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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY BERTON MILES, Defendant and Appellant.	B282723 (Los Angeles County Super. Ct. No. BA437493)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Heather E. Shallenberger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Jefferey Berton Miles of two robberies, an attempted robbery, two attempted murders and three assaults with a firearm, all in connection with a string of robberies occurring on three consecutive days. The jury also found multiple firearm-enhancement allegations to be true. The trial court sentenced appellant to a total term of 66 years and eight months to life in state prison.

On appeal, appellant contends that the court abused its discretion and violated his right to present a complete defense by: (1) preventing him from impeaching the prosecution's ballistics expert using a certain federal report; (2) excluding the proposed testimony of his ballistics expert; and (3) excluding the proposed testimony of an eyewitness identification expert. Appellant also contests the sufficiency of the evidence to support his convictions in connection with one of the robberies. Finally, appellant argues we should remand for the trial court to exercise its discretion under Senate Bill No. 620 (2017-2018 Reg. Sess.) to strike the firearm enhancements. Finding no error and concluding that remand for resentencing under Senate Bill No. 620 is unnecessary, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Information*

As relevant here, an information charged appellant with two counts of robbery (Pen. Code, § 211),[1] one count of attempted robbery (§§ 664 & 211), two counts of attempted murder (§§ 664 & 187, subd. (a)), and three counts of assault with a firearm

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

(§ 245, subd. (a)(2)). The information also alleged that appellant used a firearm in the commission of the robberies and attempted robbery (§ 12022.53, subd. (b)), and that he intentionally discharged a firearm proximately causing great bodily injury in the commission of the attempted murders (§ 12022.53, subd. (d)).[2]

B. *Evidence at Trial*

1. *Robbery at the "54th Street" Gas Station*

On June 15, 2015, at around 3:30 p.m., Yosef Ben Elyahu was working as a cashier at the "54th Street" gas station at 3227 West 54th Street in Los Angeles. Ben Elyahu was returning to his register after assisting a customer when a man approached him from behind and pointed a gun at his head. Because he was afraid, Ben Elyahu did not look at the man. The man then threw a bag onto the register and demanded the money. After Ben Elyahu emptied the register into the bag, the man took the bag and walked away. Ben Elyahu was subsequently unable to identify appellant as the robber in either a photo lineup or at trial.

The gas station's security cameras recorded the robbery. The video showed the robber, an African-American male, arriving and later escaping in a silver SUV. The robber was wearing glasses, a gray sweat suit and a brown beanie. The sweat suit had a black line running across the chest and sleeves and down the pants. The beanie had a small brim and a white tag with the letters "ES."

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[2] Appellant was charged with additional counts relating to a robbery at a "Best 1" convenience store. The jury acquitted appellant of those charges, and they are not pertinent to his appeal.

2. *Robbery at Big Lots*

The following day, June 16, at around 2:00 p.m., Sabina Montano was working as a cashier at the Big Lots store at 1815 Slauson Avenue in Los Angeles. Montano was assisting a customer when a man suddenly cornered her, pushed her against the register, shot her in the abdomen, and placed a bag on the register. The man, who was African-American, was wearing glasses and a "set" of matching "sweats." After Montano began transferring money from the register into the bag, the man shot her in the abdomen a second time. Both bullets exited her body. The man took more money out of the register and ran out of the store. He then escaped in a "light color[ed]" or "silver" Cadillac SUV with either "paper plate[s]" or "no license plate."

Police later recovered a bullet from the scene, and obtained video from the store's security system. The video showed that the robber was wearing a gray sweat suit. Montano survived the shooting. She identified appellant as the robber in a photo lineup and later at trial.

3. *Attempted Robbery at ARCO*

The following day, June 17, at around 4:40 p.m., Victor Alvarez was working as a cashier at the ARCO gas station at 5804 South Crenshaw Boulevard in Los Angeles. A man approached Alvarez's counter, pointed a gun at Alvarez, handed him a bag and told him to place all the money in the bag. Alvarez activated an alarm. The man then shot Alvarez in the abdomen, ran out without taking any money and fled in a Cadillac SUV.

Here, too, the gas station's security cameras recorded the events. Security video showed the perpetrator, an African-American male, exiting a silver Cadillac SUV with a paper license plate at the front. He was wearing glasses, black athletic

shoes, jeans shorts, and a brown beanie. The shoes had a silver-colored medallion attached to the laces. The beanie had a small brim and a white tag with the letters "ES." The video also showed that the perpetrator used a revolver to commit the attempted robbery and shoot Alvarez. Alvarez survived the shooting and later identified appellant as the perpetrator, both in a photo lineup and at trial.

4. *Appellant's Arrest and the Search of His Residence*

Several hours after the attempted robbery at ARCO, police stopped appellant after he "rolled through" a stop sign in a silver Cadillac SUV with paper license plates. The vehicle matched those seen in the video from ARCO and the 54th Street gas station. Appellant, an African-American male, was wearing glasses and black athletic shoes with a silver-colored medallion, matching the shoes worn by the perpetrator of the crimes at ARCO. Police took appellant into custody.

In a subsequent search of appellant's residence, police found a loaded revolver, a brown beanie, a gray sweat suit, and jeans shorts. The beanie had a small brim and a white tag with the letters "ES." Testing later showed appellant's DNA was on the beanie. Police found the sweat suit on a clothesline. It had a black line running across the chest and sleeves and down the pants.

The revolver was found in a case on a shelf, near several athletic socks. Subsequent testing showed appellant's DNA was on the gun. Carole Acosta, a ballistics expert called by the prosecution, testified that the bullet recovered from Big Lots was fired from appellant's gun. All three crime scenes were within one mile of appellant's residence.

5. *Appellant's Calls from Jail*

After his arrest, appellant made multiple telephone calls from jail to his own residence. These calls were recorded and played for the jury. In the first call, appellant asked his mother to look for a box "up there where the socks hang." When she informed him that police had already searched the house and that there was nothing "up there" but socks, appellant exhaled loudly. In another call, appellant asked his mother to look for a black sweat suit, but she told him she could not find it. In a third call, appellant asked the person who answered to "see if the clothes are on the line."

C. *Verdict and Sentence*

Following trial, the jury convicted appellant of the robberies at Big Lots and the 54th Street gas station, the attempted robbery at ARCO, the attempted murders of Montano and Alvarez and assaults with a firearm of Ben Elyahu, Montano and Alvarez. As to those charges, the jury found the firearm-enhancement allegations to be true.

At sentencing, the trial court stated that the case called for "a very harsh sentence." It noted that appellant had "gratuitously" shot both Montano and Alvarez and characterized appellant's conduct as "outrageous." In imposing sentence for the robbery at the 54th Street gas station, the court rejected appellant's request for a low-term sentence, opting instead for the high term of five years in prison, finding "no mitigating circumstances" and "a multitude of aggravating circumstances." The court chose to impose a consecutive sentence for each of the attempted murders, the robbery, and the attempted robbery, resulting in a total sentence of 66 years and eight months to life

in state prison.[3] The sentence included two enhancements under section 12022.53, subdivision (d), resulting in two consecutive terms of 25 years to life, and an enhancement under 12022.53, subdivision (b), resulting in a consecutive 10-year term. Appellant timely appealed.

DISCUSSION

A. *Evidentiary Challenges*

Appellant claims the trial court abused its discretion under Evidence Code section 352 and violated his constitutional right to present a complete defense by ruling he could not: (1) cross-examine the prosecution's ballistics expert about a federal report critical of the science underlying firearms identification; (2) present testimony by a ballistics expert explaining the problems the report identified; and (3) present the testimony of an eyewitness-identification expert.

Under Evidence Code section 352, a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) We review a trial court's rulings under Evidence Code section 352 for abuse of discretion. (*People v. Lee* (2011) 51 Cal.4th 620, 643.)

The federal constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' [Citations.]" (*Crane v. Ky.* (1986) 476 U.S. 683, 690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485.) Thus, courts

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[3] The court stayed appellant's sentences for the assault charges under section 654.

may not exclude evidence that is "vital to a defendant's defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684.) We assume for purposes of this decision that the de novo standard of review applies in determining whether the trial court's evidentiary rulings violated appellant's constitutional right to present a complete defense. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 [stating independent review "'comports with this court's usual practice for review of mixed question determinations affecting constitutional rights'"].)

1. *Cross-Examination of Acosta*

During his cross-examination of Acosta, the prosecution's ballistics expert, defense counsel asked if she knew that the "field of firearm testing has been wildly [*sic*] criticized in the scientific community." Acosta replied that the field had not been criticized "in the relevant scientific community," but she acknowledged that "there have been reports criticizing the field." Defense counsel then asked if Acosta was aware of a "report that came out of the Obama White House that criticized this as an investigative tool." The trial court interjected, stating, "[W]e're not going to get into this. 352. I'm not going to allow it." Counsel continued his cross-examination; he did not seek a sidebar to further identify or describe the report, nor seek to make any such report a part of the trial record.

Appellant argues the court abused its discretion and violated his right to present a complete defense by preventing him from impeaching Acosta using the federal report. He asserts the report questioned the reliability of firearms identification and would have shown that Acosta had overstated the probative value of her testimony. The relevant report is not part of the trial record, however, and appellant made no offer of proof regarding

its authorship, contents or relevance. Accordingly, he provides no basis for concluding his cross-examination of Acosta was improperly curtailed. (See *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632 [appellate courts must generally disregard documents outside the record on appeal and arguments relying on such documents].)

2. *Appellant's Ballistics Expert*

Following defense counsel's cross-examination of Acosta, the trial court asked counsel if the defense intended to call a ballistics expert to testify. After counsel confirmed the defense intended to call such an expert, the court stated: "I'm not going to allow a wholesale attack on the science of the ballistics. I think it is well settled. . . . I have no problem with you calling an expert to come in and say that what the people's expert did was insufficient. But if that expert is going to be talking about, oh, yeah, there's [an] Obama report that criticizes ballistic testing, I'm not going to allow it." Counsel made no offer of proof, and the defense did not call a ballistics expert to testify.

On appeal, appellant challenges the court's ruling as an abuse of discretion and a violation of his constitutional right to present a complete defense. He claims that had the court permitted him to call a ballistics expert, his expert would have informed the jury that the field of firearms identification "lacks any scientific foundation."

In general, failure to make an offer of proof precludes consideration of an alleged erroneous exclusion of evidence on appeal. (*In re Mark C.* (1992) 7 Cal.App.4th 433, 444.) Moreover, appellant's failure to do so defeats his claim on the merits. (See *Gutierrez v. Cassiar Mining Corp.* (1998) 64 Cal.App.4th 148, 161 [party's failure to make an offer of proof at trial rendered it

unable to establish reversible error].) One function of an offer of proof at trial is to provide an appellate court with "the means of determining error and assessing prejudice." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) Because nothing in the record properly shows what appellant's ballistics expert would have said, appellant cannot establish the probative value of the testimony for purposes of Evidence Code section 352. (See *People v. Miller* (2014) 231 Cal.App.4th 1301, 1308, fn. 5 [party's failure to "identify what specific statements were excluded by the trial court" made it impossible "to determine whether the court abused its discretion"].) Nor can he show that the expert's testimony was vital to his defense for purposes of his constitutional claim. (See *People v. Babbitt*, *supra*, 45 Cal.3d at p. 684.) We therefore reject his claim that the trial court erred in limiting potential testimony by a defense ballistics expert.

3. *Eyewitness Identification Expert*

Prior to trial, the defense indicated it intended to call an eyewitness identification expert to testify. Upon a motion by the prosecution, the trial court excluded the proffered expert, finding that there was sufficient independent evidence to corroborate the eyewitness identifications, and that the testimony "would be merely confusing to the jury and not helpful to the search for truth." The defense made no offer of proof.

Appellant contends the court's ruling constituted an abuse of discretion and violated his right to present a complete defense. His opening brief alleges that his expert would have testified about "cross-racial eyewitness identification" and thus would have helped the jury assess the identification of appellant, who is African American, by Montano, who was white. As with appellant's challenge to the trial court's exclusion of his ballistics

expert, his failure to make an offer of proof as to his proffered eyewitness identification expert is fatal to his claim. (See *Gutierrez v. Cassiar Mining Corp.*, *supra*, 64 Cal.App.4th at p. 161.)

Moreover, appellant's claims in this regard would fail even if he had properly set forth the expert's expected testimony at trial. In arguing that the trial court abused its discretion in excluding his eyewitness identification expert, appellant relies exclusively on *People v. McDonald* (1984) 37 Cal.3d 351 (*McDonald*). In *McDonald*, the prosecution presented several eyewitnesses who identified the defendant as the perpetrator of a murder "with varying degrees of certainty." (*Id.* at p. 355.) No other evidence linked the defendant to the crime, and one eyewitness "categorically testified that defendant was not the gunman." (*Id.* at pp. 355, italics omitted.) The trial court excluded the defendant's proffered eyewitness identification expert's testimony, and the jury convicted the defendant. (*Id.* at pp. 355, 363.) Reversing, the Supreme Court held: "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*Id.* at p. 377.)

Appellant argues that *McDonald* mandates the admission of eyewitness identification expert testimony in "any case where the facts indicate those factors known to affect the accuracy of the eyewitness identification." His argument, however, ignores the

court's express limitation of its holding to cases in which eyewitness identification "is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability." (*McDonald*, *supra*, 37 Cal.3d at p. 377.) Appellant does not contend that Montano's identification of him as the robber lacked substantial corroboration. Nor could he. The evidence corroborating Montano's identification of appellant as the perpetrator of the Big Lots robbery was strong.

First, forensic evidence tied appellant to the crime. Acosta, the prosecution's ballistics expert, opined that the bullet recovered from Big Lots was fired from the gun police found in appellant's home. Appellant's DNA was found on the gun.

Security video and additional eyewitness testimony further supported appellant's culpability. Eyewitnesses saw the perpetrator escape in a "light color[ed]" or silver Cadillac SUV with either "paper plates" or "no license plate," matching the vehicle appellant was driving when he was arrested. Video from Big Lots's security cameras showed the perpetrator was wearing a gray sweat suit. Police found a matching sweat suit in a search of appellant's home.

Finally, the recordings of appellant's calls from jail suggested his consciousness of guilt. In those calls, appellant asked his mother to look for a box "up . . . where the socks hang," where police had found the gun, and for his sweat suit, strongly suggesting that appellant wanted to know if police had found the items that tied him to the Big Lots robbery. In sum, there was ample evidence to corroborate Montano's identification of appellant and give it independent reliability. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1112 [eyewitness identification expert's testimony properly excluded where other witnesses corroborated

the identification of defendant, despite potential impeachment of such witnesses].) Accordingly, the trial court did not err in excluding appellant's eyewitness identification expert's testimony. (See *ibid.*; *McDonald*, *supra*, 37 Cal.3d at p. 377.)

B. *Sufficiency of the Evidence as to the Crimes at the 54th Street Gas Station*

Appellant claims there was insufficient evidence that he committed the robbery at the 54th Street gas station. In assessing the sufficiency of the evidence, "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.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Contrary to appellant's contention, there was ample evidence to support the jury's determination that he was the person who robbed Ben Elyahu at the 54th Street gas station. Security video from the gas station captured the robbery. The jury saw the video and could determine for itself whether appellant was the perpetrator. (See *People v. Denard* (2015) 242 Cal.App.4th 1012, 1022 [jury could decide for itself whether defendant was burglar seen on video].) The video also depicted items that tied appellant to the crimes. It showed the robber was wearing: (1) a gray sweat suit with a distinctive black line across the chest and sleeves and down the pants; and (2) a brown beanie with a small brim and a white tag with the letters "ES." Police found identical clothing in appellant's residence, and appellant's DNA was found on the beanie. The video further showed that the

robber arrived and fled in a silver SUV matching the vehicle appellant was driving when he was arrested.

Moreover, appellant does not contest the sufficiency of the evidence to establish that he committed the robberies at Big Lots and ARCO. The similarities between those robberies and the one at the 54th Street station also tend to support his culpability for the latter. (See *People v. Matson* (1974) 13 Cal.3d 35, 40 [a distinctive modus operandi common to multiple crimes supports a reasonable inference that the same person committed the crimes].) All three robberies occurred in commercial establishments, in the afternoon hours of three consecutive days. All three locations were within one mile of appellant's home. The perpetrator of all three robberies was an African-American male who wore glasses and drove a silver or "light color[ed]" SUV. Like the robber at Big Lots, the robber at the 54th Street gas station wore a gray sweat suit. Like the robber at ARCO, the robber at the 54th Street gas station wore a brown "ES" beanie with a small brim. These common characteristics are sufficiently distinct to suggest that the same person committed all three crimes.

Finally, appellant's calls from jail -- in which he asked others to find items that linked him to the crimes, including a sweat suit -- suggested his consciousness of guilt.[4] In sum,

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[4] Appellant argues that the content of those calls was inadmissible hearsay. His argument is meritless. Rather than hearsay, appellant's requests, seeking items that linked him to the crimes, were admissible verbal conduct. (See *People v. Curl* (2009) 46 Cal.4th 339, 362 [statement directing another to dispose of evidence was not hearsay, but "simply verbal conduct

sufficient evidence supported appellant's guilt of the crimes at the 54th Street gas station.

C. *Firearm Enhancements*

Appellant claims we must remand the case for the trial court to exercise its discretion to strike the firearm enhancements under section 12022.53. As noted, appellant's sentence included a 10-year enhancement for use of a firearm in the commission of a robbery (§ 12022.53, subd. (b)), and two enhancements of 25 years to life for intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)). At the time of appellant's sentencing, prior to the enactment of Senate Bill No. 620, a trial court could not strike firearm enhancements under section 12022.53. (See former § 12022.53, subd. (h) ["Notwithstanding Section 1385 or any other provisions of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section"].) However, effective January 1, 2018, Senate Bill No. 620 replaced the prohibition on striking section 12022.53 firearm enhancements with the following: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

Senate Bill No. 620 applies retroactively to nonfinal judgments, such as appellant's. (*People v. Chavez* (2018) 22

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consisting of a directive that was neither inherently true nor false" and "was offered for the nonhearsay purpose of demonstrating consciousness of guilt"].)

Cal.App.5th 663, 712.) Under such circumstances, an appellate court must generally remand for the trial court to exercise its newly granted discretion. (See *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].)

Citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), respondent contends that remanding this matter for resentencing would be a futile exercise because the record clearly indicates that the trial court would not have exercises discretion to strike the enhancements. We agree. Under *Gutierrez*, we need not remand a case for resentencing if the sentencing court "clearly indicated" that it would not exercise discretion to lessen the sentence. There, the court of appeal cited the trial court's comments at sentencing and the maximum sentence it imposed as support for the conclusion that "no purpose would be served" by a remand for resentencing. (*Id.* at p. 1896)

In sentencing appellant, the trial court stated its intent to impose a "very harsh sentence." It noted that appellant had "gratuitously" shot his victims, and it viewed his conduct as "outrageous." Rather than imposing a lesser sentence by selecting a low- or mid-term sentence for the robbery at the 54th Street gas station, the court opted for a high-term sentence, finding "no mitigating circumstances" and "a multitude of aggravating circumstances." And rather than producing a lesser sentence by imposing one or more sentences concurrently, the court chose to impose consecutive sentences. The court's comments at sentencing, along with the harsh sentence it deliberately crafted, clearly indicate that the court would not strike any of appellant's firearm enhancements on remand.

Accordingly, we decline to order a remand for resentencing and affirm the court's imposition of the enhancements under section 12022.53.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J.

MICON, J.*

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