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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN PHILLIPS et al.,

Defendants and Appellants.

2d Crim. No. B272498
(Super. Ct. No. TA130215)
(Los Angeles County)

Kevin Phillips, Marvin L. Vital, and Christopher Ladd appeal after a jury convicted them of the first-degree special-circumstance gang murder of Markice Brider (Pen. Code,¹ §§ 187, subd. (a), 189, 190.2, subd. (a)(22)). The jury also found true allegations that Vital, a principal, personally and intentionally discharged a firearm causing death (§ 12022.53, subds. (b), (c), (d), & (e)(1)). Vital was also convicted of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and an allegation that the crime was committed for the benefit of a criminal street

¹ All statutory references are to the Penal Code unless otherwise stated.

gang (§ 186.22, subd. (b)(1)(c)) was found true.² Appellants were each sentenced to life without the possibility of parole, plus an enhancement of 25 years to life pursuant to section 12022.53, and Vital was also sentenced to a consecutive seven-year term on the firearm possession count.

Appellants raise claims of evidentiary, instructional, and sentencing error, insufficient evidence, and ineffective assistance of counsel. In supplemental briefs, appellants claim they are entitled to a remand to permit the trial court to exercise its discretion whether to strike their section 12022.53 enhancements in light of Senate Bill 620, which became effective on January 1, 2018. We agree with the latter claim and shall remand accordingly. We shall also order striking of the parole revocation fine imposed against Phillips, and correction of a clerical error in Vital's abstract of judgment. Otherwise, we affirm.

STATEMENT OF FACTS

The Shootings of Vital

In 2013,³ appellants were members of the Grape Street Crips criminal street gang, whose territory includes the area in and around the Jordan Downs housing complex on 101st Street in Watts. On August 4, Vital was shot in the arm as he was arriving at his residence. Six expended .45-caliber shell casings were found on the street near his house. When questioned by the police, Vital was uncooperative and declined to offer any information regarding the identity of the shooter or shooters.

On September 23, Ladd's mother, Crystal Hodges, rented a Hyundai Accent. Hodges rented the vehicle at about 11:45 a.m.,

² Appellants were acquitted on charges of first-degree special-circumstance gang murder of Kevin White and the attempted murder of Ashley Green.

³ Unless otherwise indicated, all further date references are to the year 2013.

“loaned” it to Ladd shortly thereafter, and he returned it to her at about 8:00 p.m. that night.

At about 2:30 p.m. that same day, Vital was sitting outside his girlfriend’s apartment in Jordan Downs. A car drove up and one or more of its occupants fired several gunshots at Vital, who suffered a grazing wound to his head. Vital went to the hospital for treatment. When officers arrived at the hospital to speak with Vital about the incident, he ripped off his monitoring equipment and went home. At about 4:00 or 4:30 p.m., Vital’s neighbor Tiffany Denham called her friend Tiffany Cooley and said she had heard Vital say “I’m gonna go get those niggas.”

That same day, Phillips left his house in a blue Chrysler minivan that belonged to his live-in girlfriend Laneshia Harbour. That afternoon, Phillips told Harbour he was going to the hospital to visit a friend who had been shot.

The Shooting of Kevin White

Kevin White was a member of the Bounty Hunter Bloods gang, a Grape Street Crips rival, whose territory includes the area in and around the Nickerson Gardens housing complex on 114th Street in Watts. On September 23 at about 7:25 p.m., White was in the front yard of his residence at Nickerson Gardens when a Chevrolet Tahoe pulled up to the curb. White briefly approached the Tahoe, then turned and ran back into his yard. Two men got out of the Tahoe and repeatedly shot White, killing him. Four bullets recovered from White’s body and eleven casings recovered from the scene were fired by a 9-millimeter handgun, and two other casings recovered from the scene were fired by a .45-caliber handgun.

White’s neighbor, Ashley Green, witnessed the shooting and was shot in the leg after she called out to White. Latrice Antwine, who was at White’s residence when the shootings occurred, saw a grayish blue minivan stopped in the street with the passenger side doors opened. Someone got in the minivan and it sped away with the passenger door still open.

The Shooting of Markice Brider

Markice Brider was a member of the rival P.J. Watts Crips gang, whose territory includes the area in and around the Imperial Courts housing complex on 114th Street in Watts. On the evening of September 23, Brider was visiting his girlfriend Latrisian McMeans at her apartment in Imperial Courts. At about 7:35 p.m., Brider walked out of McMeans's apartment and several gunshots rang out. McMeans looked outside and saw three men getting into a minivan she later identified as Harbour's. Two of the men entered the minivan through the sliding door on the rear passenger side, while the other got in the front passenger seat. McMeans saw one of the men put a weapon into his waistband. Before the minivan drove off, McMeans heard one of the men say, "Fuck you, nigga" and "[t]his is Grape," which she interpreted as a reference to the Grape Street gang.

McMeans ran outside and found Brider, who had been shot six times. A gunshot wound to his head was fatal. The four bullets recovered from his body and four casings recovered from the scene of the shooting were fired by a 9-milimeter handgun, and four additional casings recovered from the scene were fired by a .45-caliber handgun.

The Stop and Search of the Minivan and Phillips' Arrest

At about 8:50 p.m. that night, Los Angeles Police Officer Roberto Yanez was on patrol less than a mile from Jordan Downs when he saw a blue Chrysler minivan pulling away from a curb with the rear passenger sliding door open. Officer Yanez activated his lights and conducted a traffic stop of the minivan. After conducting the stop, the officer also noticed that one of the minivan's rear brake lights was not working.

Phillips was driving the minivan and fellow Grape Street Crips members Donte Welch and Thomas Bramlett-Payton were in the front and rear passenger seats, respectively. After additional officers arrived, Phillips was ordered out of the minivan and Officer Yanez asked him for his driver's license.

Phillips responded that his identification was inside the minivan on or near the driver's seat. The officer checked the driver's seat but did not find Phillips' identification. As Officer Yanez returned to the area from which the minivan had pulled away, Officer Noel Sanchez began looking around the driver's seat for Phillips' identification and saw a handgun in plain view under the driver's seat.

Phillips, Welch, and Bramlett-Payton were arrested and Phillips' cellphone was seized from his person. A loaded .40-caliber handgun and a loaded .45-caliber handgun were found under the minivan driver's seat. Vital's cellphone was found behind the front passenger seat. It was subsequently determined that the .45-caliber handgun matched the expended .45-caliber casings recovered from the scenes of the White and Brider shootings. McMeans identified the minivan as the one she had seen when Brider was shot, and Antwine said it was similar to the one involved in White's shooting.

Video Surveillance Camera Evidence

Jordan Downs, Nickerson Gardens, and Imperial Courts all have police-monitored video surveillance and license plate recognition cameras. Recordings from these cameras on the day of the shootings were played at trial. At about 4:40 p.m. on September 23, the cameras at Jordan Downs recorded images of a blue minivan pulling into the parking lot, followed shortly thereafter by the rented Hyundai. Ladd is then shown exiting the Hyundai and walking to the occupants of the minivan, which included Phillips and an unidentified individual. Ladd then walked away in one direction while Phillips and the unidentified individual walked toward Vital's apartment. At 4:46 p.m., Ladd returned to the Hyundai with an unknown male and drove away.

At 5:07 p.m., Phillips returned to the parking lot accompanied by Welch and Bramlett-Payton. About 20 minutes later, an unknown individual approached Phillips and handed him a white object. At about 6:27 p.m., Phillips drove away in

the minivan along with two other men. When the minivan drove away, it had a license plate.

Between 7:14 p.m. and 7:16 p.m., the minivan and Hyundai were seen travelling together in Nickerson Gardens. The minivan no longer had a license plate and only one of its taillights was operable. The cameras lost sight of the vehicles at about 7:25 p.m. Shortly thereafter, the vehicles could be seen driving at a high rate of speed on Compton Avenue in Nickerson Gardens.

At 7:35 p.m., the minivan and Hyundai were seen travelling together east on 114th Street in Imperial Courts. The minivan stopped in front of Brider's residence and the Hyundai drove around the minivan. One of the men in the minivan got out with a gun in his left hand and shot Brider.⁴ Two other men got out of the minivan and also fired at Brider as he was lying on the ground. All three men got back into the minivan and drove off. The Hyundai made a u-turn and followed the minivan.

Additional Evidence

Cellular telephone records indicated that at 6:40 p.m. on the day of the shootings, Phillips sent Harbour a text stating that a friend had been shot. At about 6:54 p.m., Vital's cellphone sent a text to Phillips' phone stating, "come out." Vital and Ladd's cellphones had also utilized cellular towers in the vicinity of Brider's murder around the time he was shot.

A photograph found on Vital's cellphone (which was recovered from the minivan) depicted a .45-caliber handgun that resembled one of the guns found in the minivan. Vital's fingerprints were also found on the window of the minivan's rear passenger sliding door. In May 2015, while executing a search warrant at a Grape Street Crips hangout, officers found the 9-millimeter handgun used in the shootings of White and Brider.

⁴ At the time of the shooting, Vital had limited mobility in his right hand as result of his own shooting in August.

Gang Expert Testimony

Los Angeles Police Officer Francis Coughlin testified as the prosecution's gang expert. The Grape Street Crips' primary activities include murder, robbery, illegal firearm possession, and narcotic sales. When the shootings occurred, appellants were all documented members of the gang. For the past 20 years, the Grape Street Crips have been at war with the P.J. Watts Crips and the Bounty Hunter Bloods. The latter two gangs were united against the Grape Street Crips. When presented with a hypothetical tracking the facts of the case, Officer Coughlin opined that the shootings were committed for the benefit of the Grape Street Crips because they were in retaliation for an attack on one of its members. When a gang commits an act of violence against a rival gang member, that member's gang typically retaliates with a greater degree of violence.

DISCUSSION

I.

Renewed Motion to Suppress - Unlawful Stop

Phillips contends the court erred in denying his renewed motion to suppress all evidence flowing from the stop of the minivan because the officer who stopped him, Officer Yanez, lacked reasonable suspicion or probable cause to do so. We are not persuaded.

“The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]’ [Citations.]” (*People v. Redd* (2010) 48 Cal.4th 691, 719.)

Prior to trial, Phillips moved under section 1538.5 to suppress all evidence obtained from the minivan on the ground he was stopped in violation of the Fourth Amendment. At the hearing on the motion, Officer Yanez testified, among other

things, that prior to the stop he had received reports that a blue Chrysler minivan had been involved in the shootings of White and Bridger. The officer also testified that prior to conducting the stop he had observed that the minivan's rear sliding passenger door was partially open. The trial court denied the motion, reasoning that Officer Yanez had reasonable suspicion to believe the minivan was the one involved in Bridger's shooting based on reports he had received from others regarding the vehicle's make and color.

Phillips subsequently renewed his motion to suppress based on new evidence. At the hearing on the renewed motion, Officer Yanez was impeached with evidence undermining his prior assertion that he had received reports that the vehicle involved in Bridger's shooting was a blue Chrysler minivan. The officer reiterated that he had seen the minivan's open rear passenger sliding door prior to conducting the stop. He acknowledged, however, that the open door was not the subjective basis for the stop.

At the conclusion of the hearing, the trial court found Officer Yanez now lacked credibility to the extent he purported to justify the stop of the minivan based on reports indicating it may have been involved in the shootings. The court nevertheless denied the renewed motion. The court found that prior to conducting the stop Officer Yanez had observed the minivan's rear sliding passenger door was open, which constituted at least one violation of the Vehicle Code.⁵ The court further reasoned that even if there had been no Vehicle Code violation, it would

⁵ The court found that driving with an open door constituted a violation of Vehicle Code sections 24002, subdivision (a), which prohibits driving a vehicle in an unsafe condition, and 22517, which makes it unlawful to "leave a door open on the side of a vehicle available to moving traffic for a period longer than necessary to load or unload passengers."

have been objectively reasonable for an officer to stop the minivan to warn the driver that his door was open.

The court did not err in denying the renewed suppression motion. As a general matter, a traffic stop comports with the Fourth Amendment if the officer conducting the stop has knowledge of facts giving rise to an objectively reasonable suspicion that a traffic violation has occurred. (*Whren v. United States* (1996) 517 U.S. 806, 809.) Substantial evidence supports the court's finding that Officer Yanez saw the minivan's open rear door before he conducted the stop. Because the open door provided an objectively reasonable basis for the stop, Officer Yanez's subjective reasons for conducting the stop are irrelevant. (*People v. Woods* (1999) 21 Cal.4th 668, 680-682.) Contrary to Phillips' claim, it is of no moment that Officer Yanez did not offer the open door as a pretext to the stop. (*Ibid.*) The open door provided a sufficient basis for the stop, so Phillips' renewed motion to suppress was properly denied.

II.

Motion to Suppress - Cell Phone Evidence

Phillips and Vital also moved to suppress the evidence obtained from their cellphones, which were seized and searched incident to Phillips' arrest. Although such searches were generally considered lawful at the time under *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*), less than a year after Phillips' arrest the United States Supreme Court overruled *Diaz* and held that the Fourth Amendment prohibits the warrantless search of a cellphone incident to an arrest absent exigent circumstances. (*Riley v. California* (2014) 573 U.S. ___, [189 L.Ed.2d 430] (*Riley*).)

Although *Riley* applies retroactively, the trial court denied the suppression motions based on its finding that the officers who searched the phones did so in good faith reliance on then-controlling law. Phillips and Vital contend the court erred in applying the good-faith exception here. We conclude otherwise.

The good faith exception to the exclusionary rule applies when a search was conducted in objectively reasonable reliance on binding appellate precedent. (*Davis v. United States* (2011) 564 U.S. 229.) “[T]he ‘prime purpose’ of the exclusionary rule ‘is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures,’” and, “[a]s with any remedial device, application of the exclusionary rule properly has been restricted to those situations in which its remedial purpose is effectively advanced.” (*Illinois v. Krull* (1987) 480 U.S. 340, 347; see also *Davis*, at pp. 236-237.) When the police act in an objectively reasonable manner consistent with existing law, “the “deterrence rationale loses much of its force,” and exclusion cannot ‘pay its way.’” (*Davis*, at p. 238.)

The court properly applied the good-faith exception here. In arguing otherwise, Phillips and Vital merely offer there is no evidence that the officers who searched their cellphones “were aware of” *Diaz* “or that there were any exigent circumstances” to justify the searches. Police officers, however, are presumed to know the law, particularly laws that relate to the regular performance of their duties. (*People v. Teresinski* (1982) 30 Cal.3d 822, 832; *In re Joseph F.* (2000) 85 Cal.App.4th 975, 994.) Moreover, under *Diaz*, exigent circumstances were not a prerequisite to the legality of a warrantless search conducted incident to an arrest. That requirement was first recognized in *Riley*. (*Riley, supra*, 573 U.S. __ at pp. __ [189 L.Ed.2d at pp. 442-453].) Because the officers who searched Phillips and Vital’s cellphones acted in objectively reasonable reliance upon then-binding appellate precedent, the good faith exception was properly applied.

III.

Vital - Impeachment Evidence

Vital contends the court prejudicially erred in admitting evidence that on the day of Brider’s murder Denham told Cooley

she had heard Vital say “I’m gonna go get those niggas.” We disagree.

The challenged evidence was admitted under Evidence Code sections 1235⁶ and 352 to impeach Cooley after she denied telling the police that Denham had told her she had heard Vital make the statement. The evidence consisted of (1) a recording of an anonymous telephone call Cooley made to the police shortly after the murder (in which she said Denham told her she had overheard Vital making the statement); and (2) a subsequent police interview in which Cooley both admitted she was the anonymous caller and reiterated what Denham had told her. When Denham testified, she denied telling Cooley she had heard Vital make the statement and claimed Cooley must have overheard someone “in [the] background” make the remark.

Vital does not dispute that multiple hearsay may be admitted for impeachment purposes as a prior inconsistent statement. (See *People v. Zapien* (1993) 4 Cal.4th 929, 950-952.) He claims, however, that “the prosecution failed to establish the foundational facts necessary for admission of the prior inconsistent statement” in that “Cooley and Denham’s statements and testimony fail to establish that either witness had personal knowledge that . . . Vital made the alleged statement.” No such showing was required here. The evidence of Cooley’s phone call and police interview was inconsistent with what she testified to a trial, so it was admissible to impeach her. Cooley and Denham’s conflicting accounts of their conversation went to the weight of the evidence, not its admissibility.

Vital alternatively contends the evidence should have been excluded under Evidence Code section 352 as substantially more

⁶ Evidence Code section 1235 provides that “[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing” and the witness is given the opportunity to explain or deny the statement.

prejudicial than probative. We review the court's ruling for an abuse of discretion (see *People v. Crew* (2003) 31 Cal.4th 822, 840) and conclude there was no abuse of discretion.

“[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, “prejudicial” is not synonymous with “damaging.” [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

The trial court did not abuse its discretion in admitting the evidence of Cooley's phone call and police interview pursuant to Evidence Code section 352. In arguing otherwise, Vital essentially offers that Cooley and Denham “were inherently unreliable witnesses who gave wildly conflicting statements.” But the challenged evidence was admitted for the very purpose of impeaching Cooley and Denham at trial. Although the evidence is certainly prejudicial to Vital, it is not the sort of evidence that uniquely tends to evoke an emotional bias against him. Moreover, the evidence was highly relevant to prove contested issues at trial. Accordingly, the evidence was properly admitted under Evidence Code section 352.

IV.

Sufficiency of the Evidence to Support Vital's Convictions

Vital contends the evidence is insufficient to support his convictions. In reviewing this contention, “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.” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) We draw all reasonable inferences in favor of the verdict and presume the existence of every fact the jury could reasonably

deduce from the evidence that supports its findings. (*People v. Maciel* (2013) 57 Cal.4th 482, 515; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies where the prosecution relies primarily on circumstantial evidence. (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

The evidence is sufficient to support Vital's convictions. His claim to the contrary overlooks the standard of review, which requires us to view the evidence in the light most favorable to the judgment. (*People v. Avila, supra*, 46 Cal.4th at p. 701.) Vital, after being shot for a second time by rival gang members, was overheard saying "I'm gonna go get those niggas." Later, the minivan and Hyundai were seen near Vital's residence and the vehicles subsequently departed with three additional individuals. Video surveillance recordings show a man getting out of the minivan with a gun in his left hand and shooting Brider, a rival gang member, in the head. After the murder, Vital's cellphone was found in the minivan and his palm print was recovered from the rear passenger door. A photograph on the cellphone depicted a .45-caliber firearm like the one used to shoot Brider, which was found under the front seat. Moreover, the 9-millimeter firearm used in the shooting was subsequently found at a Grape Street Crips hangout.

In light of this evidence, the jury could reasonably find that Vital participated in Brider's murder and committed the crime for the benefit of his gang. Vital's claim of insufficient evidence thus fails.

V.

Ineffective Assistance of Counsel

Phillips and Ladd contend their trial attorneys provided ineffective assistance of counsel by failing to object to Officer Coughlin's expert testimony that gang members' tattoos are "earned" by "putting in work" for the gang, i.e., by "[committing] violent crimes such as robbery, shootings, murders." We disagree.

“When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel’s inadequacy. To satisfy this burden, the defendant must first show counsel’s performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel’s reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) The failure to raise an unmeritorious objection does not amount to deficient performance. (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24.)

To prove the gang enhancement allegations, the prosecution had to establish among other things that appellants had knowledge of the Grape Street Crips’ criminal activities. (*People v. Tran* (2011) 51 Cal.4th 1040, 1048.) Moreover, gang expert testimony is relevant to explain the significance of a defendant’s gang-related tattoos. (See *People v. Ochoa* (2001) 26 Cal.4th 398, 438, abrogated on other grounds as stated in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Lindberg* (2008) 45 Cal.4th 1, 46-47; *People v. Gardeley* (1996) 14 Cal.4th 605, 617, overruled on other grounds in *People v. Sanchez* (2017) 63 Cal.4th 665, 686, fn. 13.)

Phillips and Ladd assert that the challenged expert testimony should have been excluded because the jury may have improperly viewed it as evidence of their disposition to commit the charged crimes. “[B]ecause the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang’s criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the

street gang's criminal activities. That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant.” (*People v. Tran, supra*, 51 Cal.4th at p. 1048.) Moreover, Phillips and Ladd fail to demonstrate a reasonable probability they would have achieved a more favorable result had the challenged evidence been excluded. Their claim of ineffective assistance thus fails on both prongs. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

VI.

Adoptive Admission (CALCRIM No. 357)

When Ladd was interviewed by the police, he was repeatedly questioned about his involvement in the crimes. Throughout the interview, Ladd steadfastly denied any involvement in the shootings of White and Bridger and claimed it was merely coincidental that he was driving the Hyundai at the scene of the latter crime. In response to several of the questions Ladd responded “I don’t know,” “I don’t know what you [*sic*] talking about,” “I don’t know what you’re talking about,” or “I don’t know what’s going on.” Over Ladd’s objection, at the conclusion of the trial the court gave a modified version of CALCRIM No. 357, the instruction on adoptive admissions.⁷

⁷ The jury was instructed: “If you conclude that Mr. Ladd made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with the commission of the crime and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in his presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decided that any of these

Ladd contends the court erred in giving the instruction. We conclude that any such error was harmless because the instruction was modified in a manner that rendered it ineffectual.

In criminal cases, trial courts have a duty to instruct the jury on applicable principles of law. (*People v. Campbell* (2015) 233 Cal.App.4th 148, 164.) It is error, however, to give an instruction that has no application to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

A statement offered against a party is admissible as an adoptive admission “if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.” (Evid. Code, § 1221.) “To warrant admissibility [as an adoptive admission], it is sufficient that the evidence supports a reasonable inference that an accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant’s conduct actually constituted an adoptive admission becomes a question for the jury to decide.” (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011.)

We need not decide whether the People were entitled to an instruction on adoptive admissions as set forth in CALCRIM No. 357 because the instruction given here was modified in a manner that rendered it nonsensical. The pattern instruction, which correctly sets forth the law, contemplates a circumstance in which “someone”—i.e., a third party—“made a statement outside of court that accused the defendant of the crime [or] tended to connect the defendant with the commission of the crime” (CALCRIM No. 357.) Here, the party making the accusatory statements was the detective who interviewed Ladd. The instruction given here was modified, however, by replacing “someone” with “Mr. Ladd.” The jury was thus instructed it could

requirements has not been met, you must not consider either the statement or the defendant’s response for any purpose.”

consider Ladd's "I don't know" responses as adoptive admissions if, among other things, it concluded that *Ladd* made a statement in which he either accused himself of the crimes or tended to connect himself to its commission. Because Ladd made no such statements, no reasonable juror would have construed the instruction as allowing a finding that Ladd's purportedly evasive answers to the detective's questions were adoptive admissions. Because the instruction effectively precluded any finding that Ladd had made adoptive admissions, and there was ample independent evidence of his guilt, any error in giving the instruction was harmless.

VII.

Parole Revocation Fine

In sentencing Phillips, the court imposed and stayed a parole revocation fine pursuant to section 1202.45. Phillips asserts, and the People concede, that the fine was erroneously imposed because Phillips' sentence does not include a period of parole. (§ 1202.45; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) Accordingly, we shall order the fine stricken.

VIII.

Victim Restitution - Joint and Severable Liability

At appellants' sentencing, the court awarded \$5,000 in direct victim restitution (§ 1202.4, subd. (f)) and stated that liability for the award was "jointly and severally as to each defendant." The abstracts of judgment state that the appellants' liability for the restitution "is joint and severable as to each defendant." Appellants contend, and the People concede, that the abstracts must be modified to conform with the court's oral pronouncement of judgment.

We reject the People's concession of the issue. Parties subject to "joint and severable liability" are "jointly and severally liable." (*County of Mariposa v. Yosemite West Associates* (1988) 202 Cal.App.3d 791, 812-814.) The terms "joint and severable liability" and "joint and several liability" have identical meanings

and are thus interchangeable. (See 9 Witkin, Summary of Cal. Law (11th ed., 2017) Partnership, § 43, pp. 628-629 [using “joint and severable liability” interchangeably with “joint and several liability”].) Because the abstracts of judgment correctly state that appellants’ liability for the restitution award is joint and severable, the requested modification is unnecessary.

IX.

Ladd’s Principal Firearm Use Enhancement

Ladd contends that his abstract of judgment should be modified to reflect the imposition of a consecutive 25-years-to-life principal firearm use enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1). The People concede the point. The court imposed the enhancement as to Ladd under both subdivisions (d) and (e)(1) of section 12022.53, yet the abstract only refers to subdivision (d). We shall order the judgment modified accordingly.

X.

Senate Bill 620

After the briefs were filed, appellants filed supplemental briefs contending they are entitled to resentencing pursuant to Senate Bill 620, which the Governor signed on October 11, 2017. As relevant here, Senate Bill 620 provides that effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike enhancements for crimes in which a firearm was personally and intentionally discharged causing death. (§ 12022.53, subds. (b), (c), (d), & (e)(1)). Subdivision (h) of section 12022.53 now states that “[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.”

The People concede that the new law applies retroactively to defendants, like appellants, whose judgments were not final as

of January 1, 2018. (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].) The People claim, however, that a remand for resentencing is unnecessary here because the record establishes the trial court would not have exercised its discretion to strike appellants’ enhancements. They rely on the principle that remand is not required in these circumstances if “the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations.” (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [addressing whether remand was necessary pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497].)

We conclude that a remand for resentencing is warranted. Contrary to the People’s assertion, the record does not clearly indicate that the court would not have stricken the enhancements at issue here had it known it had the discretion to do so. Accordingly, remand is proper. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.) “Although we express no opinion as to how the trial court should exercise its newly granted discretion under section 12022.53, subdivision (h), we do conclude that the trial court must exercise this discretion in the first instance.” (*People v. Watts* (2018) 22 Cal.App.5th 102, 119.)

DISPOSITION

The judgments of conviction are affirmed. Appellants’ sentences are vacated and the matter is remanded for the trial court to exercise its discretion under section 12022.53, subdivision (h). As to Phillips, the parole revocation fine imposed pursuant to section 1202.45 is stricken. If the court declines to strike Ladd’s principal firearm use enhancement, Ladd’s abstract

of judgment is modified to reflect the enhancement was imposed pursuant to section 12022.53, subdivisions (d) and (e)(1).

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Ricardo R. Ocampo, Judge
Superior Court County of Los Angeles

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