Filed 11/27/19 P. v. Cervantes CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JUAN MANUEL CERVANTES, Defendant and Appellant.	B292142 (Los Angeles County Super. Ct. No. PA084358)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hilleri G. Merritt, Judge. Affirmed and remanded.

Mark Yanis, 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, Senior Assistant Attorney General, Stacy S. Schwartz and Charles J. Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Juan Cervantes (defendant), a member of the Pacoima Van Nuys Boys gang, of attempting to murder Carlos Hernandez (Hernandez) and illegally possessing two firearms. Most of defendant's arguments on appeal seeking reversal of his convictions center on a jailhouse conversation defendant had with (unbeknownst to him at the time) a paid police informant, a recording of which provided strong evidence of guilt on the attempted murder charge. We consider whether that recording should have been suppressed at trial as either involuntary or obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), and whether defendant was entitled to discover the identity of the informant. We also address evidence sufficiency and hearsay claims regarding the firearm possession convictions, as well as two sentencing issues.

I. BACKGROUND

A. The Attempted Murder

At approximately 11:00 a.m. on February 24, 2015, victim Hernandez was sitting in the parking lot of the Pierce Street Apartments, where he was staying with his sister, when a man shot him in the back of his left shoulder from a distance. Then, while Hernandez was injured and laying on the ground, a man (Hernandez could not say if it was the same person who first shot him) put a gun to his forehead and shot him point blank.

Los Angeles Police Department Officer Timothy Moberg responded to the Pierce Street Apartments after the shooting. When he arrived, he saw Hernandez laying on the ground and bleeding from a gunshot wound in the middle of his forehead, just above his eyes. Hernandez's face was swollen, and he also had a

gunshot wound to the back of his left shoulder. Officer Moberg believed Hernandez was dying.

Hernandez, however, survived the shooting. While he was in the hospital, three police officers came to talk to him. Hernandez was unable to speak, so he handwrote notes to the officers. Among the notes, discussed in greater detail *post*, was a note that read "Stretch called someone [*sic*] guy with a hoodie to shoot at me." Defendant's gang moniker, or nickname, is Stretch.

B. Police Execute a Search Warrant at the Home Where Defendant Is Living

Los Angeles Police Department officers thereafter went to the house where defendant was living to serve a search warrant. The officers found defendant in a bedroom. Also found in that bedroom were defendant's identification card, a piece of mail addressed to defendant, and a collection of baseball caps often worn by members of the Pacoima Van Nuys Boys gang.

The officers recovered two firearms at the residence. One was a loaded handgun found underneath the rear passenger seat of a black Camaro parked in the backyard. The keys to the Camaro were found in defendant's bedroom. The other was a rifle found in the closet of another bedroom in the house. That closet also contained a piece of mail addressed to defendant. There was no one in that bedroom on the night of the search. Officers also recovered a piece of cardboard in the rear driveway with the letters "ABK" on it.

C. Defendant's Jail Cell Conversation with the Informant

Defendant was arrested and taken to jail. Los Angeles Police Department Detective Gabriel Bucknell arranged for defendant to be placed in a cell with a paid informant and recorded the conversation between the two, listening in while the conversation was occurring. The informant was five feet eight inches to five feet ten inches tall, weighed approximately 170 pounds, and had tattoos on his arms that are not further described in the appellate record. When placed in the jail cell with defendant, the informant was dressed in street clothes.

Unaware the informant was working with the police, defendant introduced himself to the informant as "Stretch" from Pacoima Van Nuys Boys. The informant said "[p]leasure to meet you," and defendant responded, "[l]ikewise." Defendant and the informant then discussed defendant's neighborhood and gang activity in the area.

Roughly 14 minutes into the conversation, Detective Bucknell approached the jail cell and asked defendant if anyone had spoken to him yet; defendant said no. Detective Bucknell told defendant they were "gonna go talk for a bit" once an interview room became available. The detective also told defendant he was in custody for two cases: a drive-by shooting in which the victim died, and the "kid at Pierce" who was "[h]anging out at the apartments." After mentioning the latter, Detective Bucknell asked defendant, "You know what I'm talking about?" Defendant said "[n]o," and Detective Bucknell replied, "All right. Well, we're gonna talk about it." Detective Bucknell then left the area, with defendant and the informant still inside the jail cell.

Once Detective Bucknell left, defendant continued conversing with the informant and initially continued to deny any criminal liability. Defendant, for instance, told the informant the police had impounded his truck, and when the informant asked if the police were going to find anything in it, defendant said "[n]o." Defendant also protested: "I wasn't even involved in this shit that they're talking about. I don't even know why they're trying to put me—put that shit on me."

As defendant's conversation with the informant continued, however, defendant became increasingly willing to admit incriminating facts. He first told the informant, with regard to the "driveby" Detective Bucknell mentioned, that he "had no part in that job that day" but he did "know who they are." As to "the first one" the detective mentioned ("that kid at Pierce," i.e., the shooting of Hernandez at the Pierce Street Apartments), defendant conceded he "kind of knew what's up about it." Defendant said, "They're gonna try to . . . put me the other one on me because they say that—the attempt . . . ."[1]

The informant then asked defendant if he was worried about "that one." Defendant acknowledged, "I was there, look, everything. . . ." Defendant then told the informant that "the fool that's there" (i.e., Hernandez) had previously shot at him (defendant) when he was in a car with his daughter. Defendant said he did not know why Hernandez shot at him, but he thought it might have been because he went through a park where Hernandez and his friends "kick it."

---

[1] In the transcript of the conversation, italicized text indicates a translation from Spanish. We reproduce the text without the italics.

Defendant told the informant that after defendant found out who Hernandez was, defendant and his friends "eventually . . . got that one" at 11:00 in the morning. Defendant told the informant what happened: "So [¶] . . . [¶] he fired it . . . and then he gave him another one in the—in the head, but the gun jammed, it didn't want to anymore. So he ran." The informant asked, "But your hood did it, though?" Defendant responded, "Yeah."

Later in the conversation, defendant and the informant talked about whether defendant was the one who shot Hernandez. Defendant said he did not pull the trigger but told another member of his gang to do it. Defendant said he was the "big homie" for others in "the hood" and explained: "The homies, I told the homies, 'Hey, this fool's over here.' The homies went and did it and boned out [i.e., left]." Defendant volunteered, "I've done a lot for my homies too, that's why" they agreed to do it.

Eventually, Detective Bucknell returned to the jail cell and removed defendant, ending the recorded conversation between him and the informant. The detective then read defendant his *Miranda* rights. Defendant invoked his right to remain silent and said he wanted a lawyer.

D. Pretrial Proceedings

The Los Angeles County District Attorney's Office charged defendant with one count of willful, deliberate, and premeditated attempted murder. The attempted murder charge was accompanied by an allegation that a principal had discharged a

handgun causing great bodily injury. (Pen. Code,[2] § 12022.53, subd. (d); see also § 186.22, subds. (b)(1), (e).) Defendant was also charged with two counts of possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1). The information against defendant further alleged all three charged offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang.

Well in advance of trial, defendant moved for discovery of the informant's identity. At a hearing on the motion, the trial court said it listened to the recording of the jailhouse conversation and denied the motion because nothing indicated the informant could offer any material evidence that was not captured by the recording.

Defendant filed a renewed motion to discover the informant's identity later during the pretrial proceedings. Defendant asked the court to "conduct an in camera hearing to examine the physical attributes of the informer" because defendant theorized the informant's physical size, his mannerisms, and his tattoos could have created an environment of fear in which defendant "would have said virtually anything to survive." Defendant also asked the court to make findings regarding the informant's appearance and how much money he was paid. The trial court again denied the motion, reasoning details regarding the informant's appearance would only be relevant if defendant testified he was intimidated by the informant's appearance.

---

[2] Undesignated statutory references that follow are to the Penal Code.

In addition to the motions seeking discovery of the informant's identity, defendant filed a motion to suppress his statements to the informant. The motion argued the statements had been elicited through "outrageous governmental conduct" and should be suppressed because police had improperly circumvented *Miranda* by placing an informant in defendant's jail cell and having "[a]n LAPD officer actively participate[ ] in the interrogation." Defendant also argued the testimony should be suppressed on non-*Miranda* grounds because the police had violated section 4001.1, which regulates compensation of in-custody informants for their testimony.

The trial court concluded no *Miranda* warning was necessary before the conversation between defendant and the informant in the jail cell. The court believed "[t]he fact that this cell was evidently wired for sound does not make the informant any more apparent to [defendant] as an agent or representative, certainly not as law enforcement." The court reasoned "regardless of whatever was happening behind the scenes with this particular [informant], none of that was apparent to [defendant] before Detective Bucknell shows up or after Detective Bucknell showed up." The court concluded there was no outrageous government conduct and the Penal Code had not been violated: "The difference is if in fact there was no tape, if, in fact, I hadn't heard the tenor of the conversation . . . if I had heard some stress, some duress, some shuffling around that indicated some sort of a scuffle, if there was any indication that your client was like, 'Wait, what are you doing? Why are you coming at me? Why are you?' Any indication that he was not a willing participant in this conversation, perhaps I would join in your

concern and outrage. [¶] But there was none. I listened to that tape more than once."

E. The Evidence at Trial, as Pertinent to the Issues Raised on Appeal

1. Hernandez's testimony

At trial, Hernandez authenticated the notes he wrote to the police while in the hospital. After testifying he had no independent recollection of his hospital interactions with the officers, the prosecution asked Hernandez to read portions of the handwritten notes aloud to the jury. Defendant objected, arguing the notes were inadmissible hearsay. The trial court found the elements of the past recollection recorded hearsay exception had been satisfied and overruled the objection. The court stated the prosecution would be limited to asking Hernandez only "questions about things he told the officer that he today can no longer remember."

Hernandez then read the following phrases and statements from his notes into the record: (1) "Juan;" (2) "Hoodie on sweater;" (3) "He had a hoodie sweatshirt on. I was just smoking and then came and shot me three times;" (4) "Stretch called someone guy with a hoodie to shoot at me. Stretch shot me[. . .] Shot me too though. You got my story[;]" (5) "I seen a middle school picture of the guy. He's older. The guy wanted me dead for no reason . . . . People in those apartments all the time about him[;]" (6) "Fade. Like three, five minutes, he comes back and shoots me before the guy was staring down . . . staring me down, Stretch[;]" (7) "I seen a picture of Stretch in middle school [. . . .] I had seen his pic way before he shot me[;]" (8) "My friend neighbor knows him. His name is—his name is Ray. He's the same age as

the guy[;]" (9) "His friend shot me first, and then Stretch with the shotgun. I'll get the yearbook. Two different—different guns."

On cross-examination, Hernandez admitted he previously testified at the preliminary hearing that he did not recall writing the notes and that the handwriting on the notes did not appear to be his. On redirect, Hernandez stated he did not want to be in court, did not want to be testifying, and did not want to identify anyone.

After Hernandez completed his testimony, defendant moved to strike all of the testimony related to Hernandez's handwritten notes. Defendant again argued the requirements for the past recollection recorded hearsay exception had not been satisfied and the Sixth and Fourteenth Amendments to the United States Constitution had been violated. The trial court denied the motion, noting Hernandez was still subject to recall.

2. Detective Bucknell's testimony

Detective Bucknell testified he knew defendant to be a member of the Pacoima Van Nuys Boys gang, specifically the ABK clique, with a moniker of "Stretch." During his investigation, Detective Bucknell observed tattoos on defendant's body. He had a tattoo on his chest that said "PACAS" across the top and "VNB" across the bottom (which Detective Bucknell understood to be short for "Van Nuys Boys"), plus tattoos on his legs that together spelled "PVNB" (which Detective Bucknell took to signify "Pacoima Van Nuys Boys").

Detective Bucknell testified he arranged for defendant to be placed in a jail cell with the informant while he (the detective) listened in on their conversation in an adjacent room. The prosecution played excerpts from the recorded conversation for

the jury during Detective Bucknell's testimony. Detective Bucknell identified defendant's voice on the recording. The prosecution paused the playback of the recording at a few points to ask Detective Bucknell to clarify or opine on the meaning of certain words and phrases used in the conversation.

3. Officer Knolls's testimony

Los Angeles Police Department Officer Nicholas Knolls testified to facts concerning the execution of the search warrant at the home where defendant was living. On redirect examination, Officer Knolls answered questions about what he did before seizing the firearms in question:

> [PROSECUTOR]: Defense counsel asked you specifically if you did anything to try to ascertain whose bedroom the rifle was found in; is that correct?
> [OFFICER KNOLLS]: Yes.
> [PROSECUTOR]: All right. Did you?
> [OFFICER KNOLLS]: We talked to family members, specifically, the defendant's sister, who said that –
> [DEFENSE COUNSEL]: Objection. Hearsay, door not opened. She's misstated my question.
> [THE COURT]: The fact that he tried to ascertain who was in the bedroom will remain, but the rest of it does call for hearsay, so sustained.
> [PROSECUTOR]: You were serving a search warrant. You often serve search warrants at homes where people other than the suspect live; is that correct?
> [OFFICER KNOLLS]: Correct.
> [DEFENSE COUNSEL]: Objection. Relevance.
> [THE COURT]: Overruled.

[PROSECUTOR]: If you go to, like, say, a home and there's a family living there and there's a gun, do you often try to ascertain whose gun it is?
[OFFICER KNOLLS]: Yes. [¶] . . . [¶] And whose bedroom or wherever we located it belongs to.
[PROSECUTOR]: If someone were to say to you, "that's mine," do you record that in your report somehow?
[OFFICER KNOLLS]: Yes.
[DEFENSE COUNSEL]: Objection. [¶] . . . [¶] 352, relevance, calls for a conclusion.
[THE COURT]: Overruled. The answer can remain.
[PROSECUTOR]: In this case you tried to ascertain whose bedroom it was, right?
[OFFICER KNOLLS]: Yes.
[PROSECUTOR]: And after speaking to—did you speak to all the family members—yes or no—that were present?
[OFFICER KNOLLS]: No. I believe we only spoke—the person I remember speaking to was the sister.
[PROSECUTOR]: And after that conversation, you booked the rifle to the defendant, correct?
[OFFICER KNOLLS]: Yes.
[PROSECUTOR]: And the 9-millimeter handgun, did you try to ascertain whose Camaro that was?
[OFFICER KNOLLS]: Yes.
[PROSECUTOR]: Did you speak to people that were present about that Camaro?
[OFFICER KNOLLS]: Yes, we spoke to the defendant's brother, who told us that—
[DEFENSE COUNSEL]: Objection. Hearsay.

[THE COURT]: Anything beyond "brother" will be stricken. It would call for hearsay.
[PROSECUTOR]: After that conversation with the brother, you booked a 9-millimeter to the defendant, correct?
[OFFICER KNOLLS]: Yes.

4. Officer Rico's testimony

Los Angeles Police Department Officer Jesus Rico testified as a gang expert on the Pacoima Van Nuys Boys gang. Officer Rico opined defendant is a member of the Pacoima Van Nuys Boys based on his tattoos, his past contacts with other officers to whom he has admitted his gang membership, and his conversation with the informant. Officer Rico additionally testified the piece of cardboard recovered at defendant's home with "ABK" written on it was a reference to the ABK clique of the Pacoima Van Nuys Boys gang. According to Officer Rico, ABK (Anybody Killer) is a hit squad with a reputation for recklessness.

Officer Rico testified gang members known as "big homies" are higher ranking members in the gang. A big homie in the gang would have enough respect and status to call another and ask for a favor, like shooting someone. A younger gang member who performed the shooting would build themselves up within the gang. Officer Rico further testified the Pierce Street Apartments are in the territory of the Pacoima Pierce Boys, a gang that does not get along with the Pacoima Van Nuys Boys.

The prosecutor posed a detailed hypothetical question tracking the facts of the case to Officer Rico, ultimately asking him whether a shooting performed by members of a big homie's gang against a victim who the big homie believed to be a member of a rival gang, and who was involved in a shooting that

disrespected the big homie, was a crime committed for the benefit, in association with, or at the direction of the Pacoima Van Nuys Boys criminal street gang. Officer Rico opined the crime described in the hypothetical was committed both for the benefit of, and at the direction of, the gang.

F. Verdict, Post-Trial Motions, and Sentencing

The jury found defendant guilty as charged. On the attempted murder count, the jury found: defendant committed the crime willfully, deliberately, and with premeditation; a principal discharged a firearm causing great bodily injury to Hernandez; and defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang. On the two felon in possession of a firearm counts, the jury also found the associated gang allegations true.

Defendant subsequently filed a motion for new trial and, in the alternative, a motion to strike the firearm enhancement under section 12022.53. Defendant also filed a *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) motion asking the court to strike one of defendant's prior qualifying Three Strikes law convictions.

The trial court denied defendant's motions. In ruling on the motion to strike the firearm enhancement, the court reasoned that "to say just because someone else pulled the trigger it shouldn't be imputed to him and I should exercise my discretion that the courts now have on enhancements, does not in any way, shape or form seem to me to be in the interests of justice." The court believed "the interests of justice aren't served by striking a 25-to-life gun enhancement. [¶] The reason it's 25 to life is because the victim was shot in the head point-blank. Justice

would not be served in striking that enhancement."[3] Addressing the *Romero* motion, the court noted defendant's prior strike crime was for assault with a gun and the attempted murder in this case also involved a gun; the court reasoned "[t]here is nothing here in this scenario that tells me that justice would be served" by striking the prior strike.

The court sentenced defendant to life in prison with a minimum eligibility parole date of 14 years, an additional 25 to life term pursuant to section 12022.53, and another five year term pursuant to section 667, subdivision (a), for a total of 44 years to life. The court sentenced defendant to the mid-term of two years in prison on the felon in possession counts, to run concurrent with the sentence on the attempted murder count. The court also ordered defendant to pay a $300 restitution fine, a $90 criminal conviction assessment, and a $120 court operations assessment.

II. DISCUSSION

As we shall go on to explain at greater length, defendant raises a host of issues but none of his arguments merits reversal of his convictions.

Taking the attempted murder conviction first, the high court has held statements a defendant makes to non-police personnel—at least so far as the defendant is then aware—need not be preceded by *Miranda* warnings to be admissible in court. (*Illinois v. Perkins* (1990) 496 U.S. 292, 294 ["*Miranda* warnings are not required when the suspect is unaware that he is speaking

---

[3] During the argument on the motion, the court also stated "the five-year prior cannot be stricken by me, either. It cannot."

to a law enforcement officer and gives a voluntary statement"] (*Perkins*).) That, of course, is what we have here, where defendant's incriminating statements were made not in response to police questioning but in a conversation with a man defendant believed was nothing more than a fellow cellmate. That Detective Bucknell interrupted the jail cell conversation to facilitate discussion of the charged offenses does not alter the analysis, and it certainly does not establish defendant made the incriminating admissions involuntarily. Defendant continued to deny responsibility for the crimes immediately after the detective's intervention, only later letting down his guard when conversing with the informant. This establishes there was no police coercion, or even an awareness that the informant was acting at the behest of the police, that can be said to have prompted him to speak.

In the same vein, we follow published authority in holding Penal Code section 4001.1 (which limits payments to informants) applies only to efforts to elicit incriminating statements about already charged offenses (and there were none at the time of defendant's jail cell conversation). Relatedly, the trial court did not abuse its discretion by denying the motion to disclose the informant's identity because defendant did not make the showing necessary to warrant disclosure, i.e., that there was some evidence the informant would provide exonerating testimony.

Defendant's hearsay challenge to the incriminating evidence of identity outside of his confession, i.e., the hospital notes identifying "Juan"/"Stretch" as being involved in the shooting, also does not warrant reversal. Yes, there was a failure to meet one of the statutory prerequisites to admission of evidence as a past recollection recorded, namely, testimony by the

witness attesting to the veracity of what was previously recorded. But the evidentiary error was harmless when considered against the other strong evidence of guilt at trial—particularly, defendant's recorded statements admitting to participation in the crime.

As to the two felon in possession of a firearm convictions, defendant's several arguments attacking them also do not carry the day. There is substantial circumstantial evidence supporting the jury's findings that defendant had access to, and the right to control, the closet where the rifle (and a piece of defendant's mail) was found and the car (to which defendant had the keys) where the handgun was found. Defendant's claim of evidentiary error, that the prosecutor elicited "implied hearsay" when questioning Officer Knolls about his efforts to establish ownership of the firearms, is forfeited for lack of a contemporaneous objection and defendant's fallback claim of ineffective assistance of counsel fails because no prejudice resulted from admission of the testimony.

Finally, as to the sentencing-related issues defendant raises, we agree a remand is appropriate to permit the trial court to determine whether it wishes to exercise newly conferred statutory discretion to strike the five-year term imposed for defendant's prior serious felony conviction. Defendant's *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) claim concerning the order to pay a fine and assessments, on the other hand, fails because defendant—who will serve a long custodial sentence—has not been prejudiced by any failure to consider his ability to pay the financial obligations.

A. The Trial Court Did Not Err By Denying the Motion to Suppress Defendant's Conversation with the Informant

Defendant advances three arguments in support of his contention that the trial court erred in denying his motion to suppress his conversation with the informant. Defendant argues (1) the police tactics violated *Miranda* and due process, (2) his confession to the informant was involuntary, and (3) the confession should not have been admitted because the police violated section 4001.1. "We independently review the trial court's legal determinations on these issues but review its underlying factual findings for substantial evidence." (*People v. Orozco* (2019) 32 Cal.App.5th 802, 811 (*Orozco*).)

1. A Miranda *Warning Was Not Required Before the Jail Cell Conversation Between Defendant and the Informant*

The U.S. Supreme Court's decision in *Miranda* "protects the Fifth Amendment rights of a suspect faced with the coercive *combination* of custodial status *and* an interrogation *the suspect understands as official*." (*People v. Tate* (2010) 49 Cal.4th 635, 685 (*Tate*).) *Miranda* also protects suspects from the "functional equivalent" of a custodial interrogation through "'words or actions . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.' [Citation.]" (*People v. Davis* (2005) 36 Cal.4th 510, 554 (*Davis*).)

"Because the dual elements of a police-dominated atmosphere and compulsion are absent when the defendant is unaware that he is speaking to a law enforcement officer, however, *Miranda* is inapplicable when the defendant does not

know that the person he is talking to is an agent of the police." (*Davis*, *supra*, 36 Cal.4th at p. 554; see also *Perkins*, *supra*, 496 U.S. at p. 296 ["[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*"].) As the high court put it in *Perkins*, "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." (*Perkins*, *supra*, at p. 298.)

Here, defendant confessed his involvement in the crime during his conversation with the informant. Substantial evidence supports the trial court's finding that defendant did not know the informant was working as an undercover agent for the police. There is no indication in the record that would permit even an inference defendant suspected his cellmate was a paid police informant. We therefore agree with the trial court's ruling that *Miranda* principles did not require suppression of the incriminating jailhouse statements admitted in evidence at trial.

Defendant resists this conclusion chiefly by pointing to the two-minute exchange Detective Bucknell had with defendant before the conversation with the informant resumed (and the key incriminating statements were made). Defendant maintains the interruption by the detective was what motivated defendant to incriminate himself and defendant argues it should be irrelevant that it was the informant, rather than the detective himself, who was left to be the audience for the incriminatory statements.

That is a fine argument in theory (see, e.g., *People v. Montano* (1991) 226 Cal.App.3d 914), but not on our facts. There was nothing about what Detective Bucknell said during the interruption that would have compelled defendant to feel he must confess his involvement in crimes to anyone who happened to be

present; there was no threat, for instance, that if defendant did not start talking, both he and his cellmate would be subject to some retribution.[4] In addition, what actually occurred immediately after the detective left the jail cell area undercuts any contention that Detective Bucknell's interruption is what caused defendant to incriminate himself. When defendant and the informant resumed talking after the detective left, defendant's immediate response was to continue to deny involvement in any crimes. Only when the informant continued to ask questions did defendant start making admissions, which establishes it was their unguarded rapport that was the true catalyst. (See, e.g., *People v. Jefferson* (2008) 158 Cal.App.4th 830 [giving two suspects false information about evidence and placing them together in a wired jail cell did not constitute compulsion; the suspects were candid because they thought no one else was listening].) Under *Perkins*, that is constitutionally permissible without *Miranda* warnings.[5] (*Perkins*, *supra*, 496

---

[4] We do agree that Detective Bucknell violated *Miranda* and its progeny in one very narrow respect, namely, when the detective mentioned the "kid at Pierce" and asked defendant if he knew what the detective was talking about. That was unwarned interrogation by the police, not the informant. But defendant answered "no," and there is no possibility that "no" answer had any impact on the jury at trial or tainted his later admissions (*People v. Benson* (1990) 52 Cal.3d 754, 778 (*Benson*); *Orozco*, *supra*, 32 Cal.App.5th at p. 818).

[5] Because we conclude *Miranda* was not implicated, and because the substance of defendant's *Miranda*-related due process argument dovetails with his argument regarding the voluntariness of his confession, we address them together, *post*.

U.S. at p. 298; see also *Tate*, *supra*, 49 Cal.4th at p. 686 [*Miranda* not violated by allowing the defendant's girlfriend, who later reported the conversation to the police, to speak to him during break in custodial interrogation].)

2. Defendant's confession was voluntary

An involuntary confession obtained through coercive police activity is inadmissible under the due process clauses of the federal and state Constitutions. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176.) When a defendant challenges the admissibility of a confession, the prosecution must prove it was voluntary by a preponderance of the evidence. (*People v. Carrington* (2009) 47 Cal.4th 145, 169 (*Carrington*).) The issue is whether the confession "is the product of an "'essentially free and unconstrained choice'" or whether the defendant's "'will has been overborne and his capacity for self-determination critically impaired'" by coercion." (*People v. Williams* (2010) 49 Cal.4th 405, 436.)

For a confession to be found involuntary, a court must conclude it was the product of some level of coercive activity by law enforcement or some other state actor (*Colorado v. Connelly* (1986) 479 U.S. 157, 166-167), such as a confession extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*Benson*, *supra*, 52 Cal.3d at p. 778.) Although coercive activity is a necessary predicate to establishing a confession was involuntary, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041; *People v. Maury* (2003) 30 Cal.4th 342, 404-405 ["[t]he statement and the inducement must be causally linked"].)

"Under both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a confession." (*People v. Massie* (1998) 19 Cal.4th 550, 576.) Relevant factors include "'the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity' as well as 'the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 635, 660.) "'"On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review."' [Citation.]" (*Carrington*, *supra*, 47 Cal.4th at p. 169.)

In our independent judgment, and considering the totality of the circumstances, defendant's confession was voluntary. Defendant was placed in the cell with the informant around 4:00 p.m. Though defendant was arrested at around 5:00 a.m., there is no evidence indicating he was mistreated or subjected to harsh or unusual conditions during the intervening time. Defendant was not a naïve youth without experience in the criminal justice system. He was 35 years old and had previously been incarcerated. Nothing suggests he suffered from mental or physical infirmities. His exchange with Detective Bucknell lasted approximately two minutes. Though his conversation with the informant was longer—around 40 minutes total—it was a conversation, not a police interrogation. The tenor of defendant's voice and comments do not suggest he was intimidated during his conversation with the informant. These various facts all point to a conclusion that defendant's will was not overborne. (*People v. Williams*, *supra*, 49 Cal.4th at p. 442.)

There is also no evidence in the record that the informant threatened, promised, or otherwise improperly influenced defendant. Defendant confessed to the informant during what the trial court fairly characterized as "pretty laid-back" conversation with "a lot of laughter," and an element of "collegiality." The audio recording does not provide any indication the informant threatened defendant or offered him leniency or protection in exchange for the truth.

Similarly, and contrary to defendant's contentions, his exchange with Detective Bucknell does not indicate the detective threatened, promised, or otherwise improperly influenced him. On the facts here, the interruption of the conversation to provide an opening for defendant to discuss the shooting with the informant does not constitute coercive activity. While speaking to defendant, Detective Bucknell told him, in an even tone of voice, what crimes defendant was being held for, and that they were going to talk about the crimes. He did not sound threatening or menacing. And he did not improperly posit defendant's guilt by simply identifying the crimes for which defendant was supposedly being held.[6]

---

[6] *Arizona v. Fulminante* (1991) 499 U.S. 279 is inapposite. There, the Supreme Court found a confidential informant induced a confession by making a credible threat of violence against the defendant—telling the defendant the informant would protect him from other inmates if he told the truth about his involvement in the crime. (*Id.* at p. 288.) Detective Bucknell's statement that he and defendant were going to talk when a room became available is not even in the same ballpark.

3. Section 4001.1, subdivision (b) does not apply

Section 4001.1, subdivision (b) provides that "[n]o law enforcement agency and no in-custody informant acting as an agent for the agency, may take some action, beyond merely listening to statements of a defendant, that is deliberately designed to elicit incriminating remarks." (§ 4001.1, subd. (b).) When it enacted section 4001.1, the Legislature stated it intended "subdivision (b) of Section 4001.1 of the Penal Code [to be] a restatement of existing case law" and provided that "where the language in that subdivision conflicts with the language of . . . case law, the decisions of *Kuhlmann v. Wilson*, 91 L.Ed.2d 364 [*Kuhlmann*], and *United States v. Henry*, 65 L.Ed.2d 115 [*Henry*], and other United States Supreme Court decisions which have been decided at the time this act is enacted shall be controlling." (Stats. 1989, Ch. 901, § 4, p. 3095.)

Defendant contends the police violated section 4001.1, subdivision (b) by placing the informant in his jail cell and then interrupting the conversation between defendant and the informant to speak to defendant. He further contends these actions went "'beyond merely listening'" and the conversation accordingly should have been excluded.

A similar scenario arose in *People v. Gallardo* (2017) 18 Cal.App.5th 51 (*Gallardo*). There, police had placed the defendant, who was being held in county jail on unrelated charges, in a cell with two informants who spoke to the defendant and elicited information about the crime under investigation. (*Id.* at pp. 59-61.) The defendant later contended the entire conversation should have been excluded pursuant to section 4001.1, subdivision (b) because the investigating law enforcement agency took an "action" beyond listening to the defendant by

hiring paid informants to interrogate the defendant. (*Id.* at p. 78.)

The Court of Appeal held section 4001.1 does not apply to "law enforcement conduct that is designed to elicit incriminatory remarks regarding uncharged offenses." (*Id.* at p. 79.) The court reached this conclusion by looking to the Legislature's comment that section 4001.1, subdivision (b) was meant to be a "restatement of existing case law" and *Kuhlmann* and *Henry* should control where the language in the subdivision conflicts with preexisting case law. *Gallardo* looked to *Henry* and *Kuhlmann* and determined their prohibition against having a federal agent deliberately elicit incriminating statements in the absence of the defendant's lawyer did not apply to "'uncharged offenses, as to which the Sixth Amendment right has not yet attached.' [Citations.]" (*Id.* at pp. 78-79.) We find the *Gallardo* court's reasoning persuasive, reject defendant's unpersuasive statutory construction arguments to the contrary, and follow *Gallardo* here.

B. Denial of the Motion to Discover the Identity of the Informant Was Not an Abuse of Discretion

Defendant asserts on appeal that the paid informant "was a material witness who could provide testimony undermining the confession." Legally, he grounds his assertion of error in a claimed impairment of Sixth and Fourteenth Amendment rights, citing *People v. Lanfrey* (1988) 204 Cal.App.3d 491 for the proposition that all defendants must do to discover the identity of an informant "'is to demonstrate "a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in . . . exoneration."'" (*Id.* at p. 500.) We

review the trial court's ruling denying the motion to discover the informant's identity for abuse of discretion. (*Davis v. Superior Court* (2010) 186 Cal.App.4th 1272, 1277.)

The record made by defendant in the trial court does not satisfy even the authority he cites. The trial court denied defendant's initial motion to discover the informant's identity because it found, after listening to the recording of the conversation, nothing indicated the informant could offer any material evidence not captured by the recording itself. It denied defendant's renewed motion, which asked the court to conduct an in camera hearing to examine the informant's physical attributes, because that information would only be relevant if there were some evidence defendant was intimidated by the informant's appearance. Further, in later pretrial proceedings, the court did permit the prosecution and the defense to examine Detective Bucknell on the informant's physical attributes: the detective testified the informant was a 30-year-old Hispanic male, around five feet eight to ten inches, and around 170 pounds, with unspecified tattoos on his arms.

Based on our review of the record, defendant never came forward with some evidence demonstrating a reasonable possibility that the anonymous informant could provide testimony that might result in exoneration. The conversation between defendant and the informant was recorded and defendant produced nothing—including when given the opportunity to cross-examine Detective Bucknell about the informant's appearance—that suggested the recorded statements were the product of express or implied intimidation, otherwise unreliable, or somehow taken out of context. That establishes there was no abuse of discretion.

The same conclusion obtains if we analyze the issue expressly within the framework of Evidence Code section 1041, which defendant also addresses in his appellate briefing. Under that statute, "the prosecution must disclose the name of an informant who is a material witness in a criminal case or suffer dismissal of the charges . . . . [Citation.] An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant. [Citation.] The defendant bears the burden of adducing ""some evidence"" on this score. [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 159-160.) To warrant an in camera hearing on the substance of potential testimony from an informant, a defendant must make a prima facie showing for disclosure. (*People v. Oppel* (1990) 222 Cal.App.3d 1146, 1152.)

Defendant argues the identity of the informant was not privileged under Evidence Code section 1041 because the informant was placed face-to-face with defendant in the jail cell and the recording of their conversation was played for the jury. But defendant misunderstands the purpose of section 1041. "The confidentiality of which section 1041 speaks is the public interest in the confidentiality of the informant's identity for purposes of effective law enforcement." (*People v. Otte* (1989) 214 Cal.App.3d 1522, 1531 (*Otte*).) It "does not refer to the information communicated, unless the contents would disclose or tend to disclose the identity of the informant." (*Ibid.*) Thus, that the conversation was played for the jury did not eliminate the necessity of preserving the confidentiality of the informant's identity. Further, that defendant saw the informant face-to-face did not somehow reveal the informant's identity to defendant, or

defendant's motion would not have been necessary. The identity of the informant was the confidential information over which the prosecution could assert the section 1041 privilege.[7]

Next, defendant argues the informant was a material witness regarding the circumstances of his confession, contending there were questions he needed to pose to the informant that no one else could answer. Again, the crucial flaw in defendant's argument—which defeated his claim below and defeats it again here—is that defendant did not make even a low "some evidence" showing that the informant could provide potentially exonerating evidence. The record reveals no evidence defendant was, or even professed to be, afraid of the informant. As the trial court characterized it, the conversation between defendant and the

---

[7] Defendant argues *Otte* stands for the proposition that the informant's identity should have been disclosed because the informant had "'communications with [the defendant] which were monitored by the police.'" *Otte* concluded the identity of the informant did not need to be disclosed because there was nothing in the record "indicating that the informant was a participant in the offense with which [the defendant] was charged or had communications with [the defendant] which were monitored by the police." (*Otte*, *supra*, 214 Cal.App.3d at p. 1532.) Though *Otte* does list those factors in the disjunctive, the case upon which *Otte* relied, *People v. McShann* (1958) 50 Cal.2d 802, 808, involved a situation in which the informant was a participant in the offense (possession of heroin) and the conversation that was monitored took place during the commission of the offense (the call was to arrange the purchase of heroin). The principle is thus inapplicable here, where the informant was not involved in the offense and his recorded conversation with defendant did not take place during the commission of the offense.

informant was "pretty laid-back," "[t]here was a lot of laughter," and there was an element of "collegiality." Based on our review of the audio recording, the trial court's characterization was fair. Nor did defendant, during the proceedings below, present evidence to suggest any particular portion of the jail cell recording as incomplete or defectively recorded.

"The mere assertion that [an] informant is a material witness on [the] issue [of guilt], without any plausible support therefor, does not trigger the requirement[ ]" to conduct an in camera hearing. (*People v. Fried* (1989) 214 Cal.App.3d 1309, 1314-1315.) Under the circumstances here, defendant's unsupported requests for disclosure of the informant's identity were not calculated to lead to admissible and possibly exonerating evidence, and the trial court did not abuse its discretion by ruling the prosecution need not disclose identifying information for the informant.

C. Hernandez's Hospital Notes Did Not Qualify for Admission as Past Recorded Recollections, But Their Admission Was Harmless

The past recollection recorded exception to the hearsay rule allows a declarant's past statement to be read into the record "if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) [w]as made at a time when the fact recorded in the writing actually occurred or was fresh in the witness'[s] memory; [¶] (2) [w]as made (i) by the witness himself or under his direction or (ii) by some other person for the purpose

of recording the witness'[s] statement at the time it was made; [¶] (3) [i]s offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) [i]s offered after the writing is authenticated as an accurate record of the statement." (Evid. Code, § 1237, subd. (a).) We apply "the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question [citations]." (*People v. Waidla* (2000) 22 Cal.4th 690, 725.)

The trial court allowed Hernandez to read his handwritten notes to the police into the record over defendant's hearsay objection. Defendant contends this was error because the prosecution did not satisfy the past recollection recorded criterion that requires a witness to testify the prior statement made was true.

Defendant is correct that the prosecution did not elicit such testimony. The Attorney General points only to Hernandez's statement that he was "trying to be helpful to the officers," which, the Attorney General says, implies the writings were true statements because there is no indication Hernandez had a reason to provide a false statement and there were other indicia of reliability. This is insufficient. One person's representation that he or she was trying to be helpful in making statements to another is not equivalent to a representation that the statements made are truthful. To the contrary, trying to be helpful is at least sometimes understood as telling another person just what he or she wants to hear.

The defect in the foundation for the past recollection recorded hearsay exception does not warrant reversal, however. Contrary to defendant's contention, the admission of Hernandez's

statements to the police did not violate his Sixth Amendment right to confront witnesses. Hernandez testified at trial, and defendant could, and did, cross-examine him about the notes to the police. (*People v. Cowan* (2010) 50 Cal.4th 401, 468 ["[A]dmitting a witness's testimonial hearsay statement [pursuant to Evidence Code section 1237] does not violate the Sixth Amendment where, as here, the witness appears at trial and is subject to cross-examination about the statement"].) Because the admission does not amount to federal constitutional error, we review it under the *People v. Watson* (1956) 46 Cal.2d 818 standard for harmlessness. (E.g., *People v. Potts* (2019) 6 Cal.5th 1012, 1050.)

"[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error." (*People v. Mena* (2012) 54 Cal.4th 146, 162.) Here, defendant has not made that showing. The evidence regarding defendant's confession to the informant was properly admitted. With that strong evidence of guilt properly before the jury, and with the other evidence presented by the prosecution to prove the elements of the attempted murder charge, we have no difficulty concluding it is not reasonably probable defendant would have achieved a more favorable result if the trial court had prevented Hernandez from reading his hospital notes into the record.

D. There Is No Cumulative Error Warranting Reversal

Defendant argues "the combined errors of admitting [defendant's] confession, Hernandez's testimony of his writings implicating [defendant], and the court's refusal to order disclosure of the [informant's] identity strengthened the state's

case from one that would have been legally insufficient to support the attempted murder count to one that was virtually a slam dunk in light of the advantage created as a result of these errors." We have found only one of these was error, and the impact of it harmless. Defendant's argument that several errors caused cumulative prejudice warranting reversal therefore fails. (*People v. Sapp* (2003) 31 Cal.4th 240, 316; *People v. Woods* (2015) 241 Cal.App.4th 461, 489.)

E. Substantial Evidence Supports Defendant's Convictions for Possession of a Firearm by a Felon

When considering a challenge to the sufficiency of the evidence to support a conviction, we decide "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.)

Section 29800, subdivision (a)(1) provides: "Any person who has been convicted of . . . a felony . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony." Because defendant admitted to prior felony convictions, the only issue for the jury was whether defendant possessed the firearms found during execution of the search warrant.

"The elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence. [Citations.]" (*People v. Williams* (1971) 5 Cal.3d 211, 215 [drug possession].) Possession of a firearm "may be physical or constructive, and more than one person may possess the same contraband." (*People v. Miranda* (2011) 192

Cal.App.4th 398, 410 (*Miranda*).) "Possession may be imputed when the [item in question] is found in a place which is immediately accessible to the joint dominion and control of the accused and another." (*Ibid.*)

Prior cases have held that "mere proximity to [a] weapon, standing alone, is not sufficient evidence of possession. [Citation.]" (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (*Sifuentes*).) But the requisite "inference of dominion and control is easily made when the [item in question] is discovered in a place over which the defendant has general dominion and control: his residence [citation], his automobile [citation], or his personal effects [citation]." (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584 (*Jenkins*); see also *In re Charles G.* (2017) 14 Cal.App.5th 945, 951 [Possession "encompasses having a weapon in one's bedroom or home or another location under his or her control"].)

Defendant argues the evidence presented at trial was insufficient to prove he possessed the rifle because it was found in a closet in a bedroom, that bedroom was not defendant's, and other individuals lived in the house.[8] We hold there is

---

[8] Defendant also repeatedly argues sufficient evidence does not support the conviction for constructive possession of the rifle because his bedroom was not directly accessible from the main house. In support of this, defendant cites to evidence presented to the court at a pretrial hearing. It does not appear any such evidence was presented to the jury. Officer Knolls testified defendant was residing in a single-family residence, and that he was found in his bedroom. He was not asked at trial how that bedroom was connected to the main house. Because the question at hand is whether the jury had substantial evidence upon which to convict, we consider only the evidence presented at trial.

substantial circumstantial evidence defendant had constructive possession of the rifle. The evidence presented at trial established defendant lived at the address that was searched. The rifle was found in a bedroom closet, and in that same closet, searching officers found a piece of mail addressed to defendant. On the night of the search, there was no one in the bedroom in which the rifle was found. This is sufficient to permit a reasonable jury to find defendant had control over the location where the rifle was stored, and thus that he constructively possessed it. (See, e.g., *People v. Williams* (2009) 170 Cal.App.4th 587, 624 [sufficient evidence supported firearm possession conviction where firearm was found in room containing defendant's possessions including mail addressed to defendant at that address]; *People v. Rushing* (1989) 209 Cal.App.3d 618, 622 [court documents with defendant's signature inside desk drawer in bedroom where narcotics were found was sufficient evidence for jury to infer defendant had right to exercise dominion and control].) The jury could have reasonably inferred the presence of defendant's mail in the same closet where the rifle was found, located in a then-unoccupied room in the house where defendant resided, meant defendant had dominion and control over at least that closet. That other family members may also have had access to the room does not require a different conclusion. (*Miranda*, *supra*, 192 Cal.App.4th at p. 410; *People v. Busch* 187 Cal.App.4th 150, 162.)

There is also substantial evidence defendant possessed the gun found inside the car parked near the back of the residence. The keys to the car were discovered in the same room in which defendant was lying on a bed when the police arrived. Given defendant's possession of the car keys, a jury could reasonably

conclude defendant had a right to control the car and its contents, including the gun. (See *Williams*, *supra*, 170 Cal.App.4th at pp. 623-625 [rejecting sufficiency challenge to felon in possession convictions when officers found guns in the defendant's bedroom and nearby garage, even though seven other people were at the house during the search]; see also *Jenkins*, *supra*, 91 Cal.App.3d at p. 584 [a defendant has general dominion and control over his automobile].)

Defendant argues *Sifuentes*, *supra*, 195 Cal.App.4th 1410 supports a contrary conclusion. In that case, a firearm was found in a motel room under a bed near which another defendant was kneeling. The court found insufficient evidence of Sifuentes's right to control the gun where a gang expert's testimony failed to explain either the gang's restrictions regarding access to gang guns or "whether he equated access with a right to control." (*Id.* at p. 1419.) Nor, the court there reasoned, did the evidence link Sifuentes to the weapon found under the mattress next to the other defendant while Sifuentes was lying elsewhere. (*Id.* at pp. 1413-1414, 1417.) Here, by contrast, the jury could reasonably determine from the evidence that defendant had the right to control the rifle inside a closet he had used (as evidenced by the envelope addressed to him) and to control the handgun inside a car to which he had keys.[9]

---

[9] Defendant contends he "lived in a room not accessible to the interior of the house . . . ." Defendant cites no evidence to that effect that was presented at trial, and the naked assertion carries no weight on appeal.

F. Defendant's Implied Hearsay Objection Is Forfeited and His Ineffective Assistance Claim Fails

Defendant did not object to Officer Knolls's statements that he booked the rifle and handgun to defendant after speaking to defendant's sister and brother, respectively. Accordingly, defendant has forfeited his objection on implied hearsay grounds. (*People v. Becerrada* (2017) 2 Cal.5th 1009, 1033 [defendant could not argue testimony was hearsay on appeal on ground not asserted below]; *People v. Redd* (2010) 48 Cal.4th 691, 730 [failure to object to testimony on confrontation clause grounds below forfeited claim on appeal].)

Anticipating the forfeiture, defendant argues his trial attorney's failure to object was constitutionally deficient. To prevail on an ineffective assistance of counsel claim, a defendant must demonstrate both "that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 (*Strickland*).) "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009; see also *People v. Boyette* (2002) 29 Cal.4th 381, 433 ["[T]he mere failure to object rarely rises to a level implicating one's constitutional right to effective legal counsel"].)

We need not analyze whether there could be no satisfactory explanation for the failure to object on implied hearsay grounds because defendant has not carried his burden to demonstrate *Strickland* prejudice. Defendant argues admission of the officer's testimony was prejudicial because, without the evidence, it was reasonably probable defendant would not have been convicted of being a felon in possession of a firearm. We have already concluded, however, that the record contained sufficient evidence of possession without relying on any implications drawn from the challenged testimony. The mere existence of substantial evidence does not defeat a claim of *Strickland* prejudice, but we do not believe the testimony was so significant as to make a more favorable verdict reasonably probable had it been excluded.

G. Defendant Is Entitled to a Senate Bill 1393 Remand

When the trial court sentenced defendant, imposition of a section 667, subdivision (a)(1) five-year enhancement for sustaining a prior serious felony conviction was mandatory. (Former § 1385, subd. (b) ["This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667"].) Legislation that took effect on January 1, 2019, deleted the provision of section 1385 that made the imposition of the enhancement mandatory (along with related language in section 667 itself), thereby permitting trial courts to strike such enhancements when found to be in the interest of justice. (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) §§ 1, 2.)

The parties agree Senate Bill 1393 applies retroactively to defendant, whose case is not yet final, and defendant seeks a remand so the court may consider whether to exercise its

newfound discretion. The Attorney General argues a remand is unwarranted because the trial court's denial of defendant's *Romero* motion and his motion to strike the firearm enhancement clearly indicate the court would not have struck the five-year enhancement based on the prior serious felony if it had the discretion to do so.

We do not share the Attorney General's confidence. During its discussion of sentencing matters, the trial court gave specific reasons for not striking the section 12022.53 firearm enhancement or granting the *Romero* motion. As to the former, the trial court found it was not in the interests of justice to strike the firearm enhancement because defendant had instigated the attack and the victim had been shot point blank in the head. As to the latter, the trial court noted the prior strike crime defendant wanted stricken also involved a firearm. These reasons, which were limited to the nature of the requests pending before the court, do not necessarily apply to a discretionary decision to strike the five-year prior serious felony enhancement, particularly since the court stated it was denying the motions "with no reason to try to be more punitive." The sentencing impact of striking a five-year enhancement for a prior is also different from striking the prior "strike" conviction and from declining to impose a 25 year-to-life firearm enhancement. Finally, the trial court expressly stated it did not have the authority to strike the five-year enhancement and gave no indication as to whether it would impose or strike the enhancement if it had the discretion to do so. Because the trial court did not provide a clear indication it would not have stricken the five-year enhancement if it had discretion to do so, we

remand to permit the trial court to decide whether and how it wishes to exercise discretion it did not previously have.

H. The Ability to Pay Issue Does Not Warrant Reversal

Relying on the recent opinion in *Dueñas*, *supra*, 30 Cal.App.5th 1157, defendant argues imposition of the court operations assessment, conviction assessment, and restitution fine was unconstitutional because the trial court did not consider his ability to pay the financial obligations. Our Supreme Court has granted review to decide whether, as *Dueñas* holds, a court must consider a defendant's ability to pay before imposing or executing fines, fees, and assessments. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.) Even if the Supreme Court concludes consideration of ability to pay is required, that would not warrant reversal for *Dueñas* reasons here. Any error by the trial court in failing to consider, sua sponte, defendant's ability to pay the fine and assessments totaling $510 is harmless in light of the long custodial sentence imposed. (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139-140; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035.)

DISPOSITION

The cause is remanded to permit the trial court to consider whether it wishes to exercise its discretion to strike defendant's section 667, subdivision (a)(1) enhancement under section 1385. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.