

OPINION ON REHEARING

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY ROBBINS,

Defendant and Appellant.

D075544

(Super. Ct. No. SWF1300078)

APPEAL from a judgment of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed as modified, and remanded with directions.

Matthew A. Siroka, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos, Teresa Torreblanca and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael Anthony Robbins was charged with murder (Pen. Code, § 187, subd. (a)),¹ unlawful possession of a firearm by a felon (§ 29800, subd. (a)(1); hereafter, felon-in-possession), and possession for sale of a controlled substance (Health & Saf. Code, § 11378; hereafter, possession-for-sale). The murder count included a firearm enhancement allegation, and it was further alleged that Robbins had suffered two prison priors, one serious felony prior, and one strike prior.

After deliberating for about one day, the jury reached guilty verdicts on the felon-in-possession and possession-for-sale counts, but was deadlocked on the murder count. The jury foreman reported to the trial court that the lone holdout—Juror 8, an "older Black woman"—was refusing to deliberate.² The foreman explained that Juror 8 "cannot look at the evidence . . . because of a racial bias"—she "did not like the fact that two [W]hite people were pointing the finger at a [B]lack person."

The foreman's report prompted the trial court to interview the other jurors, who reported that Juror 8 held "preconceived opinions" on race, as demonstrated by, for example, her statements during deliberations that "two White people accus[ing] a [B]lack person" is "the way it goes all the time," that because "two [W]hite people had pointed the finger that they were automatically . . . true," and that the police "didn't look any further" once "two [W]hite people pointed to one [B]lack person."

¹ Further undesignated statutory references are to the Penal Code.

² To maintain consistency with the terminology used by the jurors, whose testimony we quote extensively, we will use "Black" and "White" to refer to "African-American" and "Caucasian," respectively.

Juror 8 denied that "the fact that either the witnesses or the police or the defendant were not of the same race . . . affect[ed] [her] ability to be fair and impartial to both sides."

The trial court found that Juror 8 failed to deliberate and exhibited racial bias. Accordingly, the court replaced her with an alternate juror and instructed the reconstituted jury to begin deliberations anew. After about one hour, the jury returned guilty verdicts on all counts. The trial court ultimately sentenced Robbins to a determinate term of 12 years four months, and an indeterminate term of 75 years to life. The determinate sentence included two one-year prison prior enhancements, and one five-year serious felony prior enhancement.

Robbins raises several challenges on appeal. First, he contends the trial court erred prejudicially by replacing the lone holdout juror. We disagree. The record supports the trial court's finding as a demonstrable reality that Juror 8 improperly allowed racial bias to influence her deliberations.³

Second, and relatedly, Robbins contends the trial court erred by denying his motion for mistrial based on Juror 8's removal. We disagree. The record indicates the other jurors conformed to the general presumption that jurors follow courts' instructions to deliberate impartially.

Third, Robbins—whom the court allowed to pursue a third-party-culpability defense as to *one* person—maintains the trial court erred by excluding third-party-

³ Because we find no error in the trial court's removal of Juror 8 for racial bias, we need not determine whether the court erred in also finding she failed to deliberate.

culpability evidence as to *another* person. We find no abuse of discretion in the trial court's ruling.

Fourth, as to the third party for whom Robbins was permitted to pursue a third-party-culpability defense, Robbins contends the trial court committed instructional error by denying his request for a pinpoint instruction on that theory. The California Supreme Court has rejected similar claims of prejudicial error. (See *People v. Hartsch* (2010) 49 Cal.4th 472, 504 (*Hartsch*).)

Fifth, Robbins contends—and the Attorney General concedes—we must strike his two prison prior enhancements. For reasons we will explain, we agree and will modify the judgment to strike the enhancements.

Sixth, Robbins contends the trial court erred by imposing a 25-year-to-life enhancement for personally discharging a firearm causing great bodily injury or death (§ 12022.53, subd. (d)) without first considering whether to impose less severe firearm enhancements. However, the 25-year-to-life enhancement was the only firearm enhancement that was pleaded and proved. Accordingly, that is the only enhancement the trial court had the discretion to impose.

Finally, Robbins contends we should remand to give the trial court the opportunity to exercise its newly vested discretion to strike the five-year serious felony prior enhancement. The Attorney General "reluctantly agrees" remand is appropriate. We agree, and will remand for this limited purpose. We express no opinion as to how the trial court should exercise its discretion.

As modified to strike both of Robbins's one-year prison prior enhancements, we affirm the judgment and remand for further proceedings as specified in the Disposition.

FACTUAL AND PROCEDURAL BACKGROUND

On January 22, 2013, Matthew Martin was found shot to death in his apartment. After Robbins was identified as a suspect, authorities searched his neighboring apartment and found the murder weapon and more than 11 grams of methamphetamine. The prosecution charged him with one count each of murder, felon-in-possession, and possession-for-sale. The prosecution also alleged firearm, prison prior, serious felony prior, and strike prior enhancements.

Prosecution Case

Martin and his wife, Shana B., lived in an apartment in Hemet. They regularly used methamphetamine, which they bought from their neighbor, Robbins.

Martin and Shana's friend, 30-year-old Jason K., lived around the corner from them with his parents. Jason was like a little brother to Martin and Shana. He visited them nearly every morning, and they gave him methamphetamine for free. On occasion, Martin, Shana, and Jason did drugs with Robbins.

On January 21, 2013—the night before Martin's murder—he and Shana went to Robbins's apartment to settle a drug debt. When they went to sit on the couch, "there was a small sawed-off shotgun in the way." Robbins apologized and put it in another room. Martin and Shana settled their debt and left, but later realized they had inadvertently overpaid by \$30.

The next morning, Robbins used methamphetamine with Martin and Shana at their apartment. When Martin asked Robbins "for another line," Robbins "got very agitated like he had been disrespected," and asked, " 'How can you do me like that?' " Martin "laughed it off," "like it shouldn't have been a big deal."

Later that morning, Martin and Shana were preparing to leave for their first day of a community college class. They had previously arranged to borrow Robbins's van because their car was unreliable. But when they knocked on Robbins's door, he did not answer, even though his van was there. Martin and Shana took their own car to school.

Sometime after 10:00 a.m., while Martin and Shana were in class, Jason came looking for them. Robbins heard Jason knocking on their door and told him they were not home. Jason went to another friend's house and drank some beers.

Martin and Shana returned from school around noon. About an hour later, Shana left for work. She never saw Martin again.

Around 3:30 p.m., Jason returned to Martin and Shana's apartment. He immediately sensed something was wrong. The front door was wide open, items inside were strewn about, and Martin was lying in a fetal position on the living room floor. Even though it was obvious to Jason that Martin was dead, Jason kicked him and shouted for him to get up. The kick caused Martin's body to turn over, revealing a bloody hole in his shirt.

Jason was "[p]retty freaked out." He quickly searched the apartment for Shana, and left when he did not find her. As Jason exited the apartment, he heard Robbins say in "an evil sounding voice," "Jason come here, dog." This scared Jason and triggered his

"[f]ight or flight" response. Jason shouted some profanity-laced "gibberish" and ran home.

When Jason got home, he grabbed a rifle, loaded it, and told his parents, "[S]omebody killed him. They're going to get me." Jason's father took the rifle away, and his mother called 911.⁴

Deputies from the Riverside County Sheriff's Department responded to the scene and pronounced Martin dead at 4:17 p.m. Shotgun "wadding"⁵ was visible in a wound in Martin's chest and under the carpet next to his body; a third wadding was later found in his chest during an autopsy.⁶ Deputies observed signs of a struggle in the apartment. They secured the apartment and waited for investigators to arrive.

A few minutes later, Jason returned to the scene, where deputies detained him and took him to the sheriff's station for questioning. Lead homicide detective Rick Espinoza interviewed Jason and photographed numerous scratches, scrapes, and bumps on his body. Jason explained the injuries were from his job cutting firewood. Jason's hands,

⁴ A recording of the 911 call was played for the jury. The transcript shows that an unknown male in the background said, "[S]omebody is fucking dead in that house and it looks like [Martin]." The transcript also shows that Jason's mother repeatedly told him to "calm down."

⁵ Shotgun wadding is a plastic "cup" that holds the pellets together inside a shotgun shell. When the gun is fired, the wadding and pellets travel together through the gun barrel before eventually separating.

⁶ The autopsy determined Martin's cause of death was gunshot wounds to the chest, and the manner of death was homicide.

which were dirty (i.e., they did not appear to have been washed), tested negative for gunshot residue.

Jason told investigators he believed Robbins killed Martin. Jason testified that a few days before the murder, Robbins asked him "out of the blue" how to remove gunshot residue or keep it from getting on someone in the first place. Jason told Robbins to wear gloves or use "powder solvent."

After Shana returned home from work on the evening of the murder, Detective Espinoza questioned her. Her hands, which were dirty from her work training horses, also tested negative for gunshot residue. When asked if she knew anyone who might want to hurt Martin, Shana identified Robbins.

Based on Jason's and Shana's interviews, investigators obtained a search warrant for Robbins's apartment. When investigators arrived to execute the warrant around 2:00 a.m., the front door was ajar, the screen door was unlocked, and nobody was home. The bathroom floor and tub were wet, and there were several wet, sudsy wash cloths and rags on the bathroom floor. The investigators also found in the bathroom a bottle of cleaning solution, two spent 20-gauge shotgun shells wrapped in a wet washcloth on top of the toilet, and a pair of work boots and a leather jacket on the bathroom counter. One of the

boots had apparent blood drops on the cuff,⁷ and the jacket pockets contained a pair of gloves and more than 11 grams of methamphetamine worth approximately \$1,000.⁸

In a crawlspace above the bathroom, investigators found a sawed-off shotgun. The shotgun was a single-shot breech loader, meaning that every time it is fired the shooter has to open the breech, remove the used shell, and insert a new one. No usable fingerprints were found on the shotgun. Ballistic analysis determined the shotgun likely fired the shells recovered from Robbins's bathroom and the wadding recovered from Martin's body and apartment.

Investigators searched in vain for Robbins for about 10 days, before finally arresting him near his apartment. When asked for his address, Robbins gave false information.

In addition to the motive evidence provided by Shana and Jason, the prosecution introduced evidence showing Robbins was having financial difficulties, his girlfriend had just left him, and his dog had just died.

Defense Case

The defense insinuated Jason and Shana murdered Martin because they were allegedly having an affair (which they denied). For example, Jason acknowledged he

⁷ A presumptive test determined the drops were blood, but did not distinguish between human and animal blood. In Robbins's back yard, investigators found the body of a recently buried dog, which had some blood in its mouth.

⁸ An expert testified this quantity was consistent with drug sales rather than personal use.

socialized platonically with Shana at another couple's house for about seven or eight months before she told him she was married. And Shana testified she and Martin were happily married, but she earlier told Detective Espinoza that Martin had once asked for a divorce, leaving her suicidal.

The defense also highlighted Jason's and Shana's credibility issues, including numerous inconsistencies between their trial testimony and their statements to Detective Espinoza. For example, Jason never told the police about grabbing his rifle at home the day of the murder, as he testified he had. Shana also admitted she previously stole jewelry from her father and lied to the police about it.

Finally, the defense attacked the thoroughness of the investigation. For example, although the crime scene indicated there may have been a struggle, Jason appeared to have fresh scratches, and the forensic pathologist took clippings from Martin's fingernails during the autopsy, those nail clippings were never analyzed for DNA. Nor did investigators obtain DNA reference samples from Jason or Shana to compare with blood drops recovered from the work boots found in Robbins's bathroom.⁹ And despite the fact that several neighbors cast doubt on Jason and Shana's timeline of events, and one neighbor heard men arguing, during which one man said, "Don't talk about my dad like that" (recall Jason lived with his parents), the investigators never attempted to corroborate Jason's claimed whereabouts when the murder occurred.

⁹ DNA analysis indicated there were multiple potential contributors, one of whom was female.

Jury Verdicts and Sentencing

The reconstituted jury found Robbins guilty of first degree murder, felon-in-possession,¹⁰ and possession-for-sale. The jury also found true the enhancement allegation that, during the commission of the murder, Robbins personally and intentionally discharged a firearm proximately causing great bodily injury or death.

Robbins waived a jury trial on his priors, and the court found true the allegations that he had suffered two prison priors,¹¹ one serious felony prior, and one strike prior.

The trial court sentenced Robbins to an indeterminate term of 75 years to life, consisting of consecutive terms of 50 years to life on the murder conviction (25 years to life, doubled for the strike prior), and 25 years to life for the firearm enhancement. The trial court sentenced Robbins to a determinate term of 12 years four months, consisting of consecutive terms of four years on the felon-in-possession conviction (the two-year midterm, doubled for the strike prior), 16 months on the possession-for-sale conviction (one-third the mid-term of two years, or eight months, doubled for the strike prior), one year for each of the two prison priors, and five years for the serious felony prior.

¹⁰ The parties stipulated Robbins had sustained a predicate felony conviction.

¹¹ The prison priors were based on underlying convictions for simple possession of a controlled substance (Health & Saf. Code, § 11377) and possession-for-sale (*id.*, § 11378).

DISCUSSION

I. The Trial Court Did Not Err By Removing Juror 8 for Misconduct

Robbins contends the trial court erred by removing Juror 8—the lone not-guilty holdout on the murder count—during deliberations. We disagree.

A. Background

After about three days of hearing evidence, the jury deliberated for about one full day (spread over an afternoon and the following morning) before submitting a note to the court seeking "direction" because the jury was "deadlocked on [two] counts."¹² By that point, the jury had already requested and received readbacks of Shana's and a neighbor's testimony. After breaking for lunch, the court assembled the jury and questioned the foreman.

The foreman advised the trial court that the jury had reached (unspecified) verdicts on the felon-in-possession and possession-for-sale counts, but was deadlocked 7-5 on the murder count after taking "at least three" ballots. The foreman indicated the jury had an additional question it had not yet had the opportunity to submit in writing. The court sent the jury back for further deliberations and to submit any additional questions that might be helpful.

About 17 minutes later, the jury submitted the following questions: "1. On what grounds can a juror be replaced? [¶] 2. If we cannot replace the juror, we are

¹² We infer from our reading of the record, as a whole, that the jury's reference to two *counts* referred to the murder count and the firearm enhancement allegation attached to that count.

deadlocked."¹³ The court informed counsel it intended to investigate whether a juror had committed misconduct that warranted removal. Neither the prosecution nor the defense objected.

1. *Juror Interviews*

The trial court interviewed each juror individually, beginning with the foreman (Juror 9) and concluding with Juror 8.

(a) *Foreman*

The foreman advised the trial court that Juror 8—whom he described as "the older Black woman"¹⁴—"cannot look at the evidence . . . because of a racial bias. [¶] . . . [¶] [She] did not like the fact that two [W]hite people"—Jason and Shana are both White—"were pointing the finger at a [B]lack person. And that alone was the hold up. [¶] . . . [¶] . . . It was ['I don't like it, I don't like the finger pointing . . . ' "

(b) *Juror 1*

Juror 1 stated that before they broke for lunch that day, Juror 8 "said . . . something along the lines of you have two [W]hite people pointing the finger at a Black person." When other jurors asked Juror 8 if there was "something else that we can discuss or something we can get clarification on," Juror 8 responded "[N]o. That basically the cops did not do their job because it was two [W]hite people pointing the

¹³ We infer from the reference to "*the* juror" (italics added) in the second question that the jury had taken another poll and was deadlocked 11-1.

¹⁴ The trial court noted the foreman is also Black.

finger at a [B]lack man. [¶] . . . [¶] Um, she was pretty adamant that [Robbins] wasn't even there and that—you know, the testimony given was false testimony." When the court asked if Juror 8 "ever stated why she felt the testimony was false," Juror 1 replied, "Just said that they weren't believable, I guess." It is unclear from the transcript to whom "they" refers.

(c) *Juror 2*

Juror 2 told the court that when the jury "tried to have a discussion yesterday," Juror 8 made a "comment about not believing those [W]hite people." When other jurors asked for clarification, Juror 8 responded, "[']I don't care what that is, it's—you know, the police were against him. Um, I believe . . . it was a set up.['] " Another juror responded by stating, "I don't believe that that's the case; that the police—" Juror 8 replied, "[']Well, you would because you're [W]hite.[']" Juror 2 told Juror 8, "Come on, . . . that's not right," and apologized on Juror 8's behalf to the other juror, who "had tears in her eyes." Juror 2 then asked the foreman to inquire of the court how to replace a juror.

In follow-up questioning, the court asked Juror 2 if jurors made "[a]ny other statements regarding race or racial issues today?" Juror 2 recounted Juror 8's "general discussion" that "she does not believe the police handled the situation fairly because [Robbins is] a [B]lack man, she doesn't believe that they investigated properly just

because he's a [B]lack man." When jurors told Juror 8 she "need[ed] to give the evidence a fair shake," she responded that "because of—he's not going to get a fair shake."¹⁵

(d) *Juror 3*

According to Juror 3, Juror 8 told the other jurors her "mind was made up and that nothing was going to change [her] mind." When the court asked if Juror 8 "indicate[d] why [she] [was] done," Juror 3 explained: "Some of it that was brought up was bias related. Essentially racially related [I]t seemed sort of all a sudden [she was] not going to change . . . because of a potential bias. [¶] . . . [¶] [I]t was brought up by this juror that the finger was pointed at a [B]lack person and two [W]hite people accused the [B]lack person And that that's the way it goes all the time."

(e) *Juror 4*

When the court asked Juror 4 if "any jurors made any statements that would be inconsistent with their evaluation of all witnesses and evidence," this juror responded that Juror 8 said "something to the effect that, . . . [']I don't like that two [W]hites are pointing the finger at the defendant.[']" Juror 4 then described an exchange in which Juror 8 pointed at another juror, who responded, "[']I'm not racist.[']" This prompted Juror 8 to reply, "[']Well, you would say that. I knew you would say that.[']" Juror 4 said she did not know whether Juror 8 made any statements "about . . . a racial situation regarding whether or not that affected [her] evaluation of witness credibility or evaluating the evidence[.]"

¹⁵ Juror 2 did not elaborate on Juror 8's intended meaning of "because of," but the obvious implication is that Juror 8 meant "because of *Robbins's race*."

(f) *Juror 5*

Juror 5 reported that the jurors were "all participating" in deliberations, but "perhaps not in the way instructed." Juror 5 elaborated that "there are members of the jury that don't feel that all the members are following" the "oath [the jurors] took at the beginning of the trial" to "not . . . be biased by race, religion, um, social standings, and so forth."¹⁶ When asked how jurors were not complying with this instruction, Juror 5 responded that "one of the areas was race." It appeared to Juror 5 that Juror 8 had "maybe [gone] into the jury room having preconceived opinions on things," such as "[t]hat the cops didn't do their job" and that she "[doesn't] like pointing fingers." Juror 5 also recounted that Juror 8 did "something to the [effect] of pointing to [a White] juror and saying if it would have been you, the case would have been handled differently."

(g) *Juror 6*

Juror 6 reported that although all jurors were deliberating, "the issue is more or less" that Juror 8 has "a racial factor" that conflicts with the admonition in CALCRIM No. 200 "not to let bias, sympathy, prejudice, or public opinion influence your decision." When asked to identify specific conduct or statements, Juror 6 reported that Juror 8 "was referring to—that because two [W]hite people were making a [B]lack person guilty that—because the two [W]hite people had pointed the finger that they were

¹⁶ The trial court confirmed that Juror 5 was referring to CALCRIM No. 200, which, as given, reads in part: "Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant or alleged victim, based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, or socioeconomic status."

automatically, um, true. And then she pointed to a [W]hite male in the room and said, um, if someone was pointing at you, they might look more into it. And then she pointed to [a Black juror] . . . [and] said [']if they pointed to you, then . . . the police would stop looking.[']" Juror 6 summarized that although Juror 8 "said that she would evaluate fairly, . . . her actions, I guess, prove differently."

(h) *Juror 7*

Juror 7 reported that Juror 8 "may not be completely on page with the oath that was given" agreeing "to neutrality." When asked how Juror 8 was not complying with the oath, Juror 7 responded that she exhibited "a racial bias" and an "inability to put all factors in respect to economic standing, racial, and anything else aside to come to a fair and just decision." Juror 7 provided the following example: "There was a comparison referencing one of the other jurors—actually myself, as if I were the accused it would be an entirely different story than . . . somebody of the defendant's racial background." Based on this, Juror 7 believed Juror 8 was "deadlocked on issues not pertaining to the case"—she "[w]ill not be able to reach a finding due to expectations that have not been fulfilled."

(i) *Juror 10*¹⁷

Juror 10 reported that Juror 8 was not "evaluating all of the evidence and witnesses fairly and impartially." To the contrary, she was "not looking at the evidence

¹⁷ The trial court's investigation proceeded from Juror 7 to Juror 10 because Juror 8 was the juror under investigation, and Juror 9 was the foreman, whom the court had already interviewed.

that has been given," was "prejudice[d]," and was "making it a racial issue instead of looking at the evidence"

Juror 10 related a confrontation she had with Juror 8: "She pointed to a [W]hite gentleman and said, [']Of course you would say that.['] And then she pointed to the jury foreman, [']but you would be charged,['] indicating—and then because I had spoke[n] last, she said, [']Well, of course you would think that.['] [¶] So I asked her, [']So you're telling me I'm racist now? Because we're looking at evidence. We're not talking about race, we're not talking about anything; we're talking about evidence.['] And another juror that was sitting across the table apologized for that lady's comment to me. That's how bad it is."¹⁸

Juror 10 concluded that Juror 8 was "not willing to look at the evidence at hand. She's dismissing everything and making it a—it's racist. And she thinks that the police botched it from the very beginning. She won't even look at anything."

(j) *Juror 11*

Juror 11 reported that Juror 8 was not deliberating "impartially" because there was "an instance where race was brought up." When asked how the reference to race was inconsistent with impartiality, Juror 11 related that Juror 8 "said that if it was a different colored person they wouldn't be sitting in that chair Something like that." Juror 11 believed "the whole thing about the race" indicated that Juror 8 had "prejudged."

¹⁸ This appears to be the confrontation described by Juror 2, which led her to apologize to Juror 10 on Juror 8's behalf.

(k) *Juror 12*

Juror 12 advised that "everyone's talking," but Juror 8 "is not holding up her end of the oath to not bring previous bias in." Specifically, Juror 12 stated that Juror 8 "doesn't trust the police. [¶] . . . [¶] That they didn't do their job. Um, . . . they didn't look anywhere else when two [W]hite people pointed to one [B]lack person. They didn't look any further." Juror 12 added that Juror 8 "did not say she had a previous bias against the police, but from her attitude and things she was saying, I got the impression that she—or in her life possibly had, um—that she doesn't trust the police and for them to do their job without there being prejudice. "

(l) *Juror 8*

Before questioning Juror 8, the trial court disclosed to counsel its intended line of questioning and solicited input from them: "[A]re there any questions that either party feels that the Court should ask her? I'm going to ask her whether or not she is fairly and objectively evaluating the witnesses and the police *and whether or not she made statements regarding the race of the defendant and witnesses.*" (Italics added.) One of Robbins's defense attorneys objected that the question asking whether Juror 8 made statements regarding the race of the defendant and witnesses was not "an appropriate question" because "race is inherently a part of this case. And the fact that she discusses the race of the witnesses is her right to do so." Although the court did not expressly rule on counsel's objection, the court ultimately did not ask that question.

The court also indicated to counsel that it may ask Juror 8 "whether or not she's following the instruction of [CALCRIM No.] 200" and whether she answered truthfully

during voir dire when asked if she had any biases. In particular, the court indicated it may ask Juror 8 whether "she's open to listen[ing] to both sides, including law enforcement witnesses because of the fact that they were not African-American and the defendant is African-American." Robbins's defense attorney reiterated that "[t]here were inherently racial issues within the case," so whether Juror 8 "based part of her decision . . . on those issues, that is completely irrelevant What the actual inquiry is . . . was she honest when . . . she responded in the negative to any biases or prejudice in this case and whether she believes that she continues to deliberate in that fashion."

The court then questioned Juror 8. She stated she had responded truthfully during voir dire when she indicated (1) she did not have "[']any feelings or opinions regarding the defendant, the attorneys, or any of the witnesses that would make it difficult for [her] to be fair and impartial in this case[']"; and (2) the fact that a "defendant, attorney, or witness may come from a particular national, racial, ethnic, or religious group or have a different lifestyle than [her] own" would not "affect [her] ability to render a fair and impartial judgment in this case."

The court then asked Juror 8 more pointedly whether she was evaluating all witnesses equally—"Nobody is more or less credible than anyone else"? Juror 8 responded, "Yes. I listened to what everyone had to say." She also confirmed she was adhering "[t]o the best of [her] ability" to CALCRIM No. 200's admonition "not to let bias . . . influence [her] decision."

Finally, the court asked Juror 8 whether "the fact that either the witnesses or the police or the defendant were not of the same race in this matter, did any of that affect

your ability to be fair and impartial to both sides and to listen and evaluate the testimony and evidence of all witnesses in this case?" Juror 8 responded, "No. [¶] . . . [¶] It didn't—the race or whatever didn't—I just listened to the statements."

The court asked counsel if they had any additional questions to ask Juror 8. After an unreported sidebar conference, the trial court sent Juror 8 to the jury deliberation room without further questioning. The trial court never asked Juror 8 whether she made the statements about race that the other jurors had attributed to her.

2. The Trial Court's Ruling

Before ruling, the trial court heard argument from counsel. The defense argued that Juror 8's skeptical view of the police investigation was consistent with "the defense theory that after Mr. Robbins was pointed to as the suspect, all other inquiry into other suspects ended. And so the fact that she agrees with the defense theory does not make her biased in any way" Counsel further argued that although Juror 8's belief that the police "didn't follow up with their duties because of a particular reason" "may have rubbed some jurors the wrong way, . . . that's not what a bias is."

The prosecutor maintained Juror 8 had engaged in misconduct by "exhibiting racial bias against the witnesses in violation of CALCRIM [No.] 200, as well as exhibiting bias against police, as well as her misrepresentations in voir dire that she could be fair and her misrepresentations . . . in court that she was deliberating fairly." The prosecutor then recounted the various jurors' accountings of Juror 8's racially tinged statements.

The court excused Juror 8 "for misconduct," finding as "a demonstrable reality" that she "fail[ed] to participate . . . [with] an open mind" and "[came] into this . . . with attitudes or bias that was . . . making the juror unable to fulfill her duty as a juror." The court cited specific jurors' testimony indicating Juror 8's racial bias, further noting that her "statements made to the other jurors indicat[ed] that . . . some thoughts or beliefs based upon the differences even of the jurors of their race or ethnicity . . . is interfering with her ability to participate in this deliberative process."

As noted, after the court replaced Juror 8 with an alternate juror, the reconstituted jury began deliberations anew and reached guilty verdicts on all counts.

B. *Relevant Legal Principles*

"A trial court may discharge a juror at any time during trial if the court finds that the juror is 'unable to perform his or her duty.' " (*People v. Armstrong* (2016) 1 Cal.5th 432, 450, quoting § 1089.)¹⁹ " 'A sitting juror's actual bias, which would have supported a challenge for cause, renders him "unable to perform his duty" and thus subject to discharge and substitution ' " (*People v. Lomax* (2010) 49 Cal.4th 530, 589 (*Lomax*); see *People v. Barnwell* (2007) 41 Cal.4th 1038, 1051 (*Barnwell*) ["A juror who is actually biased is unable to perform the duty to fairly deliberate and thus is subject to

¹⁹ Section 1089 states in part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

discharge."]; *People v. Fuiava* (2012) 53 Cal.4th 622, 713 (*Fuiava*) ["It is beyond dispute that a juror who cannot follow the court's instructions because of a personal bias should be discharged under section 1089."].) " 'Actual bias' in this context is defined as 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' " (*People v. Nesler* (1997) 16 Cal.4th 561, 581; see *People v. Gutierrez* (2009) 45 Cal.4th 789, 806; *People v. Rodriguez* (2014) 58 Cal.4th 587, 629 (*Rodriguez*) [prospective juror properly challenged for cause during voir dire where "he essentially admitted he would judge law enforcement witnesses by a different standard than other witnesses."].)

"When a court is informed of allegations which, if proven true, would constitute good cause for a juror's removal, a hearing is *required*." (*Barnwell, supra*, 41 Cal.4th at p. 1051.) "[T]he trial court must take care not to conduct an investigation that is too cursory [citation], but the court also must not intrude too deeply into the jury's deliberative process in order to avoid invading the sanctity of the deliberations or creating a coercive effect on those deliberations [citation]." (*Fuiava, supra*, 53 Cal.4th at p. 710.)

" 'Grounds for investigation or discharge of a juror may be established by his [or her] statements or conduct, including events which occur during jury deliberations and are reported by fellow panelists. [Citations.]' " (*Lomax, supra*, 49 Cal.4th at p. 588; see *Barnwell, supra*, 41 Cal.4th at p. 1051 ["Bias may be established by the testimony of other jurors."].) "A distinction must be made, of course, between a juror who cannot

fairly deliberate because of bias and one who, in good faith, disagrees with the others and holds his or her ground." (*Barnwell*, at p. 1051.)

"While removal of a juror is committed to the discretion of the trial court, upon review, the juror's disqualification must appear on the record as a demonstrable reality. 'The demonstrable reality test entails a more comprehensive and less deferential review' than substantial evidence review. 'It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied.' " (*People v. Homick* (2012) 55 Cal.4th 816, 899, quoting *Barnwell*, *supra*, 41 Cal.4th at p. 1052-1053.)

C. Analysis

We are confident that evidence on which the trial court actually relied—other jurors' testimony recounting Juror 8's statements indicating she was "let[ting] bias . . . influence [her] decision" (CALCRIM No. 200)—established as a demonstrable reality that Juror 8 exhibited racial bias that improperly influenced her evaluation of the prosecution's evidence.

First, Juror 8's statements contrasting Robbins's race with that of his accusers (Jason and Shana) demonstrates her bias. Several jurors reported that Juror 8 said she "did not like the fact that two [W]hite people were pointing the finger at a [B]lack person," "that's the way it goes all the time," and that "because the two [W]hite people

had pointed the finger [at a Black person] that they were automatically . . . true." The necessary inference to be drawn from these assertions is that Juror 8 holds the *general belief*—untethered from any evidence adduced at trial—that accusations by White accusers against Black suspects are inherently untrustworthy, while accusations by non-White accusers are not. In other words, she essentially admitted she applied a different standard for evaluating the prosecution's evidence because White witnesses were accusing a Black suspect. (See *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 78 (*Allen*) ["Although jurors are entrusted to evaluate the credibility of witnesses, they may not do so based on prejudice or stereotype. Nor may they apply differing standards to the consideration of different witnesses."].)

To be sure, there were plenty of reasons to doubt Jason's and Shana's credibility—they were both admitted drug users whose trial testimony sometimes contradicted their earlier statements to investigators, and Shana admitted she had previously lied to the police about stealing from her father. But none of these considerations has anything to do with race. Yet, Juror 8 identified only the fact that Jason and Shana's race differs from Robbins's as the reason for viewing their accusations with inherent suspicion.

Second, Juror 8's statements impugning the thoroughness of the police investigation based solely on the respective races of the accusers and the suspect reflect an improper general bias against law enforcement when race is involved. Several jurors reported that Juror 8 stated "she doesn't believe [the police] investigated properly just because [Robbins is] a [B]lack man" (or words to that effect), "the police were against him," "it was a set up," and "that if it was a different colored person they wouldn't be

sitting in that chair." These statements, which were completely untethered from any evidence about the specific law enforcement officers or agencies involved in the investigation here, reflect the type of general anti-police bias for which reviewing courts routinely uphold mid-deliberation removal of jurors.

For example, in *People v. Feagin* (1995) 34 Cal.App.4th 1427 (*Feagin*), the Court of Appeal affirmed the mid-deliberation removal of a juror after a "majority of the jurors confirmed that [she] . . . had brought up issues of police bias against Blacks, specifically referring to the Rodney King incident." (*Id.* at pp. 1436-1437; see *id.* at p. 1436 [one juror reported that the challenged juror "had brought up the [Rodney] King case saying, 'the officers could be biased or they could have framed' " one of the defendants].) The Court of Appeal concluded the record supported the trial court's finding that the challenged juror " 'came in with a bias against police officers, and that she would not believe any member of the Los Angeles Police Department if it pertained to a statement or situation having to do with a Black person' " (*Id.* at p. 1437, fn. 6.)

Similarly, in *People v. Thomas* (1990) 218 Cal.App.3d 1477 (*Thomas*), the Court of Appeal upheld the mid-deliberation removal of a juror whom other jurors claimed had "announced that she could not accept the testimony of the [police] officers who had testified at trial because of a firm belief, based upon personal experience, that police officers in Los Angeles generally lie." (*Id.* at p. 1482.) Although the juror denied to the trial court that she had made such statements, she "admitted to telling the other jurors about racist statements made by police officers in her neighborhood." (*Ibid.*) The Court of Appeal concluded there "was ample cause to dismiss the juror" because she "obviously

had prejudged the credibility of the police officers who testified at trial and was unable to cast aside her personal bias in weighing the evidence." (*Id.* at p. 1485.)

Finally, in *Barnwell, supra*, 41 Cal.4th 1038, the Supreme Court upheld the trial court's removal of a juror based on reports from nine other jurors that he "had expressed or exhibited a general bias against law enforcement officers" by stating, for example, that "he feels that *all* law enforcement will *always* back each other up regardless of [whether] it is right or wrong. . . . Law enforcement lies.'" (*Id.* at p. 1049.) The Supreme Court explained that the "totality of the evidence" supported the trial court's finding "that, more than simply disbelieving the testimony as given by these particular witnesses, [the challenged juror] judged their testimony by a different standard because the witnesses were police officers. Applying such different standards to the evaluation of different witnesses is, of course, contrary to the court's instructions and violative of the juror's oath of impartiality." (*Id.* at p. 1053.)

Juror 8's bias was similarly impermissible. Without any evidence about the specific agency or officers involved here, Juror 8 came into trial predisposed to believing that the police would not conduct a suitably thorough investigation if White accusers were implicating a Black suspect. There was no evidence adduced at trial to support Juror 8's bald statements that "the police were against" Robbins and that "it was a set up." (See *Feagin, supra*, 34 Cal.App.4th at p. 1436 [juror properly removed where she speculated that police "'officers could be biased or they could have framed' " the defendant].) Instead, these comments reflect that, wholly apart from the evidence, Juror

8 was inclined to apply a different level of scrutiny to the prosecution's evidence because White accusers were implicating a Black suspect.

This conclusion is reinforced by Juror 8's statements to other jurors about how the police would have handled the investigation based solely on those jurors' respective races. That is, she told a White juror that "if it would have been you, the case would have been handled differently," while she told an apparently Black juror that "if they pointed to you, then . . . the police would stop looking." These hypothetical scenarios included no facts other than the races of the accused. That Juror 8 believed she could predict how the police would handle such investigations with no additional evidence establishes that her conclusion was based solely on a generalized anti-police bias, not on evidence.

Robbins argues Juror 8 was "simply expressing from her life experience the uncontroversial proposition that racial bias infects the criminal justice system." In support, he cites *People v. Wilson* (2008) 44 Cal.4th 758 (*Wilson*), a capital case in which the Supreme Court found no misconduct in a Black juror telling other jurors, " ' "You don't understand because you're not Black." ' " (*Id.* at p. 818.) But the Supreme Court found it "significant" that this comment (and other similar ones) "arose during deliberations *at the penalty phase* rather than the guilt phase." (*Id.* at p. 830, italics added.) "Rather than the factfinding function undertaken by the jury at the guilt phase, 'the sentencing function [at the penalty phase] is inherently moral and normative, not factual; the sentencer's power and discretion . . . is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.' " (*Ibid.*)

Here, of course, Juror 8's statements were made during the factfinding phase of this noncapital case. Thus, the wholistic approach to deliberations allowed under *Wilson* is unsuitable here.²⁰ (See *Thomas, supra*, 218 Cal.App.3d at p. 1482 [removal of juror proper even where her "firm belief . . . that police officers in Los Angeles generally lie" was "based upon personal experience"].)

Even assuming personal experience was a proper basis on which to form an anti-police bias, the record does not support the conclusion that Juror 8's bias was based on such experience. Unlike the juror in *Thomas* who told jurors that her belief that police lie was based on her personal experience (*Thomas, supra*, 218 Cal.App.3d at p. 1482), Juror 8 never gave a similar explanation. Rather, she merely expressed her conclusory view that police tailor the thoroughness of their investigations based on the races of the accusers and suspects.

²⁰ *Wilson* also made clear that even in capital cases, race-based personal experiences must still be evaluated in the context of "evidence in a particular case": "A juror whose personal view was that African-American defendants *never* should, or *always* should, receive the death penalty commits clear misconduct, both by not considering the particular facts of the case and by making the penalty decision based on racial bias. It would be equally objectionable were a juror to conclude *a particular defendant* deserved the death penalty or life imprisonment because of his or her race. But relying on an understanding, based on personal experience, of the effects of certain social environments and family dynamics on a young person growing up, when this understanding illuminates the significance or weight an individual juror would accord to related evidence in a particular case, is not misconduct." (*Wilson, supra*, 44 Cal.4th at p. 831.)

Juror 8's general belief that police conduct inadequate investigations when White people accuse Black suspects is more akin to the impermissible general beliefs disapproved of in *Wilson* than to the fact-specific analysis approved of in that case. (See also *Allen, supra*, 53 Cal.4th at p. 78 [finding no misconduct in juror's reliance on "positive opinion about the reliability of Hispanics in the workplace" based on the juror's specific interactions with Hispanic coworkers].)

To the extent Robbins now contends the lack of evidence about Juror 8's personal experiences was caused by the trial court conducting an inadequate investigation, we conclude Robbins forfeited the challenge by failing to raise it below. (*People v. Williams* (2015) 61 Cal.4th 1244, 1280.) And, in any event, the trial court conducted an adequate investigation. The court interviewed each juror separately, seeking specific instances (rather than mere opinions) of misconduct. (See *Allen, supra*, 53 Cal.4th at p. 75 ["a court should focus on its own consideration of a juror's *conduct*," not "the *opinions* of jurors"], second italics added.) Then, before questioning Juror 8, the trial court expressly solicited input from counsel. Robbins's counsel responded that it would *not* be "appropriate" to ask Juror 8 whether she had had made the statements the other jurors had attributed to her, a question that undoubtedly would have triggered further exploration of her underlying beliefs. Instead, Robbins's counsel suggested the court restrict questioning to whether Juror 8 answered honestly during voir dire and was currently complying with the instruction to deliberate without bias.²¹ Robbins cannot now claim that the trial court erred by not asking a question to which his counsel objected.

Robbins maintains Juror 8 was not relying on racial or anti-police bias but, rather, merely was persuaded by the defense theory that the investigators conducted an inadequate investigation. Although the defense highlighted evidence showing the

²¹ As relates to voir dire, had Juror 8 revealed at that stage that she would apply a different standard in evaluating law enforcement witnesses based on the respective races of the accusers and the accused, the prosecution would likely have sought her removal for cause, which we likely would have upheld. (See *Rodriguez, supra*, 58 Cal.4th at p. 629 [prospective juror properly challenged for cause where "he essentially admitted he would judge law enforcement witnesses by a different standard than other witnesses"].)

investigators did not pursue all available leads, the record also shows Juror 8 was improperly predisposed to finding that evidence more persuasive based on the respective races of Robbins and his accusers.

Finally, Robbins argues the fact that Juror 8 voted to convict on the felon-in-possession and possession-for-sale counts indicates a lack of bias because the latter was based on the testimony of White witnesses that Robbins was a drug dealer. However, the felon-in-possession count was not based on the testimony of White witnesses, and the possession-for-sale count was also supported by compelling expert testimony about the large quantity of methamphetamine Robbins possessed. Thus, neither of these counts was particularly susceptible to Juror 8's predisposition to disbelieve White accusers or the police. The murder count, on the other hand, was largely dependent on the testimony of White witnesses, who supplied the supposed motive. In this context, Juror 8's biases were destined to flourish.

In sum, the trial court's adequate investigation confirmed that Juror 8 made statements to fellow jurors during deliberations that indicated she applied a different standard to evaluating witness credibility—particularly as it relates to law enforcement witnesses—when White accusers are implicating a Black suspect. Absent any evidence adduced at trial indicating racial motives on the part of any witnesses or investigators, Juror 8's imputation of such motives to them establishes she maintained undisclosed general biases based on the respective races of the accusers and the accused. This is an improper bias that justified the court's removal of Juror 8.

II. The Trial Court Did Not Err by Denying Robbins's Motion for Mistrial

After the trial court removed Juror 8, Robbins moved for a mistrial, arguing Juror 8 had so inflamed the other jurors that they would vote to convict out of spite. Robbins contends the trial court erred by denying the motion. We disagree.

A. Background

By the time the trial court dismissed Juror 8, it was about 4:15 p.m. on a Friday, so the court sent the jurors home for the weekend. When court resumed Monday morning, the defense orally moved for a mistrial.

The defense argued "[i]t was pretty clear based on the interviewing of each separate juror that what had occurred had caused a lot of inflamed feelings" The defense was concerned that "what happened back there was very polarizing . . . in a way that's very detrimental to the defense, considering that . . . one juror had such strong feelings, and . . . other jurors took offense to those feelings." The defense argued the polarization, alone, "would change people's decisions based on just the conflict that went on"

The prosecution opposed the motion, emphasizing that when the court interviewed the jurors "they all repeated that mantra that Juror No. 8 . . . was not following her oath, not following the law. This suggests . . . that those jurors are concerned with following the law and it is important to them, and that they will continue to do so."

The trial court denied the mistrial motion. In support of its ruling, the court cited the fact that "the demeanor of all [the] jurors that testified, including other jurors that were African-American, point[ed] out that [Juror 8] was problematic and not following

her oath in deliberations" The court emphasized that even the jurors who had initially sided with Juror 8 in the 7-5 split on the murder count "brought to the Court's attention and indicated that it was Juror No. 8 that was not deliberating, not following her oath." The court reiterated that, "after evaluating the evidence and all of the jurors[] questioning, that this juror was appropriately dismissed."

After denying the motion, the trial court swore in an alternate juror to replace Juror 8, and instructed the jury as follows about the replacement of Juror 8: "Ladies and gentlemen, one of your fellow jurors has been excused and an alternate juror has been selected to join the jury. [¶] Do not consider this substitution for any purpose. [¶] . . . [Y]ou must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place."

B. *Relevant Legal Principles*

" 'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged ' " (*People v. Clark* (2011) 52 Cal.4th 856, 990 (*Clark*); see *People v. Montes* (2014) 58 Cal.4th 809, 888 ["A motion for ' "mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." ' "]; *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1094 (*Dunn*).) "Whether a particular incident is so prejudicial that it warrants a mistrial 'requires a nuanced, fact-based analysis,' which is best performed by the trial court." (*Dunn*, at p. 1094, quoting *People v. Chatman* (2006) 38 Cal.4th 344, 370.)

"We review a trial court's order denying a motion for mistrial under the deferential abuse of discretion standard." (*Dunn, supra*, 205 Cal.App.4th at p. 1094; see *Clark, supra*, 52 Cal.4th at p. 990; *People v. Jenkins* (2000) 22 Cal.4th 900, 986 [" 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' "].) " 'Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*Dunn*, at p. 1094; see *People v. Hall* (2016) 247 Cal.App.4th 1255, 1264 [" 'An abuse of discretion is shown when the trial court applies the wrong legal standard.' "].)

C. Analysis

We conclude the trial court did not abuse its discretion by denying Robbins's motion for a mistrial.

We first dispense with Robbins's contention that the trial court abused its discretion by applying the wrong legal standard. This contention is based on a misreading of the record that portrays the trial court's sole rationale for denying the motion as merely reiterating that the court had properly removed Juror 8. A fair reading of the record indicates the court also relied on the other jurors' testimony expressing concern that Juror 8 was not upholding the oath to deliberate without bias. The court's focus on jurors' concerns about upholding the oath and following instructions properly addressed whether Juror 8's misconduct had prejudicially tainted the remaining jurors against Robbins.

Turning to the merits of Robbins's contention, the trial court did not abuse its discretion in denying the motion. The court had interviewed each juror and was able to assess firsthand the impact Juror 8 had on them. After replacing Juror 8, the court instructed the jurors to "not consider th[e] substitution for any purpose" and to "disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place." We presume the jurors followed these instructions. (*Fuiava, supra*, 53 Cal.4th at p. 716 ["We presume the reconstituted juries followed the trial court's instructions to begin the deliberations anew [citation], and defendant's speculation to the contrary does not persuade us to conclude otherwise."].)

That the jury likely acted in accordance with this presumption is borne out by their expressed concern that Juror 8 was *not* honoring her oath or complying with the court's instruction to deliberate without bias. It is unlikely these jurors, who were concerned enough to report Juror 8's disregard for the court's instructions, would turn around and disregard the instructions simply to spite Juror 8. Robbins's suggestion that they did so is entirely speculative. (*Fuiava, supra*, 53 Cal.4th at p. 716.)

III. *The Trial Court Did Not Err By Excluding Evidence of Third Party Culpability*

Robbins moved in limine to determine the admissibility of third party culpability evidence concerning two people: Jason K. and Eric B. The court ruled it would allow the evidence as to Jason, but not Eric.²² Robbins contends this was error. We disagree.

²² We therefore limit our discussion to Eric.

A. Background

The defense made the following offer of proof regarding Eric's culpability: (1) Eric lived in the same general area as Martin and Shana; (2) he smoked methamphetamine with them in their apartment two days before Martin's death; (3) Eric began dating Shana "[s]ometime in 2014" (i.e., at least one year after Martin's death in January 2013);²³ (4) Eric's whereabouts were unknown on the day of the murder; (5) Eric was arrested 21 months after Martin's death for shooting a man in the face with a shotgun; and (6) Eric allegedly admitted to his cellmate that he committed the murder with which he was charged, as well as "another murder in the same neighborhood." The defense acknowledged Eric was acquitted of the murder with which he was charged, and that he never corroborated his cellmate's claim that he admitted to the murder.

The prosecution opposed Robbins's motion, making an offer of proof of its own. The prosecution asserted (1) the cellmate-informant gave conflicting accounts of Eric's alleged motive in the other case ("originally . . . over drugs, then it changed to his brother"); (2) an incriminating letter that the informant claimed Eric had written appeared to be a forgery;²⁴ and (3) the informant was currently serving a prison sentence in Arizona for forgery (at least his fifth forgery-related conviction). The prosecution argued

²³ The defense acknowledged it had "no evidence that [Eric] and [Shana] were in any sort of relationship at the time of death.

²⁴ For example, the letter had 11 latent fingerprints, none of which matched Eric's; the letter was purportedly written in Spanish, yet Eric wrote all of his other letters in English; and Eric signed the letter "Eric," which he never did in any of his other letters.

these discrepancies would be "a gross violation of [Evidence Code section] 352" because it would result in undue consumption of time in the present trial.²⁵ And even if the court were to accept the informant's story as true, the prosecutor argued it was "so lacking in specificity, timeframe, or description" that it did not even tie Eric "to the actual perpetration of the murder of . . . Martin."

After hearing argument, the trial court denied Robbins's motion, explaining the link between Eric and the crime was too speculative, and that balancing concerns under Evidence Code section 352 favored exclusion:

"The only possible link to the Martin shooting is allegedly a statement that [Eric] made to the jailhouse informant that he had killed somebody else. And to make that circumstantial link that [he] was talking about . . . this particular case I believe is just speculation.

"And that's not even addressing the [Evidence Code section] 352 issue regarding how much of the homicide case we would have to litigate that [Eric] was involved in that he ultimately was acquitted for."

After confirming with the prosecutor that the informant did not testify in Eric's murder case because the prosecutor in that case "felt that he was not being truthful," the trial court reiterated its findings:

"And again, it's not even addressing the [Evidence Code section] 352 issue that we would have to deal with litigating the facts of the prior homicide and the relationship that he had with the jailhouse informant. [¶] I believe it is just pure speculation"

²⁵ Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

B. Relevant Legal Principles

"[C]ourts should . . . treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352)." (*People v. Hall* (1986) 41 Cal.3d 826, 834 (*Hall*).) To be relevant and admissible, however, "evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant's guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1325 (*Bradford*).)

These principles do "not . . . require the indiscriminate admission of any evidence offered to prove third-party culpability." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *Hall, supra*, 41 Cal.3d at p. 833 ["we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability"].) Rather, "[u]nder *Hall* and its progeny, third party culpability evidence is relevant and admissible only if it succeeds in 'linking the third person to the actual perpetration of the crime.' " (*People v. DePriest* (2007) 42 Cal.4th 1, 43 (*DePriest*).) "Without this link, such evidence is irrelevant and cannot be admitted." (*People v. Ghobrial* (2018) 5 Cal.5th 250, 283; see *People v. Lewis* (2001) 26 Cal.4th 334, 373 (*Lewis*) ["The trial court reasonably found the evidence was too speculative to be relevant."].) "Evidence that another person had

'motive or opportunity' to commit the charged crime, or had some 'remote' connection to the victim or crime scene, is not sufficient to" establish the required link. (*DePriest*, at p. 43.)

We review a trial court's exclusion of third party culpability evidence for an abuse of discretion. (*Ghobrial, supra*, 5 Cal.5th at p. 283.)

C. Analysis

The trial court did not abuse its discretion in excluding evidence suggesting that Eric might have murdered Martin. First, the court did not err in concluding Robbins's proffer was insufficient to " 'link[] [Eric] to the actual perpetration of the crime.' " (*DePriest, supra*, 42 Cal.4th at p. 43.) The only evidence directly connecting Eric to Martin's murder was the informant's claim that Eric admitted committing a murder in the same neighborhood. Even accepting the informant's dubious claim as true, it was rational for the trial court to find the assertion too speculative to be referring to Martin's murder—the murders occurred nearly two years apart, were committed with different weapons (police seized the shotgun used in Martin's earlier murder), and bore no apparent connection. The conflicting evidence regarding motive and the generic evidence regarding opportunity (that Eric knew Martin and Shana, and his whereabouts were unknown at the time of Martin's murder) were likewise insufficient to link Eric to Martin's murder. Thus, the trial court did not err in finding the evidence "too speculative to be relevant." (*Lewis, supra*, 26 Cal.4th at p. 373.)

Even if the evidence were relevant, the trial court did not abuse its discretion in finding the evidence's probative value was substantially outweighed by the undue

consumption of time that would have occurred in "litigating the facts of the prior homicide"—of which Eric had been acquitted—"and the relationship that [Eric] had with the jailhouse informant" whom the other prosecutor deemed too untruthful to call in the other murder trial. These were valid concerns.

Robbins argues the exclusion of his third party culpability evidence violated his federal and state constitutional rights. We disagree. The courts have repeatedly rejected Robbins's federal constitutional claim that the exclusion of third party culpability evidence precluded him from presenting a defense. (See *People v. Clark* (2016) 63 Cal.4th 522, 597, fn. 54 ["Defendant . . . makes the general argument that any exclusion of third party culpability evidence violates his federal constitutional right to present a defense. We have previously rejected this claim, and defendant gives us no cause to revisit it."]; *People v. Prince* (2007) 40 Cal.4th 1179, 1243 ["As we have done in similar cases, '[w]e . . . reject defendant's various claims that the trial court's exclusion of the proffered evidence violated his federal constitutional rights to present a defense, to confront and cross-examine witnesses, and to receive a reliable determination on the charged capital offense.' "]; *Bradford, supra*, 15 Cal.4th at p. 1325 ["the trial court's ruling did not constitute a refusal to allow defendant to present a defense, but merely rejected certain evidence concerning the defense"]; *Ghobrial, supra*, 5 Cal.5th at p. 283.)

As to Robbins's state Constitution claim—that the admissibility standard for third party culpability evidence established in *Hall* and its progeny violates the state Constitution's dictate that "relevant evidence shall not be excluded in any criminal proceeding" (Cal. Const., art. I, § 28, subd. (f)(2))—we are (as Robbins acknowledges)

bound by the standard enunciated by the California Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. *The Trial Court Did Not Err By Declining to Instruct on Third Party Culpability*

Robbins contends the trial court erred by denying his request for a pinpoint jury instruction focusing on the burdens associated with his third party culpability defense as to Jason.²⁶ We are not persuaded.

A. *Background*

During trial, Robbins filed a motion proposing a pinpoint jury instruction regarding his third party culpability defense. The prosecutor opposed the request, citing *Hartsch, supra*, 49 Cal.4th 472 to support the proposition that the proposed instruction "adds little to the standard reasonable doubt instruction [CALCRIM No. 220] and simply restates it and adds argumentative and disputed language." Although the trial court thought a pinpoint instruction might not be "unreasonable," the court was concerned that the wording of the proposed instruction "was pretty one-sided," "extremely strong," and "almost . . . a form of argument." The court also found "the instruction would be duplicative" of CALCRIM No. 220's instruction regarding reasonable doubt, in which "the burden of proof [is] well-covered."

²⁶ As we will explain, Robbins submitted two versions of the pinpoint instruction to the trial court—an initial version the court rejected as being too argumentative and duplicative, and a less argumentative second version the trial court still deemed unnecessarily duplicative. We interpret Robbins's appellate challenge as being directed at the trial court's rejection of the second version of the instruction.

The defense then submitted a revised proposed pinpoint instruction that read as follows:

"During the course of the trial, if you heard evidence that another person committed the offenses with which the defendant is charged, you may consider that when determining whether the prosecution has proven [its] case beyond a reasonable doubt. The defendant is not required to prove another person's guilt and you need not be convinced of the other person's guilt in order to consider whether the prosecution has met [its] burden. If after considering all of the evidence, including any evidence that another person committed the offense, you have a reasonable doubt that the defendant committed the offense you must find the defendant not guilty."

The trial court noted the revised instruction was "framed a little more neutral" and "would take away the concerns of the Court that . . . it would be argumentative." But the court found the instruction was still needlessly duplicative of the general instruction regarding reasonable doubt: "[T]he Court still feels that [CALCRIM No.] 220 adequately addresses the issue of the third-party culpability and reasonable doubt and the Court does not believe that any reasonable jury would not be able to reconcile any evidence indicating that somebody else . . . may be the person involved in this . . . ; that reasonable doubt would apply and that . . . the burden is still on the prosecution to prove that it was the defendant beyond a reasonable doubt."

The court ultimately instructed the jury with CALCRIM No. 220, which reads in part:

"A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. [¶] . . . [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant

guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

B. *Relevant Legal Principles*

"[I]n appropriate circumstances' a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case [Citations.] But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation]." (*People v. Bolden* (2002) 29 Cal.4th 515, 558; see *People v. Williams* (2016) 1 Cal.5th 1166, 1193.) "[A]ssertions of instructional error are reviewed de novo." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838; *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

C. *Analysis*

As the prosecution pointed out to the trial court, the California Supreme Court in *Hartsch, supra*, 49 Cal.4th 472 held it is not error for a trial court to refuse to give a pinpoint instruction on third party culpability because such "instructions add little to the standard instruction on reasonable doubt." (*Id.* at p. 504.) The *Hartsch* court further "held that even if such instructions properly pinpoint the theory of third party liability, their omission is not prejudicial because the reasonable doubt instructions give defendants ample opportunity to impress upon the jury that evidence of another party's liability must be considered in weighing whether the prosecution has met its burden of proof." (*Ibid.*) As the Supreme Court explained, "It is hardly a difficult concept for the jury to grasp that acquittal is required if there is a reasonable doubt as to whether

someone else committed the charged crimes." (*Ibid.*) *Hartsch* was neither the first nor last time the Supreme Court reaffirmed this principle. (See *People v. Earp* (1999) 20 Cal.4th 826, 887 (*Earp*);²⁷ *People v. Ledesma* (2006) 39 Cal.4th 641, 720; *People v. Gutierrez* (2009) 45 Cal.4th 789, 825; *People v. Lucas* (2014) 60 Cal.4th 153, 288; *People v. Covarrubias* (2016) 1 Cal.5th 838, 908.)

The trial court properly instructed the jury with CALCRIM No. 220 that Robbins was presumed innocent, the prosecution bore the burden of establishing his guilt beyond a reasonable doubt, and the jury must acquit Robbins if the prosecution did not meet its burden. Robbins's proposed pinpoint "instruction[] add[ed] little" to this pattern instruction. (*Hartsch, supra*, 49 Cal.4th at p. 504.) Thus, the court did not err in refusing to give it.

Even assuming the trial court erred in failing to instruct on third party culpability, the error was harmless. In addition to the instruction on reasonable doubt and the prosecution's burden of proof, "the jury knew from defense counsel's argument the defense theory that [the third party,] not defendant, had committed the crimes. Under these circumstances, it is not reasonably probable that had the jury been given defendant's proposed pinpoint instruction, it would have come to any different conclusion in this case." (*Earp, supra*, 20 Cal.4th at p. 887.)

²⁷ The proposed pinpoint instruction in *Earp* was quite similar to Robbins's proposed instruction. It stated: " 'Evidence has been offered that a third party is the perpetrator of the charged offense. It is not required that the defendant prove this fact beyond a reasonable doubt. In order to be entitled to a verdict of acquittal, it is only required that such evidence raise a reasonable doubt in your minds of the defendant's guilt.' " (*Earp, supra*, 20 Cal.4th at p. 887.)

V. Striking of the Prison Prior Enhancements

Robbins contends we should strike his two prison prior enhancements for two reasons.²⁸ First, as to the enhancement based on his prison prior for simple possession of a controlled substance (Health & Saf. Code, § 11377), Robbins maintains he received ineffective assistance from his trial counsel, who failed to move under Proposition 47 (The Safe Neighborhoods and Schools Act; Proposition 47) to reduce the conviction to a misdemeanor, which would have precluded the trial court from imposing a one-year prison prior enhancement on that conviction.

Second, as to the enhancement based on Robbins's prison prior for possession-for-sale, Robbins asserts we should strike the enhancement because recently enacted Senate Bill No. 136, which became effective on January 1, 2020, amends section 667.5, subdivision (b) to eliminate his underlying conviction as a qualifying offense for purposes of imposing a prison prior enhancement.

The Attorney General concedes both issues and agrees we should strike the prison prior enhancements without remanding for resentencing.

As we will explain, we, too, agree with Robbins's contentions. Further, in light of Robbins's lengthy sentence and the Attorney General's concession that remand for resentencing is unnecessary under the circumstances, we will modify the judgment to strike the prison prior enhancements without remanding for resentencing.

²⁸ Robbins raised the first contention in his original briefing. He raised the second contention in a petition for rehearing. We granted the petition and received supplemental briefing from the parties.

A. *Ineffective Assistance*

One of Robbins's prison priors resulted from a conviction in 2002 for simple possession of a controlled substance in violation of Health and Safety Code section 11377, subdivision (a). By the time Robbins was sentenced in the current case, the voters had approved Proposition 47, which reduced certain theft- and drug-related offenses—including violations of Health & Safety Code section 11377, subdivision (a)—from felonies to misdemeanors. (*People v. Valenzuela* (2019) 7 Cal.5th 415, 418, 422, 424.) "[A] person who already has completed his or her sentence for a qualifying felony . . . may have the underlying conviction redesignated as a misdemeanor." (*Id.* at p. 422; § 1170.18, subds. (f)-(h).) Doing so precludes the trial court from imposing a prison prior enhancement on the reduced conviction. (*People v. Buycks* (2018) 5 Cal.5th 857, 889 ["the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement"]; *Valenzuela*, at pp. 425-426.)

Robbins's trial counsel did not petition to have the 2002 drug-related conviction reduced to a misdemeanor.²⁹ The Attorney General concedes it "can think of no potential tactical reason why defense counsel did not file the petition, and because the failure to do so prejudiced [Robbins] to the tune of an extra year of prison added to his sentence, [the Attorney General] agrees that counsel was ineffective" and the

²⁹ His murder conviction in the instant case precludes him from doing so now. (§§ 1170.18, subd. (i), 667, subd. (e)(2)(C)(iv).)

enhancement should be stricken. We accept the Attorney General's concession and will modify the judgment to strike the enhancement.

B. *Senate Bill No. 136*

When Robbins was sentenced in 2018, his 2005 possession-for-sale conviction was a valid predicate for imposing a prison prior enhancement under section 667.5, subdivision (b). (§ 667.5, subd. (b).) But while this appeal was pending, the Governor signed into law Senate Bill No. 136, which amends section 667.5, subdivision (b) to allow a one-year prison prior enhancement only if a defendant served a "prior prison term for a sexually violent offense" (Stats. 2019, ch. 590, § 1.) Amended section 667.5, subdivision (b) took effect on January 1, 2020, and applies retroactively to all judgments not yet final as of that date. (*People v. Jennings* (2019) 42 Cal.App.5th 664, 680-681; *People v. Lopez* (2019) 42 Cal.App.5th 337, 340-341.)

Because Robbins's prison prior was not for a sexually violent offense, and because his judgment is not yet final, he is entitled to Senate Bill No. 136's ameliorative amendment to section 667.5, subdivision (b). We therefore strike the prison prior enhancement based on Robbins's 2005 possession-for-sale conviction.

VI. *The Trial Court Did Not Err In Imposing the Firearm Enhancement*

For defendants who personally used firearms in the commission of certain qualifying offenses (including murder), section 12022.53 authorizes trial courts to impose various sentence enhancements based on how the defendant used the weapon: 10 years for merely *using* it; 20 years for intentionally *discharging* it, and 25 years to life for intentionally *discharging it and proximately causing great bodily injury or death*.

(§ 12022.53, subds. (b)-(d).) Although the enhancements used to be mandatory, by the time Robbins was sentenced the Legislature had amended section 12022.53 to grant trial courts the discretion, "in the interest of justice pursuant to Section 1385 . . . , [to] strike or dismiss an enhancement otherwise required to be imposed" (§ 12022.53, subd. (h); see Stats. 2017, ch. 682, § 2; § 1385.)³⁰

The prosecution here pleaded only the most severe enhancement option, and the jury found the allegation true. The trial court, "exercising its discretion," declined to "strike or not impose the 25 to life firearm enhancement based upon the aggravating circumstances in this case."

In a supplemental brief on appeal, Robbins argues the trial court misunderstood that the scope of its discretion was limited to either imposing or striking the 25-to-life enhancement. He maintains the court also had the discretion to *substitute* one of the less severe enhancements if doing so was in the interests of justice. In support, he cites the recent decision of *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*).

In *Morrison*, Division Five of the First District Court of Appeal concluded trial courts have "discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome [is] found to be in the interests of justice under section 1385." (*Morrison, supra*, 34 Cal.App.5th at p. 223.) The *Morrison* court relied

³⁰ Section 1385, subdivision (a) states in part: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

on cases that authorize trial courts to "impose a 'lesser included' enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence." (*Morrison*, at p. 222.) The *Morrison* court reasoned that a trial court's striking of the greater enhancement in the interest of justice under section 1385 is akin to finding the enhancement unsupported or inapplicable. (*Id.* at pp. 222-223.) Thus, the *Morrison* court "[saw] no reason a court could not also impose one of [the lesser] enhancements after striking an enhancement under section 12022.53, subdivision (d)" (*Ibid.*)

More recently, the Fifth District Court of Appeal reached a different conclusion in *People v. Tirado* (2019) 38 Cal.App.5th 637 (*Tirado*), review granted November 13, 2019, S257658.³¹ The *Tirado* court grounded its analysis in statutory construction and legislative intent: "Nothing in the plain language of sections 1385 and 12022.53, subdivision (h) authorizes a trial court to *substitute* one enhancement for another. Section 12022.53, subdivision (h) uses the verbs '*strike*' and '*dismiss*,' and section 1385, subdivision (a) states the court may 'order an action to be *dismissed*.' This language indicates the court's power pursuant to these sections is binary: The court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement." (*Id.* at p. 643, italics added.) "Had the Legislature intended to grant the trial court the power to modify or reduce a firearm enhancement, it

³¹ We may still cite *Tirado* for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).)

would have done so with express language," as it has done in other contexts. (*Ibid.*; see, e.g., § 1181, subd. (6) [in ruling on a motion for new trial, "if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, *the court may modify the verdict*, finding or judgment accordingly without granting or ordering a new trial"], italics added; § 1260 [granting appellate courts the power to "*modify* a judgment or order appealed from, or *reduce* the degree of the offense or attempted offense"], italics added.)

The *Tirado* court also noted its approach was consistent with traditional principles reflecting prosecutorial authority to determine what charges to bring. (*Tirado*, *supra*, 38 Cal.App.5th at p. 644, review granted.) Thus, for example, if the prosecution had pleaded and proved all three firearm enhancements under section 12022.53, subdivisions (b) through (d), the trial court would have had the discretion to strike the greater enhancement and impose one of the lesser ones. (*Tirado*, at p. 644.) "However, because the People exercised their charging discretion to allege only one enhancement, the trial court was limited to either imposing or striking that enhancement." (*Ibid.*)

Pending further guidance from the Supreme Court in *Tirado*, we subscribe to the view expressed by the Court of Appeal in that case, and decline to follow the holding of *Morrison*. Accordingly, we conclude the trial court properly understood the scope of its discretion in imposing the 25-to-life enhancement under section 12022.53, subdivision (d).

VII. *Remand to Consider Whether to Strike the Serious Felony Prior Enhancement*

When the trial court sentenced Robbins, it was required to impose a consecutive five-year term for his serious felony prior conviction. (§§ 667, former subd. (a)(1), 1385, former subd. (b).) A subsequent legislative amendment now grants trial courts discretion to strike or dismiss such enhancements in the "furtherance of justice." (See Stats. 2018, ch. 1013, §§ 1-2 [Senate Bill No. 1393]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The amendment applies retroactively to nonfinal judgments. (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 426; *Garcia*, at p. 971.)

Robbins contends we should remand to give the trial court the opportunity to exercise its newly vested discretion under sections 667, subdivision (a)(1) and 1385.³² Although the Attorney General maintains "it is highly unlikely the trial court would strike the . . . enhancement," the Attorney General "reluctantly agrees" that "remand is probably the right choice" out of "'an abundance of caution.'" (See *People v. Johnson* (2019) 32 Cal.App.5th 26, 47, 69 [remanding under Senate Bill No. 1393 even though the trial court denied a *Romero* motion to strike a strike prior and indicated it would not strike a serious felony prior if it had the discretion to do so].) We agree, and will remand for this limited purpose. We express no opinion on how the trial court should exercise its discretion.

³² Robbins raised this contention in a second petition for rehearing, which he filed the same day we filed our Opinion on Rehearing in response to his first petition for rehearing. After requesting and receiving an Answer from the Attorney General, we granted Robbins's second petition for rehearing.

DISPOSITION

The judgment is modified to strike both one-year prison prior enhancements (§ 667.5, subd. (b)). As so modified, the judgment is affirmed. On remand, the trial court is directed to (1) consider whether to strike the serious felony prior enhancement, and (2) prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.