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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENNETH T. PARKS, Defendant and Appellant.	B267872 Los Angeles County Super. Ct. No. BA423684

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed as modified with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Kenneth Parks was convicted of first-degree murder and attempted murder after a dispute with his roommates over a $10 internet bill. On appeal, defendant contends the court erred by admitting irrelevant, prejudicial evidence that he slashed the victims' tires in the days and hours leading up to the shooting. We agree that this evidence was irrelevant to the People's case-in-chief because the prosecution did not establish that *defendant* slashed the tires. Since defendant's testimony ultimately remedied that problem, however, we conclude the error was harmless. Defendant also argues—and the People properly concede—that the three-year sentence imposed for the great-bodily-injury enhancement was unauthorized and that the two $400 restitution fines conflict with the court's stated intent to impose the statutory minimum. Accordingly, we modify the judgment to reduce the fines and stay the enhancement. As modified, we affirm.

PROCEDURAL BACKGROUND

By information filed September 26, 2014, defendant was charged with one count of murder (Pen. Code,[1] § 187, subd. (a); count 1) and three counts of attempted premeditated murder (§ 664/187, subd. (a); counts 2–4). The information also alleged four firearm enhancements in various configurations: As to all counts, the information alleged defendant personally used (§ 12022.53, subd. (b)) and discharged (*id.*, subd. (c)) a firearm; as to counts 1 and 2, the information also alleged defendant personally discharged a firearm causing great bodily injury or

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1 All undesignated statutory references are to the Penal Code.

death (*id*., subd. (d)); and as to count 2, the information also alleged defendant personally inflicted great bodily injury on a non-accomplice (§ 12022.7, subd. (a)). Finally, the information alleged three prior felony convictions as strike priors (§ 667, subds. (b)–(i); § 1170.12, subds. (a)–(d)) and serious felony priors (§ 667, subd. (a)(1)).

Defendant pled not guilty and denied the allegations. After a bifurcated trial at which he testified in his own defense, the jury found defendant guilty of first-degree murder (§ 187, subd. (a); count 1) and one count of attempted first-degree murder (§ 664/187, subd. (a); count 2) and found the conduct enhancements true (§ 12022.53, subds. (b), (c), (d); § 12022.7, subd. (a)). The jury acquitted defendant of two counts of attempted murder (§ 664/187, subd. (a); counts 3, 4) and their lesser-included offense of attempted voluntary manslaughter (§ 664/192, subd. (a)). Defendant waived his right to a jury determination of the truth of the prior convictions, and the court found the allegations true.[2]

The court sentenced defendant to an aggregate term of 158 years to life—a principal term of 100 years to life for count 1 followed by a subordinate term of 58 years to life for count 2. For the principal term, the court selected count 1 as the base term and imposed a third-strike sentence of 75 years to life—the mandatory term of 25 years to life, tripled for the strike priors

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[2] The appellate record does not contain a transcript of the proceedings from October 1, 2015, which took place before a different judge, and it is unclear from the minute order whether defendant admitted the prior convictions or received a bench trial to determine their truth. Defendant does not challenge the court's findings on appeal.

(§ 1170.12, subd. (c)(2)(A)(i))—plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), to run consecutively. For the subordinate term, the court imposed a third-strike term of 25 years to life (§ 1170.12, subd. (c)(2)(a)(ii)) for count 2 (§ 664/187, subd. (a)) plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)), three years for the great-bodily-injury enhancement (§ 12022.7, subd. (a)), and five years for the serious felony prior (§ 667, subd. (a)(1)), to run consecutively. The court stayed the remaining firearm enhancements under section 1170.01, subdivisions (f) and (g) and granted the People's motion to strike the remaining serious felony priors.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

Around 7:00 a.m. on April 14, 2014, Terri Smith woke her ex-boyfriend Leslie Andre Adkins, who had spent the previous night at her house. Smith lived in the house with their 20-month old son, Tyler Adkins, her 11-year old daughter, Taylor Smith, and several roommates, including defendant. As she woke him, Smith told Adkins that he needed to move his car, which was blocking defendant's car. This was not the first time Adkins had blocked the driveway, and defendant had argued with him about it before.

Adkins got dressed and walked out of Smith's room, where Tyler and Taylor were still sleeping. Defendant was sitting at a table in the hallway, 12 to 15 feet away. As Adkins approached, defendant stood up and asked, "What's up now, player?" Defendant was holding a revolver. He raised the gun, aimed, and quickly fired one shot, which hit Adkins in the stomach. Adkins stumbled back into the bedroom. Defendant pursued him. As defendant reached the bedroom doorway, he began firing into the

room. Taylor was sleeping on the floor and Tyler was sleeping in his playpen. Smith was standing next to Tyler. The firing stopped when the gun malfunctioned; defendant kept pulling the trigger, but the gun did not fire.

Adkins seized the moment and charged at defendant. They struggled for control of the gun; during the struggle, Adkins bit defendant's hand and was shot in the shoulder. Adkins yelled to Smith to get the kids out of the room and call 911, but defendant replied, "Terri's dead." Adkins told Taylor to call the police. Eventually, Adkins overpowered defendant and gained control of the gun. He pointed it at defendant and pulled the trigger, but the gun didn't fire, so he hit defendant in the head with it until defendant let him go. Then, Adkins pointed the gun at defendant again and told him there was one bullet left in the chamber. In response, defendant grabbed a pole, swung it at Adkins, and fled toward the back of the house.

Adkins ran outside to his car, still clutching the gun. His tires had been slashed, but he managed to drive to his son's grandmother's house. She summoned an ambulance and the police. At the hospital, Adkins identified defendant as his shooter.

Meanwhile, Taylor ran out of the house and called 911. In that call and her later interview, she identified defendant as the shooter. Taylor also explained that a few days before the shooting, her mother and Adkins had argued with defendant about a wireless bill. The next day, someone "popped" the tires on her mother's car. It seems that Smith and Adkins had argued with defendant over an unpaid $10 internet bill. Smith's refusal to pay it angered defendant. The morning after the fight, Smith's tires were slashed.

Officers were sent to the house in response to Taylor's 911 call. Smith was lying on the bedroom floor; she was dead. Officers discovered a trail of blood leading from Smith's room to defendant's room. They found defendant sitting in his room with two kitchen knives; one of the knives was bloody. Defendant was bleeding and had wounds to his legs and torso. Police noted that several vehicles in front of the house had flat tires, including Smith's. Adkins's tires were later found to have similar slash marks.

After receiving medical treatment, defendant was taken into custody and interviewed. He identified Adkins as the initial aggressor.

DISCUSSION

Defendant contends the court abused its discretion by admitting irrelevant, prejudicial evidence that he slashed the victims' tires in the days and hours leading up to the shooting. He also contends—and the People concede—that the court was required to stay the great-bodily-injury enhancement (§ 12022.7) imposed on count 2 and that we should reduce the restitution fines to effect the court's stated intent to impose the statutory minimum.

1. The erroneous admission of the tire-slashing evidence was not prejudicial.

Over defendant's objections that the evidence was irrelevant (Evid. Code, § 210) and more prejudicial than probative (Evid. Code, § 352), the court allowed the prosecutor to introduce evidence of several tire-slashing incidents that occurred in the days and hours leading up to the murder. We agree with defendant that these incidents should have been excluded from

the prosecution's case-in-chief. The evidence was only relevant if *defendant* slashed the tires, and, as the prosecutor admitted, there was no evidence he did so. We conclude that the error was harmless, however, because defendant's later testimony that he slashed the victim's tires just prior to the shooting provided the necessary link between the tire slashing and the murder, thereby establishing its relevance to the issue of premeditation and deliberation.

1.1. Legal principles

Only relevant evidence is admissible (Evid. Code, § 350)—and all relevant evidence is admissible unless excluded by the constitution or by statute (Evid. Code, § 351; see Cal. Const., art. I, § 28, subd. (d)). Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

"The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1166; Evid. Code, § 600, subd. (b) ["An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action."].) When the relevance of evidence depends on the existence of some other preliminary fact, the "proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact." (Evid. Code,

§ 403, subd. (a)(1); *id.*, subd. (a)(4) [rule applies "if the preliminary or proffered evidence is of … conduct of a particular person and the preliminary fact is whether that person … so conducted himself."]; *People v. Clark* (2016) 63 Cal.4th 522, 583 ["the trial court must determine whether the evidence was sufficient for a trier of fact to reasonably find the existence of the preliminary fact by a preponderance of the evidence. [Citations.]"].)

A trial court has broad discretion in determining the relevance of evidence but has no discretion to admit irrelevant evidence. (*People v. Carter*, *supra*, 36 Cal.4th at pp. 1166–1167.) "On appeal, we review for an abuse of discretion a trial court's admission of evidence as relevant. [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1057.) Though the court below did not explain why it believed the evidence was admissible, " 'we review the ruling, not the court's reasoning, and, if the ruling was correct on any ground, we affirm.' [Citation.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1295, fn. 12.)

1.2. The evidence was irrelevant.

Before trial, defense counsel moved to exclude evidence of several tire-slashing incidents. The slashed tires were irrelevant, counsel argued, because there was no evidence that defendant slashed them—and if defendant did not slash the tires, the evidence did not support an inference that defendant planned the shooting. The prosecutor argued that the slashed tires provided evidence of intent.[3]

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[3] The prosecutor also argued that the evidence was relevant to show "the state of the evidence when the police arrived," which was not an ultimate issue in the case. (See Evid. Code, § 210.)

Certainly, if *defendant* had slashed the tires, the evidence would have supported an inference that he did so to prevent the victims from escaping, which would have supported a further inference that he planned the killing in advance. As such, the evidence would have been relevant to the ultimate issue of premeditation and deliberation. Evidence that *someone* slashed the tires, on the other hand, was irrelevant to the question of whether *defendant* premeditated the killing; a causal link was required. Because the relevance of the tire slashing depended on the identity of the slasher, Evidence Code section 403 required the prosecutor to present the court with evidence sufficient to establish that identity. (Evid. Code, § 403, subds. (a)(1), (a)(4).)

The prosecution did not meet this burden. As even the prosecutor acknowledged, at that point in the case, he had not presented substantial evidence of defendant's involvement in the tire slashing.

> P. I think [the tire evidence] is important, because I can certainly argue. No one's going to give an opinion of—if the court wants to keep out them giving the opinion of I believe it was Mr. Parks based on nothing but assumption, I can understand that; but I think that it's admissible and, certainly, something I can argue on—
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> Ct. What issue?
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> P. In the totality of all the evidence, it's circumstantial evidence that he planned this crime, because he was slashing the tires of the vehicles that they would have used to escape, and that he coaxed one of the intended victims—

Ct. There's no evidence he did.

P. But I'm saying I could argue that. I don't—you are right. I'm trying to prove the case of the slashed tires, but I think it's in the totality of all the evidence. It's circumstantial evidence that, if they believe that he was also involved in that, and he's telling [the victim] to come out and go ahead and move his car, he's essentially welcoming one of the victims into a trap.

In short, though the prosecutor acknowledged that he had no evidence defendant slashed the tires—or directed someone else to do so—the prosecutor nevertheless contended that the evidence was relevant as part of "the totality of all the evidence." That is not the law. (See, e.g., *People v. Clark*, *supra*, 63 Cal.4th at pp. 583–584 [anonymous letter threatening a witness was relevant where substantial evidence supported the conclusion that defendant authorized it—namely, authorities found a note to a different witness in defendant's cell along with a letter in defendant's handwriting asking a third party to threaten that witness and defendant admitted ownership of those materials]; *People v. Brady* (2005) 129 Cal.App.4th 1314, 1332–1334 [court properly excluded evidence of pilot's alcohol consumption as an alternate theory of plane crash where there was no evidence the alcohol affected pilot's flying ability or judgment].) Because the prosecutor did not establish the necessary preliminary facts, the evidence should have been excluded as irrelevant.

1.3. Defendant's subsequent testimony rendered the error harmless.

Under *People v. Watson*, we may reverse for an error of state law only where a defendant can establish "that it is reasonably probable that a result more favorable to [him] would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.) A reasonable probability "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*. [Citations.]" (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) An error is prejudicial whenever the defendant can " 'undermine confidence' " in the result achieved at trial. (*Ibid.*)

Defendant has not established that the evidentiary error was prejudicial in this case. To the contrary, defendant himself placed the tires in issue and established the necessary causal link between the evidence and the murder when he testified that he slashed the tires on the morning of the shooting.[4]

The prosecution's tire evidence did not itself make it more likely that the jury would reject defendant's theory of the case. The evidence did not undermine any of the asserted defenses—self-defense; lack of motive; police rush to judgment and accompanying failure to investigate or preserve evidence; and unreliable or dishonest witnesses. To the contrary, the evidence was critical to defendant's story that Adkins was the initial aggressor, sent into a murderous rage when defendant slashed

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[4] Defendant does not argue, and our review of the record does not reveal, that defendant testified because he felt he needed to explain the erroneously admitted evidence. We express no opinion on how such information might affect our prejudice analysis.

Adkins's tires to teach him a lesson about blocking the driveway. Nor did the evidence infuse the proceedings with impermissible bias. The jury's relatively sophisticated questions about the kill zone theory of guilt—and its subsequent acquittal on the two counts relying on that theory—reveal careful deliberation, not a rush to judgment.

The verdicts in this case ultimately rested on the jury's resolution of a credibility contest between defendant and Adkins—and the jury believed Adkins. As such, it is not reasonably likely defendant would have achieved a better result if the prosecution's tire evidence had been excluded.

2. We modify the judgment to stay the section 12022.7 enhancement and reduce the restitution fines to $300 each.

Defendant argues, and the People concede, that the court (1) was required to stay the section 12022.7 enhancement imposed on count 2, and (2) intended to impose the statutory minimum restitution fine (§ 1202.4, subd. (b)) and parole revocation restitution fine (§ 1202.45, subd. (a)). We agree and modify the judgment accordingly. In reviewing the fines, we also noted an error in the abstract of judgment. We therefore direct the court to correct it on remand.

2.1. The great-bodily-injury enhancement

We may correct an unauthorized sentence on appeal despite the defendant's failure to object below. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) A sentence is unauthorized if "it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6

[unauthorized sentence "subject to judicial correction whenever the error comes to the attention of the reviewing court."].)

Section 12022.53 provides escalating sentence enhancements for firearm use in enumerated felonies—10 years for personal use (subd. (b)), 20 years for personal and intentional discharge (subd. (c)), and 25 years to life for personal and intentional discharge causing great bodily injury or death to a non-accomplice (subd. (d)). While section 12022.53 only applies to *enumerated* felonies, section 12022.7, subdivision (a), provides for an additional three-year term when a defendant personally inflicts great bodily injury on a non-accomplice in the commission or attempted commission of *any* felony.

Section 12022.53, subdivision (f), addresses the intersection of these provisions. It provides that the court may only impose "one additional term of imprisonment under this section … per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. … An enhancement for great bodily injury as defined in section 12022.7 … shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)." (§ 12022.53, subd. (f).) The California Supreme Court has interpreted this language as requiring the court "to stay, rather than strike, prohibited enhancements under section 12022.53." (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122–1123, 1129.)

Here, the jury returned true findings on four enhancements—section 12022.53, subdivisions (b), (c), and (d),

and section 12022.7, subdivision (a).[5] The court properly imposed one section 12022.53, subdivision (d), enhancement for each count, and stayed the remaining two. As to count 2, however, the court also imposed a consecutive three-year term under section 12022.7, subdivision (a). In light of the section 12022.53, subdivision (d), enhancement also imposed on count 2, the section 12022.7 term is unauthorized under section 12022.53, subdivision (f). Accordingly, we modify the judgment to stay the three-year enhancement imposed under section 12022.7, subdivision (a). (§ 1260 [appellate court's power to modify judgments]; *People v. Scott*, *supra*, 9 Cal.4th at p. 354.)

2.2. The restitution fines

Except in "extraordinary" circumstances, the sentencing court must impose a restitution fine on every defendant convicted of a crime. (§ 1202.4, subd. (b).) If the defendant is convicted of a felony, the fine must be between $300 and $10,000. (§ 1202.4, subd. (b)(1).) If the sentence contemplates a period of parole, the court must also impose and stay a parole revocation restitution fine equal to the restitution fine imposed under section 1202.4, subdivision (b). (§ 1202.45, subd. (a).) When defendant committed these crimes in April 2014, section 1202.4 provided for a minimum restitution fine of $300. (§ 1202.4, subd. (b)(1), as amended by Stats. 2012, ch. 873, § 1.5.)

At the sentencing hearing, the court ordered defendant to pay a restitution fine and parole revocation fine "in the minimum, $400." Based on this language, defendant argues, and

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[5] The section 12022.53 enhancements applied to both counts; the section 12022.7 enhancement only applied to count 2.

the People concede, that the court intended to impose the minimum possible restitution fines and was unaware that the statutory minimum was $300 rather than $400. Because the trial court expressed its intent to impose the minimum restitution fines, we modify the judgment to reduce the restitution fine (§ 1202.4, subd. (b)) and parole revocation restitution fine (§ 1202.45, subd. (a)) to $300 each. (§ 1260 [appellate court's power to modify judgments].)

2.3. The abstract of judgment is inaccurate.

The sentencing court must impose a $40 court security fee (§ 1465.8) and a $30 criminal conviction assessment (Gov. Code, § 70373) on every criminal conviction, including counts stayed under section 654. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 483–484.) The court in this case properly imposed these fees on both counts, resulting in a total court security fee of $80 and a total criminal conviction assessment of $60. The abstract of judgment, however, reflects an assessment of only $30.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Accordingly, "[c]ourts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases" (*ibid.*), may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of sentence (*id.* at pp. 185–188). As the abstract of judgment in this case is inaccurate, we direct the trial court to amend it to reflect a $60 criminal conviction assessment (Gov. Code, § 70373) and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

DISPOSITION

The judgment is modified to stay the three-year great-bodily-injury enhancement (Pen. Code, § 12022.7, subd. (a)) imposed on count 2 and to reduce the restitution fine (§ 1202.4, subd. (b)) and the parole revocation restitution fine (§ 1202.45, subd. (a)) to $300 each. As modified, the judgment is affirmed.

Upon issuance of remittitur, the trial court is directed to amend the abstract of judgment to reflect the judgment as modified, correct it to reflect the $60 criminal conviction assessment (Gov. Code, § 70373), and send a copy of the amended/corrected abstract of judgment to the Department of Corrections and Rehabilitation. The clerk of this court is directed to send copies of the remittitur and this opinion to the Department of Corrections and Rehabilitation. (Cal. Rules of Court, rule 8.272(d)(2).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON (MICHAEL), J.*

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