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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. TERRY WAYNE SMITH et al., Defendants and Appellants.	B282228 (Los Angeles County Super. Ct. No. KA109828)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed and remanded with directions.

Brad Kaiserman, under appointment by the Court of Appeal, for Defendant and Appellant Terry Wayne Smith.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Donnell Parker.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Donnell Parker (Parker) and Terry Wayne Smith (Smith) (collectively defendants), appeal from judgments entered following their convictions of murder and possession of a firearm by a felon. Smith contends that the trial court erred by admitting statements made to a confidential informant (*Massiah* error)[1]; overruling his relevancy objection to gun references in statements made to the confidential informant; denying his motion to redact statements made by Parker; and admitting images from Facebook accounts. Smith also contends that his trial counsel provided ineffective assistance by failing to object to the accomplice description given by Parker to police. Parker contends that the trial court erred by refusing to instruct the jury regarding the voluntariness of a confession; denying his motion to exclude Smith's statements which implicated Parker; and giving an incorrect adoptive admissions jury instruction. Defendants both contend that the cumulative effect of the asserted errors requires reversal, and join in each other's arguments.[2] Finding all such contentions to be without merit, we affirm defendants' convictions.

Respondent agrees with defendants' claims that their sentences should be vacated to permit the trial court the opportunity to exercise discretion regarding the imposition of firearm enhancements under recently enacted Senate Bill No. 620. Both sentences will be vacated for that purpose. In addition

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[1] See *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*).

[2] Smith and Parker have included a blanket joinder in any of each other's arguments that might benefit him. We discuss only those claims expressly raised and supported with particularized arguments. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.)

we find that the trial court erred in imposing five-year serious, prior felony enhancements based on juvenile adjudications, and in adding 10-year gang enhancements to life sentences. We direct the trial court not to reimpose those five- and 10-year enhancements on remand.

Finally, defendants both contend that insufficient evidence supported a finding that prior juvenile adjudications qualified as "strikes" under the Three Strikes law, and that they are thus entitled to a new trial on the priors. Since defendants each entered valid admissions to the prior adjudications, we reject those claims.

BACKGROUND

Defendants were charged with murder, in violation of Penal Code section 187, subdivision (a).[3] The information alleged pursuant to section 186.22, subdivision (b)(1)(C), that that the crime was committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. In addition, the information charged each defendant with three firearm enhancements, alleging that each defendant personally used a firearm in the commission of the crime, that each defendant personally and intentionally discharged a firearm, and that a principal personally and intentionally discharged a firearm, causing great bodily injury and death to Gregory Montgomery (Montgomery), within the meaning of section 12022.53, subdivisions (d) and (e)(1). Each defendant was also charged as a felon in possession of a firearm in violation of section 29800, subdivision (a)(1). It was alleged that defendants had each suffered one prior serious or violent felony conviction

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[3] All further statutory references are to the Penal Code, unless otherwise indicated.

within the meaning of sections 667, subdivisions (b) through (j), and 1170.12 (the Three Strikes law); and the same convictions were alleged for purposes of a recidivist enhancement under section 667, subdivision (a)(1). In addition, it was alleged that Parker had served a prior prison term within the meaning of section 667.5.

Defendants were both convicted as charged with murder in the first degree, and the gang and firearm allegations were found true. Defendants both waived trial on the prior strike allegations and each admitted a prior juvenile adjudication for robbery.

On April 17, 2017, the trial court sentenced defendants to aggregate prison terms of 80 years to life, each comprised of 25 years to life for the murder, doubled to 50 years to life as a second strike, with a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d) for the personal discharge of a firearm causing great bodily injury and death, plus a consecutive five-year recidivist enhancement under section 667, subdivision (a)(1). The court declined to impose an additional sentence under the gang-related firearm enhancement alleged pursuant to section 12022.53, subdivisions (d) and (e)(1). As to Parker only, the court imposed and stayed the 10-year gang enhancement of section 186.22, (b)(1)(C). For the convictions of felon in possession of a firearm (§ 29800), three years was imposed and stayed pursuant to section 654. Defendants were ordered to pay mandatory fines and fees, and were given custody credit of 691 days for Parker, and 612 days for Smith. Defendants filed timely notices of appeal.

Prosecution evidence

Just before 10:30 a.m. on May 8, 2015, Montgomery was outside his home, wiping down his car with a cloth, when his mother, Pearlie Montgomery, heard multiple gunshots. She testified that she immediately went outside and saw Montgomery

lying on the ground. Police and paramedics arrived soon afterward, and Montgomery was declared dead at the scene. Twelve shell casings, which appeared to be a combination of .45 and .380 caliber, were found on the ground.

An autopsy revealed that Montgomery had suffered 11 gunshot wounds, five of which were fatal. The deputy medical examiner testified that the entry wounds were of two different sizes, indicating two different caliber bullets. All the fatal wounds were consistent with the bullets entering either the victim's back or upper legs while his back was turned away from the shooter.

Pomona Police Department Major Crimes Unit Detectives Greg Freeman and Eric Berger, were assigned to investigate. Detective Freeman was an expert in gang culture, especially Pomona gangs, including the 456 Island Blood gang (456 gang or 456 Bloods) and the Ghost Town Crip gang (Ghost Town Crips). He knew that Montgomery was associated with the 456 gang and that his home was in an area claimed by the Ghost Town Crips. At the time of the shooting there had been an ongoing feud between the Ghost Town Crips and 456 Bloods. In March 2015, Ghost Town member Jonathan Watts ("Cartoon" or "Little Toon") was shot and killed. Police had photographed both Parker and Smith attending Watts's funeral.

A video of the shooting of Montgomery taken by a nearby surveillance system, was played for the jury. It showed two people running into the driveway on the driver's side of Montgomery's car as he was wiping his car, coming within three or four feet of him, and then shooting him. The video also showed a car which looked like a Cadillac leaving the scene.

Based upon information from an anonymous source, Detective Freeman detained Parker and spoke to a witness who had received a text message from Parker on May 10, 2015. The

text message was sent from a "2209 number." The records for that number were obtained and showed that at approximately 9:51 a.m. on the morning of the shooting Parker's cell phone received a call made from North Kern State Prison. Parker's cell phone accessed more than one cell tower for the call, indicating movement. The last cell tower accessed during that call, at approximately 10:07 a.m., was less than a mile from the crime scene.

Detectives Freeman and Berger interviewed Parker three times. In the first interview, Parker told them that he was there because "Bubbs" (Montgomery's nickname) had been killed. Parker gave his birthday as June 5, and his cell phone pass code as 3100. Detective Freeman explained that the 3100 block of Abbott Street was the heart of the Ghost Town Crips territory, and members of the gang would use the number 3100 to describe themselves. Some members even have "3100" tattooed on their bodies. Parker denied being a gang member, knowing Bubbs, or being near his house that morning. Parker said he was at his girlfriend's house, and learned about the shooting from the news on Facebook. Parker later claimed that he left his girlfriend's house that morning, and went to the Golden Bear Inn in Chino, where he stayed until 11:00 a.m. He denied having had a phone number ending in 2209 or using the screen name "TC Deuce" on Facebook.[4] Later in the first interview, Parker claimed that he was with a "big homie" in a Nissan Frontier near the scene of the shooting.[5] Parker further explained that after he argued with

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[4] Detective Freeman testified that "TC" stood for "Tiny Crips," which was a clique of the Ghost Town Crips.

[5] Detective Freeman explained "homie" was a gang term meaning friend, someone who could be trusted, or a fellow gang member. A "big homie" is a high ranking, respected gang leader

the big homie, the big homie sent two other homies instead, and they went together in a Cadillac. Parker later admitted that he was with the other homie in the Cadillac when he went to Montgomery's home, but Montgomery fired at the other homie, who then shot back.[6] After a minute of shooting at each other, Montgomery fell. Parker said the big homie met up with them, and told him to get rid of his phone. Parker described the homie who shot Montgomery as wearing "dreads" given to him by the big homie.[7]

In the second interview, Parker again admitted being at the scene of the shooting. He rode there in the front seat of the car his homie drove, and an older homie was alone in another car. Parker explained that the big homie had wanted Montgomery dead, and had been pressing everybody. Parker guessed that "Little Toon" meant something to the big homie, who was not going to let it go.[8] Parker said that he and the big homie, "Nutt" (or "Nut") were "pretty tight" a few years back, adding, "That's my nigga, Nutt." Parker also admitted that his Facebook account

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who is able to give orders to other members of his gang. Within the Ghost Town Crip gang, more than one high ranking member may hold the title.

[6] Pearlie Montgomery testified that she saw no firearms in the area. Pomona Officer Edward Lee, the first officer to arrive on the scene minutes after the shooting, testified that he saw no firearms in the area.

[7] Parker explained in the second interview that the dreads were a wig that his homie wore during the shooting.

[8] Detective Freeman explained that Little Toon was Jonathan Watts, the Ghost Town Crip who was killed about two months before Montgomery's murder.

name had previously been "TC Deuce," although he had just created a new one.

In the third interview, the detectives showed Parker a photograph of Montgomery's house. Parker told them that a big homie met him and his homie at the Golden Bear Inn, and from there they went to Montgomery's house in his homie's Cadillac. Parker claimed that they got as far as the brick wall separating them from the driveway where Montgomery was behind his car, and then Montgomery fired at them first from behind the wall. Parker also claimed that he did not cross the brick wall or enter the driveway.

Recordings of four inmate calls made from the North Kern State Prison to the 2209 number in April and May 2015 were obtained. At the start of the recording the inmate making these calls gave his name as Nut or North Side Nut, which Detective Freeman knew to be the nickname of Ghost Town gang member, Dantae Williams (Williams), who was an inmate of the prison at the time of the calls. A call was made on April 20, approximately six weeks after Ghost Town member Watts was shot and killed. Detective Freeman recognized Williams's voice on the recording. The person who answered the call identified himself as "Menace." Detective Freeman recognized Menace's voice as Parker's. Later in the call another Ghost Town gang member, known personally by Detective Freeman, came to the phone. The conversation centered on their upset and sadness over the loss of Watts. On April 25, Williams and Parker spoke more about Cartoon's (Watts's) murder. Parker related that he had been standing next to Cartoon when he was shot and killed. Williams believed that those responsible gathered at Palomares Park. Detective Freeman explained that Palomares Park was not only within the territory claimed by Ghost Town's rival, the 456 gang, but is the 456 gang's home base.

The jury heard recordings of two calls made from North Kern State Prison to the 2209 number in which the caller identified himself as Nut on the day of the shooting (May 8). The first call at approximately 9:30 a.m., was cut off about five minutes later. A second call was made at 9:52 a.m. Detective Freeman recognized the voices of Williams and Parker on the calls. He also recognized Smith's voice when he came on the line, identified by Parker as "Savage." The recordings were played for the jury. In the first call, Williams asks, "So when you think you're gonna do it?" Parker replies, "I'm gonna do it in a minute, cuz." Williams responds with "Okay," and Parker continues, "I gotta wait till TC come get me, cuz. Yeah. We're gonna shoot this nigga, cuz."

In the second call, Parker tells Williams, "I'm with Savage right now."

Smith was arrested twice. The first time, in June 2015, Smith was stopped while driving his Cadillac. Registration and insurance information in Smith's name were located, and the Cadillac was impounded. Detective Freeman showed Smith a photograph of his car at the scene of shooting and then placed him in a cell with an undercover deputy sheriff. Smith told the disguised deputy that he was a member of Ghost Town Crips and that his moniker was Savage. While Smith's Cadillac was in police custody, Detective Freeman had it driven by the crime scene, where its image was captured by the same surveillance camera, in order to compare the cars in the videos. Still photographs taken from the videos show side-by-side images of the car leaving the crime scene and Smith's car, later driven by the same camera. Both images appear to be the same car.

Smith was released, and arrested again on August 19, 2015, when Detective Freeman told him that he was arrested on murder charges, that his phone had placed him in the area of the

murder, and that his car had been at the crime scene. Detective Berger then placed Smith in a cell with a confidential informant equipped with a recording device. The hour-long recording of their conversation was played for the jury. Smith told the informant that he was Savage from Ghost Town Crips, and that he had been arrested for a "hot one."[9] Smith said the police had told him they had evidence of an alleged accomplice who "got caught up on it . . . . And they -- they saying we was together, whatever." Smith said they had a "whole lot" of evidence, because the other person "got caught with his phone . . . talking to somebody in jail," and this linked Smith to the crime because he (Smith) "got on the phone." Smith told the informant that the police had a photograph of his car at the crime scene, but did not have the license plate number, and there "could be a million cars like that." When the informant asked whether his alleged accomplice might tell the police where the guns were, Smith responded that the accomplice did not know where the guns were and thus would not be able to tell the police. Smith said he had been putting money on his alleged accomplice's books, and doubted he was cooperating with the police because if so, Smith would not have been released after his first arrest.

Later Smith said he knew the police had lied when they told him his own phone placed him at the scene, because he did not have his phone with him. He added that the only way to link him to the crime was if his alleged accomplice were to "open up his mouth." Smith acknowledged that he had "fucked up" by getting on the phone when his alleged accomplice was talking to a "nigga in jail" during a call that occurred "[b]efore that nigga went -- went to do the shit." It was that phone call from jail when

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[9] Detective Berger, explained that "hot one" is a gang term for murder.

they were on their way to the "hood" that "placed us there." Smith said it was six to ten minutes later that "the shit went down." Smith thought that the phone's GPS revealed their location and he had told the alleged accomplice to turn off the phone. Finally, Smith said, "we had to snatch the phone away from the nigga and -- and toss it."

Detective Freeman downloaded various gang-related photographs from Parker's Facebook account. One photograph depicted Parker making a G for Ghost Town with one hand, and a C for Crip with the other, while wearing a Texas Rangers hat, which is common for Ghost Town members. The initials "NS," for North Side, appear in the upper right corner next to "TC Deuce." Detective Freeman explained to the jury that the Ghost Town Crips were located in the northern part of the city, and often go by North Side Ghost Town Crips. A street sign for 3100 North Abbott appears in the upper left corner of another photograph. Another depicts the hand signs for Blood underneath which is written "killa," meaning Blood killer. In another photograph of Parker making gang signs, the word "Norfsyde," meaning Northside, appears.

Detective Freeman also found a Facebook account in Smith's name, and downloaded several photographs from there. In one photograph, Smith appears with two men, one of whom is making a G with his hand. The other is Calvin Robinson Sr., a Ghost Town member whose moniker is "Big Spook," and who was known by Detective Freeman as someone well respected in the gang at the level of a big homie. In another, Smith is depicted making a T with his hand, while the person next to him is making a G. Other photographs show several people making Ghost Town hand signs or wearing clothing favored by Ghost Town members, one of them is holding a firearm.

Detective Freeman gave his opinion that defendants were members of the Ghost Town Crips, and that the gang's primary activities were vandalism, narcotics sales, carrying deadly weapons, assaults, attempted murders, and murders. He also presented conviction records of Ghost Town members who had committed violent offenses, including a record of a robbery conviction belonging to Williams, the gang member whose telephone calls from prison were recorded and played for the jury.

Given a hypothetical question based on the facts in evidence, Detective Freeman stated his opinion that the crime was directed by the Ghost Town member in prison who made the telephone calls, and that it was committed in association with the Ghost Town Crip criminal street gang for the benefit of the gang and the gang members who committed the crime.

Defense evidence

The parties stipulated that defendants were measured and Parker was 6 feet 4 inches tall, while Smith was 5 feet 6 and one-quarter inches tall. The defense called Detective Freeman, who explained several gang expressions used in the recordings heard by the jury, including the expression, "pushing through the set," which could mean either passing through one's own neighborhood or through a rival gang's neighborhood, depending on context.

DISCUSSION

I. Smith's statements to the confidential informant

Asserting error under *Massiah*, *supra*, 377 U.S. 201, Smith contends that the trial court erred in admitting Smith's statements to the confidential informant because the statements were made after the criminal complaint was filed. Under *Massiah*, the Sixth Amendment right to counsel is violated when an undercover agent is used to elicit incriminating statements from a suspect about a crime, after the suspect has been charged

with the crime. (See *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 457-459.)

It is the defendant's burden to demonstrate a *Massiah* violation. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1006-1007.) "To prevail on a *Massiah* claim, a defendant must show that the police and the informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. [Citations.] 'Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements.' [Citation.] . . . A preexisting arrangement . . . need not be explicit or formal, but may be inferred from evidence of the parties' behavior indicative of such an agreement. [Citation.] A trial court's ruling on a motion to suppress informant testimony is essentially a factual determination, entitled to deferential review on appeal. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 67.)

We thus defer to the trial court's factual findings so long as they are supported by substantial evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 345.) Here, as respondent points out, Smith did not object on *Massiah* grounds, and thus did not afford the trial court the opportunity to resolve the factual questions under that authority. A failure to object on *Massiah* grounds forfeits the issue on appeal. (*Wilson*, at p. 348.)

Smith counters that he sufficiently raised the issue in his oral motion to exclude the statements, although he relied on inapplicable authority by referring to the placement of the informant in the cell as a "*Perkins* operation." In *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), the Supreme Court held that conversations between uncharged suspects and undercover

agents posing as fellow inmates are not interrogations which require *Miranda*[10] warnings, unless there is some element of coercion. (*Perkins*, at pp. 296-297.)

"An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide [and] will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) Here, when the trial court denied Smith's motion to exclude the statements, it understood the issue as an objection under *Perkins* to the absence of *Miranda* warnings, as the court stated, in part: "*Illinois versus Perkins*, the very case you're relying on, at 496 U.S. 292, stands for the proposition that conversations between a suspect and an agent do not implicate *Miranda*. There's no coercive behavior." The court's comments make clear that it did not construe Smith's motion as anything but a *Miranda* issue under *Perkins*. Smith has thus failed to preserve the issue for review on appeal.

Smith asks that we exercise our discretion to reach the issue because *Perkins* presents a similar issue;[11] and relying on *People v. Viray* (2005) 134 Cal.App.4th 1186, 1194-1196, defendant argues that his right to counsel had attached upon the filing of the complaint prior to the jailhouse conversation. Respondent disagrees, arguing that *Viray* and its line of cases

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10 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

11 Smith relies on *In re Sheena K.* (2007) 40 Cal.4th 875, 887, footnote 7 (reviewing court may exercise discretion to review forfeited constitutional claims when closely related to claims raised at trial); and *People v. Partida* (2005) 37 Cal.4th 428, 437-438 (defendant may argue on appeal that constitutional violation was an additional legal consequence of the asserted error).

were wrongly decided and should be reconsidered in light of *Rothgery v. Gillespie County* (2008) 554 U.S. 191, 213 (*Rothgery*), which held that the right attaches upon first appearance before a judicial officer (arraignment).[12]

We need not resolve the parties' disagreement, as Smith has failed to carry his burden to "'establish that the informant . . . was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage.' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1247.) Our review of the record revealed no more than the informant's obvious preexisting agreement to wear a recording device. Smith has cited no evidence suggesting that the informant expected any benefit or advantage; nor has he cited facts from which even an implicit agreement might be inferred. Smith thus failed to meet his burden here and below.

Smith asks that if the issue is deemed forfeited, we nevertheless determine whether defense counsel rendered ineffective assistance in failing to object on *Massiah* grounds. To prevail on a claim of ineffective assistance of counsel, a defendant must not only show deficient performance by counsel, but also resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) Prejudice is shown by "a reasonable probability that, but for counsel's unprofessional errors, the result of the

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[12] *Rothgery* did not hold that such appearance was a prerequisite to attachment, only that it would attach at that time. In a plurality opinion the United States Supreme Court held that the right attaches "at or after the time that adversary judicial proceedings have been initiated . . . [¶] . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (*Kirby v. Illinois* (1972) 406 U.S. 682, 688-689; see also *People v. Webb* (1993) 6 Cal.4th 494, 526.) Those courts did not consider the filing of a complaint.

proceeding would have been different." (*Id*. at p. 694.) Smith has not met this burden. As discussed in the next section, the evidence against him was overwhelming without regard to the jailhouse conversation such that any error in admitting the conversation was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) It follows that there is no reasonable probability that the result would have been different absent the jailhouse conversation.

II. Smith's Evidence Code section 352 objection[13]

Smith contends that the trial court should have excluded statements regarding his gun charge made to the confidential informant. He argues that any reference to the gun charge was irrelevant, more prejudicial than probative, and resulted in a denial of due process. Smith essentially told the informant that his homie was in possession of guns, the police served a search warrant on the home they shared, and although the guns were found 20 feet from Smith's area in the house, he was charged with possession. The charge was later dropped.

Only evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" is admissible. (Evid. Code, §§ 210, 352.) Even if relevant, evidence may be excluded under section 352 if its probative value is substantially outweighed by its potential to cause undue prejudice. (*People v. Scott* (2011) 52 Cal.4th 452, 490.) We review the court's ruling for an abuse of discretion. (*Id*. at pp. 490-491.) It is the defendant's burden to demonstrate both an abuse of discretion and resulting prejudice. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1122.) "[T]he admission of evidence, even if erroneous under state law, results

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13 All further references to "section 352" are meant to refer to Evidence Code section 352.

in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida, supra*, 37 Cal.4th at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) However, before reaching any federal due process claim resulting from state law error, the defendant must carry his burden to demonstrate prejudice under the test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746 (*Hernandez*).) To meet his burden under that test, Smith must establish "a reasonable probability that error affected the trial's result." (*Ibid*.)

As an initial matter, we observe that there was no express ruling on Smith's in limine motion to exclude the jailhouse statements regarding guns. Counsel argued that Smith's mention of his San Bernardino gun charge was more prejudicial than probative because there was no evidence that the guns involved were used in the crime charged in this case, and because Smith was no longer facing the gun charge. The prosecutor argued that there would be no undue prejudice because Smith himself stated that the charge had been dropped. The court deferred ruling in order to review the recording and transcript. A few days later, the court confirmed its thinking as to relevance, but did not rule and made no mention of Smith's section 352 motion.[14] Nevertheless, the recording was played at trial without

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[14] Although the court made no express ruling that the evidence was relevant and did not mention Smith's section 352 objection, the prosecutor represented to the court that it had previously ruled that the prejudicial effect of the evidence did not significantly outweigh the probative value. However, the prosecutor was mistaken, as the court's comments and the minutes of the prior hearing indicate that the court deferred ruling. Moreover, at the prior in limine hearing, the court had not yet reviewed the evidence, and Smith did not press for a ruling.

further objection. As the court ultimately admitted the evidence, and as respondent does not urge forfeiture here, we could infer an implied ruling that the probative value of the statements outweighed their potential prejudicial effect. (Cf. *People v. Flores* (1979) 92 Cal.App.3d 461, 466-467.) However, since Smith has failed to meet his burden to demonstrate any resulting prejudice, it is not necessary that we make such an inference.

Smith argues that evidence of possession of a firearm unrelated to the instant case was intrinsically prejudicial, and the evidence against him was weak because it did not include eyewitness testimony or surveillance footage. He concludes that because the evidence supported only "a suspicion of guilt, the jurors' knowledge of Smith's access to firearms may have been the piece of evidence that tipped the scale in favor of a guilty verdict."

First, contrary to his characterization of the statements here, Smith did not say that he possessed the guns or that he had access to them, and there was no evidence to that effect.[15]

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[15] In the recorded conversation, Smith said he had been arrested in San Bernardino, and "Well, they tried to get me with the guns. The guns? I wasn't even in possession of the guns. I was 20 feet away from the guns. You know what I'm saying?" When the informant replied, "They can't put that on you," Smith said, "I know that. You know what I'm saying? But, you know, that they trying to get the little -- the gun charge -- you know what I'm saying -- up under -- up under me. You feel me?" Smith later told the informant, "They take me into custody. They raid my house. They find some guns up in there. I wasn't even in the house. Matter of fact, it wasn't even my house." Smith continued, "They went inside. They searched. The homie was up in there. They charge me with the fucken guns." Smith said that his homie should have been charged, and later in the conversation, he told the informant that the charge was dropped.

Rather, Smith's statements were that he had *not* been in possession of guns, that they were in his homie's possession, that the guns were *not* found in the house near Smith, and that the charge was dropped. Nothing in the record suggests that the jurors construed Smith's statements to mean otherwise. The statements clearly did not suggest a propensity to possess, use, or maintain access to guns.

Second, Smith's conclusions do not demonstrate that the case against him was weak. Indeed, the subject passages amounted to a small fraction of the hour-long recorded conversation, while the other evidence of Smith's guilt of the charged crime was overwhelming. The shooting was captured on surveillance video, which showed two shooters and a car that appeared to be identical to Smith's Cadillac leaving the scene of the shooting. Smith admitted to being known as "Savage," a member of Ghost Town Crips, to the undercover officer in the first jailhouse recording. In Parker's first call to imprisoned gang leader Williams, Parker said, "I gotta wait til TC come get me, cuz. Yeah. We're gonna shoot this nigga, cuz." Five minutes later, Parker and Savage both spoke to Williams on Parker's phone about 20 minutes before the shooting, and the call accessed a cell tower less than a mile from the location where Montgomery was shot. Detective Freeman recognized Smith's voice when he came on the line, and Smith was identified by Parker as "Savage." Parker told Williams, "I'm with Savage right now."

Furthermore, Smith had a motive to participate in the shooting. Both Smith and Parker were members of the Ghost Town Crips, whose primary gang activities included assaults, attempted murders, and murders. Shooting rivals in their own territory benefits gangs and its members by increasing fear and respect for them in the community. Montgomery, an associate with the rival 456 gang, lived in an area claimed by the Ghost

Town Crips. Furthermore, at the time of the shooting there had been feuding between the Ghost Town Crips and 456 Bloods; Ghost Town member Watts had recently been shot and killed; and both Parker and Smith attended Watts's funeral.

In view of this evidence, we discern no reasonable probability that the result would have been different if the statements about the dismissed gun charges had been excised. As Smith has failed to demonstrate error under state law, he cannot show that he was denied due process or that his trial was rendered fundamentally unfair by admission of the statements. Nevertheless, the other evidence against him was so overwhelming that we can say with confidence that any error in admitting the statements was harmless beyond a reasonable doubt. (See *Chapman v. California, supra*, 386 U.S. at p. 24.)

III. Parker's statements admitted against Smith

Smith contends that the trial court erred in denying his motion to redact from Parker's police interviews statements regarding the shooter's Cadillac, and that the error resulted in a violation his right of confrontation under the Sixth Amendment. Smith also contends that his trial counsel provided ineffective assistance by failing to object to Parker's description of the shooter as "short, bald head," and wearing a wig of dreadlocks at the time.

Prior to trial the prosecutor sought a trial before a single jury, asked that Parker's statements be admitted, and submitted a transcript with proposed redactions. At the pretrial hearing on motions, Smith's counsel observed that the prosecutor's redactions were "appropriate to the extent that they eliminate any reference to my client"; but then counsel asked that all references to a Cadillac be redacted because they connected Smith to the crime. Without expressly denying the request, the trial court granted the prosecution's motion, noting that Cadillacs

were common and the prosecution would be obligated to connect Smith to the car with other evidence, such as surveillance video or DMV records. The jury was instructed that Parker's statements to the police could not be considered as evidence against Smith.[16]

The Sixth Amendment to the United States Constitution gives every defendant in any criminal prosecution, "the right to . . . be confronted with the witnesses against him." The United States Supreme Court has held that where a nontestifying codefendant's confession implicating the defendant is admitted in a joint trial, the defendant is denied his constitutional right of confrontation, which cannot be cured by an instruction to the jury not to consider the evidence against the defendant. (*Bruton v. United States* (1968) 391 U.S. 123, 126-128, 134-135 (*Bruton*); see *People v. Aranda* (1965) 63 Cal.2d 518.)

Bruton created a narrow exception to the general rule that jurors are presumed to follow their instructions, applicable only to a codefendant's confession which is "incriminating on its face," and not when it becomes incriminating "only when linked with evidence introduced later at trial." (*Richardson v. Marsh* (1987) 481 U.S. 200, 206-208 (*Richardson*).) "[T]he Confrontation Clause is not violated by the admission of a nontestifying

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16 The trial court read CALJIC No. 2.08, as follows: "Evidence has been received of a statement made by defendant Parker after his arrest. At the time the evidence of this statement was received, you were instructed that it could not be considered by you against the other defendant, Mr. Smith. Do not consider the evidence of this statement against Mr. Smith." Though in the pretrial hearing the trial court invited all counsel to suggest language for an appropriate admonition regarding the redactions, apparently none did, nor did counsel suggest a limiting instruction, as no admonition was in fact given when the subject statement was introduced.

codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Id.* at pp. 211, fn. omitted; see also *People v. Burney* (2009) 47 Cal.4th 203, 231.) However, a limiting instruction is less likely to be effective when the codefendant's statements "obviously refer directly to someone, often obviously to [the defendant], and . . . involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." (*Gray v. Maryland* (1998) 523 U.S. 185, 196 (*Gray*).)

The California Supreme Court declined to draw a bright line rule on the efficacy of redaction which retains references to an accomplice, albeit not his name. The court held that "the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial." (*People v. Fletcher* (1996) 13 Cal.4th 451, 456.) In *People v. Burney*, *supra*, 47 Cal.4th at page 231, the court held that the standards set forth in *Richardson* and *Gray* were not satisfied where redacted statements "did not completely eliminate any reference to the 'existence' of accomplices [citation] and . . . the statements in conjunction with other evidence led to the obvious inference that defendant was 'the other' [participant in the crime] . . . [Citation.]"

A. Statements regarding the Cadillac

Smith argues that the redactions to Parker's statements did not erase all references to the existence of another participant in the crime, and Parker's statement that the shooter drove a Cadillac, unmistakably implicated Smith, when considered with the evidence that Smith drove a Cadillac. We observe that the existence of another participant was not erased from the interviews because defense counsel agreed that the redactions

were sufficient, and he did not request further redaction regarding the other participant. Regardless, any error regarding the Cadillac statements was harmless beyond a reasonable doubt in light of other evidence presented.

"It is well established . . . that *Aranda*/*Bruton* error is not reversible per se, but rather is scrutinized under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*[, *supra*,] 386 U.S. 18, 24. [Citation.] . . . '[I]f the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless.' [Citation.]" (*Burney*, *supra*, 47 Cal.4th at p. 232.) As respondent points out, the surveillance video established that there were two shooters and that a car which appeared to be a Cadillac left the scene of the shooting. Thus, Parker's statements about the second participant and the Cadillac were merely cumulative of other, properly admitted direct evidence. In addition, a later police video of defendant's car recorded by the same surveillance camera at the crime scene, showed that Smith's Cadillac appeared to be identical to the Cadillac which left the crime scene right after the shooting. This and the evidence discussed in section II above leads us to conclude beyond a reasonable doubt that any error in admitting Parker's statements regarding a Cadillac was harmless.

B. Parker's description of shooter as short and bald

Smith contends that defense counsel's failure to object to Parker's description of the shooter as short and bald, but wearing a wig, resulted in a violation of his constitutional right to the effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that the outcome of the case would have been different if counsel had not erred. (*Strickland v. Washington, supra*, 466 U.S. at pp. 686,

694.) Smith argues that because no forensic evidence or eyewitness testimony identified him as the second shooter, and he was not identifiable on the surveillance video, it must have been Parker's description of the shooter as short and bald but wearing a wig that eliminated the jurors' reasonable doubt of his guilt. As we have previously determined that other evidence of defendant's guilt was overwhelming, we agree with respondent that a different result was not reasonably probable, even without Parker's description, and conclude that Smith has not met his burden to show otherwise.

IV. Facebook photos

Smith contends the trial court erred in admitting images obtained from his and Parker's Facebook accounts, without sufficient foundation.[17]

Parker initially objected to the admission of Facebook images printed from the account of TC Deuce. Later, Parker narrowed his objection to the graphics or memes and photographs, on the ground that Detective Freeman could not identify who had posted them, but Parker made no objection to the accuracy of the printouts themselves. Counsel explained that there was no dispute that the photographs that appeared to depict Parker did in fact depict him.

With regard to the photographs printed from the Facebook account in Smith's name, Smith argued that proper authentication required either that a witness with personal knowledge of when and where the photographs were taken, testify that the photographs were what they purport to be, or an

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[17] Smith asserts standing to challenge the court's ruling on Parker's objection, noting that prior to trial the trial court ordered that each defendant be deemed to have joined in all objections by his codefendant.

expert witness verify that the images were not faked or manipulated.

The trial court overruled the objections in part on the ground that the photographs demonstrated a continuity of subject matter or content. The court relied on *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1434-1436 (*Valdez*), which found a foundation sufficient due to the "pervasive consistency" of the content of a challenged web site. The trial court also based its ruling on the presumptions in Evidence Code sections 1552 and 1553, that a printed representation of computer information, a computer program, or images stored on a video or digital medium, is presumed to be an accurate representation of the information, program, or image that the printout purports to represent. As defense counsel later argued in a renewed objection, those presumptions apply only to the correctness of the printing process, which Parker did not dispute. (See *People v. Goldsmith* (2014) 59 Cal.4th 258 (*Goldsmith*).) In *Goldsmith*, the California Supreme Court explained that the presumptions are intended to satisfy the secondary evidence rule and "essentially operate to establish that 'a computer's print function has worked properly.'" (*Id.* at p. 269.) However, as the court cautioned, secondary evidence must still be authenticated. (*Id.* at pp. 271-272.)

Authentication of a writing, including a photograph, is required before it may be admitted into evidence. (Evid. Code, §§ 250, 1401.) "Authentication is . . . statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' or 'the establishment of such facts by any other means provided by law' ([Evid. Code,] § 1400)." (*Goldsmith*, *supra*, 59 Cal.4th at p. 266.) "[T]he proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the

photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.]" (*Id.* at p. 267.) "The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.]" (*Ibid.*, citing *Valdez*, *supra*, 201 Cal.App.4th at pp. 1434-1435.) "A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.]" (*Goldsmith*, *supra*, at pp. 267-268.) There is no restriction on the means by which a writing or photograph may be authenticated. (*Valdez*, *supra*, at p. 1435; Evid. Code, § 1410.) "'As long as the evidence would support a finding of authenticity, the writing [or photograph] is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*Goldsmith*, *supra*, at p. 267.)

We review the trial court's ruling for an abuse of discretion, and will not disturb the trial court's discretion unless it is shown to have been exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*Goldsmith*, *supra*, 59 Cal.4th at p. 266.) A miscarriage of justice occurs when it appears that a result more favorable to the appealing party would have been reached in the absence of the alleged errors. (*Watson, supra*, 46 Cal.2d at p. 836; see Cal. Const., art. VI, § 13.)

Here, the trial court considered *In re K.B.* (2015) 238 Cal.App.4th 989 [Instagram];*Valdez*, *supra*, 201 Cal.App.4th 1429 [MySpace]; and *People v. Beckley* (2010) 185 Cal.App.4th

509 (*Beckley*) [MySpace]. Smith relied on *Beckley*, where the foundation was found to be inadequate after the prosecution sought to impeach a witness with a photograph downloaded from the witness's boyfriend's MySpace site (not her own social media site). (See *Beckley*, *supra*, at p. 515.) The appellate court held that a sufficient foundation should include "'the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show . . . .' [Citation.] In addition, . . . authentication of a photograph 'may be provided by the aid of expert testimony . . . .' [Citations.]" (*Ibid*.)

Here, the trial court noted that *Beckley* predated *Goldsmith*, as well as *Valdez* and *In re K.B.*, which held that the evidence of authentication was not so restricted. (See *Goldsmith*, *supra*, 59 Cal.4th at p. 268; see *In re K.B.*, *supra*, 59 Cal.4th at pp. 996-997; *Valdez*, *supra*, 201 Cal.App.4th at pp. 1435-1436.) Smith argues that the foundation was adequate in *Valdez* and *In re K.B.* because unlike here, there was a password requirement as well as many more details tending to identify the defendant as the owner and manager of the page. (See *Valdez*, *supra*, at p. 1436; *In re K.B.*, *supra*, at p. 998.) We discern no rigid rule in *Valdez* or *In re K.B.* requiring a password or other particular facts or circumstances. Instead, those decisions recognized that the facts may differ from case to case and ultimately what is required is evidence that is sufficient to allow the trier of fact to find that the writing is what it purports to be. (*In re K.B.,* at p. 996; *Valdez*, at pp. 1434-1435; see *Goldsmith*, *supra*, at p. 267.) Under circumstances where each case necessarily depends on its own facts, a comparison with other cases is of limited utility in deciding issues of sufficiency of evidence. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)

The purpose of the evidence determines what must be shown for authentication. (*Goldsmith, supra*, 59 Cal.4th at p.

267, citing *Valdez*, *supra*, 201 Cal.App.4th at pp. 1434-1435.) Here the primary purpose of the Facebook evidence appears to have been to prove that the crime was committed in association with a gang member and at the direction of the gang. The Facebook account attributed to Parker was in the name of his admitted moniker, TC Deuce, and the Facebook account attributed to Smith was in his first and last names. Detective Freeman described the photographs he obtained from the accounts, and explained the images related to the Ghost Town Crips. On the TC Deuce site, the similar themes throughout the photographs, many of Parker, provided sufficient evidence that they were genuine and placed there either by Parker or at his direction. In one photograph, Parker is seen wearing a Texas Rangers cap, an item of apparel favored by Ghost Town Crip members. A photograph depicted the 3100 block of Abbott Boulevard, a place of significance to the Ghost Town Crips, and the number used by Parker as his cell phone passcode. The "cover photo" of the TC Deuce page contained a photograph of Parker making a Ghost Town hand sign, as well as a series of symbols representing the gang, including Abbott and 3100. Other photographs also contain symbols related to Ghost Town Crips. Similarly, the Facebook site in Smith's name featured photographs including: Smith with an unidentified person making a Ghost Town hand sign, as well as Calvin Robinson, Sr., a well-respected member of the gang; two people making a Ghost Town hand sign and wearing blue and white clothing consistent with Ghost Town attire, while one of them held a gun; Smith with others, making Ghost Town hand signs; a man holding up his shirt with the words "Savage Loc" and the number 3, a symbol of the Ghost Town Crip gang.

Such content, coupled with Detective Freeman's testimony, provided sufficient evidence to support the trial court's finding of

an adequate foundation for the admission of the materials downloaded from both Facebook accounts, such that we discern no arbitrary, capricious or patently absurd exercise of discretion. Moreover, we agree with respondent that Smith has failed to demonstrate a reasonable probability that a result more favorable would have been reached in the absence of the admission of the photographs and graphics. Apart from the Facebook material, the prosecution presented compelling evidence that defendants were members of Ghost Town Crip gang. Parker, who wore a tattoo of a Ghost Town Crips symbol, admitted to police officers during prior contacts that he was a member of Ghost Town Crip gang. Smith told both an undercover sheriff's deputy and a jailhouse informant that he was Savage from Ghost Town. Defendants associated with Ghost Town members. For example, Parker and Smith and other Ghost Town members were photographed attending the funeral held for slain Ghost Town member Watts. In addition, the recorded telephone conversation with Ghost Town member Williams, shortly before the shooting, established that Williams and the defendants were members of the same gang as the conversation included gang references, and gang business was discussed. Finally, the shooting occurred in territory claimed by Ghost Town, and the victim was associated with the rival 456 Blood gang, with whom Ghost Town was then feuding.

Although Smith acknowledges that there was substantial evidence of defendants' gang membership, he contends that the evidence of his guilt was weak. He argues that the inflammatory nature of gang-related visual images, particularly the photograph depicting Smith with a person holding a gun, implied bad character and was likely to inflame the passions of a jury such that it convicted him despite the weak evidence. We again disagree that the evidence of Smith's guilt was weak, and on the

contrary, have found it to be overwhelming. We discern no reasonable probability that the result would have been different without the Facebook evidence.

V. Parker's proposed special jury instruction

Parker contends that the voluntariness of confessions is a jury issue, and that the trial court erred in refusing to give his proposed special jury instruction on that point. Without such an instruction, he argues, the jury was not adequately equipped to consider the defense that his statements to the police were coerced. Parker relies in part on the United States Supreme Court decision of *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*), which he interprets as holding that the voluntariness of a confession is a factual issue for the jury even after the trial court has held as a matter of law that the confession was voluntary and therefore admissible. We disagree with Parker's interpretation. In *Crane*, the court held that the voluntariness of a confession is a legal issue for the trial court, and it is the separate factual question of the confession's *reliability* which presents a factual issue for the jury. (*Id.* at p. 688.) The issue in *Crane* was the admissibility of evidence, not the trial court's obligation to instruct the jury. As the court explained, a defendant may present "evidence about the manner in which a confession was obtained" as relevant to its "reliability and credibility." (*Id.* at p. 691.)

Parker's proposed instruction was not limited to the issues of reliability and credibility. Instead it read as follows: "The People must demonstrate by a preponderance of the evidence that the defendant's confession was voluntary. A statement is involuntary if it is not the product of a rational intellect and free will. The test for determining whether a confession is voluntary in psychological coercion cases is whether the defendant's will was overborne at the time he confessed. When a defendant

claims psychological coercion, you must decide whether the influences brought to bear upon the accused were such as to overbear the defendant's will to resist and bring about admissions or a confession not freely self-determined. In determining whether or not a defendant's will was overborne, an examination must be made of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation. A statement is involuntary if it was obtained by inducement, meaning direct and/or implied promises, intimidation or threat."

The determination whether a confession was coerced or voluntary must be made by the trial court before it is submitted to the jury, if requested by the defendant. (*People v. Hoyos* (2007) 41 Cal.4th 872, 897.) Parker did not object to the admissibility of the confession as involuntary or coerced, and it was not for the jury to determine or redetermine the issue of voluntariness. (See *People v. Jimenez* (1978) 21 Cal.3d 595, 607.) Parker was entitled, however, to present evidence of coercion in order to show that the confession was unreliable or incredible. (See *People v. Terry* (1974) 38 Cal.App.3d 432, 442.) Parker was not prevented from presenting such evidence. Indeed his trial counsel cross-examined Detective Freeman at length regarding the detective's interrogation methods. Parker was also permitted to argue at length that the methods were coercive and produced a false confession.

Under such circumstances it was up to the jury to determine, not whether the confession was voluntary, but whether the confession was true, partially true, or completely false. (*People v. Terry*, *supra*, 38 Cal.App.3d at pp. 442-443.) The trial court instructed with CALJIC No. 2.70: "You are the exclusive judges as to whether a defendant made an admission, and if so, whether that statement is true in whole or in part."

The instruction given was correct, and it was sufficient for the jury to determine reliability and credibility. (See *People v. Carroll* (1970) 4 Cal.App.3d 52, 61.) As the language of CALJIC No. 2.70 was correct and sufficient, the court was not required to rewrite it. (*People v. Kelly* (1992) 1 Cal.4th 495, 535.)

Furthermore, proffered instructions are properly refused when they are potentially confusing or they incorrectly state the law. (*People v. Moon* (2005) 37 Cal.4th 1, 30.) Parker argues that the instruction should be construed as referring to reliability and credibility. As there is no language in the instruction about reliability or credibility, it is not reasonably susceptible to such a construction. Also, Parker's instruction did not inform the jury what to do if it found the confession to be involuntary, but instead implied that the jury should disregard it altogether in that event, rendering the instruction potentially confusing or misleading. The trial court thus did not err in refusing it.

If we had found error, we would apply *Watson's* "'reasonable probability' test of prejudice to the court's failure to give a legally correct pinpoint instruction. [Citation.]" (*People v. Pearson* (2012) 53 Cal.4th 306, 325, fn. omitted; see *Watson*, *supra*, 46 Cal.2d at p. 836.) Such an error "requires reversal only when it appears that the error was likely to have misled the jury. [Citations.]" (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10-11.) It is Parker's burden to demonstrate prejudice. (See *People v. Hernandez*, *supra*, 51 Cal.4th at p. 746.)

Assuming the jury should have been instructed on voluntariness as Parker proposed, the instruction would have directed the jury to determine whether the confession was *induced* by "direct and/or implied promises, intimidation or threat." The instruction thus included the rule that "[a]lthough coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a

resulting confession is involuntary.' [Citation.] The statement and the inducement must be causally linked. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 404-405.) Parker fails to point to evidence of such a link. Instead, he recounts statements by the detectives which were untrue or misstatements of law, as well as statements which Parker construes as implied promises of more lenient treatment or threats of harsher punishment. Parker then concludes that such interrogation *could have* easily overborne his will and caused him to falsely admit complicity. Contrary to Parker's conclusion, the *Watson* test "must necessarily be based upon reasonable probabilities rather than upon mere possibilities." (*Watson*, *supra*, 46 Cal.2d at p. 837.)

We discern no reasonable probability of a different result. During closing argument, Parker's counsel spoke at length regarding the defense theory that Parker's confession was coerced and false. Counsel invited the jurors to review the video of the interviews, arguing that the detectives caused Parker to make false admissions with "ruses and lies." Counsel argued that the detectives created emotional turmoil by pushing Parker too hard, "scar[ing] him to death" with "about 18 references to being charged with murder or spending the rest of his life in prison," which would be "torture" for a 23-year-old.

In sum, Parker's counsel invited the jurors to judge the interviews for themselves to determine whether Parker's statements were coerced and false. In addition, the jurors were correctly instructed to determine whether a defendant's statement constituted an admission and whether it was true in whole or in part. Jurors are presumed to understand and follow the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) We thus assume that the jury understood and applied the instruction given, and found that Parker's incriminating statements were true. The jury implicitly rejected

Parker's claim of coercion and the argument that any false admissions were induced by any lies, ruses, or emotional pressure the detectives may have applied. Where a factual question is necessarily resolved adversely to a defendant under correct jury instructions, omission of other jury instructions bearing upon the same factual question is harmless error. (*People v. Sedeno* (1974) 10 Cal.3d 703, 720-721, overruled on another point in *People v. Breverman* (1998) 19 Cal.4th 142, 149.) Parker has not met his burden to show prejudice.

VI. Parker's motion to exclude Smith's statements

Parker contends that the trial court erred in denying his written motion to exclude all statements made by Smith to the jailhouse informant which either potentially implicated or actually implicated Parker in a crime. The motion was made on the ground that the statements were hearsay and did not qualify as declarations against penal interest.[18]

To be admissible, the statement must be both against the declarant's penal interest and it must be trustworthy. (*People v. Leach* (1975) 15 Cal.3d 419, 441-442.) The exception does not apply to collateral assertions or "'to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant.' [Citations.]" "[A] hearsay statement 'which is in part inculpatory and in part exculpatory (e.g., one

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[18] Evidence Code section 1230 provides an exception to the hearsay rule when the "declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, or . . . created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Smith was unavailable because he could not be compelled to testify. (See *People v. Fuentes* (1998) 61 Cal.App.4th 956, 961-962.)

which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible.' [Citations.]" (*People v. Duarte* (2000) 24 Cal.4th 603, 612 (*Duarte*).) Therefore, only those portions of statements that are "specifically disserving" to the declarant's penal interests are admissible under Evidence Code section 1230. The court should excise "'any statement or portion of a statement'" that is not specifically disserving to the declarant. (*Duarte, supra*, at p. 612, quoting *People v. Leach, supra*, at p. 441, and *People v. Campa* (1984) 36 Cal.3d 870, 882.)

"[E]ven when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. [Citations.] [¶] 'To determine whether [a particular] declaration [against penal interest] passes [the] required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant."' [Citation.] [I]n this context, assessing trustworthiness "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.'" [Citation.]" (*Duarte*, *supra*, 24 Cal.4th at p. 614.) The trial court's decision that the evidence bore sufficient indicia of trustworthiness is reviewed on appeal for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 536.)

At the pretrial motion hearing, the trial court stated: "While it certainly wanders around a bit, that is clear, the flow of the conversation appears to be what one would expect under the circumstances. It's a free-flowing conversation. It seemed to

reflect certainly on Mr. Smith's side a general stream of conscious thoughts since it bounced from one subject to another subject. It does not appear that he was deflecting the blame for the crimes onto Mr. Parker. He did seem to be unhappy about the arrest, and he was complaining at great length about the cell phone, all of which I think does not fall into the blame shifting or attempting to curry favor. There doesn't seem to be much of a relationship between Mr. Smith and the CI at all. It seemed to be the first time they had ever met. I don't see any motives that jump to mind for him to lie and not express what was just floating around on the top of his head. I think that it would [f]all under the *Greenberger*[19] line of cases, declaration of his penal interest. However, there did seem to be a lot of chitchat in there that would not be really relevant, particularly jailhouse procedures as well as other odds and ends all about the shoelaces. I'm not sure the jury needs to hear all that. You folks can get together and work on what you think would be appropriate."

The court's comments indicate a finding that the conversation was generally trustworthy, though we discerned no express ruling on Parker's pretrial motion or particular statements in the conversation. After review of the entire record without finding an express ruling elsewhere, we requested assistance in identifying such ruling. We also asked the parties to identify any renewal of Parker's objection at trial, and any stipulations regarding redactions. Letter briefs on the questions raised were received. Parker argues that the above-quoted comments indicated the court's rejection of the arguments made in the motion to exclude and a finding that the challenged statements were admissible.

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19 See *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*).

Our review of the written motion does not support Parker's contention. Although Parker's motion expressly sought to exclude those statements which were "inculpatory or potentially implicate[d] him in a crime," the motion neither identified the particular statements to be excluded from the jailhouse conversation, nor provided clear or specific paraphrases; nor was there a highlighted transcript attached to indicate the particular phrases to be excluded. Instead, the motion provided record citations and argument that statements that could be found on the cited pages and lines were exculpatory or intended to shift the blame. The motion thus left it up to the trial court to search out the cited pages and lines in transcript and then decide just which phrases Parker meant to challenge.

Under these circumstances, it is not surprising that the court made comments in which it gave its general impression of the entire conversation, and then invited counsel to agree on appropriate redactions. We construe the court's references to the circumstances and to *Greenberger* as a finding that the overall conversation was generally trustworthy, as the California Supreme Court stated in that case, "'if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial.' [Citation.]" (*Greenberger*, *supra*, 58 Cal.App.4th at p. 327, quoting *Idaho v. Wright* (1990) 497 U.S. 805, 817, 820.)

However, in the trial court Parker did not challenge the jailhouse conversation as a whole, and he does not do so on appeal. He challenges only those "various statements [that] Smith made to the informant -- in which [Smith] denied involvement in the charged murder but implicated . . . Parker [and] were not specifically disserving to Smith's penal interest." Parker provides mostly argumentative paraphrasing of some

statements and he quotes isolated words and phrases taken from statements. Citing *Duarte*, *supra*, 24 Cal.4th at page 612, Parker concludes that "those statements were not an admission that Smith was involved in the charged crime. . . . Those particular statements should have been redacted and excluded from the evidence presented against appellant Parker." Parker does not list each particular statement that he contends the trial court should have redacted, and he makes no effort to demonstrate that the quoted words and paraphrases in his briefs are the same as those challenged in the motion. There is no list of the actual statements in the motion or in Parker's briefs, and no individualized argument demonstrating error in admitting each such statement. Even if we agreed that the trial court expressly ruled that the conversation was admissible, Parker's generalized argument does not permit an assessment of error in failing to redact parts of it, or any rational discussion of prejudice from one, some, or all statements which are not clearly identified.

We do not disagree with Parker's general assertion that statements which are not specifically disserving to the declarant are subject to redaction and exclusion (*Duarte*, *supra*, 24 Cal.4th at p. 612). However, the trial court's comments and request for an agreement on redactions, indicates a willingness to consider excluding some specific statements. As both defendants acknowledge in their letter briefs, the record is silent on any proposed or executed redactions. Parker argues that the court's invitation to agree on redactions is of no consequence, because the court's comments indicated that it was willing only to consider redacting statements that amounted to irrelevant "chitchat." As Parker does not specify just which statements listed in his overbroad motion that the trial court should have redacted from the jailhouse conversation, it cannot be known how the trial court would have ruled on any proposed redactions.

Parker's conjecture supports the interpretation that the trial court deferred ruling on any specific statements within the conversation until the parties further discussed the issue.

In general, whenever a trial court defers ruling on the defendant's motion to exclude or admit evidence, the defendant must renew the motion or press for a ruling in order to preserve the issue for review. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1037 [motion to exclude]; *People v. Lightsey* (2012) 54 Cal.4th 668, 711 [motion to admit evidence].) Parker acknowledges that he did not renew his objection at the time the recorded conversation was admitted at trial, but contends that the trial court's in limine ruling was sufficiently definite and express to preserve the issue for appeal. In some cases, an unsuccessful motion in limine will preserve the issue if it was "'sufficiently clear and specific to allow the appellate court to determine'" whether a renewed motion would be "'redundant.'" (*People v. Morris* (1991) 53 Cal.3d 152, 190, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) However, the exception applies only when the trial court's ruling was express, sufficiently definite, and clear. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1108, citing *People v. Brown* (2003) 31 Cal.4th 518, 547, 550.) Thus to preserve the issue for appeal, the motion must be specific, both the motion and ruling must be clear, and the ruling must be express. Otherwise, the moving party must press for a ruling or enter an objection at trial which satisfies the requirements of Evidence Code section 353.[20] (*People v. Ramos* (1997) 15 Cal.4th 1133, 1171.)

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[20] Evidence Code section 353 prohibits reversal due to the erroneous admission of evidence unless: "There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated to make clear the specific ground of the objection or motion."

Parker has failed to satisfy either requirement to preserve the issue. The motion was neither definite nor clear, as the challenged statements consisted of disjointed and argumentative paraphrases and partial quotes without a definite, particularized argument with respect to each. As discussed, we do not construe the trial court's pretrial comments as an express ruling on Parker's motion, but rather a description of the court's general impression and an invitation to propose redactions. As such, Parker has failed to preserve the issue for review.

However, if we did construe the court's comments as an express ruling, we would find no abuse of discretion in overruling such a broad hearsay objection to any or all statements in an hour-long conversation that might have implicated Parker in a crime or which potentially implicated him. It would be neither arbitrary nor capricious for a trial court to decline to decipher from Parker's motion just which statements were to be redacted.

VII. Adoptive admission instruction

Parker contends that the trial court erred in instructing the jury over his objection with CALJIC No. 2.71.5.[21] In particular,

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[21] The trial court read CALJIC No. 2.71.5 to the jury as follows: "If you should find from the evidence that there was an occasion when a defendant, under conditions which reasonably afforded him an opportunity to reply, failed to make a denial or made a false, evasive, or contradictory statement in the face of an accusation expressed directly to him or in his presence charging him with the crimes for which this defendant is here on trial or tending to connect him with its commission, and, three, that he heard the accusation and understood its nature, then the circumstances of his silence or conduct on that occasion may be considered against him as indicating an admission that the accusation was true. Evidence of an accusatory statement is not received for the purpose of proving it is true, but only as it

Parker argues that the instruction incorrectly stated the law of adoptive admissions by instructing that a *false* statement in the face of an accusation may be an adoptive admission.

CALJIC No. 2.71.5 reflects Evidence Code section 1221, which provides that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule 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."

Parker acknowledges that silence and an evasive or equivocal response to an accusation may constitute a tacit admission, as stated in *People v. Riel* (2000) 22 Cal.4th 1153, 1189, and *People v. Preston* (1973) 9 Cal.3d 308, 314 (*Preston*).) However, Parker insists that a falsehood cannot constitute an implied admission. We disagree. "Falsehoods as to material facts produce an inference of consciousness of guilt and constitute an implied admission. [Citations.]" (*People v. Milton* (1969) 270 Cal.App.2d 408, 414; see also *People v. Osslo* (1958) 50 Cal.2d 75, 93.)

Parker notes that *Preston* and other cases refer to evasive or equivocal responses but not to false responses, and he argues that this omission implies that falsehoods are "not of the same character" as evasive or equivocal statements. The issue Parker presents here was not before those courts, "and, of course, 'an opinion is not authority for a proposition not therein considered.' [Citation.]" (*People v. Williams* (2005) 35 Cal.4th 817, 827.) Moreover, as respondent has pointed out, in *People v. Richardson* (2008) 43 Cal.4th 959, 1021-1022, the California Supreme Court

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supplies meaning to the silence or conduct of the accused in the face of it. Unless you find that a defendant's silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement."

included falsehoods with other types of responses that may be considered implied admissions. The court rejected the argument that CALJIC No. 2.71.5 was inapplicable where the defendant did not remain silent in response to an accusation by police, but rather, "'talked and talked and talked.'" The court held that because "much of that talk was *false*, evasive and contradictory," the instruction was appropriate. (*Ibid.*, italics added.)

In reply, Parker contends that *Richardson* should be distinguished on the ground that Parker expressed "outright denials" to the detectives' accusations. He argues that an express denial, even if false, cannot be considered an admission. We discern no distinction between a false statement and a false denial. It is well established that falsely denying an accusation may demonstrate a consciousness of guilt. (See, e.g., *People v. Kimble* (1988) 44 Cal.3d 480, 496-497; *People v. Cole* (1903) 141 Cal. 88, 89-90; *People v. Scott* (1927) 84 Cal.App. 642, 649-650.) Evidence Code section 1221 does not require particular words or other conduct in response to a statement, but merely words or conduct that manifest the adoption or belief in the truth of the statement.

Nevertheless, Parker appears to argue that denials are exceptions to that rule, and he suggests that his interpretation finds support in CALCRIM No. 357, which explains the circumstances under which a *failure to deny* may be an adoptive admission.[22] Extrapolating the converse from this instruction,

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[22] CALCRIM No. 357 reads: "If you conclude that someone 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 . . . [¶] 1. The statement was made to the defendant or made in (his/her) presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would,

Parker concludes that where there is no *failure* to deny, an express denial can never be an adoptive admission. Jury instructions are meant only to reflect the law; thus, "whether published or not, [they] are not themselves the law, and are not authority to establish legal propositions or precedent." (*People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) Moreover, CALCRIM No. 357 contains no language that might be construed as meaning that express denials can never be an implied admission, as it is another instruction which is meant to focus on the defendant's statements. CALCRIM No. 362 instructs that false statements relating to the charged crime may demonstrate a consciousness of guilt.[23] A false express denial is a false statement. As noted above, such false statements may imply a consciousness of guilt and thus constitute implied admissions.

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under all the circumstances, naturally have denied the statement if (he/she) 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 decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

[23] CALCRIM No. 362 reads in full: "If [the] defendant [insert name] made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show (he/she) was aware of (his/her) guilt of the crime and you may consider it in determining (his/her) guilt. [You may not consider the statement in deciding any other defendant's guilt.] [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

(*People v. Osslo*, *supra*, 50 Cal.2d at p. 93; *People v. Milton*, *supra*, 270 Cal.App.2d at p. 414.)

Finally, Parker contends that there can be no adoptive admission unless there has been a direct accusation. "'For the adoptive admission exception to apply, however, *a direct accusation in so many words is not essential*.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 661, italics added.) All that is required is "'"a statement [made] in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue . . . ."' [Citation.]" (*Ibid.*) There was no direct accusation in *Preston*, for example, where an accomplice said to a witness in the defendant's presence: "'Suzanne, we went down to your mother's trailer house, and we broke in, and as we were leaving, we had everything ready to go out, and they came in, and there was an accident and . . . but they won't talk.'" (*Preston*, *supra*, 9 Cal.3d at p. 314.) The defendant then said to the witness, "'There wasn't much money.'" (*Ibid.*; also cf. *People v. Fauber* (1992) 2 Cal.4th 792, 851-852 [defendant participated in conversation about disposing of a body]; *People v. Zavala* (2008) 168 Cal.App.4th 772, 778 [no response by defendant to statements including, "'nobody better talk,'" "'we finally got that [racial epithet]'" and, "'he won't be bothering us anymore'"].)

The trial court thus did not err in reading CALJIC No. 2.71.5 as it did. Moreover, even assuming error, defendant cannot show prejudice. Any error in instructing the jury with CALJIC No. 2.71.5 is reviewed under the *Watson* test of harmless error. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299.) That test requires the defendant to demonstrate "a reasonable probability that error affected the trial's result." (*Hernandez*, *supra*, 51 Cal.4th at p. 746.) As read by the trial court, CALJIC No. 2.71.5 concluded with the following: "Unless you find that a defendant's

silence and conduct at the time indicated an admission that the accusatory statement was true, you must entirely disregard the statement." We assume the jury understood that admonition, followed it, and accorded no weight to any statement unless it found that Parker's silence or conduct indicated an admission that it was true. (See *People v. Chism*, *supra*, at p. 1299.) Moreover, as respondent notes, Parker made numerous statements that were directly incriminating, and ultimately identified himself as the second man depicted in a still photograph taken from the surveillance video which showed two shooters. We discern no reasonable probability that the result would have been different if the word "false" had been excised from the instruction, or if the instruction had not been given at all.

VIII. Cumulative error

Smith and Parker both contend that if this court finds that no single error asserted here requires reversal, their convictions should be reversed to the cumulative effect of all such errors. Because "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must reject defendant's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

IX. Sentencing issues

A. Amended section 12022.53

Defendants contend that they are entitled to a remand for resentencing under Senate Bill No. 620's amendment to section 12022.53, effective January 1, 2018. (See Stats. 2017, ch. 682, §§ 1 & 2.) Respondent agrees.

Under former section 12022.53, each defendant received a consecutive term of 25 years to life for the personal discharge of a firearm, causing great bodily injury and death. The amended statute reads: "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).)

Since defendants' judgments were not final on January 1, 2018, when the amended statute took effect, the amendment applies retroactively to each defendant, under the reasoning of *In re Estrada* (1965) 63 Cal.2d 740, in that it gave trial courts new sentencing discretion to lessen punishment. (See *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.) In general, when new statutory discretion is applied retroactively or the trial court was otherwise unaware of its discretion, a defendant is entitled to resentencing. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.]" (*Ibid.*)

We thus vacate the sentence and remand for the limited purpose of allowing the trial court to exercise its newly granted discretion.

B. Five-year enhancements

Defendants contend and respondent agrees that the trial court erred in adding a five-year prior serious felony enhancement to each defendant's sentence pursuant section 667, subdivision (a)(1), because each enhancement was improperly based on a juvenile adjudication.

Section 667 allows a five-year enhancement for each serious felony prior conviction on charges brought and tried separately, when a defendant is convicted of a serious felony in the present case. Section 667, subdivision (a)(1) applies to "prior convictions." Prior juvenile adjudications are not "prior convictions" within the meaning of section 667, subdivision (a)(1).

(*People v. West* (1984) 154 Cal.App.3d 100, 110, cited with approval in *People v. Garcia* (1999) 21 Cal.4th 1, 24.) Thus, the five-year enhancement under section 667, subdivision (a)(1) must be stricken.

C. Ten-year gang enhancement

Defendants contend that the trial court erred in imposing and staying a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C). Respondent agrees that the enhancement imposed on Parker's sentence should be stricken, but points out that the enhancement was not imposed on Smith's sentence, and although the minutes erroneously state that it was stayed, there was no such oral pronouncement.

Defendants were convicted of first degree murder, an offense that carries a sentence of 25 years to life in prison. Therefore defendants' sentences are governed by the 15-year minimum parole eligibility term of section 186.22, subdivision (b)(5), and the 10-year enhancement is inapplicable. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007-1009.) The appropriate remedy is for this court to strike the 10-year enhancement. (See *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405.)

D. Juvenile adjudications under the Three Strikes law

Both defendants contend that they are entitled to a new trial to determine whether the prior juvenile adjudications used to double their sentences qualified as strikes under the Three Strikes law. They argue that the evidence was insufficient to prove that they were 16 years old or older at the time of the commission of the prior offenses.

The Three Strikes law provides that if a defendant has committed one prior serious or violent felony as statutorily defined, and that prior conviction has been pled and proved, the determinate term or minimum term for an indeterminate term

shall be doubled. (§ 667, subd. (e)(1); § 1170.12, subd. (c)(1).) A prior juvenile adjudication qualifies as a prior serious or violent felony only if the defendant was 16 years of age or older at the time of the commission of the prior offense. (§ 667, subd. (d)(3)(A); § 1170.12, subd. (b)(3)(A).)

The information here alleged that Smith had been convicted of robbery in 2001, that Parker had been convicted of robbery in 2009, and that the offenses were serious or violent felonies.[24] Respondent argues that because defendants each admitted having suffered the prior juvenile adjudications, and because the scope of a prior conviction admission includes all allegations concerning the felony contained in the information, any challenge based upon insufficiency of the evidence is barred. (See *People v. Ebner* (1966) 64 Cal.2d 297, 303-304 (*Ebner*).) We agree. The information alleged that each prior offense was a serious or violent felony subject to the provisions of the Three Strikes law. Thus, as the prior juvenile adjudications were alleged as strikes and defendants admitted the allegations, they are bound by their admissions. (*People v. Arias* (2015) 240 Cal.App.4th 161, 166-167, fn. 3.)

Defendants argue that their cases are different because although the information alleged here that the prior *robberie*s were serious or violent felonies, there was no allegation that the convictions (or juvenile adjudications based on the robberies) qualified as serious or violent due to defendants' ages at the time

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[24] Although the information referred to the priors as convictions rather than juvenile adjudications, this was clarified prior to defendants' admissions. From the birthdates on the information it appears that Smith turned 16 nearly six months before his "conviction" of June 26, 2001, and Parker turned 16 approximately nine months prior to his "conviction" on March 17, 2009.

of their commission. They reason that because the age factor was neither specifically alleged or expressly admitted, they are entitled to a new trial on the issue of whether the prior adjudications qualified as strikes. Such an argument presents an issue of pleading, not sufficiency of the evidence.

To impose a second-strike term, a prior serious or violent felony conviction as defined in section 667.5 or section 1192.7, must be plead and proved. (§ 667, subd. (d); § 1170.12, subds. (b), (c).) The information may allege the prior serious felony by naming the felony or the statute defining it, but need not allege the manner in which it was committed so as to render it a serious or violent felony. (*People v. Thomas* (1986) 41 Cal.3d 837, 842-843 (*Thomas*); see *People v. Mancebo* (2002) 27 Cal.4th 735, 753-754 [enhancement may be alleged by statute number or a description of the qualifying circumstances]; § 969.) For example, in *Thomas*, after the defendant argued that his admission of a prior burglary conviction was insufficient because he did not specially admit that the burglary was a residential burglary, the California Supreme Court held that since the information alleged the burglary was a serious felony within the meaning of sections 667 and 1192.7, defendant's admission effectively conceded that it was committed in a manner which would render it a serious felony. (*Thomas*, at pp. 842-843.)

Here, the information alleged as to Parker that he "had been convicted of the following serious and/or violent felonies, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b), and is thus subject to sentencing pursuant to the provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12: [PC211]." The information alleged as to Smith that he "had been convicted of the following serious and/or violent felony, as defined in Penal Code section 667(d) and Penal Code section 1170.12(b), and is thus subject to sentencing pursuant to the

provisions of Penal Code section 667(b)-(j) and Penal Code section 1170.12: [PC211]."

The information clearly alleged that the robberies were serious or violent felonies as defined in section 667, subdivisions (b) through (j) and section 1170.12. As defendants each admitted the allegations, they conceded the circumstances. (See *Thomas*, *supra*, 41 Cal.3d at p. 843.) Defendants are bound by their admissions. (See *People v. Arias*, *supra*, 240 Cal.App.4th at pp. 166-167, fn. 3.)

Smith contends that the California Supreme Court effectively abrogated *Thomas* and *Ebner* in *People v. Adams* (1993) 6 Cal.4th 570 (*Adams*). He contends that *Adams* supports his argument that the admission of his prior juvenile adjudication did not imply an admission to the additional element that he was 16 years old at the time of the offense.

Adams is inapposite as it involved a pretrial stipulation by the defendant, for tactical reasons, to having been on bail at the time of the commission of the charged offense. Our Supreme Court held that the *Boykin/Tahl*[25] advisement is not required prior to making such an admission. Nothing in *Adams* supports defendants' positions.

Here, defendants were advised of their rights to a jury or court trial, as well as their rights to remain silent and to confront and cross-examine witnesses against them. They were both

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[25] These advisements are three constitutional rights: the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers, which must be given before a defendant enters a guilty plea. (See *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132.) They must also be given before accepting a defendant's admission of a prior conviction. (*In re Yurko* (1974) 10 Cal.3d 857, 863.)

informed that the consequences of their admissions to the juvenile adjudications would be that the base prison term of 25 years to life would be doubled. *Adams* enunciated no rule of law that would invalidate those admissions.

Defendants also rely on recent authority grounded on the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, which held that "any fact, other than the fact of a prior conviction, that increases the statutorily authorized penalty for a crime must be found by a jury [or court] beyond a reasonable doubt." (*People v. Gallardo* (2017) 4 Cal.5th 120, 123-124 (*Gallardo*).) In *Gallardo*, the California Supreme Court was guided by the United States Supreme Court's discussions of Sixth Amendment limitations on "a judge's authority to make the findings necessary to characterize a prior conviction as a serious felony." (*Id.* at p. 124, citing *Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *Mathis v. United States* (2016) 579 U.S. __ [136 S.Ct. 2243] (*Mathis*).) None of these authorities is helpful here, as none held that a defendant cannot waive trial and admit a prior conviction alleged to be a serious felony, and none considered prerequisites to the validity of such an admission. Indeed, the defendants in those cases *disputed* or did not admit that their prior convictions were qualifying felonies. (See *Gallardo*, *supra*, at p. 125; *Descamps*, *supra*, at pp. 258-259; *Mathis*, at p. 2250.) Here, of course, there was no judicial factfinding for the reason that defendants waived trial on the prior convictions and admitted them; thus, there is no need here for guidance on the limits on judicial factfinding under the Sixth Amendment.

In sum, both defendants were advised of their constitutional and trial rights before they each expressly waived both a jury trial and a court trial on the prior juvenile adjudications, and admitted their prior juvenile adjudications based on robberies. Moreover, the record demonstrates that

defendants had adequate notice of the age prerequisite for use of their juvenile cases as priors, understood, and intended to admit. Prior to the admissions the prosecutor filed sentencing memoranda claiming that the charged strikes were juvenile adjudications based upon robberies, and that each defendant was 16 years old at the time he committed the alleged strike offense. The prosecutor provided Parker's counsel with a certified copy of the juvenile petition filed under Welfare and Institutions Code section 602, and a docket with booking information. Parker's counsel represented to the court that he received the documents, had shown them to Parker, and that Parker was prepared to admit the prior strike. Smith's counsel requested time to review the documents and after a pause in the proceedings, represented to the court that he had reviewed and shown the documents to Smith, and that after consultation, Smith was prepared to waive trial and admit the prior. After each defendant waived trial on his alleged prior strike and admitted it, defense counsel joined in the waivers and stipulated to a factual basis for the admissions. Under such circumstances, the trial court did not err in accepting the stipulations, and defendants are bound by them. (Cf. *People v. Palmer* (2013) 58 Cal.4th 110, 118-119 [guilty pleas predicated on counsel's stipulation to factual basis].)

DISPOSITION

Both defendants' sentences are vacated, and the case is remanded to give the trial court the opportunity to exercise its discretion under section 12022.53, subdivision (h), and then to resentence defendants accordingly. As to both defendants, the trial court is directed not to impose or reimpose the five-year enhancement of section 667, subdivision (a), or the 10-year gang enhancement of section 186.22, (b)(1)(C). The strike finding based upon defendants' admission of their juvenile adjudications is affirmed, and the judgments of conviction are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT