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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LORENZO MARTIN, Defendant and Appellant.	B266560 (Los Angeles County Super. Ct. No. BA394946)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed with directions.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Lorenzo Martin appeals from the judgment entered following his convictions by jury on two counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a); counts 1 & 2),[1] and shooting at an occupied motor vehicle (§ 246; count 3), with, as to each offense, personal use of a firearm, and personal and intentional discharge of a firearm (§ 12022.53, subds. (b) & (c)) and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4), with court findings he suffered two prior felony convictions for which he served separate prison terms (§ 667.5, subd. (b)) and a prior felony conviction (§ 667, subd. (a)(1)). We affirm with directions.

FACTUAL SUMMARY

1. People's Evidence.

The evidence established that between 7:00 a.m. and 9:40 a.m. on January 17, 2012, Los Angeles Police Detective Cedric Washington and Federal Bureau of Investigation (FBI) Special Agent Kevin Falls (officers) were engaged in plainclothes surveillance of a residence on West 53rd Street in Los Angeles, as part of a task force charged with executing an arrest warrant. The area was controlled by the Five Deuce Hoover Crips gang.

The officers were parked in a pickup truck on the north side of West 53rd Street, west of Hoover Street. Washington was in the driver's seat, and Falls was in the front passenger seat. Washington had a Glock .40-caliber firearm and Falls had an AR-15 rifle. Washington and Falls were both wearing casual clothes. They were chosen as point persons for the operation because,

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

both being African-Americans, they looked like they "fit in" in the neighborhood.

About 9:30 a.m., appellant, who was not under surveillance, walked eastbound on 53rd Street towards the truck. He approached adjacent to the passenger side of the truck, looked intently into it, and continued walking. When appellant reached Hoover Street, he looked back over his shoulder at the truck. Appellant crossed Hoover Street and continued eastbound.

About 10 minutes later, a Cadillac travelling westbound on 53rd Street slowly crossed Hoover Street. The Cadillac's windows were down. Codefendant Deshawn Beemon was driving, codefendant Lashawn Berry was in the front passenger seat,[2] and appellant was in the right rear passenger seat. The Cadillac's occupants gave the officers intimidating looks. Washington told Falls he believed a shooting or display of gang signs was about to occur, and communicated the same by phone to FBI Special Agent Schadt, who was stationed nearby.

The Cadillac stopped in front of a residence on 53rd Street. Appellant exited the vehicle, appeared to look towards Washington, and walked into a nearby house. The Cadillac made a U-turn and faced eastbound towards the truck. Approximately a minute after Washington entered the house, he exited and reentered the Cadillac.

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[2] Appellant and codefendant Beemon were tried together. Beemon was acquitted. Beemon and Berry are not parties to this appeal.

The Cadillac traveled slowly towards the truck. Washington told Falls and Schadt a shooting was imminent. Washington held his Glock pointed down and below his window. Falls chambered a round in his rifle and put it between his legs with its barrel pointed down. Washington told Falls to look for any lowering of a window on the Cadillac because that was where the gun would be.

The Cadillac stopped almost alongside the truck. The Cadillac's occupants stared at Washington, the Cadillac's left rear passenger door opened, and appellant exited. Appellant and Washington looked at each other as appellant approached. Appellant lifted his sweatshirt and, using his right hand, removed a semiautomatic pistol from his waistband. Appellant pointed the pistol in Washington's direction, holding the pistol with two hands. Washington yelled, "Gun."

When Falls saw appellant's weapon, Falls raised his rifle. Falls testified appellant pointed his weapon in the officers' direction.

Washington pointed his Glock at appellant, and the two men simultaneously exchanged gunfire. Washington testified he "may" have fired first because he perceived that appellant was going to shoot him. He initially fired two rounds towards appellant through the truck's driver's side window. Appellant was about five or seven feet away.

Washington testified that appellant continued to fire at him, so he fired two more rounds at appellant. Washington saw a series of muzzle flashes coming from appellant's gun and heard the corresponding gunfire. Appellant stumbled backwards and fired several shots over his right shoulder at Washington while running southwest towards a driveway on 53rd Street.

Washington fired three additional rounds as appellant ran. Washington testified he was shot in his right shin.

Falls testified that because appellant was pointing a weapon in the officers' direction, Falls fired two rounds at him through the windshield. Appellant ran southwest and after Falls lost sight of him, Falls exited the truck.

At approximately 11:45 a.m., Los Angeles Police Detective Tyler Lee arrived. Lee testified Washington told him that appellant pointed a gun at Washington and fired first. About 1:30 p.m., Los Angeles Police Department (LAPD) Criminalist Amanda Phelps arrived and recovered 8 nine-millimeter casings near a few houses on the south side of 53rd Street. A nine-millimeter casing was also found in front of a residence on 53rd Street. The distance between the truck and the spot where this casing was found was about 78 feet. Two cartridge cases from a rifle were found on the north sidewalk on 53rd Street. Three casings from a .40-caliber Smith and Wesson firearm were on the truck's front passenger seat. A piece of a projectile was on the truck's driver's side floorboard. Three .40-caliber Smith and Wesson casings were outside the truck.

Phelps further testified the truck's front driver's side window was shattered. Bullet impacts were on the truck's front windshield and a bullet impact was on the driver's door. Phelps opined the damage to the driver's side window of the truck was caused by one or more bullets fired from inside the truck. A bullet fired outside the truck created a hole in the driver's door.

Phelps also testified that a black hooded sweatshirt recovered on 53rd Street had three bullet holes in front and one in the back. Appellant's DNA was on the sweatshirt.

Los Angeles Police Officer Gary Koba found a nine-millimeter Sauer semiautomatic handgun under the crawl space of the house adjoining the driveway towards which appellant had fled. Another department criminalist examined the 8 nine-millimeter casings and determined they were fired from a Sauer pistol.[3] He also determined seven .40-caliber casings were fired from a .40-caliber Glock pistol. The projectile recovered from the truck's floorboard was consistent with a nine-millimeter bullet and not a projectile fired from the Glock pistol.

A police gang expert testified appellant and Beemon were members of the Five Deuce Hoover Crips gang. The shooting occurred in the gang's territory.

Appellant was arrested in Henderson, Nevada.

2. Defense Evidence.

In defense, Rogelio Cervantes testified he lived on 53rd Street, perhaps 100 feet from the corner of 53rd and Hoover Streets. About 9:40 a.m. on January 17, 2012, Cervantes was on the front porch of his home when he saw a car travelling towards Hoover Street. The car stopped near a truck and a skinny Black man exited the car. At some point, a White man and a Black man were in the truck.

When the skinny man exited the car's driver's side, Cervantes heard two gunshots and threw himself to the ground. Cervantes saw the first shot when it was coming from the truck. When Cervantes heard the shot and looked towards the truck, a

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[3] The parties stipulated: (1) the Sauer handgun retrieved by Koba was transported to LAPD's scientific investigation division for analysis, (2) the nine-millimeter casings were fired from the Sauer, and (3) the .40-caliber Smith and Wesson casings were fired from Washington's Glock handgun.

White man with a shotgun was standing near the truck's open passenger door. The White man was shooting towards Cervantes's house.

The other occupant of the truck, a short Black man whom Cervantes thought was the truck's driver, ran behind the rear bumper on the truck's driver's side. The driver remained behind the truck and was looking in Cervantes's direction. Cervantes told police he saw the men who had exited the truck shoot at the skinny man.

The skinny man ran west towards Cervantes and his house, and Cervantes heard gunshots coming from the truck. The skinny man had nothing in his hands. The skinny man fell, stood, then continued running. Cervantes did not see him running with one hand pointed towards the truck.

The skinny man ran to a pillar on Cervantes's porch, stood behind the pillar, and fired six or seven shots at the truck. Cervantes entered his house. The men at the truck were ducking. The White man was ducking behind the truck's open passenger door. Bullets from the skinny man's gun hit the windshield and driver's door of the truck. Cervantes thought the people shooting from the truck were gang members trying to get the skinny man. Cervantes was about 100 feet from the truck when he viewed these events.

3. Key Theories at Trial.

The prosecution's theory at trial was that appellant intended to shoot Washington and Falls because they were in Five Deuce Hoover territory and were perceived as enemies. The prosecution argued that Washington and Falls acted in self-defense when they shot at appellant, who was approaching the truck while pointing a gun at Washington.

The defense's theory was that the officers falsely testified that appellant pointed a gun at Washington, and that Washington overreacted and made a hasty judgment by shooting at an empty-handed appellant. When Washington initially used such unreasonable deadly force, appellant acted in self-defense by shooting back at the officer after he first tried to run away. Appellant pointed to evidence that no ejected shell casings from his Sauer handgun were located on the ground near the officers' truck.

ISSUES

Appellant claims the trial court erred by (1) giving special jury instruction No. 1 regarding the officers' right of self-defense, (2) excluding impeachment evidence, and (3) denying his *Wheeler*/*Batson*[4] motion. Appellant also asks this court to review independently the sealed transcript of the in camera hearing on his *Pitchess*[5] motion. Appellant further contends the case must be remanded in light of the recent passage of Senate Bill 620, which will give trial courts discretion to strike firearm enhancements when the law becomes effective on January 1, 2018. Finally, respondent claims the abstract of judgment must be modified to reflect the trial court's oral pronouncement of judgment concerning certain fines.

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[4] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*); *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*).

[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

DISCUSSION

1. Special Instruction No. 1 Was Proper.

Appellant contends that the court erroneously instructed the jury that if it found appellant had either displayed or drawn a handgun first, and if the officers reasonably believed that they faced an imminent threat of great bodily harm and that deadly force was necessary to prevent that danger, *then it did not matter if any actual danger existed*. Appellant contends that this last phrase impermissibly led the jury to believe it could convict him of attempted murder even if he posed no actual danger, i.e., even if he did not have an intent to kill Washington or Falls. We find that appellant forfeited his objection to the special instruction, but even if he had not, we reject his argument on the merits.

a. Pertinent Facts.

Appellant agreed to the court's proposal to give CALCRIM No. 600, the pattern instruction for attempted murder, and CALCRIM No. 965, the pattern instruction on shooting at an occupied motor vehicle. During the final charge to the jury, the court thus instructed on attempted murder, including its element that "[t]he defendant intended to kill that person," and instructed on shooting at an occupied motor vehicle that the People must prove that "[t]he defendant willfully and maliciously shot a firearm."[6]

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[6] The court further instructed the jury that "Someone commits an act willfully when he does it willingly or on purpose. [¶] Someone acts maliciously when he intentionally does a wrongful act or when he acts with the unlawful intent to disturb, defraud, annoy, or injure someone else." The instruction also stated that to prove the offense of shooting at an occupied vehicle, the People had to prove appellant did not act in self-defense.

Using CALCRIM No. 3470, the court instructed on appellant's right of self-defense and indicated it was a defense to both attempted murder and shooting at an occupied vehicle. Part of that instruction stated that "[t]he People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the People have not met this burden, you must find the defendant not guilty of the attempted murder or shooting at an occupied motor vehicle."[7]

During jury deliberations, the jury sent to the court a note stating, "We request the law because we are unclear on whether there is a difference between showing a weapon and drawing a weapon." A short time later the jury was brought into the courtroom and the foreperson reiterated the jury's confusion about the difference between showing and drawing a weapon. To avoid invading the deliberative process, the court did not further question the foreperson. Outside the presence of the jury, the court indicated it appeared the jury was trying to decide the impact of whether appellant merely displayed the gun, or drew it, on whether the officers were lawfully entitled to shoot at appellant in self-defense. The court noted the jury would need to assess several possible scenarios: (1) appellant did not show a gun and, therefore, when Washington and Falls started shooting at him, appellant had a right to shoot back in self-defense; (2) appellant showed the gun by pulling up his shirt, but never took it out of his waistband, in which case the jury was required to decide whether the officers reasonably believed they needed to

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[7] The jury was further instructed with CALCRIM No. 3472, which provides, "A person does not have the right to self-defense if he provokes a fight or a quarrel with the intent to create an excuse to use force."

act in self-defense; and (3) appellant drew his gun first, in which case it was quite likely the jury would find the officers reasonably shot at him in self-defense, and that appellant did not act in self-defense.

The court initially proposed a modified instruction for "attempted justifiable homicide by a public officer," but defense counsel objected. The court then proposed using CALCRIM No. 3470, the instruction on a *defendant's* right of self-defense, modified to instruct instead on the *officers'* right of self-defense. The proposed special instruction provided:

"If you find that Officer Washington and/or Special Agent Falls saw defendant Martin either display or draw a weapon, the People must prove beyond a reasonable doubt: [¶] [The] officer and/or special agent reasonably believed that he or his partner was in [imminent] danger of being killed or suffering great bodily injury; [¶] The officer and/or special agent reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] And the officer and/or special agent used no more force than was reasonably necessary to defend against that danger. [¶] . . . [¶] [The] officer and/or special agent's belief must have been reasonable, and he must have acted only because of that belief. [¶] . . . [¶] When deciding whether the officer and/or special agent's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the officer and/or special agent and consider what a reasonable person in a similar situation with similar knowledge would have believed. *If their beliefs were reasonable, the danger does not need to have actually existed. . . .*"

The morning after the trial court proposed the special instruction, appellant's counsel objected to the italicized language above because he felt it told the jury that if the officers acted reasonably, "then the attempted murder automatically flows from that conclusion." Counsel stated, "I would like to also include something about the prosecution still must prove that beyond a reasonable doubt that" appellant did not act in self-defense. The court agreed to add that language, and with the agreed-upon addition, appellant's counsel said he had no further objection. All counsel declined the court's offer to permit reargument to accompany the new instruction.

The court orally read to the jury special instruction No. 1 that was similar in all material respects to the proposed instruction set forth above.[8] The final instruction also included at the end appellant's counsel's requested addition that "the People have the burden of proving beyond a reasonable doubt that the defendants did not act in lawful self-defense. If the People have not met this burden you must find the defendants not guilty of attempted murder."

b. Analysis.

According to appellant, in instructing the jury that if the officers' beliefs were reasonable " 'the danger does not need to have actually existed,' " the court erroneously conveyed to the jurors that appellant did not need to pose an actual danger to the officers in order to be found guilty of the offenses of attempted murder and shooting at an occupied vehicle. He contends that

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[8] The beginning of the instruction was amended to state that the jury was to consider it "[i]f you find that Officer Washington or Special Agent Falls saw defendant Martin either display or draw a handgun upon exiting the car."

this instruction undercut the requirement that appellant be found guilty of attempted murder only if he had the requisite intent to kill, and guilty of shooting at an occupied vehicle only if he "willfully and maliciously" shot his gun at the truck.

(i) Appellant forfeited his claim of instructional error.

"A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal [citations]. . . . If [a] defendant believe[s an] instruction . . . require[s] elaboration or clarification, he [is] obliged to request such elaboration or clarification in the trial court." (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

The special instruction, including the phrase, "the danger does not need to have actually existed," correctly defined the *officers'* right of self-defense, and appellant does not otherwise contend.[9] Appellant also does not assert that the jury was improperly instructed on the elements of attempted murder or shooting at an occupied vehicle. Rather, appellant's claim boils down to a concern that the jury could have been confused by this self-defense instruction as to the *officers*, in assessing what

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[9] Citing *People v. Watie* (2002) 100 Cal.App.4th 866, 876, appellant concedes that "a jury instruction regarding the victim's right of self-defense may be warranted when the defendant is charged with an assaultive type crime." Appellant does not contend that the court generally erred by instructing the jury as to the circumstances in which the officers had the right to use deadly force to defend themselves.

mental elements needed to be proven as to *appellant* in order to find him guilty of the charged offenses.

Appellant's counsel had every opportunity to seek a modification or clarification of the proposed special instruction No. 1 to ensure that the jury would not consider the phrase, "the danger does not need to have actually existed," when determining whether *appellant* harbored the mental elements of the crimes of attempted murder or shooting at an occupied motor vehicle. Indeed, the court made the one modification requested by appellant's counsel, adding that it remained the People's burden to prove beyond a reasonable doubt that the defendants did not act in self-defense. Once that modification was made, appellant's counsel said he was "fine" with the proposed special instruction. Appellant, by his failure to request clarifying instructions on the point now urged, forfeited the issue of whether the special instruction was erroneous.

(ii) It is not reasonably likely that the jury misapplied special instruction No. 1.

Even if appellant did not forfeit his claim of instructional error, his claim is without merit. "In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys." (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.) "In reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.]" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220.) "Jurors

are presumed able to understand and correlate instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

As stated above, the jury was correctly instructed with the pattern instructions for attempted murder and shooting at an occupied vehicle. The jury was instructed that in order to convict appellant of attempted murder of Washington and Falls, it had to find that he "intended to kill" each of them. The jury was further instructed that in order to find appellant guilty of shooting at an occupied vehicle, it had to find that he "willfully and maliciously" shot at the car. The jury was also instructed that "[t]he People must prove not only the defendants did the acts charged but also that they acted with a particular intent or mental state. The instruction for each crime and allegation explains the intent or mental state required." We presume the jury followed these instructions in convicting appellant on counts one through three (*People v. Clark* (2016) 63 Cal.4th 522, 589), and we find it is not reasonably likely that, because of the wording in the separate self-defense instruction pertaining to the *officers*' state of mind, the jury would abandon the defined elements of the charged offenses and find appellant guilty of attempted murder and shooting at an occupied vehicle without finding he possessed the requisite intent to commit those offenses.

Fairly read together, the jury instructions did *not* advise the jurors that if they found that the officers reasonably acted in self-defense based on a mistaken assumption that they were in danger, that finding correlated with a finding that appellant was guilty of the charged offenses. The jury instructions, and the closing arguments of the parties, left open the possibility that the jury could find both that the officers reasonably acted in self-defense, *and* that appellant subsequently acted in self-defense.

That scenario was possible if the jury found that no actual danger existed when appellant exited the car because he did not intend to harm Washington or Falls, but the officers mistakenly (but reasonably) believed that appellant planned to shoot them because he lifted up his shirt and revealed a weapon in his waistband. In that event, the jury still could have found that appellant acted in self-defense, reacting to the officers' use of deadly force. Notably, the jury was instructed at the end of the special instruction No. 1 that even if the jury applied that instruction and concluded the officers acted in self-defense, the People still had to prove beyond a reasonable doubt that appellant *did not* act in self-defense.

In sum, we find no instructional error.

2. The Court Did Not Erroneously Exclude Impeachment Evidence.

At trial, defense counsel sought to elicit testimony from Washington that he refused to provide a voluntary statement about the present shooting during an LAPD internal affairs investigation, and only made a statement under threat of disciplinary action. We conclude that the trial court did not err in excluding the proposed testimony under Evidence Code section 352.

a. POBRA and Script for LAPD Interrogations

The LAPD's internal affairs investigation regarding the present shooting was subject to the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq. [POBRA]), which sets forth certain protections for peace officers. As relevant here, Government Code section 3303 sets forth conditions for conducting an interrogation of an officer who "is under investigation and subjected to interrogation by his or her

commanding officer . . . ." (Gov. Code, § 3303; see *Berkeley Police Assn. v. City of Berkeley* (2008) 167 Cal.App.4th 385, 406-407.) It provides that the "officer under interrogation shall not be . . . threatened with punitive action, except that an officer refusing to respond to questions or submit to interrogations shall be informed that failure to answer questions directly related to the investigation or interrogation may result in punitive action." (Gov. Code, § 3303, subd. (e).) Further, with certain exceptions, "[n]o statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action shall be admissible in any subsequent civil proceeding." (*Id.,* § 3303, subd. (f); see *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827-828.) In addition, "[n]o public safety officer shall be subjected to punitive action . . . because of the lawful exercise of the rights granted under this chapter [which includes section 3303] . . . ." (Gov. Code, § 3304, subd. (a).)[10]

If a police officer provides a voluntary statement as part of an internal investigation, that statement is admissible in any subsequent trial involving the officer. (*People v. Lazarus* (2015) 238 Cal.App.4th 734, 775-776 (*Lazarus*).) *Lazarus* suggests it is commonplace for LAPD officers who are subjected to interrogation as part of an internal investigation to take advantage of the protections afforded by POBRA for statements that are *not* voluntarily provided. They do so by refusing to make

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[10] To the extent appellant suggests that these procedural protections under POBRA are only applicable when it appears the officer is likely to be charged with a criminal offense, he is wrong. There are additional protections that come into play when a criminal prosecution is likely (Gov. Code, § 3303, subd. (h)), but those provisions are not at issue here.

a voluntary statement, and then providing a statement only after being advised that (1) their failure to answer questions could lead to administrative discipline, and (2) any statements made under the compulsion of the threat of such discipline cannot be used against them in subsequent proceedings. (*See id.* at pp. 770-771.) By proceeding this way, their statement may not be used against them in a subsequent civil proceeding.

Lazarus describes this standard process, as set forth in a declaration from a LAPD deputy chief: "[W]hen an officer is internally or administratively investigated . . . [i]f the officer does not wish to give a voluntary statement during an administrative interrogation, he or she is 'explicitly ordered, on pain of administrative discipline up to and including termination, to . . . answer questions.' Such instruction is 'always explicit and verbal, and the officer being interrogated is directed to sign a form indicating that [the officer is] the subject of an administrative investigation and that [the officer is] providing a statement under duress, for administrative purposes only.' " (*Lazarus, supra,* 238 Cal.App.4th at p. 770.) " '[I]n every case [in which the LAPD seeks to compel a statement from an officer] . . . they ask, ["]are you going to give a voluntary statement?["] ' If the officer exercises his or her Fifth Amendment privilege, the response is: ' ["]Very well, we are going to order you now to make a statement and now your privilege is protected because it's supplanted by the use immunity.["] ' " (*Id.* at p. 771.)

When the trial court was considering the prosecutor's objections to defense efforts to elicit testimony from Washington concerning his refusal to provide a voluntary statement, the court, outside the presence of the jury, had the prosecutor read

into the record the following excerpt of the interview between Washington and LAPD Detective David Smith:

"[Smith]: Before we begin this interview, will you provide a voluntary statement?

"[Washington]: No.

"[Smith]: Is this interview being conducted during your regularly schedule shift and work hours?

"[Washington]: Yes.

"[Smith]: Since you decline to provide a voluntary statement, I must read you the following: 'The entire investigation concerning this incident, including this tape-recorded interview, is classified as confidential by the Chief of Police. Do you understand?'

"[Washington]: Yes.

"[Smith]: As a supervisor of the Los Angeles Police Department and as authorized by the Chief of Police, I want to inform you that your silence could be deemed as insubordination, lead to administrative discipline, which will result in your discharge or removal from office, and that any statement made under compulsion of the threat of such discipline cannot be used against you in any subsequent criminal proceedings. Do you have any questions?

"[Washington]: Yes. If I refuse to answer your questions, may I be subject to discipline?

"[Smith]: Yes.

"[Washington]: Could that discipline be as much as discharge or removal from office?

"[Smith]: Yes.

"[Washington]: In other words, my statement will be used for internal administrative purposes only and will not be used in any way in any criminal investigation or prosecution?

"[Smith]: Yes.

"[Washington]: Also, my statement will not be used in any manner that is inconsistent with [POBRA]?

"[Smith]: Correct.

"[Washington]: For those reasons, and those reasons alone, I will give you a statement. I am not waiving any of my constitutional rights; however, I will cooperate with any criminal investigation arising out of this incident because case law and the [LAPD] manual requires me to do so upon pain of being discharged [for] insubordination resulting in possible termination.

"[Smith]: Okay. Thank you. I hereby order you to provide a statement in this matter. Okay?

"[Washington]: Yes." (Some punctuation changed.)

b. Trial Court's Ruling.

The trial court found that Washington's refusal to provide a voluntary statement was irrelevant, and that under Evidence Code section 352, "the probative value is far outweighed by the prejudicial effect." The court found that "the fact that [Washington] wouldn't give a voluntary statement, he was exercising his rights in protecting [against] any possible future action against him, that he cooperated when he was ordered to do so with the understanding that it was a confidential interview that otherwise couldn't be used for any criminal purposes. I am not going to allow him to be impeached for that."

When appellant reiterated he was offering the testimony for impeachment and to show bias and motive, the court replied, "this wasn't put in by the prosecution. This whole interview was first put in by you. So it's not [that the prosecution was] trying to show [Washington's] more credible . . . ."

c. Analysis.

Appellant claims the trial court erred by excluding as irrelevant, and under Evidence Code section 352, testimony from Washington that he refused to give a voluntary statement. Appellant argues, "The trial court refused to allow Washington to be impeached with his refusal to answer the questions. This ruling was erroneous because evidence demonstrating consciousness of guilt by Washington was critical defense evidence." We review a trial court's evidentiary rulings for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718,723-724; *People v. Tuggles* (2009) 178 Cal.App.4th 1106, 1128.)

Appellant concedes the LAPD was conducting an internal affairs investigation of Washington's involvement in the instant shooting. It is clear from the essentially scripted colloquy between Washington and Smith that at the time Washington refused to give a voluntary statement, he was intending to exercise his rights under POBRA to provide a statement, under compulsion of disciplinary action, which could not be used against him in a subsequent civil proceeding.

Even assuming the anticipated testimony regarding Washington's refusal to provide a voluntary statement was relevant, the trial court reasonably excluded the testimony under Evidence Code section 352. Admission of the testimony would have necessitated undue consumption of time, and would have

created a substantial danger of undue prejudice, of confusion (including regarding the underlying POBRA protections and standard scripts used by the LAPD in internal affairs interviews), and of misleading the jury. This is especially true where, as here, Washington ultimately cooperated and answered questions about the shooting.

Further, as the trial court also indicated, evidence of Washington's refusal to give a voluntary statement was inadmissible impeachment on a collateral matter. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Nor did the exclusion of this evidence violate appellant's constitutional rights, as appellant failed to demonstrate that admitting such evidence would have produced a "significantly different impression" of Washington's credibility. (*People v. Contreras* (2013) 58 Cal.4th 123, 152; see *People v. Dement* (2011) 53 Cal.4th 1, 52 [the " 'ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' "].)

3. No *Wheeler/Batson* Error Occurred.

Appellant claims the prosecutor impermissibly challenged Jurors 9, 4, and 12 because they were African-Americans,[11] and, accordingly, the trial court erroneously denied appellant's *Wheeler*/*Batson* motion as to those three jurors. We conclude otherwise.

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[11] Although appellant's *Wheeler*/*Batson* challenge below alleged discrimination as to both race and gender, on appeal appellant contends only that the prosecutor engaged in race-based discrimination against African-American prospective jurors. Appellant himself is African-American.

Appellant made his *Wheeler*/*Batson* motion after Juror Nos. 9, 4, and 12 were excused, but explicitly brought his motion only as to the last two jurors, Juror Nos. 4 and 12. Appellant thus forfeited any *Wheeler*/*Batson* issues as to Juror 9.[12] (*People v. Avila* (2006) 38 Cal.4th 491, 553.)

As for the peremptory challenges to Juror Nos. 4 and 12, for the reasons that follow, we find that the trial court did not err in finding that appellant failed to make a prima facie showing of racial discrimination.

a. Juror No. 4.

During voir dire of prospective Juror No. 4 (originally Juror No. 16, with badge No. 2904), she testified she was single, employed as a respiratory therapist, and without prior jury experience. She had never been a victim of, or a witness to, a crime. The court asked if anyone close to her had been arrested for, charged with, or convicted of, a crime. She replied, "my brother, my cousin, and my stepfather." The court asked what kind of crimes, and she replied, "statutory rape, burglary, theft, and second degree murder." She denied having strong feelings about law enforcement that would make it difficult for her to be fair, and indicated she had family friends who worked in the criminal justice system as a probation officer, a police officer, and a correction officer. She indicated she could be fair to both sides.

Juror No. 4 also testified that officers sometimes "overreact or use excessive force out of fear or out of being threatened," and

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[12] We note that although the record confirms that Juror No. 9 was female, appellant has pointed to no evidence in the record that identified her as being African-American. As noted, appellant's trial counsel did not object to her dismissal and thus did not note her race.

she said that race was sometime a factor. In explaining her answer, she stated, "Because you see it in the news all the time, you know, just racial profiling, African-Americans." In response to further questioning, she acknowledged that it was possible for people of all races and occupations to engage in racial profiling.

Juror No. 4 later was one of several jurors to respond affirmatively to the prosecutor's question whether the police were sometimes too quick to use their guns. She said, "Well, you just see all the time where the police officer killed someone just because they thought they had a gun, and it's a phone, for example, and my first question is always, what happened to them being trained to take the threat down, but why kill them, and then it's kids. I mean, it happens frequently, well, that's the case, and I always question that every time I hear it." She later testified that she understood officers had to use their weapons in response to an actual threat, but she questioned why officers had to "put them down, just their arm, their leg, something to just stop them, but why do you shoot, shoot, shoot to kill?"

b. Juror No. 12.

During voir dire on the issue of hardship preventing jury service, Juror No. 12 (badge No. 5643) testified she was unavailable because she was taking her son to college. She then testified she was "visiting colleges next week" with her son and, when the court asked her where her planned visits were, she responded, "I have a visit lined up at Mammoth" from Wednesday until Friday or Saturday. The court asked if she had any proof of her plans, and she said no. The court asked if the visit could be postponed, and she responded, "Well, I don't have to be there. [¶] . . . [¶] There are several of us going."

Juror No. 12 testified she was single, unemployed, and had no prior jury experience. She denied ever being a victim of, or witness to, a crime, but indicated she had an uncle who was murdered. No one close to her had been arrested for, or convicted of, a crime. She denied having any strong feelings about law enforcement that might prevent her from being fair, and indicated she could be fair to both sides.

Juror No. 12 testified that two stereotypes she attributed to gang members were that they do not finish school and they do not grow up in a loving family or with support. She stated her belief that gang members should be taken off the street, "if the evidence points to it."

Later, the prosecutor asked if anyone felt that police should be held to a higher standard or subjected to more scrutiny as to their credibility. Juror No. 12 was the only prospective juror on the panel to raise her hand and indicate that "maybe" she did believe that police officers should be subject to more scrutiny as to their credibility, because they are in a position of authority and their occupation allows them to carry and use a gun. The prosecutor examined her further on this issue, and ultimately she agreed that no matter what occupations people hold, they should be subject to the same level of scrutiny in terms of their credibility as witnesses.

Besides Juror No. 4 (and Juror No. 8 who was the prosecutor's first peremptory challenge), Juror No. 12 was the only other juror who raised her hand in response to the prosecutor's general question to the panel about whether police are too quick to use their guns. Juror No. 12 offered that "there was recently a situation, I believe Ohio, where a six-year-old Black child was killed in the car. Six years old, you had to shoot

a child who was in his vehicle? That's excessive force." Juror No. 12 said she "absolutely" believed that the case of the child killed in Ohio involved excessive and unreasonable force, but she denied that any of her feelings about that case might cause her to be unfair in the instant case. She denied believing that, in general, police officers tend to overreact and resort to lethal force.

c. Appellant's Motion.

The prosecutor exercised a total of six peremptory challenges, including to Juror Nos. 4 and 12, as his fifth and sixth challenges, respectively. During a sidebar conference, appellant's counsel stated, "I'm just getting concerned at this point. I bring a *Batson/Wheeler* just on the last two jurors. . . . They both are . . . female, both Black, and . . . so . . . I didn't see them as biased jurors."

The trial court stated, "Oh, I beg to differ, each and every one of them. . . . I'm going to find you didn't make a prima facie case, and that's because each and every one of them had some question about police being either trigger happy or too quick or questions about police activity. No prosecutor in their right mind would keep that juror independent of any skin color. It's very obvious and very clear."

The court then indicated the prosecutor could make additional comments but was not required to do so. After the prosecutor provided his reasons for dismissing the jurors, the court did not address the stated justifications.

d. Analysis.

In *Wheeler*, our Supreme Court concluded that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; accord, *People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*).) *Batson* reached the same conclusion based on the federal equal protection clause. (*People v. Huggins* (2006) 38 Cal.4th 175, 226.)

When a defendant asserts at trial that the prosecution's peremptory challenges were based on race, the defendant must make out a prima facie case by showing the totality of the relevant facts gives rise to an inference of discriminatory purpose. The burden then shifts to the People to provide permissible race-neutral justifications for the challenges. Thereafter, if a race-neutral explanation is tendered, the trial court must decide whether the defendant has proven purposeful racial discrimination. (*People v. Cowan* (2010) 50 Cal.4th 401, 447; accord *Gutierrez, supra*, 2 Cal.5th at pp. 1157-1159.)

"[T]he existence of a prima facie case depends on consideration of the entire record of voir dire as of the time the motion was made." (*People v. Scott* (2015) 61 Cal.4th 363, 384 (*Scott*).) The challenged juror's "racial identity, standing alone, is not dispositive" in determining whether a defendant has made a prima facie showing of race-based discrimination by the prosecution in its juror challenge. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 470 (*Sattiewhite*).) Among the relevant factors to consider are "whether the prosecution (1) struck most or all of the members of an identifiable group from the venire, (2) used a

disproportionate number of its peremptory challenges against that group, or (3) engaged in little more than desultory voir dire." (*Ibid.*) Evidence that the defendant is a member of the identified group is also relevant to the inquiry, although that factor may have less import where the victim is also a member of the same group. (*Scott,* at p. 384; *People v. DeHoyos* (2013) 57 Cal.4th 79, 115 [where the defendant and the victim were of the same race, "it was unlikely the prosecutor would be concerned about minorities unduly identifying with the defendant"]; *People v. Jones* (2017) 7 Cal.App.5th 787, 805 [fact that victim was same race as defendant and excused juror supported trial court's finding of no prima facie case of race-based peremptory challenge].) At this first stage, " '[a] court may also consider nondiscriminatory reasons for a peremptory challenge that are apparent from and "clearly established" in the record.' " (*People v. Sanchez* (2016) 63 Cal.4th 411, 434.)

"When a trial court denies a motion under *Wheeler*, . . . after finding no prima facie case of group bias, we consider the entire record of voir dire for evidence to support the trial court's ruling. If the record suggests grounds upon which the prosecutor might reasonably have challenged the prospective jurors in question, we affirm." (*People v. Yeoman* (2003) 31 Cal.4th 93, 116; accord *Jones, supra,* 7 Cal.App.5th at p. 802.) " 'Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we must give "considerable deference" to the determination that appellant failed to establish a prima facie case of improper exclusion. [Citation.]' [Citation.]" (*People v. Rushing* (2011) 197 Cal.App.4th 801, 809; see *People v. Lenix* (2008) 44 Cal.4th 602, 621.) Only if we were to determine

that the trial court erred in finding no prima facie case of discrimination would we proceed to the "third stage" and examine the prosecutor's asserted reasons for excusing the jurors. (*Scott, supra,* 61 Cal.4th at p. 391.)[13]

The trial court properly found appellant failed to make a prima facie case of discrimination as to Juror Nos. 4 and 12. Appellant's showing amounted to little more than pointing out the fact that out of six total peremptory challenges, the prosecutor challenged two female African-Americans, Juror Nos. 4 and 12. Two out of six peremptory challenges is not a disproportionate number and, unfortunately, appellant failed to make a record of the racial makeup of the jury panel at the time; thus, for all we know, there were a number of African-Americans left on the panel. (*People v. Parker* (2017) 2 Cal.5th 1184, 1212 (*Parker*) [even assuming prosecutor struck only two African-Americans in the jury pool, this "bare circumstance" was insufficient to support inference that they were challenged

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[13] After finding that appellant had failed to establish a prima facie case of discrimination, the court stated, "If the D.A. wants to add anything, that's their business, but they are not required to." The prosecutor then elected to augment the record with his reasons for excusing the jurors, after which the court made no comment. "[A]n appellate court properly reviews the first-stage ruling if the trial court has determined that no prima facie case of discrimination exists, then allows or invites the prosecutor to state reasons for excusing the juror, but refrains from ruling on the validity of those reasons." (*Scott, supra*, 61 Cal.4th at p. 386; see *Sattiewhite, supra,* 59 Cal.4th at p. 470 [unless trial court explicitly or implicitly evaluated prosecutor's stated justifications, appellate review should begin with trial court's first stage finding of no prima facie case].)

because of their race].) Although it is relevant that appellant was African-American, that fact alone does not establish a prima facie case (*id.* at p. 1213), and is even less compelling given that the victims, Washington and Falls, were both African-Americans themselves. Further supporting the trial court's determination that no prima facie case was made is that the prosecutor engaged in extensive and focused, rather than desultory, questioning of both Juror Nos. 4 and 12.

Moreover, the record supports the trial court's view that there were evident race-neutral reasons for challenging Juror Nos. 4 and 12. Juror No. 4 had close relatives with significant negative experiences with the criminal justice system. (Cf. *Wheeler*, *supra,* 22 Cal.3d at p. 277, fn. 18; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690.) Moreover, she indicated her belief that police sometimes overreact and use excessive force, and suggested that African-Americans are frequently the subject of racial profiling and the use of unreasonable force. She questioned why police shoot to kill instead of merely shooting to wound and stop a person. She was one of only a few jurors (all of whom were dismissed by the prosecutor) to respond affirmatively that she believed police are often too quick to use their guns. She indicated that she believed that the police "frequently" shoot and kill someone who turns out not to have a weapon. Given all her statements, it was a reasonable conclusion that Juror No. 4 had a negative attitude towards law enforcement and could be unduly defense-oriented. (Cf. *People v. Winbush* (2017) 2 Cal.5th 402, 436; see *People v. Jordan* (2006) 146 Cal.App.4th 232, 258.)

Juror No. 12 similarly evidenced a distrust and negative attitude towards law enforcement. She initially made comments suggesting police officers' credibility should be subject to greater scrutiny. She was also one of the few jurors to raise her hand to indicate she agreed that police officers were often too quick to use their guns. She referenced a deadly police shooting of a child in Ohio as an instance of police use of excessive force.

Further, Juror No. 12 initially claimed hardship because she said she had to take her son to college; then changed her answer to say she had college trips planned; then stated she had one trip planned "to Mammoth" for four days the following week but did not have any proof; and finally she said she did not need to go on the trip because several people were going. This record suggested that Juror No. 12 may have been untruthful in claiming a hardship, providing another race-neutral ground for excluding her.

The trial court did not err in finding that appellant failed to make a prima facie showing that Juror No. 4 or Juror No. 12 was challenged because of race. No *Wheeler*/*Batson* error occurred.

4. The Trial Court Fulfilled Its Responsibilities Under *Pitchess*.

On December 4, 2013, appellant filed a pretrial *Pitchess* motion seeking evidence of misconduct by Washington as contained in various LAPD records. On January 2, 2014, the court granted the motion as to acts "of dishonesty and excessive force." The January 8, 2014 minute order reflects that on that date, Commissioner H. Elizabeth Harris called the matter for an in camera hearing on the *Pitchess* motion. The court, court reporter, and an LAPD records custodian were in chambers. The minute order states, "After [the] in-camera hearing, discoverable

information is found." The court ordered the records custodian to turn over to defense counsel all discoverable information.

On May 25, 2017, this court issued an order directing the clerk of the superior court to have prepared and sent to this court a sealed reporter's transcript of the oral proceedings that transpired during the January 8, 2014 in camera hearing. However, the managing court reporter for the Los Angeles Superior Court sent to this court a declaration indicating there were no proceedings held on the record on January 8, 2014, and thus no transcript of those proceedings could be prepared.

People v. Mooc (2001) 26 Cal.4th 1216, 1228-1229 (*Mooc*) requires a trial court to make a record of which documents it examined before ruling on a *Pitchess* motion, to permit the appellate court to conduct a meaningful review of that ruling. To enable us to conduct such a review of the trial court's decisions during the January 8, 2014 in camera hearing, we issued an order on June 16, 2017, which, inter alia, directed Commissioner Harris to conduct, and transcribe the proceedings of, a limited in camera hearing to settle the record as to what documents the commissioner ordered disclosed on January 8, 2014. The order also directed that a sealed reporter's transcript of the record settlement proceedings be provided to this court. On July 14, 2017, the commissioner conducted the in camera record settlement proceedings and the superior court clerk later provided to this court the sealed reporter's transcript of those proceedings.

Appellant asks this court to conduct an independent review of the sealed reporter's transcript of the January 8, 2014 in camera hearing to determine if discoverable evidence was not turned over to the defense. As mentioned, that transcript is unavailable. However, this court has reviewed the sealed reporter's transcript of the July 14, 2017 record settlement proceedings.

Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Memro* (1995) 11 Cal.4th 786, 832.) The sealed reporter's transcript of the July 14, 2017 record settlement proceedings constitutes an adequate record of the trial court's review of the documents provided to the trial court during the January 8, 2014 in camera hearing, and fails to demonstrate the trial court abused its discretion by not disclosing additional information. (Cf. *Samayoa*, at p. 827; see *Mooc, supra,* 26 Cal.4th at pp. 1228-1230, 1232.) The trial court fulfilled its responsibilities under *Pitchess*.

5. Appellant is Not Entitled to Remand Pursuant to Senate Bill 620.

For counts 1 through 3, the jury found true firearm enhancements under section 12022.53, subdivisions (b) and (c). The trial court imposed the then-mandatory enhancement under subdivision (c) of section 12022.53 as to counts 1 and 2, adding 20 years and six years eight months, respectively, to appellant's sentence. (The sentence for count 3 was stayed pursuant to section 654.) In post-argument briefing, the parties addressed whether, as a result of the recent Senate Bill 620, this matter must be remanded to the trial court for resentencing so that the court may exercise its newly-bestowed discretion regarding

whether to strike the firearm enhancements on appellant's sentence.

On October 11, 2017, the Governor signed Senate Bill 620. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike an enhancement for personally using (§ 12022.53, subd. (b)) or personally and intentionally discharging (*id.*, subd. (c)) a firearm. The new provision states as follows: "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Senate Bill 620 does not go into effect until January 1, 2018, but the Attorney General concedes that, if appellant's conviction is not yet final as of January 1, 2018, appellant would be eligible to have the matter remanded for resentencing because the amended statute granting discretion to the trial court has the potential to lead to a reduced sentence. (See *In re Estrada* (1965) 63 Cal.2d 740, 748 [for a non-final conviction, "where the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed"]; *People v. Francis* (1969) 71 Cal.2d 66, 75-78 [where statute enacted during pending appeal gave trial court discretion to impose a lesser penalty, remand was required for resentencing].) Even so, the Attorney General argues remand would not be appropriate in this particular case because, based on the record at sentencing, there is no reasonable probability that the trial court would strike the enhancements if given the opportunity on remand. (See *People v.*

Gutierrez (1996) 48 Cal.App.4th 1894, 1896 [remand not required where trial court's comments at sentencing and sentence itself clearly indicate that the court would not have exercised its discretion to strike allegations and thus "no purpose" would be served by a remand].) We agree with the Attorney General that remand would be futile here.

The new provision directs courts to exercise discretion as to whether to strike a firearm enhancement "in the interest of justice pursuant to Section 1385." (Stats. 2017, ch. 682, § 2.) In turn, section 1385 provides that a court may, "in furtherance of justice, order an action to be dismissed." (§ 1385, subd. (a).) A trial court's discretion under section 1385 to dismiss "an action" extends to striking "factual allegations relevant to sentencing," including striking prior felony conviction allegations in cases brought under the Three Strikes law and striking non-mandatory sentence enhancements. (*People v. Hernandez* (2000) 22 Cal.4th 512, 523, italics omitted; see *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529–530; *People v. Jones* (2007) 157 Cal.App.4th 1373, 1379-1381.)

In determining whether striking a prior felony strike allegation or a non-mandatory sentencing enhancement is "in furtherance of justice," the trial court must consider "both . . . the constitutional rights of the defendant, and the interests of society represented by the People." (*Romero, supra,* 13 Cal.4th at p. 530, italics omitted; see *People v. Williams* (1998) 17 Cal.4th 148, 161.) "[T]he court should consider the nature and circumstances of the defendant's current crimes, the defendant's prior convictions, and the particulars of his or her background, character, and prospects." (*People v. Orabuena* (2004)

116 Cal.App.4th 84, 99.) This standard will guide a trial court's decision whether to strike a firearms enhancement.

At sentencing, appellant made a *Romero* motion to strike his prior felony strike conviction from 2006. The court denied the motion, stating the following: "I'm looking at, quite frankly, the facts of this crime and realizing the defendant did not know that the two involved officers, the FBI agent and the police officer, were officers. He still was attempting to blow away two people to put it bluntly, and I don't think he's deserving of any discretion on the court's part to strike a prior. It's my belief for these kinds of actions he deserves to serve the maximum." Accordingly, the trial court engaged in an exercise of discretion under section 1385 as to appellant's motion to strike a felony strike allegation, and concluded that it should not exercise its discretion to strike the allegation because of the nature and circumstances of appellant's current crimes. Because the court already has found that appellant is not deserving of an exercise of discretion to lessen his sentence by striking a prior strike allegation, it would defy reason to assume that the court would, applying the same standard, decide to strike the firearm enhancements under section 12022.53.

Even if the trial court had not already specifically engaged in an exercise of discretion under section 1385, given the sentence imposed and the comments made by the court at the sentencing hearing, it plainly would serve "no purpose" to remand the matter. (*People v. Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) The court noted that appellant was ineligible for probation, but emphasized that "[e]ven if he were not ineligible, I would not grant him probation because of the severity of the crimes." The court further found "no circumstances in mitigation" and

reiterated its conclusion that appellant "deserves to do the maximum amount of time." The court imposed the upper term on count 1 and rejected appellant's request that it impose a concurrent rather than a consecutive sentence on count 2. Because there is no reasonable likelihood that the trial court would choose to exercise its discretion to strike the firearm enhancements if the matter were remanded, we conclude that remand would be futile.

6. The Abstract of Judgment Must Be Corrected.

During the August 14, 2015 sentencing hearing, the court imposed on each of the four counts a $240 section 1202.4, subdivision (b) restitution fine and a $240 section 1202.45 parole revocation fine. However, the abstract of judgment filed August 20, 2015, reflects the court imposed in this case the following: "$300 per PC 1202.4(b) . . . ; $300 per PC 1202.45 suspended unless parole is revoked."

Respondent claims without dispute that the abstract of judgment must be modified to reflect one $960 section 1202.4, subdivision (b) restitution fine, and one $960 section 1202.45 parole revocation fine. We agree. Although imposition of four $240 section 1202.4, subdivision (b) fines (one for each count) and four corresponding section 1202.45 fines was error because only one section 1202.4, subdivision (b) fine and one section 1202.45 fine may be imposed in a case (*People v. Sencion* (2012) 211 Cal.App.4th 480, 482-483), the error was not prejudicial because $960 was well within the applicable statutory range of $240 to $10,000 for the section 1202.4, subdivision (b) fine (*ibid.*) (and the section 1202.45 fine must be equal). We will direct the trial court to amend the abstract of judgment accordingly. (Cf. *People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.)

DISPOSITION

The judgment is affirmed. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting that the trial court has imposed a $960 Penal Code section 1202.4, subdivision (b) restitution fine and a $960 Penal Code section 1202.45 parole revocation fine, and that the latter fine is suspended unless appellant's parole is revoked.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STONE, J.*

I concur:

EDMON, P. 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.

LAVIN, J., Concurring:

I concur in the judgment. After review, I have found no error requiring reversal. I also agree with the majority that the matter should not be remanded as a result of the recent passage of Senate Bill 620.

I write separately because I do not join in the majority's entire *Wheeler/Batson* analysis. While I agree with the majority that the record does not establish the racial makeup of the jury panel at the time the prosecutor challenged Juror Nos. 4 and 12, the responsibility for making an adequate record is not solely the responsibility of the defense. "Counsel have a role to play in ensuring that the record of proceedings sufficiently supports neutral, credible justifications for strikes of prospective jurors. But the ultimate responsibility of safeguarding the integrity of jury selection and our justice system rests with courts." (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1175.) In my view, however, the defense failed to make out a prima facie case because evidence of specific bias was elicited from each of the prospective jurors in question. My conclusion, therefore, does not rest on the racial makeup of the venire or the jury.

LAVIN, J.