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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JORDAN JOSEPH, Defendant and Appellant.	B278013 (Los Angeles County Super. Ct. No. YA093603)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Conditionally reversed and remanded.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Jordan Joseph (defendant) guilty of second degree murder for shooting Kody Cook (Cook) as Cook sat in his car. Defendant testified he shot Cook because Cook was reaching for a gun, but no weapon was recovered from Cook's car. Defendant was 17 years old when he shot Cook, and at a fitness hearing held under then governing law prior to changes made by Proposition 57, the Public Safety and Rehabilitation Act of 2016 (the Act), the juvenile court determined defendant was not fit for juvenile court proceedings and permitted prosecutors to file charges in a court of criminal jurisdiction. We consider whether the changes worked by the Act require a new fitness hearing for defendant because his conviction is not yet final. We also consider whether the trial court should have given defendant's proposed jury instruction on imperfect self-defense and whether reversal is warranted due to asserted prosecutorial misconduct.

I. BACKGROUND

A. The Proceedings in Juvenile Court

The People filed a Welfare and Institutions Code section 602 petition to have defendant adjudged and declared a ward of the juvenile court. The petition alleged one count of murder, with enhancements relating to defendant's use of a firearm. The petition further alleged defendant should be tried in a court of criminal jurisdiction (often referred to colloquially as "adult court") because he was not a fit and proper subject to be dealt with under the juvenile court law.

The basic facts of the offense, as established by the testimony during an *Edsel P.* hearing[1] in juvenile court, were these. Defendant and another man had parked their van when victim Cook drove by in a car with two passengers. Defendant and the group in Cook's car engaged in a "stare-down" for a few seconds. Cook continued driving, and after an intervening stop, parked outside a Baskin Robbins. Ten minutes later, defendant arrived and walked up Cook's car, with Cook still in the driver's seat. There was an exchange of words, and defendant pulled a gun and shot Cook four times, killing him.

Following the *Edsel P.* hearing, the juvenile court took additional evidence and heard argument from counsel on the fitness issue, i.e., whether the case against defendant should remain in juvenile court. The defense had already filed a pre-hearing brief arguing defendant was fit for rehabilitation in juvenile court under the then-prevailing standard described in former Welfare and Institutions Code section 707, subdivision (c), Stats. 2015, ch. 234, § 2 (hereafter, former section 707). That statute required a juvenile court making a fitness determination to consider (1) the degree of criminal sophistication exhibited by the minor, (2) whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, (3) the minor's

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[1] The hearing takes its name from the seminal case of *Edsel P. v. Superior Court* (1985) 165 Cal.App.3d 763 (*Edsel P.*) in which the Court of Appeal held that a formerly existing statutory presumption (see *post*) that a minor is not fit to be tried in juvenile court applies only if the prosecution establishes a prima facie case of guilt. The probable cause determination made at an *Edsel P.* hearing is the functional equivalent of a preliminary hearing determination in a court of criminal jurisdiction.

previous delinquent history, (4) the success of previous attempts by the juvenile court to rehabilitate the minor, and (5) the circumstances and gravity of the offense(s) the minor was alleged to have committed. A minor charged with a serious offense like murder was presumed to be unfit for a juvenile court disposition and a juvenile court was empowered to make a contrary finding only if it found the minor fit "'under each and every one' of the five criteria set forth above." (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 682-683; see also Former § 707, subd. (c).)

Just before the presentation of evidence regarding fitness began, the court noted for the record the governing legal standard that applied at the time, explaining that "the burden . . . shift[ed] to the defense" under former section 707, subdivision (c). Defense counsel thereafter called three witnesses: the probation officer who prepared a report concerning defendant's fitness for rehabilitation in juvenile court, a former intake officer for the Department of Juvenile Justice who the defense retained and who opined defendant would be a good candidate for rehabilitation in juvenile court,[2] and one of defendant's teachers while in custody in juvenile hall who testified he held defendant in "high regard" in part because he had no "write-ups" and no behavioral issues. Defense counsel also reminded the court of a report from a Dr. Douglas Allen that was appended to its pre-hearing brief, including the doctor's conclusion that defendant

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[2] The former intake officer found it especially significant that defendant had no prior sustained delinquency petitions, which was unusual; defendant had "several more years" available for rehabilitation in juvenile court because he was then only 18 years old; and defendant could avail himself of the rehabilitative programs the Department of Juvenile Justice had available.

had an IQ score of 75 (which placed him in the "low to borderline mental retardation range").

The prosecution did not call any witnesses but relied on the probation officer's report to argue the juvenile court should find defendant unfit to remain in juvenile court. That report concluded defendant was fit for juvenile adjudication as to three of the statutory criteria (rehabilitation before expiration of juvenile court jurisdiction, prior delinquent history, and prior efforts at rehabilitation) but unfit under the remaining two (criminal sophistication and gravity of the alleged offense). The probation officer believed that the crime was "sophisticated" because defendant "used a weapon for the purpose of committing murder" and "the victim was sitting in his vehicle unarmed." The probation officer believed the circumstances and gravity of the crime were "egregious" because defendant "used a weapon to murder the victim who was unarmed and defenseless as he sat in his vehicle" and "this murder appears to be premeditated." The prosecution likewise emphasized the "horrific" crime in arguing defendant should be found unfit.

Counsel for defendant argued the court should give his client "a chance to turn his life around, a chance to be found fit for the Department of Juvenile Justice." Defense counsel agreed with the probation office that defendant was fit under the second through fourth criteria in former section 707, but counsel disputed the probation office's assessment concerning criminal sophistication and the gravity of the alleged crime.

Unlike the prosecution and the probation office, the juvenile court found defendant would be fit to remain in juvenile court under each of the statutory criteria save just one—the circumstances and gravity of the alleged offense. Specifically, the

court found the crime was relatively unsophisticated because it occurred in broad daylight and defendant made no attempt to conceal his identity; there was "no dispute that there is time in which to rehabilitate [defendant] and use the facilities at the Department of Juvenile Justice"; defendant had no prior delinquent history; and there had been no previous (unsuccessful) attempts to rehabilitate defendant.

But as to the remaining statutory factor, the court found the offense was "cruel and callous and . . . about as grave an offense as [the court could] think of" because it was "just plain, premeditated murder." The juvenile court noted it believed defendant "armed himself to go have a confrontation with somebody." Because the juvenile court accordingly declined to make a fitness finding under the fifth statutory criterion, the court gave the prosecution leave to file a case against defendant in "adult court," which the prosecution did.[3]

B. The Ensuing Court of Criminal Jurisdiction Proceedings

After the juvenile court's fitness determination, the Los Angeles County District Attorney charged defendant with Cook's murder in a court of criminal jurisdiction. We will describe the pertinent proceedings.

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[3] As already noted, the court's determination was consistent with governing law at the time, which permitted a juvenile to remain in juvenile court for adjudication only if the court could make a fitness finding "under each and every one of [the statutory] criteria." (Former § 707, subd. (c).)

1. The evidence at trial

Cook initially parked his BMW on Arcturus Avenue in the city of Gardena on the day he was killed. His friends, Ivan Williams (Williams) and Shage Miller (Miller), sat in the front passenger seat and rear of the car, respectively. The three young men spent 10-15 minutes smoking marijuana. A minivan arrived and parked on the street several houses in front of Cook's BMW. There were no other vehicles between the BMW and the van.

The van belonged to the parents of defendant's friend, Gabriel Clark (Clark). Clark parked the van outside his parents' house and went inside. Defendant, Clark's passenger, waited outside. At some point, defendant stepped out of the van and leaned against it. About a minute later, Cook drove the BMW down the street. Cook slowed and stopped when he reached defendant.

The two accounts at trial of what transpired next, from defendant and Miller,[4] diverged. According to Miller, defendant and the occupants of Cook's BMW stared at each other. Defendant did not respond when Cook asked, "What's up?" Defendant "just looked at [Cook and his friends]," and Cook drove off. The stare-down lasted between five and ten seconds. According to defendant (who testified in his own defense), someone in the BMW "pulled out a gun at [defendant]," defendant ran behind the van for cover, and the BMW drove away. Defendant described the gun as a "big and black" M-14 rifle. Defendant then went inside to tell Clark about the

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[4] Miller testified at defendant's preliminary hearing, but the parties stipulated he was unavailable at trial. His preliminary hearing testimony was read into the record.

confrontation, and Clark drove defendant to his grandparents' house. Defendant retrieved money and his grandfather's semi-automatic handgun. According to defendant, he took the gun because he was afraid the occupants of the BMW would "see [him] again and shoot [him]."

After driving by defendant, Cook dropped Williams off at home. Miller moved from the rear of the BMW to the front passenger seat. Cook and Miller then drove to a nearby Baskin Robbins to meet Miller's friend, Delwaun "DJ" Beard (Beard). Cook backed into a parking space near the Baskin Robbins, and he and Miller waited for Beard.

Defendant testified he and Clark were on their way to the home of another friend when they stopped at a 99-cent store called Good Neighbor Store to buy gum. Good Neighbor Store shares a parking lot with the Baskin Robbins. Cook's BMW was parked near the front entrance of Good Neighbor Store, between it and the Baskin Robbins. Surveillance video showed Clark's van drive past the entrance to the parking lot nearest the BMW, make a U-turn, and return to the lot through a different entrance. Clark backed the van into a space around a corner from the BMW, near the side of Good Neighbor Store.

According to defendant, he and Clark exited the van, walked toward Good Neighbor Store, and "noticed that the car that pulled out the gun on [defendant] was right there." Defendant testified he approached Cook's BMW, said "hey," and Cook "started cursing at [him]." Defendant then saw Cook reach for a silver handgun "towards the middle of the car." Defendant pulled out his grandfather's gun in response and "just started shooting it" because he "was afraid [Cook] was gonna shoot [him]."

Defendant fired a total of six shots. Two bullets hit the BMW, and four hit Cook. Cook was shot once in the neck and three times in the head (a coroner testified that each wound would have been fatal by itself). Defendant ran immediately to Clark's waiting van and the two drove away. No gun was recovered from the BMW. Nor did defendant mention a silver handgun when interviewed by the police not long after the shooting.

There were several other witnesses to the shooting. Miller, seated in the front passenger seat of Cook's BMW, was the closest. Miller testified he "began rolling up some additional marijuana" as he and Cook waited for Beard to arrive at Baskin Robbins. About two minutes after Cook parked the BMW, Miller noticed defendant "walking, slightly jogging up to the car." According to Miller, defendant "said 'what's up now,' and he proceeded to cock back his weapon . . . [and] fired into the car." Miller testified that someone, most likely defendant, also yelled "bitch." As defendant fired, Miller ducked while Cook tried to start his car and open the door to push defendant's gun away. After defendant fled, Miller ran into Good Neighbor Store to call 911 on his cell phone. Miller did not give his name or wait for police to arrive.[5] He returned to the BMW to retrieve either his wallet or loose cash and then left with Beard to tell Cook's

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[5] Later the same day, at a daycare facility, Miller saw a news report about the shooting on TV. Miller happened to be standing next to a law enforcement officer. He told the officer he had witnessed the shooting and planned to contact police the next morning. The officer reported Miller's comments and police interviewed Miller that evening.

parents what had happened. Miller testified there was never a gun inside the BMW.

Beard arrived at Baskin Robbins shortly before the shooting. He was friends with Miller but did not know Cook. He drove by the BMW, saw Miller in the passenger seat, and looked for a parking spot. As he looked for a spot, Miller heard "kind of like talking back and forth" and "basically like someone saying, 'what's up,' walking up." Beard heard gunshots and saw defendant's arm raised toward the BMW. Beard parked and ran toward Miller, who by then had exited the BMW. Beard saw no weapons on Miller and saw no weapons inside the BMW.

A Good Neighbor Store customer, John Abada (Abada), also witnessed the shooting. Abada parked his van next to Cook's BMW and walked inside Good Neighbor Store to buy water. As Abada walked outside to return to his van, he had an unobstructed view of defendant "yelling and shooting at" Cook. Abada said he did not see Cook display a weapon or yell at defendant, but he also admitted he could not see Cook's waist or anything below that level.

Peter Flores was working at Good Neighbor Store the day of the shooting. Through a partially-obstructed window, Flores saw defendant and Clark walk toward Cook's BMW and look at it "like they were trying to make sure who was in the car." Flores then saw Clark walk away as defendant approached the BMW. He heard multiple voices shouting and saw defendant shoot at Cook. Flores had a poor view of the car, but he did not see Cook make a hostile gesture toward defendant.

2. Jury instructions

After both sides rested, the trial court noted for the record that the parties "had a chamber's conference . . . as it relates to jury instructions" and defendant requested "an instruction as it relates to voluntary manslaughter in this case under two theories, a theory of provocation as well as the theory of imperfect self-defense." The court found there was substantial evidence to support the provocation theory and gave the relevant instruction. The court also gave a perfect self-defense instruction. But the court found "no substantial evidence to warrant the giving of the imperfect self-defense instruction."

The trial court believed an imperfect self-defense instruction should not be given when, as here, a defendant's testimony is such that if the jurors credit it, "then it was pure self-defense," and if the jurors do not credit it, "then it was a murder . . . ." The court reasoned that "Mr. Joseph's testimony was quite clear: that he approached the vehicle; that he saw the victim, Kody Cook, produce from the middle of the vehicle a silver handgun. And in response to a silver handgun being produced and pointed at him, at that time he fired in self-defense. That's the evidence that's before this jury."

3. Verdict and sentence

The jury found defendant guilty of second—not first—degree murder and found true allegations that he used a firearm within the meaning of Penal Code section 12022.53, subdivisions (b) through (d). The court imposed a sentence of 15 years to life for the murder plus 25 years to life for the Penal Code section 12022.53, subdivision (d) firearm enhancement.

II. DISCUSSION

Defendant contends his conviction must be conditionally reversed and remanded to the juvenile court for a new fitness hearing[6] pursuant to Welfare and Institutions Code section 707, subdivision (c) as now amended by the Act. Among other things, the Act's amendments to the statute eliminated the presumption of unfitness for minors accused of certain crimes and the requirement that minors must satisfy "each and every" one of the five fitness criteria listed in section 707 (and recited above). In addition, defendant presents two arguments for outright reversal: (1) the trial court should have instructed the jury on imperfect self-defense because there was substantial evidence defendant unreasonably believed Cook was reaching for a gun when defendant shot him, and (2) various remarks made by the prosecution during closing argument constitute prejudicial misconduct. Finally, defendant asserts his case should at least be remanded to permit the trial court to exercise its newly conferred discretion under section 12022.53, subdivision (h) (added by the enactment of Senate Bill 620) to strike the firearm enhancement the jury found true.

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[6] After Proposition 57's amendments to Welfare and Institutions Code section 707, subdivision (a)(1), courts have variously referred to the hearing that subdivision requires as a "fitness hearing" or a "transfer hearing." The term "fitness hearing" prevailed prior to the amendments, but the statute no longer uses the term "fitness" and instead states prosecutors may file a "motion to transfer." To avoid confusion and maintain consistent terminology in light of defendant's earlier hearing, we will use the term fitness hearing.

Our Supreme Court recently held a provision of the Act precluding prosecutors from forgoing a fitness hearing and charging minors directly in adult court applies retroactively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 308-309 (*Lara*)). The *Lara* Court also held that, in the absence of any grounds to reverse the judgment outright, the appropriate remedy is conditional reversal and remand to the juvenile court to conduct a fitness hearing pursuant to Welfare and Institutions Code section 707. (*Id.* at pp. 309-310, 313.) *Lara* controls here and requires a conditional reversal so that the juvenile court may hold a transfer hearing under the new legal standard that applies now and is more favorable to defendant.

We, however, reject defendant's arguments that would require outright reversal. There was no substantial evidence to support an imperfect self-defense instruction and none of the prosecution's statements during closing argument constitutes misconduct. Finally, we agree, if this case is not ultimately resolved in juvenile court, that defendant is entitled to an opportunity to ask the trial court to exercise its discretion under section 12022.53, subdivision (h) to strike the firearm enhancement to his sentence.

A. Defendant Is Entitled to the Benefit of the Act's Amendments to Welfare and Institutions Code Section 707

At the time of defendant's fitness hearing in January 2016, former section 707, subdivision (c) provided that minors accused of murder and other enumerated crimes were "presumed to be not a fit and proper subject to be dealt with under the juvenile court law" unless the juvenile court concluded "that the minor

would be amenable to the care, treatment, and training program available through the facilities of the juvenile court" based on "each and every one" of five criteria.[7]

California voters approved the Act at the November 2016 general election. The Act took effect the next day, November 9, 2016. (Cal. Const., art. II, § 10, subd. (a).) Section 4 of the Act made a number of amendments to Welfare and Institutions Code section 707. As pertinent here, the Act repealed both the presumption against fitness and the requirement that "each and every" fitness criterion must be satisfied to deem a minor accused of murder fit for adjudication in juvenile court. Defendant argues he is entitled to the benefit of these amendments because his conviction is not yet final, and he asserts it is "more than reasonably probable . . . that the court would find [him] amenable to treatment in juvenile court on remand" when applying the Welfare and Institutions Code section 707 standard as amended by Proposition 57.

Most litigation thus far concerning the Act's retroactive effect has focused on a provision eliminating prosecutors' ability to directly file charges against juveniles in a court of criminal jurisdiction without a prior fitness hearing in juvenile court. *Lara* resolved a split of authority in the Courts of Appeal (see, e.g., *People v. Pineda* (2017) 14 Cal.App.5th 469, 478-479) and

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[7] To reiterate, the criteria are: (1) the degree of criminal sophistication exhibited by the minor, (2) whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction, (3) the minor's previous delinquent history, (4) the success of previous attempts by the juvenile court to rehabilitate the minor, and (5) the circumstances and gravity of the offenses alleged to have been committed by the minor.

held the ameliorative benefit of the Act's amendments—which require a juvenile court fitness determination before a minor can be prosecuted in a court of criminal jurisdiction—apply retroactively. (*Lara*, *supra*, 4 Cal.5th at p. 309 ["We agree . . . that [the] inference of retroactivity applies here. Proposition 57 is an 'ameliorative change[ ] to the criminal law' that we infer the legislative body intended 'to extend as broadly as possible'"].)

Lara's retroactivity rationale applies to the Act's amendments to the provisions of Welfare and Institutions Code section 707 governing a juvenile court's fitness analysis. Those amendments are unquestionably ameliorative as compared to previously existing law: they give juvenile court judges greater discretion to retain a minor in juvenile court. (Welf. & Inst. Code, § 707, subd. (a)(2), as amended by Prop. 57, as approved by voters, Gen. Elec. (Nov. 8, 2016) ["[T]he juvenile court shall decide whether the minor should be transferred to a court of criminal jurisdiction. In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E). If the court orders a transfer of jurisdiction, the court shall recite the basis for its decision in an order entered upon the minutes"]; see also *People v. Francis* (1969) 71 Cal.2d 66, 76.) Proposition 57's amendments to Welfare and Institutions Code section 707 therefore apply as broadly as constitutional principles permit—including to defendant, whose conviction is not yet final.

The Attorney General argues that even if defendant is entitled to avail himself of the beneficial changes in law worked by Proposition 57, his criminal court conviction should still be affirmed because he already had a fitness hearing and there is no reasonable probability the juvenile court, if given the chance,

would find him a fit and proper subject to be dealt with under the juvenile court law. In light of the significant changes in Welfare and Institutions Code section 707 worked by the Act, we reject the Attorney General's argument. The absence of a presumption that, as the juvenile court here put it, "shifts the burden to the defense," plus the elimination of the requirement that a fitness finding must be made under "each and every" statutory criterion makes it reasonably probable the juvenile court could today come to a different conclusion—particularly because the court previously found defendant fit under four of the five statutory criteria.[8] (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 ["'reasonabl[e] probab[ility]'" for purposes of *People v. Watson* (1956) 46 Cal.2d 818 "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*"].) A conditional reversal for a new hearing under current law is the only reliable means to ensure defendant's conviction in a court of criminal jurisdiction reflects an appropriate exercise of discretion to find him unfit to be dealt with in juvenile court. (See *People v. Bruce G.* (2002) 97 Cal.App.4th 1233, 1247 ["An erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion"]; *People v. Lara* (2001) 86 Cal.App.4th 139, 165 ["To

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[8] We recognize, of course, that time has elapsed since the juvenile court made its first determination on the issue of fitness, which will require a reevaluation of whether there still exists sufficient time to rehabilitate defendant in juvenile court (as well as consideration of any other pertinent developments in the interim). But some time still remains—defendant is now 20 years old—and this is a question the juvenile court must in the first instance address.

exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision"]; see also *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [a sentencing court that is unaware of the scope of its discretionary powers cannot exercise """informed discretion"""].)

B. The Trial Court Correctly Declined to Instruct the Jury on Imperfect Self-Defense

"The doctrine of self-defense embraces two types: perfect and imperfect. [Citation.] Perfect self-defense requires that a defendant have an honest and reasonable belief in the need to defend himself or herself." (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) By contrast, "[a]n instance of imperfect self-defense occurs when a defendant acts in the actual but unreasonable belief that he or she is in imminent danger of great bodily injury or death. [Citation.] Imperfect self-defense differs from complete self-defense, which requires not only an honest but also a reasonable belief of the need to defend oneself. [Citation.] It is well established that imperfect self-defense is not an affirmative defense. [Citation.] It is instead a shorthand way of describing one form of voluntary manslaughter. [Citation.] Because imperfect self-defense reduces an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, this form of voluntary manslaughter is considered a lesser and necessarily included offense of murder. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).)

"A trial court has a sua sponte duty to instruct the jury on a lesser included uncharged offense if there is substantial evidence that would absolve the defendant from guilt of the

greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. [Citations.]" (*Simon*, *supra*, 1 Cal.5th at p. 132; accord, *People v. Moye* (2009) 47 Cal.4th 537, 553.) A court reviewing a claim of instructional error in this context considers the evidence in the light most favorable to the defendant. (*People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

Here, the trial court instructed the jury on perfect self-defense, but rejected defendant's request to instruct the jury on imperfect self-defense. The court explained: "Mr. Joseph's testimony was quite clear: That he approached the vehicle; that he saw the victim, Kody Cook, produce from the middle of the vehicle a silver handgun. And in response to a silver handgun being produced and pointed at him, at that time he fired in self-defense. That's the evidence that's before this jury." The court cited *People v. Valenzuela* (2011) 199 Cal.App.4th 1214 (*Valenzuela*) and *People v. Rodriguez* (1992) 53 Cal.App.4th 1250 (*Rodriguez*) for the proposition that an imperfect self-defense instruction is not warranted when "the defendant's version of the crime could only lead to acquittal based on justifiable homicide . . . [and] the prosecution's version could only lead to the conviction of murder." The court reasoned defendant's testimony left "no in between ground": The jury could either credit defendant's testimony and acquit based on perfect self-defense or reject defendant's testimony and convict him of murder.

Under the circumstances presented here, the trial court correctly declined to instruct on imperfect self-defense, and for

essentially the correct reason. To be precise, defendant did not quite testify the silver handgun was, as the court said, "pointed at him," but defendant did testify (a) someone in Cook's BMW brandished a "big and black" M-14 rifle at him minutes before the confrontation in the Baskin Robbins parking lot, and (b) Cook reached for a silver handgun while parked in the parking lot and "flashed" it at him right before defendant pulled his own gun and shot Cook.[9] The honest belief defendant had in the need to use deadly force in self-defense under the circumstances was therefore the belief that Cook was moving for a gun to shoot him after Cook or one of his confederates had previously brandished a firearm at him during the stare-down.

As the trial court correctly reasoned, these circumstances were an all-or-nothing proposition for self-defense purposes; an honest belief in the need to use deadly force to defend against the prospect of being shot is an objectively reasonable defense. (*Valenzuela*, *supra*, 199 Cal.App.4th at p. 1228 [all or nothing situation, such that no imperfect self-defense instruction

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[9] On direct examination, defendant testified: "I see [Cook] start reaching for a gun towards the middle of the car. [¶] Q Now, you said you saw him start reaching for a gun towards the middle of the car. [¶] Q What did that gun look like? [¶] A Silver. [¶] Q Now, when he reaches towards that gun, what do you do? [¶] A I see a gun, then I pulled out the gun I had. [¶] Q After you pull out that gun, what do you do with it? [¶] A I just started shooting it. [¶] Q Why? [¶] A Because I was afraid he was gonna shoot me." On cross-examination, the prosecutor asked, "[Defendant], you said that the gun you saw that day was silver; right? [¶] A Yes. [¶] Q This is the gun that you claimed Kody flashed at you at the 99 cents store? [¶] A Yes."

necessary, where the defendant was followed by others, heard an insult to his gang, heard a popping sound, and saw one of the others with "a black object" in his hand]; *Rodriguez*, *supra*, 53 Cal.App.4th at p. 1275 ["Defendant's statements, if believed by the jury, could only lead to an acquittal based on justifiable homicide. It is inconceivable a jury could find defendant (who had earlier been attacked by Moore with a knife, and whose life was spared only because others intervened) acted unreasonably in killing Moore after Moore once again attacked him with a knife"]; see also *People v. Duff* (2014) 58 Cal.4th 527, 562.) If the jury were to credit defendant's account, the fact that Cook was described as reaching toward the gun and "flashing" the gun at defendant rather than "pointing" it at defendant is immaterial for purposes of assessing the reasonableness of defendant's response.[10]

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[10] Defendant relies on the majority opinion in *People v. Ceja* (1994) 26 Cal.App.4th 78 (*Ceja*) to argue the contrary. In that case, the Court of Appeal held it was error not to give an imperfect self-defense instruction where the defendant testified he saw the victim pull a gun from his waistband but no gun was found at the scene and prosecution witnesses testified that the victim did not have a gun. (*Id.* at p. 86 [jury "might well have concluded that defendant was mistaken about the victim being armed but also have concluded that defendant honestly but unreasonably believed his life was in danger, making the killing at most voluntary or involuntary manslaughter"].)

The analysis in *Ceja* deviates to a degree from the better view of how an imperfect self-defense inquiry should be conducted. Pursuant to that view, a court proceeds by effectively accepting a defendant's articulated honest belief and assessing whether the use of deadly force on those facts is justified. (See, e.g., *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, 1405

C. The Prosecution Did Not Commit Misconduct

During closing argument, "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citation.] However, she does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."]' [Citation.] If the challenged

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["When a defendant intentionally kills based on an honest belief in the need for self-defense, but *this belief* is not objectively reasonable, the defendant acts in 'imperfect' or 'unreasonable' self-defense"], emphasis added; *Rodriguez*, *supra*, 53 Cal.App.4th at p. 1275 ["Defendant's statements, if believed by the jury . . ."].) Proceeding in that fashion here, defendant's use of deadly force would necessarily be reasonable on the facts as he claimed them to be. But even assuming *Ceja* reflects a permissible approach to imperfect self-defense analysis, defendant was unequivocal about the presence of a gun. If the jury concluded he was mistaken about that, we are convinced (*Chapman v. California* (1967) 386 U.S. 18, 24) the jury would not have credited his claim to have had an honest belief in the need to shoot Cook.

comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

The general rule is that "'[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition.'" (*People v. Williams* (2013) 56 Cal.4th 630, 671 (*Williams*); accord, *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081 [purpose of the requirement is to encourage defendants to bring errors to the attention of the trial court so they may be corrected].) This rule is subject to an exception: failure to object and request an admonition does not waive a misconduct claim if objection would have been futile or an admonition ineffective. (*People v. Arias* (1996) 13 Cal.4th 92, 159.)

Here, defendant argues that the prosecution (1) misstated the evidence, (2) misstated the law, (3) argued evidence that had been excluded, and (4) denigrated defense counsel. Although many of defendant's claims on appeal are forfeited by the absence of a proper objection and request for admonition, we address and reject all of defendant's arguments on the merits to avoid any need to analyze whether defense counsel's failure to object at trial constitutes ineffective assistance of counsel.

1. Remarks regarding the evidence

a. Miller's contacts with police

Defendant argues the prosecution overstated Miller's cooperativeness with police. The prosecution argued: "The first thing [Miller] does is call 911. The second thing he does is go to [Cook's] parents' house. And that afternoon he goes up to Agent

Hsile, a law enforcement agent, and says I need to make a full statement about what happened." Defense counsel objected, and the court admonished the jury that, "[i]f the attorneys' statements on the evidence conflict with your memory or your findings on the evidence, it's your findings as to what was proven and the statements."

Defendant contends the prosecution's statements were misleading because Miller did not wait for police to arrive after he called 911 and because Miller did not "contact Hsile and tell him he needed to make a statement," but rather told Hsile he (Miller) had witnessed the killing and that he would go to the police the next morning. Defendant overreads what the prosecution actually said; the argument neither stated nor implied that Miller waited for police to arrive after he called 911. Indeed, the prosecutor's mention of Miller's later encounter with Hsile directly undermines any inference that Miller had spoken with police at the scene. Nor does the prosecution's paraphrase of Miller's comments to Hsiel warrant defendant's suspicion that the jury might have inferred Hsiel was "an uncalled witness [who] would have testified that Miller said he needed to make a full statement." (*People v. Adams* (2014) 60 Cal.4th 541, 577 ["In conducting [a prosecutorial misconduct] inquiry, we do not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements"], internal quotation marks and citations omitted.)

b. Defendant's pants

Defendant argues the prosecution improperly stated defendant "threw away his pants" that he wore during the shooting: "The pants, where are the pants? Where are these

Adidas track pants that Detective Saldana was specifically looking for when he searched . . . defendant's home after the murder occurred? They weren't there. . . . [¶] So why did he get rid of the pants? Well, after you kill somebody, if you're trying to be a good criminal, you get rid of the clothing you wore in case somebody saw you in it . . . ." Defense counsel's objection to this part of the prosecution's argument was overruled.

Defendant's testimony that he had not disposed of the pants does not render the prosecution's contrary inference improper. "[P]rosecutors 'have wide latitude to discuss and draw inferences from the evidence at trial,' and whether 'the inferences the prosecutor draws are reasonable is for the jury to decide.' [Citation.]" (*People v. Ervine* (2009) 47 Cal.4th 745, 806.)

c. Defendant's gang involvement

Defendant contends the prosecution exaggerated evidence of defendant's gang involvement and understated evidence that Cook was not "an entirely innocent victim." The defense specifically points to the prosecution's argument that "[Cook] has no prior criminal history. Nothing. Never been field identified. The defendant's been identified three times . . . ."

None of what the prosecution said is inaccurate. Defendant's suggestion that the statement about Cook is somehow undermined by the fact that he had been kicked out of his parents' house and was living in his car is baseless. Defendant does not dispute that he had been field identified three times, but emphasizes that he was only once identified as a potential gang member. The prosecution did not argue otherwise.

d. Characterization of percipient witnesses' testimony

Defendant contends the prosecution misrepresented the testimony of Miller, Beard, Abada, and Flores when he argued defendant's self-defense theory failed because "[e]very percipient [witness] says this is murder." Defense counsel objected, and the court admonished the jury that, "if you find that the testimony—comments by the attorneys conflict with the evidence as you find them, it is your findings as it relates to the evidence."

Defendant contends the prosecution's comment was misleading because Abada did not see how the encounter started and Beard and Flores testified both Cook and defendant were yelling. The prosecution, however, made this statement in the context of arguing that defendant's self-defense theory was not supported by the evidence. (See *People v. Mendoza* (2016) 62 Cal.4th 856, 908 [evaluating closing argument misconduct claim in context and finding no misconduct].) The prosecution had license to fairly comment on the evidence, and the statement that the percipient witnesses said the shooting was a murder is consistent with the testimony that Miller did not remove a gun from the BMW and Cook did not make any threatening gestures toward defendant.

e. Clark

Defendant contends the prosecution's commentary on Clark's absence at trial was improper. The prosecution asked "[w]here is Gabe Clark? The defendant's best friend who he sees every day, the one person on earth who could corroborate this story is mysteriously absent from this trial. Think about that. The guy who he was with when all this went down. The one

person who could have got in that box and been like that's totally true. These guys threatened us. They pulled a gun on us." Defense counsel objected, but the objection was overruled.

Defendant argues it was improper for the prosecution to speculate about how Clark might have testified and points out that Clark was not a percipient witness to either instance in which defendant claims Cook threatened him with a gun. Defendant is correct that a prosecutor cannot tell a jury that an absent witness, if called, would have testified in a particular way. (*People v. Hall* (2000) 82 Cal.App.4th 813, 817.) However, the prosecution did not claim that Clark *would have* corroborated defendant's testimony, but rather that he is the only person who conceivably *could have* done so. A prosecutor may make reference to the defense's failure to call logical witnesses (*ibid.*; *People v. Winbush* (2017) 2 Cal.5th 402, 482 (*Winbush*)), and that is what the prosecution did here.

2. Remarks regarding the law

Defendant argues that the prosecution misstated the law by making statements that would have tended to reduce its burden to prove Cook's killing was not justified. The prosecution argued: "[Defense counsel] says if the People can't prove what [Miller] took out of the car, then you have to find—or it wasn't a gun, then you have to find my client acted in lawful self-defense. That's not true either. That's not true either. It doesn't matter what's in the car. If you're just sitting there and are ambushed by somebody and shot before you have any time to react, that's not self-defense. It doesn't matter what's in the car. It doesn't. You can't just go up to somebody and ambush them." Defense counsel objected, and the court admonished the jury that, "in a

moment you'll receive the instructions on the law. If the attorneys['] comments on the law conflict with my instructions, you're to follow my instructions on the law."

The court subsequently gave a self-defense instruction based on CALCRIM No. 505, which provided in pertinent part that "[t]he People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter." According to defendant, the People therefore had to prove "that what Miller grabbed from the car was not a gun and that appellant was not afraid for his life when he fired on Cook." Defendant is mistaken. Although the prosecution had the burden to prove that the killing was not justified, the prosecution could satisfy this burden by proving either that there was no gun in the car or, regardless of whether there was a gun in the car, that Cook posed no threat to defendant when Cook was shot. The prosecution's argument that this was an "ambush" and Cook had no time to threaten defendant underscores the latter alternative.

3. Remarks regarding excluded evidence

The prosecution impeached defendant with video from his police interview conducted shortly after the murder. Prior to defense counsel's cross-examination of one of the interviewing officers (Detective Sargent), the court and counsel discussed (outside the presence of the jury) limits on defense counsel's ability to ask questions about the officers' statements to defendant regarding his potential sentencing exposure. After ruling various statements would need to be redacted, the court advised defense counsel "[w]e can continue to go through [the

statements], but if there are any specific references to time, life sentences, years, that's going to be coming out [i.e., redacted]. If you want to talk about he's going to be in prison, he's going to be finished in jail, prison those references are absolutely fine to talk to the detective about." When finalizing copies of transcripts to share with the jurors, the court ordered various references to a potential life sentence redacted.

In his closing argument, defense counsel anticipated the prosecution would replay excerpts from the interview and highlight defendant's false statements. Defense counsel attempted to explain these falsehoods as the natural response of a young person being threatened by police: "You know what clip [the prosecutor] isn't going to play? He isn't going to play the detectives threatening [defendant]. He isn't going to play the detectives lying to [defendant]. You're not going to hear any of that. All you're going to hear is the alleged inconsistencies. You know what else he isn't going to play that also was recorded? He's not going to play any of [Miller's] lies because that doesn't fit in his theme of the case."

The prosecution responded on rebuttal: "[A]nd by the way, when the defense made it [seem] like the People were just showing clips and hiding things, I just want to tell you, first of all, that's not true, and second of all, if it was, the defense could have got up and played [¶] . . . [¶] the entire video interview in its case, all of it, but they didn't." Returning to this point, the prosecution reiterated that "[defendant] could have played the entire video, but they chose not to. [¶] . . . [¶] And then they tried to make the People look like we're hiding something. Just not true." Defense counsel's objections to these remarks by the prosecution were overruled.

Defendant now argues the prosecution improperly referred to evidence deemed inadmissible, namely, the portions of the interview concerning sentencing exposure that the trial court excluded. It was correct, however, that defendant could have played more of the interview; portions including threats and ruses that did not address specific prison terms were not categorically excluded. The prosecution's claim that defendant could have played the "entire" interview was therefore not, as defendant suggests, an attempt to make "jurors to draw an inference that they might not have drawn if they had heard the evidence the judge had excluded." (*People v. Daggett* (1990) 225 Cal.App.3d 751, 758.) From a juror's perspective, the only inference to be drawn from the prosecutor's statements was that defense counsel could have played more of the video that he suggested the prosecution was hiding. This argument was permissible.

4. Remarks regarding defense counsel

Finally, defendant argues the prosecution attacked defense counsel's integrity by commenting on defense strategy: "So what is the defense going to trial? Like I told you, it was some other guy did it. The first time I heard self-defense was going to be the defense was in [defense counsel's] opening statement and my jaw almost fell to the floor. I couldn't believe it. They completely abandoned their first theory."

Defense counsel objected that these remarks misstated the evidence, specifically as to the prosecution's reference to "they" (i.e., counsel and defendant). The court asked the attorneys to approach and directed the prosecutor "to refrain from discussing what [defense counsel's] trial tactics were as far as your

impressions of what you knew of the defense prior to trial. It's [treading] on dangerous grounds. [¶] So I think it's appropriate what was apparent at the time of the beginning of the trial, the defendant's stories, that's fine. You can make those comments, but to imply that [defense counsel] . . . has changed his tactics in preparation of the trial from the beginning of the proceedings prior to trial and at trial, is improper argument."

When resuming argument, the prosecution stated the defense at trial was "just fabricated out of thin air. It is a completely new defense. It has nothing to do with the old defense. It literally is a 180. It's made up. It's fake. And you have to—I'm confident that I've picked 12 tough-minded jurors, and I hope that you can see through what the defense is doing."

"Personal attacks on the integrity of opposing counsel can constitute misconduct. [Citation.] 'It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom.' [Citation.] However, 'the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account.' [Citation.]" (*Winbush*, *supra*, 2 Cal.5th at p. 484.)

Here, the prosecution was free to emphasize inconsistencies in defendant's account of his encounters with Cook, even to the point of branding the testimony "made up" and "fake." (*Winbush*, *supra*, 2 Cal.5th at p. 484.) The only arguably improper element of the prosecutor's remarks is the implication that "they"—i.e., defense counsel together with his client—concocted defendant's

account. In context, however, this comment was a critique of defendant's implausible trial testimony rather than an attack on defense counsel's personal integrity. (See *Williams*, *supra*, 56 Cal.4th at p. 673 [prosecutor was commenting on weakness of defense evidence and not denigrating defense counsel when the prosecutor argued counsel "says his client wasn't there. I say he's lying."].) In this light, the remarks were not prejudicial misconduct.

D. Cumulative Error

Defendant argues that even if prosecutorial misconduct and the court's failure to instruct the jury on imperfect self-defense do not individually require reversal, these errors cumulatively prejudiced his right to a fair trial and compel reversal. We have rejected all of defendant's assertions of error requiring outright reversal. "Accordingly, there was no prejudice to accumulate," and defendant's cumulative prejudice argument fails. (*Winbush*, *supra*, 2 Cal.5th at p. 486.)

E. Senate Bill 620

The jury found defendant personally and intentionally discharged a handgun causing Cook's death within the meaning of Penal Code section 12022.53, subdivision (d). That statute provides for an additional and consecutive sentence of 25 years to life when a jury makes such a finding.

At sentencing, the trial judge stated "[t]he sentence that I'm about to prescribe today is the sentence that's prescribed by law. The court has the direction of the Legislature in this matter, and I will impose that sentence as prescribed by law." The court also observed that among all the cases it had heard for almost ten

years, "this case stands out and will stand out forever in the senseless loss of life . . . ." The trial court then imposed a consecutive 25 years to life sentence for the Penal Code section 12022.53, subdivision (d) enhancement the jury found true.

After defendant's sentencing, Senate Bill 620 took effect. (Sen. Bill No. 620 (2017-2018 Reg. Sess.) [effective January 1, 2018].) Senate Bill 620 amended Penal Code section 12022.53 to give trial courts discretion, in the interest of justice, to strike a firearm enhancement finding made under the statute. (Pen. Code, § 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2 ["The court may, in the interest of justice pursuant to [Penal Code] Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section"].)

Defendant contends that, failing a juvenile court determination of fitness, he should have the opportunity to ask the trial court to exercise its newly conferred discretion under Penal Code section 12022.53, subdivision (h). The Attorney General does not contest the assertion that the statute applies retroactively to defendant, and we agree he is entitled to the opportunity he seeks. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 428 [remand necessary when there is no clear indication of the trial court's sentencing intent].)

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the juvenile court with directions to conduct a fitness hearing under Welfare and Institutions Code section 707, if the prosecution moves for such a hearing, no later than 90 days from the date the remittitur issues. If, after a fitness hearing,

the juvenile court determines that it would transfer defendant to a court of criminal jurisdiction under current law, the judgment of conviction shall be reinstated as of the date of that determination and the cause transferred to the trial court to permit the court, if it so chooses, to exercise its discretion to strike the Penal Code section 12022.53 enhancement.

If no motion for a fitness hearing is filed, or if a fitness hearing is held and the juvenile court determines it would not transfer defendant to a court of criminal jurisdiction, defendant's criminal conviction, including the true findings on the firearm enhancement, will be deemed to be juvenile adjudications as of the date of the juvenile court's determination. In the event the conviction is deemed a juvenile adjudication, the juvenile court shall then conduct a disposition hearing and impose an appropriate disposition within the court's discretion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P. J. DUNNING, J.*

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

Kriegler, J., concurring
People v. Jordan Joseph
B278013

I concur in the analysis of the court's opinion. I write separately to emphasize my understanding that footnote 8 of the court's opinion permits the juvenile court at a new fitness hearing to consider all developments after the original fitness hearing—favorable to defendant or not—in exercising its discretion in resolving the issue of defendant's fitness for treatment in the juvenile court system.

The hearing previously held pursuant to *Edsel P. v. Superior Court* (1985) 165 Cal.App.3d 763, established only the prima facie case necessary to trigger the presumptions of unfitness under the former version of Welfare and Institutions Code section 707. By definition, the prosecution's burden to establish a prima facie at an *Edsel P.* hearing is not the equivalent of a fully developed record at trial. That fully developed record now exists and should be considered by the juvenile court before making its discretionary ruling on fitness.

The juvenile court may consider and give whatever weight is appropriate to defendant's behavior in custody. This was a positive factor at the original hearing, and if his good behavior has continued, the juvenile court should take it into account in exercising its discretion.

On the other hand, the record is now settled, through defendant's own testimony at trial, that he was entirely dishonest with the police in his interrogation. In addition, defendant's

newly minted defense at trial—that he shot in reaction to the victim reaching for a gun (that apparently never existed)—has been rejected by the jury. The juvenile court may consider these facts in determining whether defendant is amenable to rehabilitation in the few years remaining until his 23rd birthday (Welf. & Inst. Code, § 607), and whether he is as unsophisticated as it first appeared. The court may also weigh and consider the rebuttal evidence at trial regarding defendant's contacts with law enforcement—which did not result in adjudication of charges—but which nonetheless suggest a connection to a criminal street gang.

The same considerations will be appropriate at any new sentencing hearing pursuant to Senate Bill No. 620, in the event the juvenile court finds defendant unfit for treatment in the juvenile system. With this understanding of the intent of footnote 8 of the court's opinion, I join in the analysis and fully concur.

KRIEGLER, Acting P.J.