IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOAQUIN GONZALEZ,** Defendant and Appellant.	Case No. A150198

Alameda County Superior Court, Case No. H58965
The Honorable Leopoldo E. Dorado, Judge

RESPONDENT'S BRIEF

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INTRODUCTION

In a fit of road rage, appellant fired a bullet into the driver's side door of the car next to him. For the first time on appeal, he argues that evidence retrieved from a database using his license plate number should have been suppressed. His claim is forfeited, and, in any event, fails because he had no reasonable expectation of privacy in his license plate data. He also argues there was 1) instructional error relating to eyewitness identification; 2) trial court error in taking judicial notice of court records of his prior conviction; and 3) trial court error in the dual use of facts during sentencing. Each of those claims is meritless. Finally, he argues he is entitled to remand for resentencing on two of his enhancements pursuant to recent changes in the law. We agree the matter needs to be remanded for resentencing. In all other respects, the judgment should be affirmed.

STATEMENT OF THE CASE

On June 29, 2016, the Alameda County District Attorney filed an information charging appellant with assault with a firearm (Pen. Code, § 245, subd. (a)(2); count 1),[1] with the further allegation that he personally used a firearm during the commission of the offense (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)); shooting at an occupied motor vehicle (§ 246; count 2); and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3). (CT 1-3.) It was further alleged that he had a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior strike (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). (CT 4.)

On September 13, 2016, the jury found appellant guilty on the charged offenses and found true that he personally used a firearm. (3RT 848-849, 851-852.) After a bifurcated trial on appellant's prior conviction,

[1] Further undesignated statutory references are to the Penal Code.

the jury found true that he had suffered a prior strike conviction. (3RT 866.)

On October 17, 2016, the court sentenced appellant to an aggregate term of 18 years four months in prison. (CT 198-199; 3RT 880-881.)

Appellant timely appealed. (CT 183.)

STATEMENT OF FACTS

Shortly after midnight on July 3, 2015, a red and white Buick quickly exited the freeway onto A Street in Hayward and nearly collided with a white Nissan Maxima. (1RT 418-420, 427; 2RT 488.) The Maxima was driven by Eli Ortiz, who honked for a few seconds at the Buick. (2RT 490, 499.) The Buick slowed down and allowed Ortiz to pass. (2RT 490.) The Buick then began to follow Ortiz. (1RT 420-421, 428; 2RT 490-492.)

The Buick followed close behind Ortiz for several streets, which made Ortiz nervous. (2RT 490-493.) Finally, as Ortiz approached a stop sign, the Buick moved into the oncoming traffic lane to the left of Ortiz and pulled up beside him. (1RT 430; 2RT 494.) Ortiz saw the Buick's passenger side window roll down and heard a loud popping noise. (2T 494.) The Buick turned left and sped away. (1RT 431; 2RT 494.)

Ortiz continued straight and then pulled over to examine his car. (2RT 494.) There was a hole in the driver's side door. (2RT 494-495.)

Wansin Ounkeo, a computer forensic examiner with the Alameda County Sheriff's Office crime lab, witnessed the incident. (1RT 414, 418-432.) He had been driving behind the Maxima when the Buick came off the freeway and nearly caused a collision. (1RT 418-419.) He followed the cars, hoping his presence would prevent the Buick from doing anything. (1RT 429-430.) He used his cell phone to take a video of the Buick. (1RT 422.) He heard a loud pop when the Buick pulled up beside the Maxima, and then he followed the Maxima to ensure the driver was unharmed. (1RT 431-433.)

As Ortiz was examining his car, Ounkeo pulled up and asked if he was okay. (1RT 434; 2RT 500.) He asked Ortiz to follow him to the parking lot of a fast food restaurant so they could talk. (1RT 434.) At the parking lot, Ounkeo took pictures of the hole in the door of the Maxima. (1RT 434-435.) He told Ortiz they should call the police, but Ortiz said no. (1RT 436-437.) Ortiz was afraid that the driver of the Buick would come back and hurt him. (2RT 501-502.)

Ounkeo went home and examined the video he took on his cell phone. (1RT 438.) He was able to identify the Buick's license plate number: 7CHZ518. (1RT 424; 2RT 624.) He told a coworker about the incident, and, on the coworker's advice, reported it to police. (1RT 438.) Detective Santamaria of the Alameda County Sheriff's Office interviewed Ounkeo and Ortiz. (1RT 439; 2RT 502.) Officers removed a bullet from the driver's side door of Ortiz's Maxima. (2RT 502-503.)

Later that same day, Deputy Lema of the Alameda County Sheriff's Office was on patrol when she saw a red and white Buick. (2RT 570-571.) She was aware the car was important to Santamaria's investigation. (2RT 585.) She was familiar with the car from an incident the day before, and knew it was registered to appellant and that his driver's license was suspended. (2RT 571, 578-579.) She pulled the car over and arrested appellant. (2RT 580-581.)

At some time before noon that day, appellant had changed the license plate on his car. (2RT 625-626; 3RT 744-753.) One of the plates containing plate number 7CHZ518 was found in a closet in appellant's house. (2RT 623-624.) The other plate had been turned into the DMV with a form attesting to a missing plate. (3RT 744-753.) Appellant's car was impounded and samples were taken to be analyzed for gunshot residue. (2RT 683.) Appellant's cell phone was searched and a picture of the

interior of the Buick had been taken at 12:33 a.m. on July 3, approximately 15 minutes after Ounkeo had taken his video. (2RT 604-605.)

Detective Moschetti interviewed appellant on July 3, but there was insufficient evidence at that time to arrest him for the shooting. (2RT 616.) However, in December 2015, Moschetti interviewed Ortiz again. (2RT 627.) Ortiz identified appellant in a photographic lineup. (2RT 509.) Moschetti ran a report from the Automated License Plate Reader (ALPR) program confirming that the Buick bore license plate 7CHZ518 the day before the shooting. (2RT 562-564, 635-636.) In April 2016, the crime lab confirmed that gunshot residue was present on the interior passenger window of appellant's car. (2RT 633, 714.) In May 2016, the bullet was determined to be a .38-caliber bullet fired from a revolver, although the gun was never located. (2RT 633, 647, 674-675, 696.) Detective Moschetti arrested appellant for the shooting. (2RT 641.)

ARGUMENT

I. APPELLANT'S FOURTH AMENDMENT CLAIM IS FORFEITED, AS WELL AS MERITLESS BECAUSE THERE WAS NO SEARCH

Appellant contends that records from the ALPR program should have been suppressed because the records were obtained in violation of his reasonable expectation of privacy. (AOB 36-41.) Appellant did not move to suppress the records, thus forfeiting his claim. Additionally, Detective Moschetti's obtaining the ALPR records did not constitute a search under the Fourth Amendment because appellant did not have a reasonable expectation of privacy in the license plate data. Further, any error was harmless because other evidence besides the ALPR records showed that appellant changed his license plate shortly after the shooting.

A. Background

In the ALPR system, cameras take pictures of license plates, read the license plate numbers, and compare the numbers against a "hot list" of plates that are of interest to law enforcement, such as stolen vehicles, or vehicles involved in Amber alerts. (2RT 555.) The cameras record the date, time, and location, of where the picture was taken. (2RT 555.) Some cameras are fixed, such as at an intersection, and others are mobile units attached to patrol cars. (2RT 556.)

If a camera on a patrol car takes a picture of a license plate on the hot list, the officer in the patrol car is alerted. (2RT 556.) The officer must then confirm that the camera read the license plate correctly, and that the plate is actually on the hot list. (2RT 556-557.) Additionally, officers can use the ALPR system to see if photos have been taken of a particular license plate. (2RT 560-561.) In that instance, a "properly-vetted officer with a need and right to know" would log into the system, provide a justification for the search, meaning a valid case number and a reason for it, and input the license plate number into the system. (2RT 561.) The officer can then pull a report that shows the picture of the license plate taken by the ALPR system, along with the date, time, and location where the picture was taken. (2RT 561-563.)

Fifty law enforcement agencies in the Bay Area use the ALPR system, which is hosted by the Northern California Regional Intelligence Center. (2RT 553-554.) The system itself is owned by 3M. (2RT 558.) Agencies purchase the product through 3M, but the Northern California Regional Intelligence Center serves as the centralized repository for storing information and maintaining the hot list. (2RT 558-559.) License plate photos are stored in the database for one year. (2RT 561.)

Detective Moschetti ran appellant's license plate through the ALPR system on December 15, 2015. (2RT 635.) He printed a report of two hits

that were relevant to his investigation. (2RT 634-636.) The report showed pictures of appellant's front license plate and the date and time and location of where the license plate was found. (2RT 635-636.) The report was admitted at trial. (2RT 634-636.)

B. Appellant Did Not Move to Suppress the Records

Appellant contends that the ALPR report should not have been admitted at trial because it was obtained through a warrantless search. (AOB 36-41.) His claim should be rejected at the outset because he did not move to suppress the ALPR records. Although he moved to suppress some items of evidence, he did not include the ALPR records in his motion. (CT 20-25.) Therefore, he cannot raise this issue on appeal.

Section 1538.5 states plainly that a defendant may challenge suppression issues on appeal "provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of evidence." (§ 1538.5, subd. (m).) "The Legislature did not intend to permit an appellate court to make an initial and plenary factual decision on a search and seizure issue." (*People v. Smith* (1986) 180 Cal.App.3d 72, 80.) A defendant making a motion to suppress evidence is required to give the prosecutor fair notice of the grounds on which the motion is made and any inadequacies in the prosecutor's proffered justifications for the warrantless search or seizure. (*People v. Williams* (1999) 20 Cal.4th 119, 136.) "Defendants who do not give the prosecution sufficient notice of these inadequacies cannot raise the issue on appeal. '[T]he scope of issues upon review must be limited to those raised during argument . . . . This is an elemental matter of fairness in giving each of the parties an opportunity adequately to litigate the facts and inferences relating to the adverse party's contentions.'" (*Ibid*.)

Appellant never gave the prosecutor notice that he believed the ALPR records were the result of an unreasonable search, and thus the prosecutor

was not given the opportunity to develop evidence to refute his claim. The trial court likewise did not make any factual findings related to this issue. (See *People v. Johnson* (2006) 38 Cal.4th 717, 728 [in a suppression hearing, "the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court"]; *People v. Cudjo* (1993) 6 Cal.4th 585, 627 ["Because the legality of the search was never challenged or litigated, facts necessary to a determination of that issue are lacking"].) Because there is no factual record on this issue, the matter should be deemed forfeited. "An appellate court should not declare that a police officer acted unlawfully, suppress relevant evidence, [and] set aside a jury verdict . . . unless it can be truly confident all the relevant facts have been developed and the police and prosecution had a full opportunity to defend the admissibility of the evidence." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Appellant acknowledges he did not object to the ALPR evidence. (AOB 40.) Nevertheless, he argues the issue should not be deemed forfeited because an objection below would have been futile. (AOB 40-41.) He argues that the basis for suppressing the evidence is a recent decision from the United States Supreme Court, *Carpenter v. United States* (2018) ___U.S.___ [138 S.Ct. 2206], and that had he made a motion to suppress the evidence before that case was decided, the court would not have granted the motion. (AOB 40-41.)

The cases appellant cites for the proposition that his claim is not forfeited involve claims of prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692; see AOB 40-41.) In that instance, an objection may not be required if it would almost certainly be overruled or an admonition to the jury would not have cured the harm caused by the misconduct. (*Hill*, *supra*, at p. 820; *Pitts*, *supra*, at p. 692.) The same is not true for suppression issues, in

which courts hold hearings "specifically designed to allow for the determination of all issues relating to suppression of evidence obtained by the allegedly improper conduct of the police." (*Smith*, *supra*, 180 Cal.App.3d at p. 80.)

Courts that have found an exception to the forfeiture rule for suppression issues have done so only "where to require defense counsel to raise an objection would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal." (*People v. De Santiago* (1969) 71 Cal.2d 18, 23, internal quotation marks omitted.) Appellant, however, argues that at the time of his trial "[t]here was no binding appella[te] precedent *prohibiting* or *supporting* the warrantless search of digital data." (AOB 40, italics added.) He cannot therefore claim that moving to suppress would have been futile. If, as appellant claims, there was no binding appellate precedent supporting the warrantless search of digital data, appellant was free to argue that the search was unreasonable. On appeal, he relies on *United States v. Jones* (2012) 565 U.S. 400, a case decided well before his trial, to support his argument. (AOB 37.) He thus could have crafted an argument along the lines he makes now without the benefit of *Carpenter*, much like the defendant in *Carpenter* did. That the trial court might have denied the motion to suppress does not justify his failure to make the argument altogether.

Further, if appellant is correct that *Carpenter* constituted a dramatic change to the law such that raising it below was futile, then obtaining the data without a warrant would have been subject to the good faith exception to the exclusionary rule. "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." (*Davis v. United States* (2011) 564 U.S. 229, 241.) If appellant was

excused from the requirement to object to the evidence below because there was an unforeseen change in the law, then law enforcement was equally entitled to rely on earlier precedent. In that case, suppression of the evidence would not have been warranted. Thus, appellant's claim is either forfeited or he was not entitled to suppression under the good faith exception; either way, his claim fails.

C. Appellant Did Not Have a Reasonable Expectation of Privacy in the License Plate Data

Even if appellant's claim is not forfeited, it fails because there was no Fourth Amendment violation. "The 'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person . . . has a legitimate expectation of privacy in the invaded place.' A defendant has the burden to establish a legitimate expectation of privacy in the place searched." (*People v. Rivera* (2007) 41 Cal.4th 304, 308, fn. 1, citations omitted.)

Appellant contends a search took place when Detective Moschetti ran his license plate number in the ALPR system. (AOB 36.) However, "a license plate check does not qualify as a search under the Fourth Amendment." (*United States v. Diaz-Castaneda* (9th Cir. 2007) 494 F.3d 1146, 1150.) Indeed, "every circuit that has considered the issue in a precedential opinion has held that license plate checks do not count as searches under the Fourth Amendment." (*Ibid*.) The reason checking a license plate is not a search is because "people do not have a subjective expectation of privacy in their license plates, and . . . even if they did, this expectation would not be one that society is prepared to recognize as reasonable." (*Id*. at p. 1151.)

Appellant contends that a warrant was required to search the ALPR database under the reasoning of *Carpenter*, *supra*, 138 S.Ct. 2206. In *Carpenter*, the United States Supreme Court analyzed whether a search

took place when law enforcement officers obtained the defendant's cell phone records containing cell-site location information (CSLI). (*Id*. at pp. 2211-2212.) CSLI is a time-stamped record that is created every time a cell phone connects to a cell site, which happens several times a minute, even when the owner is not using one of the phone's features. (*Id*. at p. 2211.) Because people "compulsively carry cell phones with them all the time," CSLI data "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" (*Id*. at pp. 2217-2218.) "Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." (*Id*. at p. 2218.) The court held that "[g]iven the unique nature of cell phone location records," obtaining CSLI data from a wireless carrier constituted a search. (*Id*. at p. 2217.)

Appellant argues that this Court can simply replace "CSLI" with "ALPR" throughout the discussion in *Carpenter* and find that requesting the ALPR records constituted a search. (AOB 38.) But that argument ignores the distinction between cell phone records and records related to a car.

The United States Supreme Court has long held that there is a diminished expectation of privacy in an automobile. (*United States v. Knotts* (1983) 460 U.S. 276, 281.) "A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." (*Ibid*.) Thus, when [appellant] traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property." (*Id*. at pp. 281-282.)

Additionally, "automobiles are justifiably the subject of pervasive regulation by the State. Every operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy[.]" (*New York v. Class* (1986) 475 U.S. 106, 113.) "[I]t is unreasonable to have an expectation of privacy in an object required by law to be located in a place ordinarily in plain view from the exterior of the automobile." (*Id*. at p. 114.) Because "license plates are located on a vehicle's exterior, in plain view of all passersby, and are specifically intended to convey information about a vehicle to law enforcement authorities, among others[,] [n]o one can reasonably think that his expectation of privacy has been violated when a police officer sees what is readily visible and uses the license plate number to verify the status of the car and its registered owner." (*Diaz-Castaneda*, *supra*, 494 F.3d at p. 1151; accord *United States v. Miranda-Sotolongo* (7th Cir. 2016) 827 F.3d 663, 667-668 [no reasonable expectation of privacy in vehicle's registration tag].) License plate checks also are not intrusive. (*Diaz-Castaneda*, at p. 1151.)

In *United States v. Yang* (D.Nev. Jan. 25, 2018, No. 2:16-cr-231-RFB) 2018 U.S. Dist. LEXIS 11967, a district court within the Ninth Circuit held that using a database similar to the ALPR database at issue here did not constitute a search requiring a warrant. (*Id*. at p. *17.) Amongst the factual findings the district court relied on were that the database reflected random observations of license plates by digital cameras, the program was not designed to track an individual's movements continuously or even regularly, the digital cameras did not permit advanced or invasive surveillance of individuals or individual automobiles, the technology could not capture images through solid barriers such as walls erected to protect the privacy of personal property or individual movements, and that law enforcement officers had not used the database to

regularly or continuously monitor the movements of the defendant. (*Id*. at pp. *15-*16.)

The same is true here. The ALPR records reflected two instances when appellant's license plate was photographed on a public street. There was no evidence that law enforcement used the ALPR database to continuously or regularly track appellant's movements. There was no evidence the ALPR data tracked appellant onto private property. Unlike the cell phone data at issue in *Carpenter*, the ALPR data did not "track[] nearly exactly the movements of its owner." (*Carpenter*, *supra*, 138 S.Ct. at p. 2218.) Indeed, *Carpenter* itself recognized that CSLI data implicated greater privacy concerns than the GPS monitoring of vehicles at issue in other cases. (*Ibid.*) "While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales." (*Ibid.*) The ALPR data, in contrast, did not go "beyond public thoroughfares;" it recorded information when appellant was on a public street. Appellant has thus failed to meet his burden to establish he had a legitimate expectation of privacy in the ALPR data, and a warrant was not required to obtain the information.

D. Any Error Was Harmless

Even if the ALPR records should not have been admitted, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23.) The ALPR records showed that before the shooting, on July 2, 2015, appellant's license plate on his Buick was 7CHZ518, even though when he was arrested after the shooting, in the late afternoon of July 3, 2015, his license plate number had changed. The fact that appellant changed his license plate shortly after the shooting was also shown through other evidence. Ounkeo had videotaped appellant's Buick shortly after

midnight on July 3 and it still had the 7CHZ518 plate on the rear of the car. (1RT 424-425; 2RT 624.) Detective Moschetti searched appellant's apartment on July 3 and found one of the 7CHZ518 plates in appellant's closet, along with an envelope from the DMV reflecting a new license plate had been issued. (2RT 623-624.) DMV paperwork showed he obtained the new license plate on July 3, and, based on the transaction number on the paperwork, the transaction likely took place before noon on July 3. (3RT 744-753.) Thus, even without the ALPR records there was evidence that appellant changed the plate shortly after the shooting. Therefore, excluding the ALPR records would not have altered the result at trial. (*People v. Moore* (2011) 51 Cal.4th 1104, 1128.)

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON EVALUATING EYEWITNESS TESTIMONY USING CALCRIM NO. 315 AND ANY ERROR WAS HARMLESS

The court instructed the jury with CALCIRM No. 315, which provides a list of factors for jurors to consider in evaluating witness identification testimony. (CT 131-132.) Appellant contends it was error to tell the jury, "You have heard eyewitness testimony identifying the defendant," because neither of the witnesses identified appellant as the driver of the Buick. (AOB 43-44.) He argues that the instruction would have led the jury to believe that there was an identification, which, in turn, lessened the prosecutor's burden of proving identity. (AOB 44-45.) Appellant's claim is meritless.

First, in appellant's recitation of facts supporting this argument, he omits the fact that Ortiz identified appellant in a photographic lineup. (2RT 509.) Therefore, his "argument on its face lacks merit." (*People v. Golde* (2008) 163 Cal.App.4th 101, 119.)

Second, his claim is forfeited because he failed to raise it below. (See 2RT 729.) A trial court does not have a sua sponte duty to instruct with

CALCRIM No. 315 or to modify its language. (*People v. Sánchez* (2016) 63 Cal.4th 411, 461; *People v. Ward* (2005) 36 Cal.4th 186, 213; *People v. Alcala* (1992) 4 Cal.4th 742, 802-803.)

Third, no reasonable juror would interpret CALCRIM No. 315 the way appellant suggests. An appellate court conducts a de novo review to determine whether a jury instruction correctly stated the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Smithey* (1999) 20 Cal.4th 936, 963.) To make this determination, courts consider "the specific language challenged, the instructions as a whole and the jury's findings." (*People v. Cain* (1995) 10 Cal.4th 1, 36.) The correctness of jury instructions must be determined "from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*Smithey*, *supra*, 20 Cal.4th at p. 963, internal quotation marks and citations omitted.) "It is [also] fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

Appellant argues that the instruction lowered the prosecutor's burden of proof of identity. (AOB 45.) However, the instruction itself states that the "People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime." (CT 132.) The court also gave the standard reasonable doubt instruction that the prosecutor had to prove appellant's guilt beyond a reasonable doubt, and that appellant had to commit each of the elements of the charged crimes. (CT 126 [CALCRIM No. 220 (defining reasonable doubt)], 136-141 [instructions defining the offenses].) Thus, his assertion is baseless.

Appellant's claim is essentially that jurors would have understood the phrase "you heard eyewitness testimony identifying the defendant" to mean

that they could take as fact that appellant was the driver of the car without considering all the evidence. In other words, he claims the jury would have disregarded Ortiz's testimony surrounding his ability to identify appellant, such that it was dark at the time, he did not get a good look into the Buick, and he was not 100 percent certain that appellant was the driver of the Buick. (2RT 510, 535.) CALCRIM No. 315, however, explicitly told the jury to consider those facts bearing on the identification of appellant as the shooter. It instructed the jury to consider all circumstances affecting the witness's ability to identify the defendant, including how well the witness could see the perpetrator, lighting or other circumstances that would that affect the witness's ability to observe, and how certain the witness was when he or she made an identification. (CT 131-132.) Defense counsel also argued those facts to the jury to support the argument that there was not enough evidence to convict appellant of the crimes. (3RT 801-802; see *People v. Young* (2005) 34 Cal.4th 1149, 1202 [courts consider the argument of counsel in assessing the probable impact of the instruction on the jury].) Thus, there is no reasonable likelihood that the jurors misunderstood the instruction in the way suggested by appellant.

CALCRIM No. 315 is also a correct statement of law. "A criminal defendant 'is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.'" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1110.) CALCRIM No. 315 did just that. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1143-1144 [approving CALJIC 2.92, the predecessor to CALCRIM No. 315].)

Finally, any error in CALCRIM No. 315 was harmless. Appellant contends the purported error was federal constitutional error because it relieved the prosecution of proving the identity of the perpetrator beyond a

reasonable doubt. (AOB 48-49.) As set forth above, there is no merit to that assertion. Errors including "incorrect, ambiguous, conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated in [*People v. Watson* (1956) 46 Cal.2d 818, 836]." (*People v. Beltran* (2013) 56 Cal.4th 935, 955, internal quotation marks omitted.)

Appellant has not shown that it is reasonably probable a more favorable result would have been obtained absent the error. Appellant was the registered owner of the Buick, Deputy Lema saw him driving it hours before the incident and hours after, and appellant's cell phone contained a photograph of the interior of the car taken approximately 15 minutes after the incident. (2RT 571-572, 577-578, 580, 604-605.) Thus, there was independent evidence to corroborate that appellant was the person driving the Buick at the time of the shooting. Additionally, appellant cross-examined Ortiz on his ability to determine that appellant was driving the Buick that night, and argued to the jury that the prosecution had not proven beyond a reasonable doubt that appellant committed the charged crimes. (See 2RT 510, 520-522; 3RT 801-802.) The jury thus understood that identity was at issue. Therefore, any possible error in CALCRIM No. 315 did not prejudice appellant. (See *Sanchez*, *supra*, 63 Cal.4th at pp. 462-463 [any error in instruction on eyewitness identification harmless]; *Ward*, *supra*, 36 Cal.4th at pp. 213-214 [same].)[2]

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[2] Further, to the extent appellant is asserting cumulative prejudice from the asserted errors in both the admission of the ALPR records and CALCRIM No. 315 (see AOB 46), there were no errors and therefore no cumulative prejudice. (*People v. Griffin* (2004) 33 Cal.4th 536, 600 ["Because there is no additional error to 'cumulate' . . . , defendant's claim of cumulative error is clearly without merit"]; *People v. Whalen* (2013) 56 Cal.4th 1, 92.) Moreover, if any error occurred in this case, none rendered

(continued…)

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN TAKING JUDICIAL NOTICE OF COURT RECORDS

Appellant contends the trial court erred in admitting the records of appellant's prior conviction because they were "uncertified and unauthenticated." (AOB 49.) However, the trial court properly took judicial notice of the documents because they are court records.

A. Background

Appellant requested a bifurcated trial on the allegation that he had suffered a prior strike conviction. The prosecutor sought to use three documents to prove appellant's prior conviction. The court gave appellant an opportunity to review the documents, and explained, "Now we're electronically—that everything is on electronically-based, those have been printed out from our Odyssey system, and [the prosecutor] indicated he was going to ask me to take judicial notice of the accuracy and authenticity of those documents, and I'll be granting that motion." (3RT 852.)

The three documents were from the court file from appellant's 2004 conviction. Exhibit 39 consisted of appellant's change of plea form dated March 15, 2004, and the minutes from the March 15, 2004, change of plea hearing. The plea waiver form was stamped filed by the clerk of the Alameda County Superior Court on March 15, 2004. Exhibit 40 was the reporter's transcript for the change of plea hearing held on March 15, 2004. It contained the certification from the court reporter and had a stamp by the clerk of the Alameda County Superior Court showing it was filed on May 7, 2004. Exhibit 41 included a form containing the terms and conditions of appellant's probation, a copy of the business card of appellant's 2004

(…continued)
appellant's trial fundamentally unfair. (*People v. Williams* (170 Cal.App.4th 587, 646.)

defense attorney, and the court minutes from a hearing on May 10, 2004, during which appellant was sentenced to probation.

After reviewing the documents, appellant confirmed that he wanted to proceed with a jury trial on the prior conviction allegation. (3RT 853.) Appellant objected to the three documents:

> We're objecting to the admission of these three documents based on lack of foundation, and we're also objecting to the Court taking judicial notice. These are not certified copies. It's my understanding that these have been printed out from the Odyssey court system. This Odyssey court system has just been put into play in Alameda County. I believe it was rolled out in the beginning of August of this year, 2016. There have been numerous errors with this program, and due to those errors and the lack of certification, we do not believe that these documents are reliable, admissible, and any judicial notice of these documents at this point would be improper.

(3RT 856.)

The prosecutor responded that there were no longer court files in Alameda County; all of the court files had been scanned and put into the Odyssey system. "Asking the Court to take judicial notice of these documents is the same as asking the Court to take judicial notice of the court file that wouldn't have been certified, but would have been here in court and available for all of us to view." (3RT 857.)

The court determined that the documents all contained the same docket number for the 2004 case, and that the Personal File Number (PFN) listed on the minute orders in the 2004 case corresponded with appellant's PFN in this case. (3RT 857.) The court took judicial notice of appellant's PFN number. (3RT 857.) The court also found and took judicial notice "that these are accurate documents as previously described, and they'll be received into evidence." (3RT 857.) The court then noted that exhibit 41 was not necessary for the prosecutor to prove the prior conviction. (3RT

857-858.) The prosecutor agreed. Thus, exhibit 41, was marked for identification but not entered into evidence. (3RT 858.)

B. The Trial Court Did Not Abuse Its Discretion

A court's taking of judicial notice is reviewed for abuse of discretion. (*Hart v. Darwish* (2017) 12 Cal.App.5th 218, 224.) A trial court's ruling on the admissibility of evidence will not be disturbed "'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

Courts may take judicial notice of the records of "any court of this state." (Evid. Code, § 452, subd. (d); accord *People v. Franklin* (2016) 63 Cal.4th 261, 280 ["'A court may take judicial notice of the existence of each document in a court file . . .'"].) The documents at issue here were from appellant's 2004 electronic court file, including his signed plea form, a minute order, and a reporter's transcript from a court hearing. "[M]inute orders and transcripts are '[r]ecords' of a 'court of this state.'" (*Hart v. Darwish*, *supra*, 12 Cal.App.5th at p. 224.)

Appellant cites *People v. Skiles* (2001) 51 Cal.4th 1178, to argue that the documents were not properly authenticated under Evidence Code section 1530. (AOB 50-51.) *Skiles* did not involve judicially noticed documents. Moreover, in *Skiles*, the California Supreme Court held that a court document from an out-of-state court that was not properly certified under Evidence Code section 1530 was nonetheless properly admitted because there was evidence sufficient to sustain a finding of authenticity. (*Id*. at pp. 1188-1189.) The court explained that the Evidence Code did not limit the way in which a document could be authenticated and held that "a writing can be authenticated by circumstantial evidence and by its contents." (*Id*. at p. 1187.) The court found that the similarities between the uncertified document and the certified documents was sufficient to

support a determination that the uncertified document was an accurate representation of a court document. (*Id*. at pp. 1188-1189.)

Here, the prosecutor represented that the documents were printed from Alameda County Superior Court's electronic filing system called Odyssey. The court was familiar with the Odyssey system and the prosecutor explained that all court files had been digitized into that system. (3RT 852, 857.) Exhibits 39 and 40 contained stamps showing the documents had been filed in the Alameda County Superior Court. The trial court reviewed the documents and confirmed that they all contained the same docket number for appellant's prior case, and that the PFN listed in the 2004 case was the same as appellant's PFN in the present case. (3RT 857.) The contents of the documents thus support a finding of authenticity, rendering the documents admissible. (*People v. Landry* (2016) 2 Cal.5th 52, 87 ["as long as the evidence would support a finding of authenticity, the writing is admissible"].) Thus, the trial court did not abuse its discretion in taking judicial notice of the documents. (*Hart v. Darwish*, *supra*, 12 Cal.App.5th at p. 224.)

IV. THE TRIAL COURT DID NOT ERR IN IMPOSING SENTENCE

Appellant contends the trial court erred in imposing the upper term on count 1, assault with a firearm, because it relied on facts that were elements of the enhancement for personal use of a firearm. (AOB 52-54.) Appellant's contention is forfeited and meritless.

A. Standard of Review

A trial court's sentencing decision is reviewed for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A trial court's exercise of discretion will not be disturbed unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd

manner that resulted in a manifest miscarriage of justice. (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, [t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review. Second, a decision will not be reversed merely because reasonable people might disagree. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377, citations and internal quotation marks omitted.) Thus, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.)

B. Background

The court sentenced appellant to the upper term of four years for assault with a firearm. (3RT 879; see § 245, subd. (a)(2).) The court explained its imposition of the aggravated terms by discussing various factors outlined in California Rules of Court, rule 4.421:[3]

> Moving to the Circumstances in Aggravation—Mitigation, Rule 4.421(a)(1), the offense involved great violence and threat of great bodily harm. The Defendant fired a gun at an occupied vehicle striking the victim's side door. Fortunately, the bullet was stuck in the door. It was low in the door in the victim's driver side. Had the bullet shot been just a little bit higher, it would have gone through the door seriously injuring and very possibly killed the victim given the large caliber of bullet that was used;

[3] Subsequent references to rules refer to the California Rules of Court.

> Subsection (a) subsection (2) The Defendant was armed and used a weapon at the time of the commission of the crime. I'm not going to use this as a Circumstance in Aggravation. However, it is noted for the record;
>
> Subsection (b) subsection (1) The Defendant has engaged in violent conduct which indicates a serious danger to society, particularly under these circumstances. The victim merely honked at the Defendant for—as the Defendant cut him off in a dangerous driving maneuver. In return, the Defendant followed him, stalked him, and got himself in a position where he could then fire a gun towards the driver. All this occurred in a residential neighborhood placing other possible innocent bystanders and victims at risk;
>
> (b)(4) The Defendant was on Court probation when the crime was committed;
>
> (b)(5) The Defendant's prior performance on formal and Court probation was unsatisfactory. He was on Court probation at the time of the arrest, and he had suffered seven probation revocations while on probation.

(3RT 878-879.) The court found there were no circumstances in mitigation. (3RT 879.)

C. Appellant's Claim is Forfeited and the Sentence Did Not Violate the Prohibition Against the Dual Use of Facts

Appellant asserts that the trial court used the fact that he fired a gun at an occupied vehicle to impose both the upper term on the assault with a firearm conviction and the enhancement for personal use of a firearm. (AOB 53.) His claim is forfeited. "[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) The forfeiture rule applies to "cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a

particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Id*. at p. 353.) The purpose of the forfeiture rule is to "reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Ibid*.)

Although appellant suggests that he can assert this claim for the first time on appeal because he received an unauthorized sentence (AOB 54), that argument was expressly rejected in *Scott*. (*Scott*, *supra*, 9 Cal.4th at p. 354.) Thus, a court's purported dual use of a fact during sentencing falls squarely within the forfeiture rule. (*Id*. at p. 353; *People v. Gonzalez* (2003) 31 Cal.4th 745, 755 [dual use violations forfeited by failure to object in trial court]; *People v. de Soto* (1997) 54 Cal.App.4th 1, 7-8, 10 [general objection at sentencing insufficient to preserve objection on dual use grounds].)

In any event, the trial court did not make dual use of a single fact. "It is an impermissible dual use of facts for a court to impose an upper term by using the same fact used to enhance the sentence." (*People v. Wilson* (1982) 135 Cal.App.3d 343, 358, disapproved on other grounds in *People v. Jones* (1988) 46 Cal.3d 585, 600, fn. 8; *Scott*, *supra*, 9 Cal.4th at p. 350; rule 4.420(c).) Appellant's enhancement was for personally using a firearm in the commission of the offense. (§ 12022.5, subd. (a).) The trial court expressly did not use the fact of appellant's use of a weapon during the commission of the offense as an aggravating factor. (3RT 878, see rule 4.421(a)(2).) Rather, the trial court used the "great violence" and "threat of great bodily harm" as one reason for aggravating appellant's sentence. (3RT 878, rule 4.421(a)(1).) Appellant fired a weapon directly at Ortiz and it struck the driver's side door of the car. Given the caliber of bullet that appellant used, he could have seriously injured or even killed Ortiz if the shot had been higher. (3RT 878.) Thus, it was the manner in which

appellant used the gun, not the mere fact of gun use, that the trial court relied on in aggravating the sentence. (3RT 878-879.)

Moreover, any error was harmless because the purportedly improper dual fact was but one of four reasons the trial court gave for imposing the aggravated term. "Only a single aggravating factor is required to impose the upper term." (*People v. Osband* (1996) 13 Cal.4th 622, 728.) "A case will not be remanded for resentencing based on the use of an invalid factor if the superior court's remarks indicate a strong belief that the upper term was proper and other valid factors were mentioned." (*People v. Clark* (1992) 12 Cal.App.4th 663, 666-667.) In addition to the asserted improper aggravating circumstance, the trial relied on the fact that appellant posed a serious danger to society, he was on probation at the time of the crime, and he had previously been unsuccessful on probation, to justify imposing the aggravated term. (3RT 878-879.) Thus, "[i]t is not reasonably probable that a more favorable sentence would have been imposed in the absence of error." (*People v. Davis* (1995) 10 Cal.4th 463, 552; accord *Osband*, *supra*, 13 Cal.4th at pp. 728-729; *Clark*, *supra*, 12 Cal.App.4th at pp. 666-667.)

V. APPELLANT IS ENTITLED TO REMAND AND RESENTENCING ON THE ENHANCEMENTS

Appellant contends the case must be remanded for resentencing for the trial court to exercise its newly granted discretion to strike the four-year firearm enhancement imposed under section 12022.5, subdivision (a), and the five-year enhancement for his prior serious felony, imposed under section 667, subdivision (a). (AOB 54-60.) We agree. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The record does not "show[] that the trial court clearly indicated when it originally sentenced [appellant] that it would not in any event have stricken [the section 667, subdivision (a)(1)]

enhancement." (*McDaniels*, at p. 425.) Thus, the matter should be remanded for resentencing.

CONCLUSION

Accordingly, the judgment should be affirmed, but the matter remanded for resentencing on the two enhancements.

Dated: April 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains **7,596** words.

Dated: April 24, 2019

XAVIER BECERRA
Attorney General of California

/S/ *MELISSA A. METH*

MELISSA A. METH
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. J. Gonzalez***
Case No.: **A150198**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 24, 2019, I electronically served the attached **RESPONDENT'S BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 24, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

County of Alameda
Rene C. Davidson Courthouse
Superior Court of California
1225 Fallon Street, Room 107
Oakland, CA 94612-4293

The Honorable Nancy O'Malley
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 24, 2019, at San Francisco, California.

M. Mendiola	/s/ *M. Mendiola*
Declarant	Signature

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21428177.docx

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **The People v. Gonzalez**
Case Number: **A150198**
Lower Court Case Number: **H58965**

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2. My email address used to e-serve: **Melissa.Meth@doj.ca.gov**

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4/24/2019

Date

/s/Melissa Mendiola

Signature

Meth, Melissa (263571)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm