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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BERNARD WILLIAMS, Defendant and Appellant.	B280187 (Los Angeles County Super. Ct. No. NA091969)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith Levey Meyer, Judge. Affirmed and remanded with directions.

Kathy R. Moreno, 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, Shawn McGahey Webb, Supervising Deputy Attorney General, Nicholas J. Webster, Deputy Attorney General, for Plaintiff and Respondent.

An altercation between defendant and appellant Bernard Williams (defendant), defendant's acquaintance Evian Hayden (Hayden), and victim Raynard Fulton (Fulton) left Fulton dead of a gunshot wound. On trial for the killing, defendant sought to sow doubt regarding who shot Fulton. A jury found defendant was the shooter and convicted him of second degree murder. We consider defendant's various arguments seeking reversal of his conviction: the trial court should have instructed the jury on the lesser included offense of aiding and abetting voluntary manslaughter under a natural and probable consequence theory; trial counsel provided ineffective assistance by eliciting what he claims was prejudicial testimony from a law enforcement witness; the trial court improperly commented on, and limited argument concerning, a transcript of an audio recording; there was insufficient evidence to prove the predicate offenses that would support a gang allegation true finding; the trial court abused its discretion in denying his *Romero*[1] motion to strike a prior strike conviction; and the cause should be remanded in any event so the trial court may exercise newly conferred discretion to strike a firearm sentencing enhancement.

I. BACKGROUND

A. The Shooting of Reynard Fulton

On the evening of October 1, 2011, defendant encountered Hayden, aka "G-loc," at a shopping center in Long Beach. Hayden and defendant got into a fight with Fulton, who was shot and killed in the shopping center parking lot as a result.

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[1] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

Surveillance video cameras in the shopping center captured footage of defendant and Hayden fleeing the scene but not the fight or the shooting. Hayden was 6 feet 4 inches tall and was wearing dark pants. Defendant was 5 feet 10 or 5 feet 11 inches and was dressed in a gray hoodie with a front center pocket and blue basketball shorts; the video footage appears to depict him with his hands in the pocket of the hoodie while running away.

Fulton's autopsy revealed two gunshot wounds: one bullet hit the corner of his mouth and the other—inflicting the fatal wound—entered his lower back. The fatal shot traveled upward six inches, hitting Fulton's liver and heart, before becoming lodged near his sternum. The medical examiner could not determine the relative positions of the shooter and Fulton—except that the shooter was facing Fulton's back when he fired the fatal shot. Fulton had abrasions on a finger of his right hand, his right wrist, and his abdomen. Blood samples determined there was alcohol, PCP, and marijuana in his system at the time of death.

Fulton was a member of Holly Hood Piru, a Blood gang based in Compton. At the time of the shooting, he was living with his girlfriend in an area of Long Beach claimed by Crip gangs, including the "Rollin 20s" criminal street gang.

Defendant lived near the shopping center at the home of Xzochil Palafox (Palafox). Palafox's sister and her sister's two children, Paul Nicholas Proano (Proano) and Donovan Baldwin, lived with them. Law enforcement officers arrested defendant for Fulton's murder in April 2012; they arrested Hayden two months later.

B. The Charges and the First Trial

The Los Angeles County District Attorney charged defendant and Hayden in an information with murder (Pen. Code, § 187, subd. (a))[2] and attempted robbery (§§ 211, 664). Defendant alone also faced a separate charge of possession of a firearm by a felon (the prior felony being a conviction for making criminal threats). The district attorney alleged that the charged crimes were gang related (§ 186.22, subd. (b)(1)(C)) and that defendant and Hayden personally used a firearm (§ 12022.53, subd. (b)), and personally and intentionally discharged a firearm causing Fulton great bodily injury and death (§ 12022.53, subds. (c) & (d)).

Defendant and Hayden were tried before a jury in 2013. The jury acquitted defendant of attempted robbery, but it could not reach a verdict on the counts against him for murder and firearm possession by a felon.[3]

C. Retrial

Defendant was retried on the murder and weapons possession charges in 2016. The defense endeavored to undercut the prosecution's case by suggesting that Hayden, not defendant, was the shooter and that Fulton was overly aggressive.

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

[3] The jury was deadlocked by a vote of 11 to 1 in favor of defendant's guilt on both counts. The jury acquitted Hayden of both charges against him.

1. Evidence of the shooter's identity

a. eyewitness testimony

Defendant and Hayden both testified at defendant's trial, with each suggesting the other shot Fulton. Defendant testified Fulton approached Hayden on a bicycle in an aggressive manner. Hayden or Fulton said "'what's up?'" to the other, and defendant heard Fulton say "'West Side,'" "'Compton,'" and "'Blood.'" According to defendant, he tried to "deescalate" the situation by telling Fulton, "'you don't have to bring it with all the extras.'" Defendant testified Fulton appeared "tensed up" and was "in motion to swing on [Hayden]" when defendant swung first at Fulton. Defendant missed, and Fulton hit Hayden in the face, knocking him to the ground. When defendant picked up Fulton's bike and tried to hit him with it, defendant heard gunshots. Defendant claimed he had seen Hayden in possession of a gun before and figured he was carrying one at the time of the fight "because . . . [Hayden] always ha[d] one."

Hayden testified Fulton was aggressive toward defendant and Hayden was trying to break up a fight between the two of them when Fulton threw Hayden to the ground. As Hayden struggled to rise, he heard gunshots. Hayden testified he never had a gun.

Three bystanders to the shooting—two of whom called 911 after it happened—testified at defendant's trial. Theary Ly (Ly) was across the street from the shopping center parking lot when he noticed three men throwing punches. Ly saw Fulton fall to the ground and the other two men kicking him. Ly testified the taller of the two (recall that Hayden was taller) threw a bike at Fulton then pulled out a gun and shot him. Ly "positively"

recalled the taller man was the shooter, but he was less certain at the time of trial about what the perpetrators were wearing.[4]

Stella Lugo (Lugo) was sitting in her car in the shopping center parking lot when she noticed three men scuffling over a bike. Lugo saw Fulton push the bike toward defendant and Hayden, then turn to run away, at which point Fulton was shot. Lugo testified the shooter was standing and that none of the men fell to the ground before Fulton was shot.[5]

Jorge Ulloa (Ulloa), Lugo's boyfriend, was in the car with Lugo when the shooting happened, but he did not see it. After

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[4] When Ly called 911 after the shooting, he told the dispatcher the shooter was "at least" 6 feet 3 inches tall and was wearing black or blue shorts and a striped T-shirt (recall that defendant was the one wearing shorts). When the dispatcher asked if Ly saw "who did it," Ly responded he saw the shooting but would not "be able to make [the shooter] out . . . ." Approximately nine months after the incident, Ly told a law enforcement officer the non-shooter was wearing shorts. After viewing video footage of defendant and Hayden fleeing the scene of the shooting, Ly testified neither looked like the men he remembered seeing. In Ly's view, the men involved in the shooting were older and were wearing different clothes than defendant and Hayden.

[5] Lugo told the 911 dispatcher immediately after the shooting that the shooter threw the bike at Fulton before shooting him, but she later testified that statement was "not correct." When the dispatcher asked if she saw the shooter, Lugo responded "they were pretty far away." At trial, Lugo testified she was not wearing her glasses that night, she could not make out the facial features of the men involved in the shooting, and she did not pay attention to their clothing.

hearing shots fired, Ulloa saw defendant and Hayden running from the scene—one wearing dark pants and the other wearing shorts. Ulloa testified the man wearing pants was carrying something dark in his right hand.

b. text messages

Shortly before the altercation with Fulton, defendant was hanging out at the shopping center with a friend, Ishia Bridgette (Bridgette). She left shortly before the fight and heard gunshots as she arrived at her house, which was close to the shopping center. Minutes later, Bridgette and defendant exchanged texts:

"[Defendant]: Im ok

"[Bridgette]: So what happened

"[Defendant]: We shoot cuh[6]

"[Bridgette]: You had a gun on you

"[Defendant]: Yea always

"[Bridgette]: Smh [shaking my head]

"[Bridgette]: So yall shot him for what

"[Defendant]: Are u mad at me

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[6] Multiple witnesses testified about the terms "cuh" and "cuz." Their testimony generally established the words were Crip terms that had spread into use by non-Crips and non-gang members.

When confronted with this text message during his testimony, defendant said he wrote "we" even though he did not personally shoot Fulton because he had "been in jail multiple times, so [he] kn[e]w if you [were] with a person, it's going [to] automatically mean 'we.'" In defendant's first trial, he testified that he meant to text "'he'" and the word was "probably" changed to "we" by his phone's autocorrect function.

"[Defendant]: He was set trippin[7]

"[Bridgette]: That's dumb thats why I don't bang

"[Defendant]: I know can u see police around yo house"

Bridgette replied she was busy, and their communications ceased that evening.

Bridgette and defendant exchanged another series of texts the next morning:

"[Bridgette]: You guys killed that guy [¶] . . . [¶]

"[Defendant]: Yea I know

"[Defendant]: he was a paru [*sic*] blood[8]

"[Bridgette]: Smh it was a question

"[Defendant]: oh ma bad yea we did

"[Bridgette]: Rme [rolling my eyes] I guess

"[Defendant]: Wat u mean u guess

"[Bridgette]: Just what I said I guess

"[Defendant]: Oh wow so u mad

"[Bridgette]: You killed a dude

"[Defendant]: Ok I dont wanna talk about it

"[Defendant]: so you not ma friend nomo?

"[Bridgette]: ok why would you say that . . . ? Do I like what you did no

"[Defendant]: Oh I thou u wasnt nomo . . can we keep dat a secret wat I did

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[7] Bridgette understood "set trippin" to mean the person was "from a different gang or neighborhood, and he either dissed your neighborhood [or] threw up his own gang or neighborhood."

[8] Bridgette took this to be an explanation for why Fulton was killed: "He was in 'Crip territory,' and he was a Blood."

"[Bridgette]: My dad is the one who told me [the victim died] and they have cameras but yeah thats not something I'm going to go and broadcast"

About an hour later, defendant exchanged text messages with Palafox:

"[Defendant]: It[ ] was me I gotta leave asap

"[Defendant]: Dont tell [Demetrius, i.e., Palafox's husband]

"[Palafox]: Shut the FUCK up . . . .[9]

"[Palafox]: Nobody knows

"[Palafox]: Stop lying

"[Defendant]: 20s[10]

"[Palafox]: It was [Hayden]

"[Defendant]: YeA

"[Defendant]: how u know

"[Palafox]: Cuz I know things niguh . . . I pay attention . . .

"[Defendant]: i was wit him and I tuched da bike

"[Defendant]: [Proano] told u

"[Palafox]: SHIT u just happen ta b Der at da wrong time . . . how u touch da bike . . . .??

"[Palafox]: No [Proano] didn't say SHIT Datz on my dead grandma . . .

"[Defendant]: i was wit him"

The next day, defendant texted Palafox, "I wanna run away today," and shortly thereafter, "Fucc now." A few days later,

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[9] Palafox's texts included a "signature" phrase that she changed from time to time depending on her mood. These phrases are omitted from the quoted excerpts here.

[10] Palafox understood "20s" to mean defendant was swearing on the Rollin 20s street gang, i.e., that he was serious.

Palafox and defendant were exchanging texts about plans they had previously made to move to Las Vegas with Palafox's husband when defendant texted Palafox, "I got ma gun." Palafox did not respond. That same day, defendant sent the following text to an unidentified person: "Ima get 20s on ma face." Defendant did not actually get a Rollin 20s tattoo on his face, however.

Two weeks after the shooting, defendant sold his cell phone to a juvenile, Chris B. The next day, defendant sent a text message to Chris from Palafox's phone: "Aye nigga this [is] Bernard I need da memory card out da phone." Chris asked to keep the memory card and it was unclear whether he did so, but law enforcement found nothing of evidentiary value on the phone when they later obtained it.

2. Gang evidence

Long Beach Police Department detective Chris Zamora testified as a gang expert for the prosecution. Detective Zamora had been a gang detective for over five years and had done gang-related work for "the majority" of his 14 years as a police officer.

The detective testified the Rollin 20s was a Long Beach Crip gang with approximately 350 members. The Rollin 20s use references to "the number '20'" and "'the East Side'" as symbols for the gang, along with Pittsburgh Steelers paraphernalia.[11] The gang's primary activities were narcotics sales, illegal weapons possession, and violent acts including shootings and homicides.

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[11] The detective admitted non-gang members also referred to parts of Long Beach as "'the East Side'" and might express pride at being from "the LBC," meaning "'Long Beach City.'"

The Rollin 20s were antagonistic toward Blood gangs, of which Long Beach had none.

Detective Zamora testified about two prior offenses committed by Louis White (White) and Demetrius Granvle (Granvle) that could be used to establish the pattern of criminal activity required to prove the alleged gang enhancement. White was convicted of murder in 2010, and Detective Zamora believed he was a Rollin 20s gang member based on his "gang-related tattoos" and "the facts surrounding [the] investigation" of his crimes. Granvle was convicted of carrying a loaded firearm in public, and Detective Zamora believed he was a Rollin 20s gang member because he had a "'20'" tattoo, he committed the offense while at a party attended by 30 to 40 other Rollin 20s members, and he was carrying a card in his wallet that read, "'East Side Rollin 20.'"

Detective Zamora had never personally interacted with defendant prior to trial, but he opined defendant was a member of the Rollin 20s. In forming his opinion, Detective Zamora relied on defendant's 2010 admission to law enforcement that he was affiliated with (though not a member of) the Rollin 20s. Detective Zamora also relied on defendant's tattoos that the detective believed were related to the Rollin 20s. Three days after shooting Fulton, defendant had "'EAST SIDE'" tattooed on his arms. Two years later, defendant had "'ROLLIN 20'" tattooed across his fingers. Defendant also had an "'LBC'" tattoo on one arm that, in Detective Zamora's opinion, stood for "Long Beach Crip" rather than "Long Beach City" when considered together with defendant's "EAST SIDE" tattoo.

Detective Zamora also relied on defendant's text messages to conclude he was a Rollin 20s gang member. Crips avoided

putting a "'c'" next to a "'k'" because rival gangs used "ck" to mean "'Crip killer.'" In defendant's text messages, he routinely spelled "fuck" as "fucc," "back" as "bacc," "suck" as "succ," and so forth. Defendant also made references to "'20z'" and "'20s.'" When asked about defendant's text to Bridgette that Fulton was "'set tripping,'" Detective Zamora explained "set tripping" referred to members of different gangs aggressively claiming their respective gangs.

In response to a hypothetical posed by the prosecution that described a fight in Rollin 20s territory between a Holly Hood Piru gangster and members of the Rollin 20s—who were losing the fight but who had a gun—Detective Zamora opined it was "highly likely" the gun would be used and that the shooting would be for the benefit of, in association with, and in order to assist and promote the Rollin 20s because it would promote the gang's reputation and help the gang maintain control over the area.

Defendant testified he became a member of the Rollin 20s in August or September of 2013—almost two years after Fulton's shooting—while he was incarcerated awaiting trial. Defendant said he obtained the "ROLLIN 20" tattoo on his hands at that time. According to defendant, his "EAST SIDE" tattoo was unrelated to the gang and he got the tattoo only because it was "popular at that time." Defendant conceded he had "claimed the [Rollin 20s] gang" in the past and had told detectives in this case he was an "ex" gang member, but he attributed those statements to "nervousness" and "[j]ust young, dumb, [and] want[ing] to be cool."

Tony Houston (Houston), a security guard at the shopping center who saw defendant approximately "every other day,"

believed defendant was a member of the Rollin 20s because he "banged on [Houston]" the first time they met—"kind of aggressive[ly]" saying something like "'[w]hat's up cuz?'"—and Houston saw defendant associating with a man Houston believed to be a gang member. Bridgette said defendant told her he associated with the Rollin 20s and she had heard him use the term "'20s.'" Palafox testified defendant was an associate of the Rollin 20s but "not a full gang member."

Kimi Lent (Lent), a gang intervention specialist, testified as a gang expert for the defense. Lent opined that at the time of the shooting, defendant was "definitely an associate" of the Rollin 20s but not an active member of the gang. Lent said people who were not active gang members sometimes joined gangs when they went to jail "[j]ust for protection reasons." She understood that defendant obtained his "Rollin 20" tattoo while he was in custody, and she did not believe his "East Side" tattoo indicated he was a gang member. Lent also testified she was unaware of any specific, or ongoing, rivalry between the Rollin 20s and any Blood gangs, and it was more common for gang rivalries to occur between gangs based in the same immediate area. Lent did agree Crips did not spell words with "c" and "k" next to each other.

Hayden testified he had never been a gang member, and there was no evidence he had any gang tattoos. Defendant testified he believed Hayden was a member of the Exotic Family City Crips gang.

3. The jury verdict and defendant's sentence

The jury found defendant guilty of second (not first) degree murder and of possessing a firearm as a felon. It further found

true the enhancements alleging defendant "personally and intentionally discharged a firearm, a handgun, which caused great bodily injury and death to [Fulton]," and committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang.

Defendant admitted he sustained a prior strike conviction but asked the trial court to exercise its discretion to strike the conviction under *Romero*, *supra*, 13 Cal.4th 497 for purposes of sentencing. The court denied defendant's *Romero* motion and sentenced him to prison for 60 years to life: 15 years to life for the murder conviction, doubled on account of defendant's prior strike, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), plus another five years under section 667 because the prior strike was a serious felony. The court imposed but stayed sentences relating to defendant's felon in possession of a firearm conviction and the jury's true findings on the gang enhancement and other firearm enhancements.

II. DISCUSSION

Defendant raises a litany of claimed errors—by the trial court, his counsel, and the jury—but none has any merit, particularly in light of the aspects of the trial and the jury findings defendant does not challenge.

Defendant contends he is entitled to reversal of his conviction because the trial court refused to give a voluntary manslaughter instruction premised on a natural and probable consequences theory of liability, but the contention fails by definition—the jury specifically found defendant personally and intentionally shot and killed Fulton and defendant does not challenge that finding.

Defendant argues his trial attorney provided constitutionally deficient representation by eliciting testimony from a detective that would tend to undermine defendant's credibility, but defendant admitted on the stand that he had lied to the detective and defense counsel's question is easily understood, in context, as an attempt to show the detective was biased and/or to "front" defendant's testimony that would come later during trial.

Defendant contends the court compelled the jury to conclude he was the shooter by commenting on the evidence and interfering with the jury's fact-finding, but this argument is forfeited for failure to raise a contemporaneous objection and the record shows, in any event, the court did nothing to alter the actual evidence considered by the jury.

Defendant asserts there was insufficient evidence he was a gang member, but he admitted claiming membership in the Rollin 20s and his text messages corroborated the same.

As to his sentencing assertions of error, defendant claims the trial court abused its discretion by declining to strike his prior strike conviction. To the contrary, the record demonstrates the court properly discharged its responsibility to sentence defendant within the spirit of the Three Strikes law. We do agree, however, that the trial court should be given an opportunity to exercise the discretion it has now been given by statute to strike one or more of defendant's firearm enhancements. We will therefore remand the case for that purpose.

A. Defendant's Assertion of Alleged Instructional Error Does Not Warrant Reversal

The trial court instructed the jury it could find defendant guilty of second degree murder under three theories: if it found defendant personally pulled the trigger or if it found Hayden killed Fulton and defendant either directly aided and abetted the murder or aided and abetted an assault resulting in Fulton's murder as a natural and probable consequence. The court also instructed the jury it could find defendant guilty of the lesser included offense of voluntary manslaughter rather than murder, but only if the jury determined defendant—and not Hayden—personally shot Fulton upon sudden provocation or based on an unreasonable belief in the need to defend himself or Hayden.

Defendant contends it was error for the trial court not to instruct the jury it could alternatively find him guilty of voluntary manslaughter on a natural and probable consequences theory. Defendant requested such an instruction, but the trial court declined to give it after engaging in considerable discussion with counsel, which encompassed whether and to what extent our Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) should be read to foreclose such an instruction.[12]

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[12] *Chiu*, *supra*, 59 Cal.4th 155 holds an aider and abettor may not be convicted of first degree murder under a natural and probable consequence theory. (*Id.* at p. 166.) The *Chiu* court acknowledged that "[a]ider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature" (*id.* at p. 164) and it had "never held that the application of the . . . doctrine depends on the foreseeability of every element of the nontarget offense" (*id.* at p. 165, fn. omitted). But the court limited natural and probable consequences liability to second degree murder for policy reasons and because the "uniquely

A trial judge must instruct jurors on all lesser included offenses "'if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense, but not the greater, charged offense.' [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 538 (*Nelson*); see also *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*)). We review a claim the trial court failed to give a lesser included offense instruction de novo. (*Nelson*, *supra*, at p. 538.)

Our Supreme Court has made reference to voluntary manslaughter under the natural and probable consequences doctrine without directly considering the issue. (See, e.g., *People v. Smith* (2014) 60 Cal.4th 603, 612 [reviewing murder conviction in case where jury was instructed on both murder and voluntary manslaughter under natural and probable consequence theory]; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1450 [same].) We have no need to examine the scope of the doctrine in this case because the trial court's refusal to give the requested instruction cannot have prejudiced defendant.

Our Supreme Court has held that "'"[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions."' [Citations]." (*People v. Beames* (2007) 40 Cal.4th 907, 928; see also *People v. Sedeno* (1974) 10

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subjective and personal" mental state required for first degree murder was "too attenuated" to the aider and abettor's culpability to impose the severe punishment accorded to those convicted of first degree murder (*id.* at p. 166).

Cal.3d 703, 721 [where "factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions," the defendant suffers no prejudice "since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury"], disapproved on other grounds in *Breverman*, *supra*, 19 Cal.4th at p. 165.) Here, the jury specifically found defendant—not Hayden—was the shooter when it found true the allegation that defendant personally used and discharged a firearm causing Fulton's death. Because that finding cannot be reconciled with convicting defendant of voluntary manslaughter under a natural and probable consequence theory, there could be no prejudicial error in declining to give the requested instruction.[13]

B. Defendant Has Not Shown His Trial Attorney Was Constitutionally Ineffective on the Record before Us

During defense counsel's cross-examination of Detective Mark Bigel, the investigating officer, counsel confirmed the detective interviewed defendant twice after his arrest and then asked the following: "And then he—would it be fair to say, in the first session, you didn't think much about what [defendant] had to say about the facts of the incident?" Detective Bigel responded: "Right. He was being less than truthful." Defense counsel followed up by asking whether the detective investigated

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[13] The jury finding that defendant personally shot Fulton prevents defendant from establishing prejudice under either the *People v. Watson* (1956) 46 Cal.2d 818 or the *Chapman v. California* (1967) 386 U.S. 18 standard of assessing prejudice.

certain issues relating to defendant's background that might bear on his possible gang membership—the detective said he had not.

Defendant argues Detective Bigel's testimony branded him a liar and damaged the heart of his defense, which depended on the jury believing he was telling the truth. He contends his trial counsel was constitutionally deficient because he had no tactical reason to elicit, and then not move to strike, Detective Bigel's assertedly prejudicial testimony.

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692[ ].)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*).) To carry the burden of establishing deficient performance, the defendant must show "counsel's performance fell below an objective standard of reasonableness . . . under prevailing professional norms. [Citation.]" (*Ibid*., internal quotation marks omitted.) To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*Ibid*.)

Where the record on appeal does not demonstrate why counsel acted in the manner asserted to be deficient, "a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel's actions or failure to take certain actions were objectively unreasonable." (*Mickel*, *supra*, 2 Cal.5th at p. 198; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) "[W]e begin with the presumption that counsel's actions fall within the broad range of reasonableness, and afford 'great

deference to counsel's tactical decisions.' [Citation.]" (*Mickel*, *supra*, at p. 198.) What this means, in effect, is that a conviction will not be reversed for ineffective assistance of counsel on direct appeal absent "affirmative evidence that counsel had ""no rational tactical purpose"" for an action or omission." (*Ibid*.)

Defendant's ineffective assistance claim fails because "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged" and defendant does not demonstrate "there simply could be no satisfactory explanation" for his counsel's strategy in questioning Detective Bigel. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) There could be various tactically valid reasons why trial counsel pursued the line of inquiry he did; here are two.

First, defense counsel may have sought to demonstrate Detective Bigel was a biased investigator who jumped to conclusions regarding defendant's credibility. Defense counsel may have reasonably sought to show Detective Bigel formed an opinion that defendant was "less than truthful" even though the detective did not investigate aspects of defendant's background that might have substantiated defendant's account during the interview.

Second, defense counsel may have sought to preemptively diminish the impact of defendant's self-damaging testimony to come. (See, e.g., *In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1543 [trial counsel often pose questions for the strategic purpose of making "a preemptive strike against an expected question on cross-examination"].) Defendant's attorney (who had also represented him in the first trial) would have been keenly aware that the prosecution would spend significant time exploring defendant's prior testimony and statements to law enforcement

during its cross-examination of defendant.[14] The defense made no attempt to conceal the fact that some of defendant's prior statements were false; rather, defendant's strategy was to argue he had good reason to lie when he did—because he did not actually kill Fulton and did not want to be charged with a crime he did not commit.

Not only could there be valid tactical reasons for defense counsel's question to Detective Bigel, the question also resulted in no prejudice to defendant. Because Detective Bigel's response did not introduce evidence contrary to defendant's own testimony, there is no reasonable probability the jury would have rendered a more favorable verdict for defendant absent defense counsel's question. (*People v. Cruz* (2008) 44 Cal.4th 636, 673 [no prejudice in admitting evidence of the defendant's adoptive admission where he "admitted as much in his own confession" to authorities].)

C. The Trial Court Did Not Usurp the Jury's Fact-Finding Role

A trial court "may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause." (Cal. Const., art. VI, § 10.) Any comments made by the court must ""be accurate, temperate, nonargumentative, and scrupulously

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[14] Indeed, this is exactly what occurred. Early in its cross-examination, the prosecution asked defendant: "So initially when you talked to the detectives, there were things that you were not truthful about; right?" Defendant responded affirmatively, explaining he was "basically just denying [his] involvement."

fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.'" [Citations.]" (*People v. Monterroso* (2004) 34 Cal.4th 743, 780.) The court "'should make clear that [its] views are not binding but advisory only.' [Citation.]" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 823.)

The issue here concerns statements Proano made to police detectives regarding Fulton's shooting.[15] Prior to calling Proano to testify, the defense sought a ruling on whether it could introduce in evidence one of Proano's statements to police. The defense planned to ask Hayden whether he told Proano he shot Fulton and the defense anticipated Hayden would say no. The defense then intended to impeach this expected answer by asking Proano whether he heard Hayden say he shot Fulton. If Proano responded in the negative, the defense wanted to highlight a statement Proano purportedly made to detectives, namely, that Hayden told Proano, "'I capped his [i.e., Fulton's] ass.'"

Here is the portion of Proano's exchange with the detectives at issue, as originally transcribed by district attorney's office personnel from an audio recording of the interview (with added emphasis on the key statement at issue):

"[Detective Hubert]: So did you ever have a conversation with [Hayden] about this shooting? [¶] . . . [¶]

"[Proano]: Real life? Yeah, I think so. One time, afterwards. [¶] . . . [¶]

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[15] The police arrested Proano in April 2012 for Fulton's murder but dropped the charges after interrogating him.

"[Detective Hubert]: Okay. How did that conversation go?

"[Proano]: Just saying, like, oh, what's—just basically how I explained about the shooting and stuff like that, about how the guy was fighting back and stuff like that, and he open fired [*sic*]. Like, he capped his ass, he said.

"[Detective Hubert]: Those were the words he used?

"[Proano]: No, not like that. *He said, 'I capped his ass.'* It's kind of hard—you know what I'm saying?"

Later in the interview as transcribed, however, Proano said he told his mother defendant "did the shooting." The following exchange ensued:

"[Detective Hubert]: So who did it, [defendant] or [Hayden]?

"[Proano]: [Defendant] said [Hayden] did it and [Hayden] never really said, 'I pulled the trigger,' other than that me and [defendant] capped, you know[ ] what I'm saying? That me and [defendant] were trying to come up on a bicycle, this and that, that—you know what I'm saying?

"[Detective Hubert]: Okay, let's back up then, because in my notes here when we were just now talking about [Hayden], and you said you had a conversation—

"[Proano]: Capped his ass, yeah.

"[Detective Hubert]: Well, that's the word you used.

"[Proano]: Yeah, he didn't say that. I go—I capped his ass, like I said, but, like, you know what I'm saying? Just, like, oh, yeah, 'We shot him.'

"[Detective Hubert]: We shot him?

"[Proano]: Yeah.

"[Detective Hubert]: So—

"[Proano]: Like, yeah, we were trying to come up and this and that, and we shot him.

"[Detective Hubert]: Uh-huh.

"[Proano]: He never admitted to, like, oh, I shot the guy, but [defendant] told me that [Hayden] shot him. [¶] . . . [¶]

"[Detective Hubert]: Okay. And [Hayden] just kind of said we?

"[Proano]: Yeah, he was, like, 'Yeah, we came up, the guy knocked me out and I shot him.' Woop di woop[.] That's what—he didn't say, 'I shot him.' He was, like, 'We shot him.'

"[Detective Hubert]: We shot him.

"[Proano]: Yeah."

After listening to the audio recording, the trial court believed the transcript was inaccurate: In the court's view, Proano did not say, "He said, 'I capped his ass.'" Quite the opposite, the court determined Proano said, "He [i.e., Hayden] didn't say I capped his ass." The court informed counsel that, considering "the context of the entire conversation," it did "not believe and [was] not going to submit this to the jury as to a factual finding whether they think Mr. Proano said [Hayden] shot [Fulton]."

Defense counsel responded by seeking the court's permission to ask Hayden whether he told Proano, "we shot [Fulton]," and the court responded "[a]bsolutely, you may ask him that." The court told the defense, however, it could not "argue anywhere that . . . Hayden says, 'I shot him.' You can argue that the tape—you guys [i.e., the jury] can listen to the tape. You can determine what he says, but that one line will be changed in the transcript." Defense counsel responded he "[didn't] have a problem changing that one line" but argued he should be able to

argue to the jury that "there's a change of tone" and "[w]hat [Proano was] correcting [wa]s the tone." The court was "fine" with defense counsel's proposal, noting it was up to the jury to decide the tone based on what it heard.

During Proano's testimony, the jurors were given the revised transcript in which Proano's statement "He said, 'I capped his ass'" was interlineated by the court to read "He didn't said [*sic*], 'I capped his ass.'" The court advised the jury that "the [audio recording], itself, is the evidence" and "[t]he transcript is just supposed to be an aid to what we think is being said." The court told jurors it had written a word in on the transcript "because after listening to [the recording], that's how [the court] thought [it] heard it . . . ." But, the court added, jurors were entitled to disagree with its view and should decide for themselves "what it says and how it's said."

Defendant contends the court's conduct "withdrew a material fact from the case" and "at least impliedly directed a verdict of guilty." He believes the trial court contravened the proper limits on its commenting authority and prohibited the defense from taking a position contrary to the trial judge's comment on the evidence. The argument does not carry the day, both because defendant forfeited any error and because the court's ruling was not error regardless.

Defense counsel did not object to the trial court's alteration of Proano's interview transcript. Rather, counsel acquiesced in the ruling and asked only that the court permit him to argue Proano's second "capped his ass" statement showed Proano was

correcting his earlier tone.[16] By accepting the trial court's alteration of the transcript and not objecting when the court prohibited any argument inconsistent with what it heard on the recording, defendant forfeited his claim of error.[17] (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237 ["judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial" unless raising an objection would fail to cure the resulting prejudice or be futile]; see also *People v. Williams* (2017) 7 Cal.App.5th 644, 693.)

Even assuming defendant preserved the issue, his argument is unconvincing on the merits. The court did not invade the province of the jury because it did not prevent them from considering relevant evidence or effectively direct a verdict for the prosecution. The court did nothing to alter the actual

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[16] Later during closing argument, the defense argued: "If you listen to [the audio recording] carefully, you can almost hear [Proano] saying it in terms of—he knows he says it close enough to sounding like it was something that [Hayden] told him because he goes back and corrects it. He said, 'Oh, no. That's not what [Hayden] said. He said something different.'"

[17] Defendant suggests the trial court was aware he objected to its decision and that protesting further would have been futile. The argument is not persuasive. Defense counsel's statement that he "[didn't] have a problem changing that one line" so long as he could argue Proano's tone to the jury—which the trial court permitted—cannot reasonably be interpreted as an objection. And defendant fails to show a direct objection would have been futile: there is no basis to conclude the trial court would have, for example, certainly refused to reconsider or to differently tailor what it would tell the jury had the court been presented with the precise objection now advanced on appeal.

evidence—which it advised the jury was the audio recording, not the transcript.

Moreover, the court advised jurors before playing the recording that they should not substitute the court's interpretation for their own, and it later instructed them that if anything the court said or did "intimate[d] or suggest[ed] what [jurors] should find to be the facts," jurors were to "disregard it and form [their] own conclusion." Under the circumstances, defense counsel's decision not to object is "understandable, as the [court's conduct] was innocuous." (*People v. Riel* (2000) 22 Cal.4th 1153, 1177.) Jurors were told they should decide for themselves what Proano said, with the implication being they could decide differently from the trial judge's interpretation. And defense counsel was told he could argue jurors should listen to the recording to determine what Proano said.[18] Defense counsel asked Proano on the witness stand: "Isn't it true that you had a conversation with [Hayden] where he admitted to you he shot the guy?" Proano responded, "[n]ot that I recall," and the jury later heard the recording, allowing them to determine for themselves what Proano said Hayden told him.

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[18] The trial court's limitation on argument by the defense was within appropriate bounds. A trial court can, of course, sustain an objection during closing argument that an attorney has misstated the evidence. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1390 ["Trial judges have the duty to responsibly and fairly control the proceedings to prohibit argument which is not supported by substantial evidence"].) That the court made the equivalent of such a ruling in advance here is immaterial.

D. The Prosecution Presented Substantial Evidence of a Pattern of Criminal Gang Activity by the Rollin 20s

A defendant who is "convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members," is subject to an enhanced sentence. (§ 186.22, subd. (b)(1).) For section 186.22, subdivision (b)(1) to apply, the prosecution must not only prove the defendant acted for a gang-related purpose, it must also "'prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period.' [Citations.]" (*People v. Sanchez* (2016) 63 Cal.4th 665, 698 (*Sanchez*).)

Defendant does not dispute that the Rollin 20s is a criminal street gang, but he contends the prosecution failed to prove a "pattern of criminal gang activity" because the prosecution did not prove Rollin 20s gang members committed two predicate offenses. Specifically, defendant acknowledges that defendant's crimes in this case, and the crimes committed by White and Granvle, would qualify as predicate offenses, but he asserts the prosecution's proof failed because there was insufficient evidence that defendant, White, or Granvle were members of the Rollin 20s.

In considering defendant's sufficiency of the evidence claim, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation]. If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

Under this standard of review, there is arguably enough evidence that all three men (defendant, White, and Granvle) were members of the Rollin 20s, but there is ample evidence that defendant and Granvle were members of the gang. Because proof of the charged crime may serve to establish a predicate offense for the purpose of showing a pattern of criminal gang activity (*People v. Loeun* (1997) 17 Cal.4th 1, 9-10), we accordingly have no difficulty concluding (for reasons we shall now summarize) the pattern of criminal gang activity element was satisfied at trial.

The evidence that defendant was an active member of the Rollin 20s at the time of the shooting was contested, but it is sufficient to support the jury's finding. Defendant's affiliation with the Rollin 20s was undisputed, and defendant admitted he had "claimed the gang" in the past and had described himself as an "ex" gang member. Defendant called out "20s" in his text messages and routinely avoided spelling words with "ck" together. He told Bridgette he and Hayden shot Fulton because

Fulton was a Blood gang member who was "set trippin." That is enough.

As for Granvle, defendant concedes that if Detective Zamora's testimony regarding his gang membership is "accepted at face value," the testimony "arguably show[s] Granvle's gang membership." But defendant contends the prosecution was also required to prove, and did not prove, Granvle's offense was committed for the benefit of the Rollin 20s. That, however, is not the law. In establishing a "pattern of criminal gang activity" (§ 186.22, subd. (e)), the prosecution need not show the predicate offenses were committed for the benefit of, at the direction of, or in association with the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621, disapproved on another ground by *Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 581.)

E. Cumulative Error

Defendant contends that even if the errors at his trial did not prejudice him when considered individually, their cumulative effect deprived him of due process and a fair trial. Having failed to establish multiple errors, defendant's cumulative error claim is meritless. (See, e.g., *People v. Sattiewhite* (2014) 59 Cal.4th 446, 491; *People v. Edwards* (2013) 57 Cal.4th 658, 767.)

F. Sentencing Issues

1. The trial court did not abuse its discretion in denying defendant's Romero *motion*

A trial court has discretion, "in furtherance of justice" in accordance with section 1385, subdivision (a), to strike an allegation that the defendant was previously convicted of a

serious or violent felony subjecting the defendant to an increased sentence under the Three Strikes sentencing scheme. (*People v. Williams* (1998) 17 Cal.4th 148, 151-152 (*Williams*); *Romero*, *supra*, 13 Cal.4th at p. 504.) The Three Strikes law "creates a strong presumption that any sentence that conforms to [its] sentencing norms is both rational and proper." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).) As such, "it carefully circumscribes the trial court's power to depart from [the] norm[s it establishes] and requires the court to explicitly justify its decision to do so." (*Ibid.*) In order to properly exercise its discretion to dismiss a prior strike allegation under section 1385, the trial court "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of [the defendant's] background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though [the defendant] had not previously been convicted of one or more serious and/or violent felonies." (*Williams*, *supra*, at p. 161.)

A trial court's decision declining to strike a prior conviction allegation is reviewed for abuse of discretion. (*Carmony*, *supra*, 33 Cal.4th at p. 374.) A trial court abuses its discretion in declining to strike a prior strike conviction when the court is unaware of its discretion, when it considers "impermissible factors" in reaching its decision, or when "'the sentencing norms [established by the Three Strikes law . . . , as a matter of law,] produce[ ] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]" (*Id.* at p. 378.)

In making his *Romero* motion, defendant argued his young age, the "minimal nature" of his prior strike conviction, and his mental condition placed him outside the spirit of the Three Strikes law. Defendant was 19 years old at the time of the shooting and 24 years old on the date of sentencing. Defendant provided voluminous records documenting his fractured home life: his mother was a drug addict who lost custody of defendant and his siblings; his older sister sexually abused him; and his father beat defendant and placed him and three siblings in foster care before passing away when defendant was 12. School and medical records showed defendant performed far below grade level and was diagnosed with mild mental retardation and depression.

Defendant also argued the underlying facts of his prior strike conviction were not particularly serious. Defendant's attorney emphasized he was 18 years old and "[j]ust barely out of the foster care system" when he telephonically threatened the foster mother of his younger brother because she would not let the brother speak to defendant on the phone. Defense counsel stated defendant was particularly close to the brother in question and that the offense stemmed from his "family situation."

The prosecution opposed striking defendant's prior conviction allegation. Pointing to information in the probation report for that prior conviction, the prosecution argued defendant was minimizing his prior conduct. The report indicated defendant not only threatened his brother's foster parents but also threatened the officer investigating the parents' complaint. The prosecution also described criminal conduct defendant had engaged in while held in custody (committed against "[Los

Angeles County Sheriff's] deputies downtown"), which had resulted in another criminal conviction.

The trial court declined to strike defendant's prior strike conviction, and defendant now contends this was an abuse of discretion because the court failed to consider his youth, background, and mental problems. The record demonstrates otherwise.

The trial court properly considered, and balanced, defendant's age and background against other factors including the seriousness of his present murder conviction and criminal conduct defendant engaged in after his arrest. The court stated it was aware it must consider, among other factors, "[t]he particulars of the background, character, and prospects of the defendant" in deciding whether or not to dismiss the prior strike allegation. The court made reference to defendant's difficult childhood and indicated it might have considered striking the prior conviction allegation had defendant not "escalate[d] in violence."[19] The court noted it "fe[lt] sorry" for defendant in light of his background but recognized it was obligated to consider not

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[19] Defendant argues the trial court "expressly refused to consider" defendant's abuse, neglect, and mental problems by characterizing the record as if the court stated "[defendant's] background might 'have been something to consider' if he hadn't escalated into violence." In context, the court was not refusing to consider defendant's background but commenting more generally on one of the reasons why it felt it would be inappropriate to grant a *Romero* motion: "But the general argument that you're telling me . . . is essentially—I should strike it because I feel sorry for your client. So that may have been something to consider if he didn't escalate in violence."

only defendant's future prospects but also the safety of society. Considering defendant's behavior after he was arrested for murder—which included "two open cases" after the date of Fulton's murder, one involving criminal threats and the other involving use of force likely to produce great bodily injury—the court concluded defendant did not show himself to be "outside the spirit" of the Three Strikes law.

The trial court's decision was not an abuse of discretion. The court properly "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law . . . .'" (*Carmony*, *supra*, 33 Cal.4th at p. 378, citation omitted.)

2. A remand is warranted so the trial court can decide whether to exercise its section 12022.53, subdivision (h) discretion

Senate Bill 620, which the Governor signed in October 2017 and which went into effect January 1, 2018 (after briefing was completed in this case), amended the Penal Code to give trial courts discretion "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by" section 12022.5 or 12022.53. (§§ 12022.5, subd. (c), 12022.53, subd. (h).) In a supplemental brief, defendant contends that because he was sentenced to a mandatory, consecutive 25-years-to-life prison term pursuant to section 12022.53, subdivision (d), we should remand his case to give the trial court an opportunity to strike the firearm enhancement that led to the imposition of that term.

The Attorney General concedes section 12022.53, subdivision (h) applies retroactively to defendant but contends remand would be futile because the record shows the trial court

would not have exercised its discretion to strike the section 12022.53, subdivision (d) enhancement. Relying on the trial court's rejection of defendant's motion to strike his prior strike allegation, which added 15 years to his sentence, the Attorney General argues the trial court impliedly decided the sentence imposed was the appropriate length and there is no chance the court would exercise its discretion to strike the 25-year-to-life firearm enhancement.

While the Attorney General may ultimately be proven correct in predicting the trial court would not choose to exercise its discretion to strike defendant's section 12022.53, subdivision (d) sentencing enhancement, we are not confident the record "clearly indicat[es] that [the sentencing court] would not, in any event, have exercised its discretion to strike the allegation[ ]." (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) A trial court's discretionary calculus when deciding whether to strike an allegation in furtherance of justice for purposes of applying the Three Strikes law may not overlap with a court's consideration of those factors it finds relevant to deciding whether to strike a firearm allegation. (*Williams*, *supra*, 17 Cal.4th at p. 160 [in order "to give content to the concept of 'furtherance of justice'" under section 1385, courts must "look[ ] within the [particular statutory] scheme in question, as informed by generally applicable sentencing principles"].) We believe the better course in this case is to permit the trial court to make the determination itself in the first instance, rather than attempting to read the tea leaves.

DISPOSITION

The matter is remanded to the trial court for the limited purpose of providing the court with an opportunity to decide whether to exercise its discretion under section 12022.53, subdivision (h). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.