected to the officer's statements, the trial court may have excluded or sanitized them.

C. *Any Error Harmless*.

Because there was no objection to the comments of Officer Stupar and Agent Rosenberg, there is no ruling for us to review. But if there had been an objection, and if it had been erroneously overruled, we would conclude that any error was harmless beyond a reasonable doubt.

"[S]tate law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*Partida, supra,* 37 Cal.4th at p. 439; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) But if there is a due process violation, the reviewing court must reverse "unless the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. [Citations.]" (*People v. Albarran* (2007) 149 Cal.App.4th

214, 229.) When applying this federal standard,[7] the analytical focus is on "'what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error." [Citation.]' [Citation.]" *(People v. Pearson* (2013) 56 Cal.4th 393, 463.)

The evidence established that Williams lied during his interview. His story about shopping in downtown Los Angeles around the time of the burglary was contradicted by his cell phone records, which placed him near the Saitos's home. And the story he told was internally inconsistent; he said he went into a clothing story, and then he said he went into a jewelry store he had been told about nine years earlier because he wanted to buy a ring and pawn a ring.[8] His story about the coins found in his car kept changing and was utterly implausible. Thus, the evidence strongly established that Williams was lying, which showed consciousness of guilt.

Beyond the foregoing, there was overwhelming evidence of his guilt. Williams was driving the Escalade, which contained burglary tools, Shinobu's flashlight, and cash in the amount of $6,000, which was the amount taken from the Saitos's. The

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[7] The seminal case is *Chapman v. California* (1967) 386 U.S. 18, 24.

[8] There is no evidence he was in possession of a ring when he was searched. Nor was a ring found in the Escalade.

police scanner found in the Escalade was tuned to the frequency used by the LAPD's Harbor Division, which indicates it was intended to be used in or near San Pedro. Cell phone records established that Williams's cell phone was used in the vicinity of the Saitos's San Pedro home around the time the burglary happened.

II. CALJIC No. 2.70.

According to Williams, the trial court erred in giving the confession portion of CALJIC No. 2.70 to the jury, and the error was prejudicial because it may have misled the jury into concluding that he confessed to burglarizing the Saitos's home. In our view, any error was harmless.

A. *Relevant Proceedings*.

Defense counsel objected to the trial court giving the jury the confession portion of CALJIC No. 2.70 because there was nothing "in this case that constitutes a confession of any kind." The trial court decided that it should give the instruction and let the jury decide whether it applied.

With respect to CALJIC No. 2.70, the trial court instructed: "A confession is a statement made by a defendant in which he acknowledges guilt of the crimes for which he is on trial. In order to constitute a confession, the statement must acknowledge participation in the crime as well as the required criminal intent. [¶] An admission is a statement made by the defendant which

does not by itself acknowledge his guilt of the crime for which the defendant is on trial, but which statement tends to prove his guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made a confession or admission, and then whether the statement is true in whole or in part. [¶] Evidence of an oral confession or an oral admission of the defendant not contained in an audio or video recording and not made in open court should be viewed with caution."

Next, the trial court instructed pursuant to CALJIC No. 2.72 and stated: "No person may be convicted of a criminal offense unless there is some proof of each element of the crime independent of any confession or admission made by him outside of this trial."

Then, inter alia, pursuant to CALJIC No. 17.31, the trial court instructed: "The purpose of the court's instruction is to provide applicable law so that you may arrive at a just and lawful verdict. Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given I am expressing an opinion as to the facts."

B. *Any Error Harmless.*

Instructional error is reversible only if it was prejudicial under the *Watson* test. (*People v. Wilkins* (2013) 56 Cal.4th 333, 350.)

Here, even if the trial court erred, it is not reasonably probable the verdict would have been more favorable to Williams absent the error. (*Watson*, *supra*, 46 Cal.2d at p. 836.) During the interview, Officer Stupar, Agent Rosenberg and Williams never discussed the burglary he was charged with, or any burglary. As a result, contrary to what Williams urges on appeal, it was impossible for the jury to conclude that Williams acknowledged guilt for the charged burglary. Furthermore, the jury was instructed not to apply an instruction unless it was warranted by the facts. And it was told that the trial court was not expressing an opinion about the facts by giving an instruction. We presume that the jury understood and applied the instructions to the facts presented to them. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1229.) Finally, the evidence against Williams was overwhelming.

III. Cumulative Error.

If there were multiple errors, Williams maintains that the cumulative effect denied him a fundamentally fair trial. Because we have concluded that he waived his objections to the comments by Officer Stupar and Agent Rosenberg, Williams has not

established evidentiary error. Thus, at most, there was instructional error, so we need not analyze the cumulative error argument.

IV. The Enhancements for the Prison Priors Related to Case Nos. LA039685 and BA294146.

In connection with case Nos. LA039685 and BA294146, the trial court imposed two one-year prison prior enhancements under section 667.5, subdivision (b), and also two five-year prior serious felony enhancements under section 667, subdivision (a)(1). As the People concede, this was error, and the two section 667.5, subdivision (b) enhancements must be stricken. (*People v. Perez* (2011) 195 Cal.App.4th 801, 805–806; *People v. McFearson* (2008) 168 Cal.App.4th 388, 395.)

Additionally, Williams contends the trial court improperly imposed separate prison prior enhancements in connection with case Nos. BA261550 and BA294146 because his sentences were concurrent. This issue is moot given that the prison prior enhancement related to case No. BA294146 must be stricken. Regardless, to be complete, we note that the People concede the point. Further, the law and records establish that Williams is correct.

In the information, it was alleged, inter alia, that in case Nos. LA039685, BA261550, BA294146 and SA074177 Williams suffered four prison priors within the meaning of section 667.5,

subdivision (b). At a sentencing hearing, Williams stated that he would admit all priors. The trial court asked Williams if he admitted a conviction in case No. LA039685 for purposes of section 667.5, subdivision (b), but it did not ask the same question as to case Nos. BA261550, BA294146 and SA074177. At the next sentencing hearing, defense counsel informed the trial court he thought Williams had been committed on only three occasions. The trial court stated: "I thought it was four, [which is] what my notes say. In any case, if I'm wrong, the Court of Appeal will tell me."

A review of the record indicates that Williams was convicted on March 17, 2004, in case No. BA261550 of violating Health and Safety Code sections 11350, subdivision (a) and 11357, subdivision (a). His sentence was suspended, and he was given formal probation. Eventually, probation was revoked and the matter was set for a probation violation hearing. That hearing trailed case No. BA294146. On April 20, 2006, in case No. BA294146, Williams was convicted of violating section 459 and sentenced to four years in state prison. On the same day, in case No. BA261550, Williams stipulated that he violated probation, and was again sentenced to four years in prison. The minute order in case No. BA261550 stated: "Jail time is concurrent to any other time." Williams's probation report stated

that the proceedings in case No. BA261550 were terminated due to the sentence in case No. BA294146.

As the People acknowledge, it appears that Williams served one prison term for case Nos. BA294146 and BA261550.

Section 667.5, subdivision (b) provides an additional penalty of one year "for each prior separate prison term . . . imposed . . . for any felony." A prior separate prison term is "a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes . . . ." (§ 667.5, subd. (g).) "[T]his statutory language means that only one enhancement is proper where concurrent sentences have been imposed in two or more prior felony cases." (*People v. Jones* (1998) 63 Cal.App.4th 744, 747.) Because the sentences in case Nos. BA294146 and BA261550 were concurrent, they supported only one enhancement, not two.

V. The Prison Prior Enhancement Based on Case No. BA261550.

Williams asks that this prison prior enhancement be stricken. However, following our limiting remand on his Proposition 47 petition for recall and resentencing, the trial court granted the petition and ordered the prison prior enhancement stricken. "As a general rule, an appellate court only decides actual controversies." (*People v. Rish* (2008) 163 Cal.App.4th

1370, 1380.) Consequently, Williams's request is moot and there is no reason for us to consider it.

VI. The $1,000 Penalty Assessment.

Williams argues that the trial court erroneously imposed a $1,000 penalty assessment pursuant to section 1464 and Government Code section 76000.[9] The People concede that the assessment must be stricken.

Section 1464, subdivision (a)(1) requires a trial court to levy a state penalty "in the amount of ten dollars ($10) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses[.]" Subdivision (a)(3)(A) of section 1464 provides that the penalty authorized by that section does not apply to "[a]ny restitution fine." Government Code section 76000, subdivision (a) provides for a similar penalty, but it, too, does not apply to restitution fines. (Gov. Code, § 76000, subd. (a).) The trial court did not impose any of the fines to which section 1464 and Government Code section 76000 applied. Consequently, we agree with Williams and the People that the $1,000 penalty assessment was unauthorized.

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[9] The trial court did not pronounce the $1,000 assessment at sentencing. It is not mentioned in the abstract of judgment. The assessment appears only in a minute order.

DISPOSITION

The two one-year section 667.5, subdivision (b) enhancements related to case Nos. LA039685 and BA294146 are stricken. The $1,000 penalty assessment that was imposed pursuant to section 1464 and Government Code section 76000 is also stricken. The judgment is modified accordingly. As modified, the judgment is affirmed. We order the trial court to amend the abstract of judgment to reflect these modifications, and to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT